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Extradition between France and the United States: an Exercise in Comparative and International Law

Christopher L. Blakesley

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EXTRADITION BETWEEN FRANCE AND THE UNITED STATES: AN EXERCISE IN COMPARATIVE AND INTERNATIONAL LAW

*Christopher L. Blakesley**

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I. INTRODUCTION

Whiteman has defined extradition as

the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and to those who have been convicted *in absentia*. It does not apply to persons merely suspected of having committed an offense but against whom no charge has been laid or to a person whose presence is desired as a witness or for obtaining or enforcing a civil judgment.¹

In 1878 Cardaillac defined extradition as "the right for a State on the territory of which an accused or convicted person has taken refuge, to deliver him up to another State which has requi-

1. M. WHITEMAN, 6 DIGEST OF INT'L LAW, 727 (1968); see also Terlinden v. Ames, 184 U.S. 270, 298 (1902).

sitioned his return and is competent to judge and punish him."² The term "extradition" was imported to the United States from France, where the *decret-loi* of February 19, 1791, appears to be the first official document to have used the term. The term is not found in treaties or conventions until 1828.³ The Latin equivalent to extradition, "*tradere*", is not found in early Latin works, but the comparable term "*remittere*", which means to remit, is often employed.⁴ Thus, although the actual term "extradition" was not used until the late eighteenth century, the notion was extant, and equivalent or similar terms were not uncommon.

This study is a comparative analysis of the international law of extradition as applied through the general extradition law of the United States and France. It will compare each country's approach to and attitude toward the phenomenon of extradition in a systematic analysis of the United States-French Treaty of Extradition.⁵

Extradition is an extremely technical process that requires precision and cooperation between two sovereign systems, often different in fundamental legal theory and procedure. An extradition treaty represents an attempt by diplomatic and legal means to establish this process so that the two sovereign states can cooperate in rendering fugitive criminals to one another. It strives to accomplish this goal without seeming to diminish either party's sovereignty or to bypass or demean either's institutions, processes, or basic theories of criminal justice.

All this should be accomplished without violating the traditional rights of the accused fugitive. This is no easy task, and it is

2. F. DE CARDAILLAC, *DE L'EXTRADITION* 3-4 (1878) (writer's translation). More recently, French commentators defined it as

[t]he procedure by which a sovereign state, the requested state, accepts to deliver an individual who is found on this latter's territory to another state, the requesting state, to permit the latter to judge the subject or, if he has already been convicted, to have it execute its sentence.

R. MERLE & A. VITU, *TRAITE DE DROIT CRIMINEL: PROBLEMS GÉNÉRAUX DE LA SCIENCE CRIMINELLE* § 268 (2d ed. 1973).

3. BILLOT, *TRAITÉ DE L'EXTRADITION* 34 (1874).

4. *Id.* Compare to the French term *remettre* often used in early French extradition treaties.

5. Treaty of Extradition, Jan. 6, 1909, United States-France, 37 Stat. 1526, T.I.A.S. No. 872 [hereinafter cited as 1909 Extradition Treaty] *as amended by Proclamation on Extradition*, Feb. 12, 1970, United States-France, 22 U.S.T. 407, T.I.A.S. No. 7075 [hereinafter cited as 1970 Proclamation]. See note 29 *infra*.

not made any simpler by the fact that the terms of the extradition treaty have meaning only when applied to disparate legal concepts and processes. These, in turn, have meaning only within each country's given cultural, linguistic, and anthropological context. Translation of these terms often exacerbates the problem by exchanging terms with a specific cultural and legal meaning in one context for terms having meaning only within the corresponding context of the other state. For example, the term "representation," which does not have to be translated in the United States-French Treaty because it is the same in both French and English, creates a completely different conceptual response in the French *vis-a-vis* the United States official. In the United States the term connotes an attorney actively and affirmatively representing the interests of his client. In France, on the other hand, the *avocat general*, the judicial officer designated to represent foreign states in extradition hearings, might do no more than present the papers for the state and respond to requests for discussion and information made by the court. Indeed, he may recommend that the court decide the case in a manner unfavorable to his client.

It is essential, then, to educate officials of both parties to an extradition treaty, including judges, police, prosecutors, defense attorneys, and administrators. To understand extradition, they must go behind the translation of the specific terms of the treaty. They must understand the practical and conceptual meaning of treaty terminology in the context of the other party's domestic law and procedure.

Failure of the extradition process may have implications beyond those of losing the fugitive. The extradition process, although preliminary in nature, calls parts of each country's entire criminal justice construct into play. Most importantly, in terms of diplomatic relations, each party's pride in the integrity and coherence of its system is often in the balance. Misunderstanding and rejection of an extradition request may be perceived as an insult to the requesting state's system.

II. DUTY TO EXTRADITE APART FROM TREATY OBLIGATION

The continental theory and practice in extradition matters, exemplified by that of the French, allows extradition in the absence of any treaty obligation. It does not follow from this, however, that there is an absolute duty to extradite apart from a treaty

obligation to do so.⁶ Authority to extradite in the absence of a treaty was once the King's birthright, but now is granted by the Extradition Law of 1927.⁷ The extradition law implicitly recog-

6. De Vattel believed that international law imposes on each state a duty to extradite all those who have been accused of serious crimes. 2 DE VATTEL, LE DROIT DES GENS, §§ 76-77 (1916). Bodin and Grotius believed that there was a natural duty under international law either to extradite or to prosecute fugitives from one state's justice found within another state's borders. J. BODIN, THE SIX BOOKS OF THE COMMONWEALTH 108-11 (1962); H. GROTIUS, 2 DE JURE BELLI AC PACIS 527 (Kelsey trans. 1964). The views of de Vattel, Bodin, and Grotius have been followed by a diverse group of scholars. See list in WEATON, ELEMENTS OF INTERNATIONAL LAW 188 (5th ed. 1916). Pufendorf and others have disagreed, however, claiming that extradition is only an imperfect obligation requiring a special compact or treaty to secure the full force and effect of international law. 8 PUFENDORF, Elements of International Law §§ 23-24 (1729). See generally, BASSIOUNI, EXTRADITION & WORLD PUBLIC ORDER 7 (1974); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 24 (1971). The United States has followed the latter school.

In late nineteenth century France, Professor Billot wrote that it is "an established principle that extradition may be authorized in the absence of a treaty." BILLOT, *supra* note 3, at 259 (emphasis added). See also P. BOUZAT & J. PINATEL, TRAITÉ DE DROIT PÉNAL ET DE CRIMINOLOGIE 1324 (1969); DONNEDIEU DE VABRES, LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL 249 (1927); MERLE & VITU, *supra* note 2, at 322. Today, in the absence of a treaty, France's source of authority for extradition is the Extradition Law of Mar. 10, 1927, Loi Relative à l'extradition des étrangers [1927] D.P. IV, reprinted in C. PR. PEN. after art. 696 (Dalloz 1980-81) (translated in *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. at 380 (Supp. 1935) hereinafter cited as Extradition Law of 1927.

7. Extradition Law of 1927, *supra* note 6. For discussion see 4 TRAVERS, DROIT INTERNATIONAL PENAL (1929); TRAVERS, L'ENTRAIDE RÉPRESSIVE INTERNATIONALE ET LA LOI FRANCAISE DU 10 MARS 1927 (1928); Donnedieu de Vabres, *La Loi du 10 mars 1927, sur l'Extradition des Etrangers*, 1927 SEM. JR. 593; de Vabres, *La Nouvelle Loi Relative à l'Extradition des Etrangers*, 1927 ET. CRIM. 21; Donnedieu de Vabres, *Le Regime Nouveau de l'Extradition d'après la Loi du 10 mars 1927*, 1927 DR. INT'L PR., at 169; Rioufol, *l'Extradition d'après la Loi du 10 mars 1927*, 1927 *Revue Critique de la Législation et de la Jurisprudence*. 503; M. Aupecle, L'EXTRADITION ET LA LOI DU 10 MARS 1927, (1927) (unpublished thesis in Law Library, Columbia University School of Law).

The history of the 1927 Extradition Law's nascency is a protracted one. It started in 1878, when the Senate approved, but the *Chambre* never did approve, an extradition law presented by M. Defaure. After that, there were several failing attempts to promulgate the extradition law. In 1900, another version was presented, but was never even discussed. In 1923, another new proposition was presented by M. Renoult. It reproduced, with a few modifications, the essential provisions of the 1900 project. The Senate submitted it to the Society of Legislative Studies, which studied and generally approved it. Finally, its propositions

nizes the premier position of the extradition treaty.⁸ It does not abrogate any treaties of extradition, but applies only where a default of a treaty occurs, where no treaty exists at all, or where there is a gap in a particular extradition treaty.⁹ It also functions as a guide for negotiations of new extradition treaties.

Extradition in the United States is a federal power.¹⁰ There was a grand debate in the United States between 1794 and 1840 over whether or not there was a duty to extradite fugitives in the absence of a treaty obligation to do so. In 1799, the first judicial decision to consider the issue, *United States v. Robbins*,¹¹ failed to settle the debate. Divergence of opinion among judges and commentators continued until 1840, when the United States Supreme Court held that no obligation to extradite existed apart from that imposed by treaty.¹²

The Supreme Court reaffirmed its holding of 1840 in the famous case of *United States v. Rauscher*:

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well defined obligation on one country to deliver up such fugitives to

and amendments were approved by the Senate under the report of M. Vallier, and by the *Chambre*, under the report of M. Ranaldy. On March 10, 1927, the law was officially promulgated. See Donnedieu de Vabres, *Rapport à la Société d'Etudes Legislatives*, in BULL. SOCIÉTÉ D'ETUDES LEGISLATIVES 330 (1924); *id.* at 99 (1925); DONNEDIEU DE VABRES, *TRAITÉ ELEMENTAIRE DE DROIT CRIMINEL* 872 (2d ed. 1943).

8. Extradition Law of 1927, *supra* note 6, art. 1; MERLE & VITU, *supra* note 2, at 322.

9. BOUZAT & PINATEL, *supra* note 6, at 1322-23 (1969) (French extradition treaties are self-executing; if they are duly approved and promulgated by the legislature, they operate without further legislative implementation). See MERLE & VITU, *supra* note 2, at 322 (once ratified the treaty is published in the JOURNAL OFFICIEL and is then in full force and effect); SHEARER, *supra* note 6, at 11; Extradition Law of 1927, *supra* note 6, at 380. The treaties must be approved and promulgated by the legislature because they are of the type that modify legislative dispositions. FR. CONST. of Oct. 4, 1958, arts. 52, 53.

10. *United States v. Rauscher*, 119 U.S. 407, 412-14 (1866); U.S. CONST. art. I, § 10.

11. 27 Fed. Cas. 825 (D.S.C. 1799) (No. 16,175).

12. *Holmes v. Jennison*, 39 U.S. 470, 14 Pet. 540 (1840).

another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.¹³

In *Factor v. Laubenheimer*, the Supreme Court reiterated,

[T]he 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.¹⁴

In 1936, the Supreme Court went further to hold that not only is there no duty to extradite apart from that born of treaty, there is no authority in the United States law to do so without an express legislative or treaty stipulation.¹⁵ The Court declared,

Applying, as we must, our law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondent.¹⁶

An extradition treaty is generally self-executing and so does not require implementing legislation.¹⁷ Nevertheless, statutes relating to extradition have been enacted by Congress. These statutes, unlike those in France, do not authorize extradition in the absence of a treaty. Their operation and the authority they confer are expressly made dependent on the existence of an appropriate extra-

13. 119 U.S. at 411-12.

14. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

15. *Valentine v. United States*, 299 U.S. 5 (1936).

16. *Id.* at 18. Earlier in the opinion, the Court had explained that "it cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the states But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision." *Id.* at 8.

17. 18 U.S.C. § 3181 (1979); *WHITEMAN*, *supra* note 1, at 734; *see also*, U.S. Const., art. VI, § 2; *Head Money Cases*, 112 U.S. 580 (1884); *Chew Heong v. United States*, 122 U.S. 536, 540, 556 (1884).

dition convention.¹⁸

The first United States legislation concerning extradition was enacted in 1848.¹⁹ It required that any act of extradition find its authority in a treaty and that it be subject to judicial proceedings in federal district court. The extradition statute currently in effect, 18 U.S.C. section 3181, reads, "The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such governments."²⁰ The United States has consistently articulated this requirement to foreign governments.²¹ The result is the same when the terms of an existing treaty do not cover the circumstances of the particular case before the court.²²

The fountainhead for United States judicial refusal to grant extradition, without treaty authority is the

fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law Legal authority does not exist, save as it is given by act of Congress or by the terms of a treaty

18. WHITEMAN, *supra* note 1, at 734.

19. Act of Aug. 12, 1848, Ch. 167 (1848).

20. 18 U.S.C. § 3181 (1976).

21. Under the laws of the United States, the Government . . . may extradite an individual from this country to a foreign country only in accordance with an extradition agreement. It may not extradite an individual to a foreign country in the absence of such an agreement or in a case not coming within the terms of such agreement.

Note to Ambassador of the Turkish Republic from Secretary of State Herter, May 1, 1959, MS Dept. of State file 211.8215, Yeneriz, Muhip/3-3059, *reprinted in* WHITEMAN, *supra* note 1, at 734-35.

22. Herter, as Acting Secretary of State in 1958, suggested this in a letter to an individual who had asked for information on the subject:

[I]t may be said that if the offense for which an individual's return is desired is not one of those enumerated in the treaty between the two countries concerned, the requested country would be under no obligation to surrender in extradition an individual charged with that offense and the requesting country would be unable to invoke the provisions of the treaty to obtain his surrender.

Letter from Acting Secretary of State Herter, to A.I. Mendelsohn, Dec. 29, 1958, MS Dept. of State, file 266.1115/12-1158, *reprinted in* WHITEMAN, *supra* note 1, at 733.

. . . .²³

The language used by the United States Supreme Court in the 1936 *Valentine* case is conclusive of the proposition that extradition is not possible if the circumstances are not covered by the treaty terms.²⁴

The Department of State has powerful influence on judicial interpretation of the validity of treaty provisions and their applicability to specific fact situations. The judiciary relies on executive expertise to resolve these issues. A Department of State determination that a treaty exists or that its provisions apply to the facts will be upheld in most cases. The executive power to make treaties with the advice and consent of the Senate²⁵ and its power to conduct foreign affairs²⁶ provide the rationale for this reliance.

A misconception has developed out of the judicial refusal to allow extradition except under the terms of a valid treaty. Virtually every commentator on extradition who refers to United States practice assumes that the United States will not request extradition from foreign countries with which it does not have an extradition treaty or when the pertinent extradition treaty does not cover the facts of the specific case.²⁷ This may have been true in the past, but it is no longer accurate. The Department of State will request extradition in any case deemed important enough by its officials and the appropriate officials of the Department of Justice, as long as evidence sufficient for success exists, whether or not an extradition agreement is extant between the United States

23. *Valentine v. United States*, 299 U.S. 5, 9 (1936).

24. *Id.* In this case, the United States Supreme Court refused to extradite an American national to France, even though the general policy of the United States' Government was to eliminate the nationality exemption from extradition. It held that the exemption clause in the treaty absolutely precluded the right of the executive to extradite one of its nationals. While the holding regards United States nationals only, the rationale posits that no extradition from the United States to a foreign country can take place unless there is a specific treaty provision covering it.

25. *See, e.g., Ivancevic v. Artukovic*, 211 F.2d 565 (9th Cir.), *cert. denied*, 348 U.S. 818 (1954); *see also Charlton v. Kelly*, 229 U.S. 447 (1913).

26. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Missouri v. Holland*, 252 U.S. 416 (1920); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

27. *E.g., J. MOORE, TREATISE ON EXTRADITION AND INTERSTATE RENDITION* 33-35 (1891); SHEARER, *supra* note 6, at 27; WHITEMAN, *supra* note 1, at 732-37.

and the country of refuge.²⁸ The Department of State is always careful to draft the extradition request in such a way as to make it very clear to the requested state that there can be no reciprocity under United States law for a similar request from the foreign government. Positive responses by foreign governments to extradition requests made in this manner are not uncommon as a matter of comity or on the basis of that country's municipal extradition law.

III. UNITED STATES - FRANCE EXTRADITION TREATY

A. *Extradition Hearing*

The Extradition Treaty between France and the United States allows extradition only after a proper hearing. This subsection and those that follow will define a proper hearing and illuminate its elements and characteristics.²⁹ French law designates the *chambre d'accusation* as the forum to hear extradition cases.³⁰ The competent *chambre d'accusation* is the one of the place in

28. During my stay with the Legal Adviser's Office of the Department of State, which included two years of working on extradition matters, there were many such requests. They are most common in cases of narcotics violations, which are not included as extraditable offenses in most of the older extradition treaties. There is obviously a valid interest in making these requests and, usually, a valid interest on the part of the requested country to approve.

29. When the 1909 Extradition Treaty and the 1970 Proclamation, *supra* note 5, are considered as a whole, this study will refer to them as "The Extradition Treaty between France and the United States." It will be noted that there was an exchange of notes and letters of interpretation clarifying terms and filling gaps in the 1909 Extradition Treaty, as amended by the 1970 Proclamation. There is currently much discussion in France regarding the validity of such exchanges of notes and letters executed to be effective in the absence of treaties or to fill in lacunae in existing treaties. The consensus is that those notes and letters exchanged before the promulgation of the Extradition Law of 1927, *supra* note 6, are clearly valid, but that those notes exchanged after its promulgation are effectively negated, unless the treaty clearly provides that its dispositions may be completed or refined by their use. See MERLE & VITU, *supra* note 2, at 325. For examples of treaties allowing clarification by diplomatic note, see French Treaties with Madagascar, June 27, 1960, art. 22. The 1970 Proclamation does not expressly provide for any exchange of notes or letters, although there was agreement during the negotiations to exchange letters to clarify certain specific sections. See Gaither, Minutes, Treaty Supp. Negotiations (Paris, Nov. 6, 24-28, 1969) (Jan. 5, 1970) (on file in Office of Legal Adviser, U.S. Dep't of State). The letters are contained in the printed copies of the 1970 Proclamation itself; the French Government has not questioned their validity.

30. Extradition Law of 1927, *supra* note 6.

which the fugitive is arrested.³¹ United States legislation provides for the hearing of extradition cases as follows:

Any justice or judge of the United States, or any magistrate authorized so to do by a Court of the United States, or any judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction (of a foreign government with which the United States has a treaty of extradition) any of the crimes provided for by such treaty or convention issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate to the end that the evidence of criminality may be heard and considered.³²

Hearings in the United States must be "held on land, publicly, and in a room or office easily accessible to the public."³³ Both France and the United States afford the accused person all the protection of any judicial proceeding during the extradition hearing.

B. *Jurisdiction*

Article I of the 1909 Extradition Treaty between France and the United States provided that the parties "agree to deliver up persons who, having been charged with or convicted of any of the crimes or offenses specified in the following article, committed within the *jurisdiction* of one of the contracting parties . . ."³⁴ This language has not been altered. Thus, this treaty, on its face, could be construed to provide for jurisdiction to extradite whenever an extraditable offense is committed in such a way as to trig-

31. For the background and development of French law on this point, see Saint-Aubin, 1928 REV. GEN. DE DROIT INT'L 10; see also MERLE & VITU, *supra* note 2, at 338. Some countries use a court of broad territorial or jurisdictional competence, like the Supreme Court of the capital city, or the highest appeals court to hear extradition cases: e.g., Peru, Extradition Law, Oct. 23, 1888; Switzerland, Federal Extradition Law, Jan. 22, 1892, (English text in 29 AM. J. INT'L L. (Supp. 1935)); Sweden, Law of Extradition, Dec. 6, 1957, No. 668; Law Respecting Extradition to Denmark, Finland, Iceland, Norway, June 5, 1959, No. 254; Brazil, Decree-law No. 394 of Apr. 28, 1938, regulating Extradition, and Venezuela, Penal Code, July 15, 1926, art. 6 and Venezuela Criminal Procedure Code, June 19, 1957, arts. 389-93.

32. 18 U.S.C. 3184 (1972).

33. 18 U.S.C. 3189 (1970).

34. 1909 Extradition Treaty, *supra* note 5, art. I (emphasis added).

ger jurisdiction of either contracting party as defined by the laws of either state. The term "jurisdiction" as used in extradition treaties, however, has been interpreted by United States courts and commentators to connote territorial jurisdiction exclusively.³⁵

Difficulties may arise when one of the parties attempts to extradite an offender who has committed an extraditable offense deemed by the requesting state to be within its notion of jurisdiction, but which would not be considered by the law of the requested state to be within its jurisdiction under similar, but obverse, circumstances. For example, if a French national accosted and robbed another French national on foreign soil, French law would admit jurisdiction of its courts over the subject matter, as long as the courts could obtain jurisdiction over the person. French courts could assert jurisdiction on the basis of the nationality of either the accused or the victim. Under United States law and its territorial interpretation of jurisdiction, on the other hand, extradition would be denied.

The drafters of the 1970 Convention appear to have attempted to resolve this problem by adding the following provision:

Without prejudice to the jurisdictional provision of Article I of this Convention, when the offense has been committed outside the territory of both contracting Parties, extradition may be granted if the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.³⁶

Although this new article might appear to provide for an exception to the traditional United States interpretation of the term "jurisdiction" in extradition treaties, it does not. If the drafters' purpose was to make such an exception, they essentially failed by connecting jurisdiction for extraditability to the law of the requested party. In practical effect, this changes very little. It simply makes United States law on jurisdiction determinative for any extradition request. The provision would allow the United States, the party with the most restrictive law of jurisdiction, to seek extradition from France, the party with the more expansive law of

35. BRIERLY, *THE LAW OF NATIONS* 302 (1955); W. FRIEDMANN, O. LISSITZYN, R. PUGH, *INTERNATIONAL LAW: CASES AND MATERIALS*, 531, n.1 (1969); 1 J. MOORE, *TREATIES ON EXTRADITION AND INTERSTATE RENDITION*, 135 (1891); RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 30(2) (1965); Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887 FOR. REL. 757.

36. 1970 Proclamation, *supra* note 5, art. I Bis.

jurisdiction, and to apply the French (the requested state's) law of jurisdiction to determine extraditability. Extradition would not normally be requested by the United States, unless its more restricted laws on jurisdiction would allow prosecution.

There appear to be at least two explanations for the wording for article I *bis*. It could have been presented by the United States negotiating team as an attempt to allow the flexibility to expand the notion of jurisdiction for extradition beyond the territorial principle as United States domestic law expands beyond that principle. Alternatively, it could have been a bungled attempt to allow France to obtain jurisdiction over the person through extradition, if her law allowed it over the subject matter, even when United States law would not allow jurisdiction in similar circumstances. Either would have been a reversal of the judge-made principle that jurisdiction in extradition treaties means territorial jurisdiction.

This reversal would not have violated the language of article I on its face. It is likely, however, that the former explanation is the more accurate. United States law on jurisdiction over extra-territorial crimes has been expanding.³⁷ The United States delegation proposed the additional article, and apparently both negotiating teams agreed that the new clause would be helpful in countering narcotic and counterfeiting offenses, areas in which United States courts have transcended the pure territorial theory to take jurisdiction. The French delegation probably decided that a little expansion of extraditability beyond the territorial principle, as previously required by the courts, is better than none.

C. *Standard of Proof Required for Extradition*

Article I of the 1909 Extradition Treaty provides that extradition "shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person who

37. This expansion is apparent in relation to violations of: antitrust laws, *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); securities laws, *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *rev'd on other grounds en banc*, 405 F.2d 215 (2d Cir. 1968); and conspiracy to import narcotics, *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Williams*, 589 F.2d 210 (5th Cir. 1979); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *United States v. Petrulla*, 457 F. Supp. 1367 (M.D. Fla. 1978); *United States v. Keller*, 451 F. Supp. 631 (D.P.R. 1978). *See also*, Note, 39 LA. L. Rev. 1189 (1979).

charged shall be found, would justify his or her apprehension and commitment for trial if the crime or offense has been there committed."³⁸

French extradition law, like that of many other countries, allows extradition upon a mere showing of two elements of evidence: (1) a properly authenticated arrest warrant or other similar document, in the case of a person charged with having committed an extraditable offense, or the official document or judgment and sentence of the convicted fugitive; plus (2) evidence that the accused person standing before the court and the one who is the subject of the extradition documents are identical.

In keeping with this minimal standard of evidence, the duty of the French judge in the usual extradition hearing is to verify the formal regularity of the extradition request and its conformity with the dispositions of the extradition treaty and internal French law.³⁹ The French judge, in contrast with his counterpart in the United States, does not normally have the authority to consider the sufficiency of the evidence or the foundation of the complaints against the accused. He does not have the authority to consider the verisimilitude of the charge(s) or the evidence or to scrutinize the validity and propriety of the investigation, unless there is clear evidence of some blatant error, such as a photograph of the person charged or convicted showing clearly that the person before the court is not the one in the extradition request.⁴⁰

Thus, the Treaty between France and the United States gives the French judge more authority than he would have under most extradition treaties. Not only may he examine the veracity and foundation of the charges, he may scrutinize the sufficiency of the evidence. Indeed, he must scrutinize the evidence, and it may be argued that he has the duty to request additional information and

38. 1909 Extradition Treaty, *supra* note 5, art. I. The requirement of evidence to show probable cause for extradition has been a cause of frustration to France in her relations with Anglo-Saxon countries since the beginning of the modern era of extradition. The first treaty providing for extradition between France and England, the Treaty of Amiens (Feb. 13, 1843) was eventually renounced by France because English magistrates: a) refused to accept French procedure and evidence; and b) required that the French produce evidence sufficient to show the accused was sought and that he did commit the offense charged. J. SAINT-AUBIN, *L'EXTRADITION ET LE DROIT EXTRADITIONNEL* (1913).

39. See generally MERLE & VITU, *supra* note 2, at 340.

40. Judgment of July 10, 1952, Cass. Crim. [1952] Bull. Crim.; Judgment of Feb. 9, 1954, Cass. Crim. [1954] Bull. Crim. MERLE & VITU, *supra* note 2, at 340.

evidence if he feels it necessary.⁴¹

Continental commentators have, over the past century, disparaged the Anglo-American predilection to require evidence of the fugitive's guilt in extradition hearings.⁴² The rule has been called "a vexatious hindrance to the cause of justice."⁴³ These commentators, apparently, have assumed that the requirement is based on some sort of suspicion of inadequacy in the criminal justice systems of the requesting state. This simply is not true. Rather, it is based on the belief that it is unfair, under any system, to imprison the person sought in extradition and to send him to a distant place without providing some evidence of the validity of the charge against him. The Anglo-American policy of extraditing their nationals is testimony against any claim that chauvinism is the source of the requirement that evidence be presented in extradition hearings. Indeed, it is the continental countries, including France, which refuse to extradite nationals because of a tradition based on mistrust of foreign criminal justice. Perhaps this distrust of other systems is the source of the French suspicion that the basis for the requirement of evidence is the foreign states' distrust of the French system. Most contemporary French commentators do not disparage the evidentiary requirement, although they do signal its unique character.⁴⁴

Statutory authority for the evidentiary requirement in United States law is 18 U.S.C. section 3184. This statute provides that the accused may be held for surrender if, after an extradition hearing, the judge "deems the evidence [of criminality] sufficient to sustain the charge under the provisions of the proper treaty or convention."⁴⁵ United States extradition treaties uniformly provide that extradition will be allowed only when the evidence of

41. The United States Government takes the position that the French government has not only the right to request additional evidence or information, but also the responsibility to do so, if the case is believed to be deficient in some way. The United States bases this requirement on the representation clause, art. VI, of the 1970 Proclamation, *supra* note 5.

42. BILLOT, *supra* note 3, at 202. See also Comment, 31 MICH. L. REV. 544, 556-57 (1933). Professor Shearer presents a brilliant discussion of the pros and cons of this requirement in SHEARER, *supra* note 6, at 150.

43. This comment was reported in a *British Law Journal* editorial, as having been made by a spokesman for the French Government. 1 BRIT. L. J. 175 (1886), cited in SHEARER, *supra* note 6, at 159 n.3.

44. See, e.g., MERLE & VITU, *supra* note 2, at 340.

45. 18 U.S.C. § 3184 (1964).

criminality presented would justify committal for trial under the laws of the place where the fugitive is found.⁴⁶

The evidentiary standard for extradition requires that there be probable cause to believe that the person before the court committed the extraditable offense charged in the request and its documentation. The United States District Court for the Southern District of New York has held that the judge or magistrate must make a specific finding as to the sufficiency of the evidence to establish probable cause that the fugitive committed the offense(s).⁴⁷ The court explained, citing the basic United States Supreme Court authority,

As stated in *Benson v. McMahon* . . . the test as to whether such evidence of criminality has been presented is the same as that "of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made out against him." . . . It is in essence the same as the test whether "there is probable cause to believe that an offense has been committed and that the defendant has committed it" under Rule 5 of the Federal Rules of Criminal Procedure.⁴⁸

D. *Specific Evidence Required*

The judge hearing an extradition case must determine whether the person charged with the offense(s) and the person before him are one and the same. The judge must determine whether a valid treaty of extradition exists between the United States and the re-

46. See *Benson v. McMahon*, 127 U.S. 457, 463 (1888); listing of treaty provisions in SHEARER, *supra* note 6, appendix.

47. *In re D'Amico*, 185 F. Supp. 925, 927-28 (S.D.N.Y. 1960), cited in WHITEMAN, *supra* note 1, at 945.

48. *Id.* at 927-28. There have been many cases in which the evidence submitted for extradition is found insufficient to meet this standard, either by the administrative officials prior to the hearing or by the magistrate. See, e.g., *Argento v. Jacobs*, 176 F. Supp. 877 (N.D. Ohio 1959); *Karadozole v. Artukovic*, 170 F. Supp. 383, 389 (S.D. Cal. 1959). Decision of United States Comm'r, T. Hocke, May 24, 1961, MS Department of State, file 211.9215, Praphai, Boonsom/72561, reported in WHITEMAN, *supra* note 17, at 981. Several examples of the Department of State returning documentary evidence to the requesting state on the grounds of insufficiency may be found in WHITEMAN, *supra* note 1, at 992-94.

questing state and whether or not the offenses charged are among the enumerated extraditable offenses. He must decide whether the documentary evidence presented with the extradition request provides reasonable grounds to believe that the accused committed the offenses charged. Finally, he must determine whether any of the exceptions to extradition would apply to preclude extradition under the circumstances.

Article III of the Extradition Treaty between France and the United States delineates the specific type of evidence required for the fugitive to be found extraditable. Its second paragraph reads,

If the person whose extradition is requested shall have been convicted of a crime or offense, a duly authenticated copy of the sentence of the court in which he was convicted, or if the fugitive is merely charged with a crime or offense, a duly authenticated copy of the warrant of arrest in the country where the crime or offense has been committed and of the depositions or other evidence upon which such warrant was issued, shall be produced.⁴⁹

The third paragraph of article III provides that the law of the requested state regulates the operation of the article. It is the phrase "depositions or other evidence" that proves difficult for some countries to comply with, as they often provide their investigative police reports and nothing more.

The basic items of documentation that are required by a United States judge before extradition will be approved include:⁵⁰ (1) indictment(s) or their equivalent; (2) warrant(s) of arrest;⁵¹ (3) proof of the accused's identity;⁵² (4) affidavit(s) of applicable

49. 1909 Extradition Treaty, *supra* note 5, art. III.

50. This entire list is presented in United States Dep't of Justice, Criminal Division, EXTRADITION HANDBOOK (undated, but prepared in 1975).

51. Great Britain and some former British Colonies sometimes require the original warrant to be submitted in evidence, refusing extradition if the warrant submitted is only a copy. See State Dep't Instruction to United States Mission at Ottawa expressing displeasure at such a denial, *reprinted in* WHITEMAN, *supra* note 1, at 960; Instruction No. 37, March 10, 1950, MS Dep't of State file 242/1115, Guy, Lawrence Sidney/2-950.

52. The Dep't of State Memorandum on the Preparation and Handling of Applications for the Extradition of Fugitives from Justice Located Abroad, Aug. 1974, at 4, explains what evidence should be included to establish identity before foreign courts. The same evidence would be required of a foreign government in presenting a documented extradition request before a United States court. The memorandum states, "Preferably such data will include a fingerprint record, photographs or affidavits describing the fugitive and distinguishing physical marks. Photographs should be permanently attached to affidavits by one or

laws;⁵³ and (5) evidence of probable cause or proof of conviction and sentence.⁵⁴

All evidence issuing from the United States must be duly certified and authenticated by the Attorney General of the United States, under the Seal of the Department of Justice, in the case of federal crimes, and by the Governor or the Secretary of State, under the Seal of the relevant state, in the case of state crimes. After receiving the formal request and its accompanying documentation, the Department of State, Office of the Legal Adviser, scrutinizes it for proper form and sufficiency. The Secretary of State then authenticates the entire package under the Seal of the Department of State. This package is sent to the United States Embassy in the country in which the fugitive is located, and the Embassy is instructed to request extradition of the fugitive by formal diplomatic note enclosing the documentation.⁵⁵

The formal diplomatic note requesting extradition and enclosing the documentation is prepared by the United States Embassy

more identifying persons who have also signed the photographs on the back." If extradition documentation is received without the proper identifying evidence, the extradition process stops until such evidence is produced.

53. Department of State Memorandum, *supra* note 52, at 4 provides,

3. An authenticated copy of the tests of applicable laws including:

- (a) the law defining the offense;
- (b) the law prescribing the punishment for the offense;
- (c) the law relating to the limitation of the legal proceedings or the enforcement of the penalty for the offense; and
- (d) the affidavit or deposition of a practicing attorney that the laws were in effect when the crimes were committed.

54. The Department of State Memorandum, *supra* note 52, at 3-4, describes what type of evidence should be included to show probable cause:

Certified and authenticated depositions or affidavits on the basis of which such warrant or order may have been issued. It is considered preferable that these include the depositions or affidavits of private individuals, if possible, in addition to those of police and other law enforcement officials.

Such depositions should contain:

- (a) a precise statement of the criminal act or acts with which the person sought is charged;
- (b) the date and place of the commission of the criminal act;
- (c) statements by witnesses which would be used to establish the commission of a crime.

Oral evidence is generally permitted, but evidence is usually submitted in documentary form. Extradition to foreign countries of fugitives convicted *in absentia* may be obtained, but the documentation must be the same as that required for those merely charged with an offense.

55. Department of State Memorandum, *supra* note 52, at 6.

and forwarded officially to the French Minister of Foreign Affairs, who examines the dossier and transmits it to the Minister of Justice or *garde des Sceaux* (The Guardian of the Seals). The *garde des Sceaux* makes another examination of the documentation to determine its regularity and transmits it to the *procureur général*, who transmits it, in turn, to the *procureur de la République* of the place in which the accused is located.⁵⁶ The action for extradition is brought before the *chambre d'accusation* by the *procureur général* or *avocat général*.

An extradition request from France or any other foreign country must meet the same requirements of sufficiency and authenticity as those required of the state and federal prosecutors, as described above. If the documentation is lacking for any reason, the Department of State returns it to the requesting state by diplomatic note, describing the deficiencies and suggesting measures that may be taken to rectify them.

The evidence issuing from the foreign requesting state must be authenticated as well. The basic United States statutory authority regarding admission of evidence in extradition hearings is 18 U.S.C. section 3190. It provides for the reception and admission of "depositions, warrants, or other papers or copies thereof" if they are properly and legally authenticated. The documents must be authenticated in such a way as to entitle them to be received for similar purposes before the courts of the requesting country. The statute provides further that the certificate of authentication signed by the principal diplomatic or consular officer of the United States in the requesting country "shall be proof that the same, so offered, are authenticated in the manner required."⁵⁷

Thus, the procedure required of France for presenting properly authenticated evidence in an extradition request to the United States is clear. The *procureur de la République* of the jurisdiction seeking the fugitive transmits the request for extradition, accompanied by documentation to the *procureur général*, who in turn transmits the dossier with his opinion of its merits to the *Chancellerie*. The latter office attaches the necessary affidavits of law and evidence, including that relating to complicity, prescription, and attempt and provides precise description of the facts on which the request for extradition is based. Then, the *garde des Sceaux* transmits the entire package to the Minister of Foreign

56. See MERLE & VITU, *supra* note 2, at 338-39.

57. 18 U.S.C. § 3190 (1964).

Affairs, who presents it to the United States Embassy in Paris for certification by the Ambassador or the Consul General. The package is then returned to the Foreign Minister, who transmits the request and its accompanying documentation to the French Embassy in Washington, D.C. The French Embassy presents the package to the Department of State under cover of a formal diplomatic note requesting extradition and provisional arrest pursuant to the 1909 Extradition Treaty.⁵⁸ If the Legal Adviser's Office determines everything to be proper and sufficient, the case will be presented by a Justice Department official or United States Attorney to the court in the district where the fugitive is found.⁵⁹

E. *Principle of Double Criminality*

The principle of double criminality, *réciprocité d'incrimination*, based on the long-standing maxim *nulla poena sine lege*, ensures the requested state that the fugitive will not be punished for acts not criminal under its domestic law. Statements by commentators to the contrary notwithstanding, this is a very important principle in extradition law because of the sharp divergencies among the criminal laws of the various countries of the world. Its value becomes apparent when the laws of various countries relating to offenses such as euthanasia, suicide, adultery, and abortion are compared.

The rather strident criticism of this principle⁶⁰ appears to be based on the supposedly onerous burden it places on the requested state's judiciary to determine the criminality of the act in the requesting state's law. In reality, there is no such burden on the court, as it is satisfied if the requesting state submits, along with the rest of its evidentiary documentation, an affidavit of relevant law containing the statute that makes the action in question criminal. It is a simple task easily worth the effort, as it significantly diminishes the possibility of spurious extradition requests.

58. See generally MERLE & VITU, *supra* note 2, at 336.

59. This is true no matter what crime (equivalent of state or federal) is charged, as it is the United States Government, not that of the various states, that represents the foreign country.

60. See P. BERNARD, *TRAITÉ THÉORIQUE ET PRATIQUE DE L'EXTRADITION* 226 (1890); SHEARER, *supra* note 6, at 138-39; 4 TRAVERS, *TRAITÉ DE DROIT PÉNAL INTERNATIONAL*, No. 2158 (1929); DONNEDIEU DE VABRES, *TRAITÉ*, *supra* note 7, at 878-79.

The principle of double criminality is standard in all French and United States extradition treaties. Moreover, the French Extradition Law of 1927⁶¹ provides that the offense for which extradition is sought must be punishable by the laws of the requesting state and by those of the requested state. United States cases in which the principle of double criminality determined the outcome of the request are abundant.⁶² The 1970 Proclamation followed the tradition of both countries when it added a general double criminality provision. This provision reads, "Extradition shall be granted for the following acts if they are punished as crimes or offenses by the laws of both States."⁶³

The principle of double criminality appears always to have been applied in practice and certainly was extant in French and United States law well before the addition of the general clause in the 1970 proclamation. The 1909 Extradition Treaty applied the principle to certain specific offenses which were believed to be the ones that may present discrepancies between French and United States law.⁶⁴

F. *Problems in Extradition Caused by the United States Dual System of Criminal Jurisdiction*

The tenth amendment to the Constitution of the United States reserves to the separate states all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States respectively, or to the people."⁶⁵ Thus, two sets of criminal justice systems coexist in the United States. The federal government, however, can make acts criminal only pursuant to powers granted explicitly by the United States Constitution. Thus, federal jurisdiction obtains in respect of certain offenses, including

61. Extradition Law of 1927, *supra* note 6, arts. 4(1) and 4(2).

62. *E.g.*, *Factor v. Laubheimer*, 290 U.S. 276, 300 (1933); *Collins v. Loisel*, 259 U.S. 309, 311 (1922); *Kelley v. Griffin*, 241 U.S. 6 (1915); *Pettit v. Walshe*, 194 U.S. 205, 217 (1904).

63. 1970 Proclamation, *supra* note 1, art. II.

64. For example, the crimes of fraud and breach of trust were qualified with the provision: "when such act is made criminal by the laws of both countries." 1909 Extradition Treaty, *supra* note 5, art. II(7). The French Law of Extradition has required application of the principle since Mar. 10, 1927. Each of the separate provisions for the double criminality principle on the Extradition Treaty was eliminated by the 1970 Proclamation, when it added the general clause applying the principle to the entire treaty.

65. U.S. CONST. amend. X.

piracy, felonies on the high seas, and counterfeiting.⁶⁶ Moreover, the federal government is assumed to have the authority to prescribe and enforce criminal laws relating, for example, to the destruction of post offices because of the constitutional grant of power to establish and regulate these facilities.⁶⁷ Similarly, federal criminal law applies to crimes involving United States Government instrumentalities such as national banks. It is applicable, as a matter of federal control over foreign affairs, in cases of crimes against instrumentalities established in implementation of treaties. Federal criminal jurisdiction also applies throughout the United States in federal enclaves; these are specially designated geographical areas, such as military bases. The Roman Assimilative Crimes Act⁶⁸ assimilates state common law offenses to federal jurisdiction when committed within the federal enclave, so as to fill the void that would otherwise exist. In addition, the Commerce Clause⁶⁹ has been interpreted to allow the assertion of federal jurisdiction over offenses that occur in connection with commerce among the several states, the Indian Tribes, and foreign nations.⁷⁰

Although there is often a variance among the various states' laws for particular offenses, virtually all common crimes are defined and enforced by the several states of the Union. The resulting set of parallel systems of criminal justice appears confusing to one not trained in or familiar with the United States legal system. Difficulties in extradition arise out of the very nature of this dual system. The famous case of *Factor v. Lauberheimer*⁷¹ exemplifies this type of problem. In *Factor*, Great Britain requested the extradition of a fugitive for the crime of "receiving money knowing the same to have been unlawfully obtained."⁷² The fugitive had been apprehended in Illinois where the extradition hearing was to be held. The precise crime in England, however, was not criminal as so denominated under the law of Illinois. To be extraditable the offense had to be listed as such in the appropriate treaty,

66. U.S. CONST. art. I, § 8, cls. 6, 9.

67. U.S. CONST. art. I, § 8, cl. 7.

68. Assimilative Crimes Act of 1948, 18 U.S.C. § 13 (1976).

69. U.S. CONST. art. I, § 8, cl. 3. This clause has become the most important single source of power in criminal law exercised by the federal government in time of peace.

70. *Id.*

71. *Factor v. Lauberheimer*, 290 U.S. 276 (1933).

72. *Id.* at 303.

which it was, and it had to be a crime in both the requesting and the requested states. Britain had properly made its extradition request to the United States, but because the fugitive had been apprehended in a state that had not made that particular conduct criminal, the question arose as to whether or not the rule of double criminality was satisfied. The United States Supreme Court was faced with a unique question: Should double criminality be determined by the law of the state in which the fugitive is found, the law of the majority of states, or some other criterion? The Court held the fugitive extraditable on a different ground,⁷³ but stated very clearly what its solution to the double criminality dilemma would be,

[T]he conduct with which Factor was charged was a crime in Great Britain, was within the provisions of the Treaty of 1931, between the two countries, and was a crime under the law of many states, if not Illinois, punishable either as receiving money obtained fraudulently or by false pretenses, or as larceny.⁷⁴

Since the *Factor* decision, the courts in the United States have generally followed the same approach, holding an offense to be extraditable if it is "generally recognized as criminal" in the United States.⁷⁵ The decisions do not determine what "generally recognized as criminal" means, however. What the Supreme Court in *Factor* and the courts which have followed the rationale appear to be saying is that the judge will determine whether there is a sufficient number of states that have criminalized the action in question to legitimize his decision or to lend it credibility. The

73. The Supreme Court resolved the problem by holding that the offense or the actions described in the extradition papers need not be denominated criminal in the same language by the law of the requested state. All that is necessary is that the offense or the actions constituting the offense be enumerated as extraditable in the treaty, and that those actions be some kind of an offense in the requested state, although denominated differently. Thus, it held that receiving money known to have been obtained unlawfully was equivalent to fraud, which the treaty covers. *Id.* at 292, 303.

74. *Id.* at 300, 303. For a critical view of the *Factor* decision, see Hudson, *The Factor Case and Double Criminality in Extradition*, 28 AM. J. INT'L L. 274 (1934).

75. *United States v. Deaton*, 448 F. Supp. 532, 536 (N.D. Ohio, 1978); *Jhirad v. Ferrandina*, 355 F. Supp. 1155, 1160-61 (S.D.N.Y. 1973); *In re Edmondson*, 352 F. Supp. 22, 26 (D. Minn. 1972). *Cf. Bacardi Corp. v. Domenech*, 311 U.S. 151, 163 (1940); *Valentine v. United States*, 299 U.S. 5, 11 (1936); *United States v. Kaulukukui*, 520 F.2d 726, 731 (9th Cir. 1975).

obvious defect is uncertainty.⁷⁶

Professor Shearer proposes an alternative to the *Factor* approach. He suggests that the dilemma may be resolved by applying what he calls the no-list formula for making offenses extraditable.⁷⁷ The no-list formula, which determines the extraditability of an offense on the basis of the gravity of the potential penalty rather than on the basis of specifically enumerated offenses, is really no solution to this problem. The principle of dual criminality requires offenses to be criminalized by the laws of both states regardless of whether the list or no-list method is used. For an action to be extraditable under the no-list theory, or any other theory, the conduct still must be a crime in both states. The no-list method merely allows more offenses in both states to be considered extraditable on the basis of the length of penalty, as long as they are offenses in both states. Its adoption does not alter the basic problem of determining what is criminal in the United States when certain conduct is criminalized in some states and not in others. Notwithstanding the problem of uncertainty, the solution articulated by the Supreme Court in the *Factor* case is still the best. The uncertainty that it creates is manageable, as it is not difficult to determine what percentage of states consider the conduct a crime. Its advantage is that it does not make extraditability hinge on the fortuitous circumstance of the location of the accused when apprehended.

The rule of double criminality is not the only source of difficulty related to the United States federal/state criminal justice system. One of the most common and vexatious difficulties arises out of the transportation offenses.⁷⁸ Over the years, there have

76. See Extradition Law of 1927, *supra* note 6, at 380-82, art. 2(b). Some earlier cases had held that the law of the place of the hearing should be determinative of the double criminality issue: *Collins v. Loisel*, 259 U.S. 309, 314-17 (1922); *Charlton v. Kelly*, 229 U.S. 447, 456 (1913); and *Currier v. Vice*, 77 F.2d 130 (9th Cir. 1935).

77. See SHEARER, *supra* note 9, at 148.

78. "Transportation offenses" are those acts made criminal under United States federal law, having as a necessary element, in addition to the substantive elements of the particular offense (theft, prostitution, etc.), the transportation, transporting, or transfer across state or foreign borders of persons, articles, or other items related to the offense. The Commerce Clause of the United States Constitution provides the authority for federal jurisdiction.

The reasons for this method of providing federal jurisdiction are clear. If it were not for this or some other method of providing for federal jurisdiction, each separate state in which part of an offense has occurred would vie for jurisdiction

been many denials of extradition requests by foreign governments because the foreign judge hearing the case could find no crime in his country's laws such as "theft of property in interstate commerce," or "transportation of a woman for the purpose of prostitution." Theft and prostitution are common crimes within the law of most countries, yet the transportation aspect of the language in the federal statutes often confuses the judge or administrator who must interpret the treaty and its relation to the offense committed.

It is unfortunate that the language "moving in interstate or foreign commerce" in and of itself would negate an extradition. The language is simply the trigger to the assertion of federal jurisdiction in cases particularly important for the federal government to prosecute, either because of the difficulty of state prosecution or the importance of the type of crime or offender.

Many foreign judges, never having had any training in the United States or opportunity to develop a conception of the nature or function of the United States dual system of criminal justice, have a difficult time understanding what appears to be clear and simple to an eye trained under the latter system.⁷⁹ The solution to the problem is clear. United States law must be changed to make a clear distinction between jurisdictional language and language providing the gravamen of the offense. The other alternative would be to word treaties to make the jurisdictional nature of the transportation language clear.

Thus, the United States Government has attempted to negotiate transportation clauses into its extradition treaties. The United States delegation to the negotiations of the 1970 Procla-

to try all or part of the offense on the basis of what took place within its territory. This would be unwieldy. Furthermore, many of the "transportation offenses" tend to involve organized crime, thus, making the funding, expertise, and larger investigative and prosecutorial capabilities of the federal system even more important.

The proposed revision to the United States Criminal laws, *see* Senate Bill S-1437, 95th Cong. 1st Session, May 2, 1977, is being drafted so as to alleviate this problem.

79. It should be pointed out that the gravamen of some federal crimes is the transportation itself, not a common crime. For example, interstate transportation of stolen property is usually not extraditable, for it is the transportation of the property that is the gravamen. *See* 18 U.S.C. § 2314 (1976). Foreign states usually do not have an equivalent offense. On the other hand, theft from an interstate shipment is extraditable, because its gravamen is clearly theft.

mation with France suggested the incorporation of the following clause:

The words "transporting" and "transportation" as used in Article II of the present Convention, are included in order to grant jurisdiction for prosecution of the enumerated offenses to the United States Government. It is understood that for the purposes of this convention the gravamen of the offense will be the underlying crime.⁸⁰

The French delegation refused to accept this clause, but suggested that the former opening clause of article II be changed to place the emphasis on the actions constituting an offense, rather than the denomination.⁸¹ In addition, a formal exchange of letters was made on February 12, 1970, to clarify this point. Ambassador Sargent Shriver's letter to Ambassador Hervé Alphand, Secretary General of the Ministry of Foreign Affairs, is included in the documents accompanying the printed copy of the Supplementary Convention of 1970.⁸² The letter reads, in part,

The purpose intended in this modification is to eliminate certain difficulties which could arise in the application of the Convention. Extradition will be based on the nature of *acts* and not on the particular statutory terminology. In particular, it is understood that this modification will resolve any question concerning jurisdiction terminology of Federal offenses of the United States. Thus, extradition will also be granted for any act which serves as the basis of an offense foreseen in Article II even though, for the purposes of granting jurisdiction to the Government of the United States of America, transporting or transportation is also considered a necessary element of the offense.⁸³

G. *Extraditable Offenses*

1. The Enumerative Method versus the No-List or Minimum Penalty Method of Ascribing Extraditability to Offenses

Extradition treaties usually incorporate one of two methods for

80. Draft of 1970 Proclamation, art. II (on file, U.S. Dep't of State, Office of the Legal Adviser).

81. The opening phrase had previously read: "Extradition shall be granted for the following crimes and offenses." This clause now reads: "Extradition shall be granted for the following *acts* if they are punished as crimes or offenses by the laws of both States" (emphasis added).

82. 1970 Proclamation, *supra* note 5, at slipsheet 9-10, and 22 U.S.T. 416-17.

83. *Id.*

delimiting extraditable offenses. The first is the enumerative method, whereby the extradition treaty enumerates certain specific offenses as being extraditable under its terms. If an offense is not listed, it is not extraditable. The second method is the minimum penalty or no-list method, in which the treaty incorporates a clause providing that a certain minimum standard of punishability under the laws of both states renders an offense extraditable.⁸⁴

Understanding that treaty lists were limitative, the French opted for the no-list approach. The French Extradition Law of 1927 permits extradition for all persons charged with offenses punishable by a *peine criminelle* (generally, those from ten years to life imprisonment or the death penalty), for all persons charged with offenses punishable by a *peine correctionnelle* (generally those from one to five years imprisonment) having a maximum penalty of two years or more, and for all persons convicted of an offense and sentenced to at least two months imprisonment.⁸⁵ The French Extradition Law of 1927 and the European Convention on Extradition are consistent in their approach to defining extraditable offenses.⁸⁶

The United States has continued to use the enumerative approach. Until 1979,⁸⁷ all of the United States bilateral extradition treaties have used the enumerative method.⁸⁸ United States refusal to utilize the eliminative or no-list approach stems basically from the multi-jurisdictional criminal justice system in this country. The United States representative to the negotiations of the 1970 Proclamation⁸⁹ stated in his Minutes of the Negotiations

84. There is also a less common approach which combines these two methods.

85. Extradition Law of 1927, *supra* note 6, art. 4. Those offenses with penalties within these categories of "*peines criminelles*" (*des crimes*) and "*peines correctionnelles*" (*des délits*) are roughly equivalent to felonies in the United States.

86. European Convention on Extradition, 359 U.N.T.S. 273 (1957).

87. The Treaty on Extradition Between the United States and Japan, currently in the ratification process, is non-enumerative.

88. The United States Government has used the enumerative method from the beginning of its extradition practice. The Jay Treaty of 1794, United States-Great Britain, art. 27, 8 Stat. 116, T.S. No. 195, limited extradition to the crimes of murder or forgery. From this first extradition treaty to the present day, the list of extraditable offenses has expanded, but the approach has remained the same.

89. 1970 Proclamation, *supra* note 5.

that it was necessary because of "the divergence of provisions on punishment amongst the various states; and the desire of the United States Government to draft a treaty wherein only the most important offenses would be subject to extradition."⁹⁰

The pure no-list formula would be quite unwieldy in the United States. In nearly every case, the same question as that which arose in the *Factor* case⁹¹ of what law determines whether or not the offense is extraditable, would have to be answered. Some very difficult problems could arise. Should the United States request extradition if a request is made by one of its constituent states for an offense that is penalized by the minimum punishment in that state alone? To apply the law of the state in which the fugitive is apprehended, although more efficient and dynamic in that it covers newly defined crimes, makes extradition hinge upon the fortuity of where the fugitive happens to be caught. This difficulty could, perhaps, be alleviated by adopting a hybrid no-list formula whereby only federal crimes would be extraditable, even though not on the list, if they had the minimum penalty.

The United States Department of Justice has preferred to adopt the no-list approach,⁹² in light of the high cost in time and effort of updating treaties. The anachronistic state of United States extradition treaties is apparent from the dates of treaties currently in force. Many of these were negotiated in the late nineteenth and early twentieth centuries and do not even include narcotics violations as extraditable offenses.⁹³ The failure of extradition treaties to cover important modern crimes may tend to encourage law enforcement agencies to skirt the extradition pro-

90. Gaither, Minutes, *supra* note 29.

91. *Factor v. Laubheimer*, 290 U.S. 276 (1933); see discussion at notes 71-76 and accompanying text *supra*.

92. Based on discussions with John Murphy, then Chief of the Government Regulations Section, Criminal Division, Department of Justice (the section charged with responsibility for extradition) during treaty negotiations in which the writer and Mr. Murphy participated in April, May and June of 1975. There is no reason to believe the approach has since changed.

93. Treaty Affairs Staff, Dep't of State, *Treaties in Force* (1979), lists 29 bilateral extradition treaties currently in force that do not include narcotics violations among the extraditable offenses. It is true that the updating problem is mitigated by some multilateral treaties relating to other matters such as hijacking which provide that particular offenses be made extraditable. See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192.

cess in favor of extra-legal methods of returning fugitives. The Treaty between France and the United States, negotiated in the early 1900's and updated in 1970,⁹⁴ is no exception to the old rule of the enumerative method.

2. Homicide, Rape, and Larceny

The English text of article II (1) of the Extradition Treaty between France and the United States provides that extradition shall be granted for "murder, assassination, parricide, infanticide and poisoning; manslaughter, when voluntary; and assault with intent to commit murder."⁹⁵ The French text reads "*meurtre, parricide, assassinat, empoisonnement (et) infanticide . . .*"⁹⁶ It is obvious that the English text contains more elements than does the French. The reason for this is that the French law relating to murder includes both intentional manslaughter and assault with intent to murder.⁹⁷ Moreover, the last paragraphs of article II of the Treaty allow extradition for attempts, as well as for participation or complicity in extraditable offenses.⁹⁸

Article II (4) of the Treaty presents a similar situation. The English text, as amended in 1970, reads "[l]arceny, robbery, burglary, house-breaking or shop-breaking, assault with intent to rob."⁹⁹ The French text is more elaborate and spells out what has come to be understood in most jurisdictions of the United States by the terms in the English version. Notably, however, the French text leaves out any reference to "assault with intent to rob" because, just as in the case of homicide, the attempt is considered to

94. 1909 Extradition Treaty, *supra* notes 5 and 82.

95. *Id.*

96. *Id.* These are capital crimes in French law. Each of them traditionally received the death penalty. "Empoisonnement" is a capital offense for which the death penalty has been applied even when death did not occur as a result of the poisoning. Furthermore, French law in principle applies the same possible penalty to an attempt to commit a crime and the completed offense. *Code Pénal*, art. 2 (1978-79).

97. Article 295 of the French *Code Pénal* defines "*meurtre*" as "homicide committed voluntarily" (writer's translation). Also, all "*crimes*," in the French connotation of that term, include their attempt. *Code Pénal*, art. 2 (1978-79).

The French delegation to the negotiations of the 1970 Proclamation explained that assaults with intent to commit a crime would be included within the French concept of "attempt."

98. 1909 Extradition Treaty, as amended by 1970 Proclamation, *supra* note 5, art. II.

99. *Id.* art. II (4).

be the equivalent of the crime.¹⁰⁰

Paragraph (2), of article II, allows extradition for "[r]ape, abortion, bigamy." It is understood, of course, because of the double criminality provision,¹⁰¹ that only illegal abortions under the laws of both countries are extraditable.

3. Technical Amendments of the Supplementary Convention and Important Aspects of Translation of Terms

Certain technical changes in the enumeration of extraditable offenses are effected by the 1970 Proclamation. Double criminality was made a general treaty requirement in the first paragraph of article II.¹⁰² Monetary value limitations were deleted because of the continual change in currency valuation.¹⁰³ In addition, the French text was changed to comport with the language of the French *Code Pénal*,¹⁰⁴ but this required no change in the English text.

4. New Offenses Added by the 1970 Proclamation

The 1970 Proclamation added the following to the list of extraditable offenses: (1) violations of narcotics laws; (2) violations of bankruptcy laws; (3) revolt or hijacking of aircraft; and (4) use of the mails to defraud or to obtain by false pretenses.¹⁰⁵

(a) *Violation of Narcotics Laws.*—The English text of article

100. *Code Pénal* art. 2 (1978-79). See text accompanying note 97, *supra*. The French version of this offense in the treaty was revised in 1970 by adding the phrase, "vol simple ou commis notamment" to that existing in the 1909 treaty, in order to accord the treaty language with that of the new French *Penal Code*. The "vol" (theft) aspect of the offense in sub-part (8) of article II was deleted because it is now covered by the new language of article II (4). The amended French text reads: "Vol simple ou commis notamment avec l'une des circonstances suivantes: violence, menace, éfraction, escalade, fausses clés; vol commis la nuit dans une maison habitée; vol commis par plusieurs personnes ou par un individu porteur d'armes." The writer translates this as, "Simple theft or that committed notably with one of the following circumstances: violence, threat, breaking a door or lock, climbing through a window, or the use of skeleton keys; theft committed during the night in an inhabited dwelling, theft committed by several persons or by an armed person."

101. See discussion of double criminality at notes 60-64 and accompanying text *supra*.

102. 1970 Proclamation, *supra* note 5, at art. II.

103. See Gaither, Minutes, *supra* note 29.

104. *Code Pénal*, art. 408 (1978-79).

105. 1970 Proclamation, *supra* note 1, art. II (1).

II (16) was taken directly from the United States Draft Extradition Convention.¹⁰⁶ It allows extradition for, "Offenses against the laws relating to the traffic in, possession, or production or manufacture of, opium, heroin and other narcotic drugs, cannabis, hallucinogenic drugs, cocaine and its derivatives, and other dangerous drugs and chemicals or substances injurious to health."¹⁰⁷ This article combines narcotics offenses with those relating to poisonous chemicals and substances injurious to health. These were combined in the Treaty because the French delegation felt that it would help avoid confusion in the French courts as the French *Code Pénal* combines them.¹⁰⁸ Furthermore, to avoid any possibility of confusion for French or United States judges, certain substances were specified explicitly in the French text as well. Thus, the French text reads: ". . . *notamment le cannabis, L'héroïne, la cocaïne et les hallucinogènes.*" The term "*notamment*" indicates that the list of substances is not intended to be limiting or all-inclusive.¹⁰⁹

(b) *Violations of the Bankruptcy Laws.*—Offenses against the bankruptcy laws were not really new to the Extradition Treaty between France and the United States. A bankruptcy offense clause had been added to the 1909 Convention by the Supplementary Convention of April 23, 1936. The Supplementary Convention of 1970 simply modernized the bankruptcy clause by deleting the reference to double criminality.¹¹⁰

(c) *Revolt on Board or Hijacking of Aircraft.*—The language

106. See Gaither, Minutes, *supra* note 29.

107. 1970 Proclamation, *supra* note 5, art. II(16).

108. See also Gaither, Minutes, *supra* note 29, at 4. Narcotics violations are found in art. R. 5149 *Code Pénal* (App., Petits Codes Dalloz, 7th ed., 1979-80). This article falls under Title III, Restriction of the commerce of certain substances and certain objects Ch. I, Poisonous Substances (*Restriction au Commerce de Certaines Substances et de Certains Objets, Ch. I, Substances Vénéneuses.*) Articles R. 5165-5166-1 cover narcotics (*Stupéfiants*); art. R. 5151-5164 cover poisonous substances (*Substances toxiques*); and art. 5167, covers dangerous substances (*Substances dangereuses*).

109. See Gaither, Minutes, *supra* note 29, at 5.

110. The 1970 Proclamation incorporated the provisions of two previous Supplementary Conventions to the 1909 Extradition Treaty. These were the Supplementary Convention of January 15, 1929, T.S. 787, 46 Stat. 2276; and the Supplementary Convention of April 23, 1936, T.S. 909, 50 Stat. 1117. Article IX of the 1970 Proclamation reads: "Upon the entry into force of the present Supplementary Convention, the Supplementary Extradition Convention signed at Paris on January 15, 1929, and April 23, 1936, respectively, shall terminate."

employed for the English text of the new hijacking offense in article II (19) is that of the United States Model Treaty. It reads "revolt on board an aircraft against the authority of the captain; any seizure or exercise of control, by force or threat of force or violence, of an aircraft."¹¹¹ The French text does not include the phrase "by force or threat of force," as this concept is included in the French term "*violence*." The hijacking clause was not operative until July 15, 1970, when the French domestic hijacking law was promulgated.¹¹²

(d) *Mail Fraud*.—The mail fraud offense was added at the behest of the United States delegation, which considered the offense of growing importance in our criminal law. The language used is that of the United States Model Treaty.¹¹³

5. Escape or Violation of Bail or Parole

Escape from prison or violation of parole or bail do not, in and of themselves, constitute extraditable offenses under the provisions of the Extradition Treaty between France and the United States.¹¹⁴ Extradition may be sought only on the basis of the underlying offense for which the fugitive was charged or convicted.

H. Action Constituting the Offense Emphasized, Rather than its Denomination

The terminology used in statutes differs greatly from one country to another for actions which are basically the same. Language and tradition influence the development of code language in so many ways that it is necessary to include a clause in extradition treaties explicitly stating that the acts or actions underlying the enumerated offenses are determinative of extraditability, rather than the denomination of the offense in the treaty, the extradition request, or in the laws of either party. Thus, the first paragraph of the 1909 Extradition Treaty was amended to read "extradition shall be granted for the following *acts* if they are

111. 1970 Proclamation, *supra* note 5. See Gaither, Minutes, *supra* note 29.

112. This law was promulgated on January 15, 1970, L'N° 70-634, art. 462 *Code Pénal (Petits Codes Dalloz 77 ed. 1979-80)*.

113. See Gaither, Minutes, *supra* note 29, at 5.

114. Neither escape nor violation of parole or bail has ever been included in a ratified United States extradition treaty. For analysis of the parole system in France, see Blakesley, *Conditional Liberation (Parole) in France*, 39 LA. L. REV. 1 (1978).

punished as crimes or offenses by the laws of both States."¹¹⁵

The need for such a clause was evident from the many requests for extradition that had been denied on the basis of inconsistent denomination, when the gravamen of the offense committed was clearly criminal in both countries and was extraditable under the terms of the treaty. United States practice reflects the interest in determining extraditability on the basis of the facts of each case, rather than the denomination of the offense charged. In 1961, Acting Legal Adviser Meeker described the United States attitude in a letter to Assistant Attorney General Miller, "The important thing is that whatever its denomination, if the facts of the particular case make out an offense under the treaty extradition should be granted."¹¹⁶ Meeker continued, citing *Factor*,¹¹⁷ "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred."¹¹⁸

In the case of *Gallina v. Fraser*,¹¹⁹ the United States extradited a fugitive by looking to the documentation and evidence to determine the extraditability when the language of the request was confusing. Italy had requested the extradition of the fugitive for "continuous," "aggravated," and "reiterated" robbery. The United States district court stated, "an examination of the record established that these words describe circumstances surrounding a robbery or series of robberies. . . . The offense of aggravated robbery as encompassed in the Italian Penal Code, translated sections of which are in the record, is extraditable under the treaty."¹²⁰

115. 1970 Proclamation, *supra* note 5, art. II (emphasis added).

116. Letter, June 6, 1961, MS Dep't State file 211.3115, Perez Jimenez Marcox/3-3161, cited in *WHITEMAN*, *supra* note 1, at 764-65.

117. *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

118. *Id.* at 286-87.

119. *Gallina v. Fraser*, 177 F. Supp. 856 (D. Conn. 1959).

120. *Id.* at 866-67. An English court took a similar approach in a 1961 extradition request by the state of Illinois. The Illinois documentation proffered by the Department of State defined the offenses as being "larceny by bailee" and "confidence game." These denominations had no counterparts in British legislation.

The English court, nevertheless, found the fugitive extraditable, because his actions were consistent with actions made criminal by British criminal law which were also extraditable under the treaty. The solicitors representing the State of Illinois before the English courts equated "larceny by bailee" with "fraudulent conversion" in British law; they equated "confidence game" with the

I. Provisional Arrest

Article IV of the Extradition Treaty between France and the United States provides that an application for arrest and detention of a fugitive may be made by diplomatic note or even by telegraph, on information of the existence of a judgment of conviction or a warrant or arrest.¹²¹ The application for provisional arrest pursuant to the extradition treaty must be addressed to the Minister of Foreign Affairs in France and the Secretary of State in the United States. After a review in the Ministry of Foreign Affairs of the Department of State, the request is forwarded to the Ministry or Department of Justice. This latter Ministry or Department initiates the arrest procedure.

Article IV also provides that in case of urgency, the application "may be addressed directly to the competent magistrate in conformity to the statute in force." In the United States, article IV notwithstanding, provisional arrest may not be initiated solely on the basis of a warrant issued by authorities of another country or on a request from the authorities of a foreign country to the authorities of the United States. A competent court of the United States¹²² must issue a warrant of arrest under 18 U.S.C. section 3184 which mandates that a complaint be filed before the appropriate judicial officer by someone representing the requesting country in the United States. Thus, an official of the Department of Justice or a United States Attorney would have to make the complaint before the appropriate court.¹²³ The complaint must be made under oath, although it may be, and usually is, made on information and belief, based on the requesting government's

British crime of "obtaining money by false pretenses." The accused was found extraditable on the basis of the latter charge. He was not extraditable on the former charge because of insufficient evidence, not because of its denomination. Case described in dispatches between Department of State and the United States Embassy, London. Cable No. 2407, London to Dep't State, June 22, 1961, MS Dept. of State file 241.1115, Lavin, Thomas J./6-2261, and Cable, American Embassy, London, to Dep't State, June 29, 1961, 6-2961, *cited in* WHITEMAN, *supra* note 1, at 787.

121. 1909 Extradition Treaty, *supra* note 5 art. IV.

122. The warrant of arrest issued pursuant to § 3184 is valid throughout the United States. *See* Henrich Case, 11 Fed. Cas. 1143 (No. 6369) (C.C.S.D.N.Y. 1867), where the fugitive was arrested in Wisconsin on a warrant issued by a judge in the Southern District of New York.

123. 1970 Proclamation, *supra* note 1, art. VI, which replaced art. XII of the 1909 Extradition Treaty.

communication through diplomatic channels.¹²⁴

Thus, the provision allowing application for provisional arrest made directly to the competent magistrate is only effective for United States requests made in France. Apart from the unfairness, due to the lack of real reciprocity, this provision is not really advantageous to the United States Government. A local police chief in France who receives a request from his counterpart in a United States city may arrest the fugitive without violating French law. The United States police chief merely has to declare that the arrest is based on a warrant and that extradition will be sought. This means that local United States police officials could initiate a provisional arrest in France without having communicated first with the Department of State. Usually neither the local police officials in the United States nor those in France are knowledgeable about the specific requisites and subtleties of the extradition treaty. Often, when a provisional arrest request is made without going through the Department of State, the offense is not extraditable. If the offense is extraditable, the local official usually makes the request not knowing that there is a very limited amount of time, forty days in the French Treaty,¹²⁵ in which to present the evidence to the foreign government, before the accused will be released and, of course, lost. The request is usually made precipitately by the local police official upon his learning of the fugitive's location. The evidence has not been gathered, organized, or authenticated. The documentation must be prepared in proper form to be presented to a court, and each document must be translated. The package must then be sent by air-pouch to the United States Embassy in the foreign country to be presented by diplomatic note to the Foreign Ministry. Unless the documentation is largely prepared before the provisional request is made, the treaty time limitation will not be met, and the accused will be released, knowing all too certainly that he is a matter of interest to the requesting officials.

Improper provisional arrest requests made by local police offi-

124. See *Yordi v. Nolte*, 215 U.S. 227 (1909); *Rice v. Ames*, 180 U.S. 371 (1901). The United States Justice Department will not approve an arrest unless it has received a formal request from the Department of State on behalf of the foreign country.

125. Article IV of the 1909 Extradition Treaty, *supra* note 5, requires that the documentation be in the hands of the Foreign Ministry officials within forty days of the provisional arrest.

cial without going through the diplomatic channel cause embarrassing consequences. The United States Government will have to seek the release of a provisionally arrested person and will have to make apologies to the person and to the foreign government for its expense and trouble in improperly arresting the accused. The Departments of State and Justice have leveled harsh criticism at local officials who have not made their provisional arrest requests through the Department of State to ensure against the occurrence of these difficulties.

To ensure that a provisional arrest request is justified, the United States Department of Justice requires the following information from United States Attorneys who wish to seek extradition of a fugitive in a foreign country:

- (1) [A] showing of the necessity of provisional arrest must be provided. For example, the United States Attorney should provide evidence of the likelihood of the fugitive's continued flight or his known possession of the fruits of the crime;
- (2) the United States Attorney must provide the exact whereabouts of the fugitive and the source of this information;
- (3) he must have identifying data, including the accused's complete name, aliases, date and place of birth, physical description—including gender, height, weight, special identifying marks, hair and eye color citizenship, passport or other identifying numbers;
- (4) he must provide the details of the offense including: the court and case number, the date the accused was indicted or the date the complaint was filed, the date the warrant of arrest was issued and the name of the issuing judge, a list of the code violations and a description of the offense(s) from the indictment, complaint, or judgment of conviction, a statement of whether or not the fugitive was in the United States or in the country of refuge in connection with the commission of offenses;
- (5) the source of the evidence (whether it comes from eyewitness affidavits, laboratory reports, or Grand Jury testimony) must be provided;
- (6) a summary of the evidence to establish probable cause to believe that the fugitive committed the offense(s), unless he is already convicted, must be presented;
- (7) he must provide a statement of the availability of non-hearsay evidence, i.e., the location of the necessary affiants; and
- (8) other information, such as the existence of other pending federal charges against the fugitive, his nationality and other aspects of his legal status in the country of refuge, including whether or not he is in custody there, and, if so, for what reason, and the un-

usual importance of this particular fugitive or the charges against him should be included.¹²⁶

The Department of State requires basically the same information from officials of the various states when they wish to have a fugitive provisionally arrested in a foreign country. In addition, the Department of State requires a statement from the Governor that his state will see the extradition through to a conclusion and pay the expenses.

The Departments of State and Justice also prefer not to initiate a foreign country's provisional arrest request until the proper documentation has been delivered to the Department of State. The reason for the preference, in addition to those mentioned above, is that United States federal judges tend to release fugitives on bail unless the documentation is in the hands of the United States officials. State and Justice Department officials believe that, because most extraditable offenses are major crimes, the fugitives often have either the funds or the connections to obtain funds to meet any bond requirements. Once released, it is not uncommon for them to take flight.

IV. EXCEPTIONS TO EXTRADITION

A. *Non-Extradition of Nationals*

The 1909 Extradition Treaty between France and the United States originally provided that "neither party shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention."¹²⁷ The exemption of nationals from extradition is not an uncommon phenomenon.¹²⁸ Antiquity saw citizens of the Greek city states, the Italian cities, and Rome, as well as other

126. EXTRADITION HANDBOOK, *supra* note 50, contains these requirements.

127. On the issue of the extradition of nationals generally, *see*, SHEARER, *supra* note 6, at 34; RAFUSE, THE EXTRADITION OF NATIONALS (1939); Baltatzis, *La non-extradition des nationaux*, 13 REV. HELLENIQUE DU DROIT INT'L 190 (1960). 1909 Extradition Treaty, *supra* note 5, art. V.

128. Of the total of 163 extradition treaties printed in the League of Nations Treaty Series and the first 550 volumes of the United Nations Treaty Series, 98 except the national of the requested State absolutely, 57 give to the requested State a discretionary right to refuse to surrender its nationals, while only eight provide for extradition regardless of the nationality of the fugitive.

SHEARER, *supra* note 6, at 96, app.II.

great civilizations, exempt their citizens from extradition.¹²⁹ Native American tribes refused to deliver up their denizens.¹³⁰ The modern practice of exempting nationals from extradition appears to have been initiated and developed by the French. The extradition treaties between France and her adjacent neighbors in the mid-eighteenth century contained provisions exempting nationals of the requested state.¹³¹ Napoleon contradicted the trend by issuing a decree that French nationals could be extradited. The decree, however, was never executed.¹³² Professor Billot maintains that French public law prohibited the extradition of nationals as early as 1788,¹³³ while others have claimed that the Parliament of Paris declared the exemption as early as 1555.¹³⁴

The French Minister of Justice formally promulgated a *circulaire* in 1841,¹³⁵ prohibiting the extradition of nationals. Although France subsequently negotiated extradition treaties with Great Britain and the United States without including the exemption of nationals clause, it has never extradited one of its nationals under the treaties.¹³⁶ Since 1884, French treaty practice has consistently exempted nationals from extradition,¹³⁷ and the French Extradition Law of 1927 specifically exempts French citizens from extradition.¹³⁸

The practice of exempting nationals from extradition has been disparaged in reports of international conferences¹³⁹ and by many

129. SHEARER, *supra* note 6, at 95; Baltatzis, *supra* note 127, at 190, 197. Barbarian Europe followed the same principle.

130. Crimes committed by members of the tribe against outsiders were usually not considered to be crimes, and "extradition" was refused. The most severe penalty for intratribal crimes was banishment, however.

131. Aupele, *supra* note 7, at 15.

132. BILLOT, *supra* note 3, at 70-72. See also, SHEARER, *supra* note 6, at 104.

133. See, SHEARER, *supra* note 6, at 104.

134. Manton, *Extradition of Nationals*, 10 TEMPLE L.Q. 12 (1935-36); SHEARER *supra* note 6, at 104, n.3.

135. *Circulaire du Ministre de la Justice*, Apr. 4, 1841, para. 2 cited in SHEARER, *supra* note 6, at 104, n. 5.

136. SHEARER, *supra* note 6, at 104; BILLOT, *supra* note 3, at 73; These were the last French extradition treaties that did not contain the exemption in some form. Both treaties were negotiated in 1843.

137. The Extradition Treaty between France and Luxembourg started the trend. The Extradition Treaty of 1909 with the United States was no exception; see note 127 and accompanying text.

138. Extradition Law of 1927, *supra* note 6, art. 5, para. 1.

139. See INST. OF INT'L LAW CONF. REPORT (1880); CONF. POUR L'UNIFICATION DU DROIT PENAL (1935), which provide for the extradition of nationals in their

commentators.¹⁴⁰ Its weakness has been argued,

If justice as administered in other states is not to be trusted, then there should be no extradition at all. If a State owes to its nationals a duty to apply its own laws to them as to acts, wherever committed by them, then it should demand extradition of nationals who have committed acts abroad and have been taken into custody there. In fact, in the latter situation, the State of allegiance contents itself with watching to see that its nationals obtain justice. The same protection of nationals should suffice after extradition.¹⁴¹

The exemption of nationals clause in the 1909 Extradition Treaty reads, "neither party shall be bound to deliver up its own citizens or subjects under the stipulations of this Convention."¹⁴² This clause would appear, on its face, to allow discretionary extradition of nationals. It does not. Neither France nor the United States will allow it. The French Extradition Law of 1927 prohibits the extradition of French nationals outright.¹⁴³ The United States

reports. Cf. TENTH CONG. OF INT'L CRIM. LAW, (1969), which provides for discretion to extradite nationals; The European Convention on Extradition, *supra* note 86, art. 6, which also leaves the contracting parties the discretion to refuse the extradition of nationals.

140. This includes French commentators, e.g., MERLE & VITU *supra* note 2, at 329; BOUZAT & PINATEL, *supra* note 6, at 1325-26.

141. *Harvard Research in International Law, Extradition*, 29 AM. J. INT'L L. (Supp. 1935), at 380-85.

142. 1909 Extradition Treaty, *supra* note 5, art. V.

143. "Extradition is not granted: 1. When the person, the object of the request, is a French citizen or a person under French protection, the status of citizen or protected person being determined as of the time of the offense for which the extradition is requested." Extradition Law of 1927, *supra* note 6, art. 5, para. 1. With regard to the issue of the timing of the determination of the accused's nationality, the Court of Appeals at Aix-en-Provence, V.C. Aix (*chambre d'accusation*), decision of March 15, 1951, 1951 J.C.P. II 6243; [1951] INT'L L. REP. 324 (No. 101), held that under this article of the Extradition Law of 1927, France could surrender a fugitive from the justice of Italy who had committed certain extraditable offenses in 1945, even though he had acquired his French citizenship by naturalization in 1950. The Franco-Italian Extradition Treaty of 1870, then in effect, exempted the extradition of nationals, but extradition was approved on the basis of the nationality at the time of the offense, as required by the 1927 Law.

The determination of nationality for *prosecution* in France of French nationals who have committed crimes outside French territory is just the opposite. The French *Code de Procedure Penal*, art. 639, para. 3, provides that for the jurisdiction of French courts to apply over offenses committed abroad by French

Supreme Court has held unequivocally that the exemption of nationals clause in the 1909 Treaty creates an absolute bar to the extradition of United States citizens to France.¹⁴⁴

The United States Government, although it would prefer to incorporate a clause explicitly allowing extradition of nationals, has had to use four different approaches to the extradition of nationals in its extradition treaties. The first, like the 1909 Convention between France and the United States,¹⁴⁵ provides that the parties to the Convention are not bound to extradite their nationals. This is a complete and absolute bar. The second approach, adopted by the 1970 Supplementary Convention, is that in which there is no obligation to extradite nationals, but the executive is expressly given discretionary authority to extradite nationals on a case-by-case basis. Thus, article III of the Supplementary Convention of 1970, amended article V of the 1909 Extradition Treaty between France and the United States to read,

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, insofar as the legislation of that State permits, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.¹⁴⁶

nationals, the nationality of the accused is determined as of the day of the prosecution, not the day of the offense.

French practice with regard to the timing of the determination of nationality for purposes of extradition exemption is different from general international extradition practice. The determination of nationality for purposes of the exemption from extradition usually occurs as of the time of the extradition hearing.

144. *Valentine v. United States*, 299 U.S. 5 (1936). The United States Supreme Court stated that this was not a matter of policy, but of legal authority. It reasoned that the power to extradite from the United States must be specifically granted in the terms of the extradition treaty. Extradition requires a positive statement of the power to extradite. The Supreme Court was considering the "exemption of Nationals" clause in the 1909 Extradition Treaty between France and the United States, art. V, "Neither party shall be bound to deliver up its own citizens or subjects under the stipulation of this Convention." The Court stated that such a negative phrase cannot be construed as a grant of power to the executive. *Id.* at 9-10.

145. 1909 Extradition Treaty, *supra* note 5, art. V.

146. The minutes to the negotiations of this Proclamation read:

The United States representative explained to the French delegation the inability of the United States to extradite its own nationals under the present Convention and expressed a strong desire to rectify this situation. He explained that the United States Supreme Court had decided (in *Valen-*

The third approach is to remain silent on the subject of the extradition of nationals.¹⁴⁷ The fourth expressly provides for extradition without regard to nationality.¹⁴⁸

The United States Government extradites its nationals pursuant to the latter three types of provisions. When discretion to extradite nationals is expressly allowed, the courts have found that the executive has the discretion, but not the obligation to do so.¹⁴⁹ With regard to treaties that are silent on the question of the extraditability of nationals, the United States Supreme Court has held that nationals are extraditable. If the treaty requirements are met, the executive is obligated to extradite nationals, as included in the term persons used in these treaties.¹⁵⁰

The policy preference of the United States Government is to extradite fugitives regardless of their nationality. United States

tine v. U.S. ex rel. Neidecker, 229 U.S. 5 (1936)) that the French Convention did not as indirectly required by the United States Constitution, grant the executive authority to extradite United States citizens. He noted that very few U.S. penal laws provided any form of extraterritoriality and that therefore unless such persons were returned to France, they would not be able to be prosecuted in the United States.

The French delegation explained that their extradition law generally prohibited extradition of nationals and expressed opposition to the formula proposed by the United States (the formula explicitly providing for extradition of nationals). The United States representative then suggested the article used in the United States - Brazil Treaty of 1961 (article VII) to which the French delegation agreed.

Gaither, Minutes, *supra* note 29, at 5-6. See also Convention on Extradition, October 24, 1961, United States - Sweden, 14 U.S.T. 1845; T.I.A.S. No. 5496; Treaty of Extradition January 13, 1961, United States - Brazil, 15 U.S.T. 2093; T.I.A.S. No. 5691.

147. See, e.g., Extradition Treaty, Dec. 22, 1931, United States - Great Britain and Northern Ireland, 47 Stat. 2122, T.S. No. 849.

148. See, e.g., Convention on Extradition, Dec. 10, 1962, Israel - United States, 14 U.S.T. 1707, T.I.A.S. No. 5475.

149. *In re Lucke*, 20 F. Supp. 658, 659 (1937).

150. In *Charlton v. Kelly*, 229 U.S. 447 (1913), the Supreme Court stated, [T]here is no principle of international law by which citizens are excepted out of an agreement treaty itself. Upon the contrary, the word "persons" includes all persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons."

Id. at 467-68. Canadian courts take the same view. In *re Burley*, 1 CAN. L.J. 34 (1865).

negotiators always attempt to include a clause expressly allowing extradition of nationals. When this is not possible due to the internal extradition laws of the other negotiating party, the United States delegation has suggested the inclusion of a clause explicitly providing executive discretion to extradite nationals. This allows the United States Government to maintain its policy of extradition of its own nationals, whether or not the other party can reciprocate.

Most commentators on extradition suggest that this discretionary type clause is meaningless because discretion will not be exercised unless reciprocity exists.¹⁵¹ That is clearly not true insofar as United States practice is concerned. The discretionary clause is put into extradition treaties precisely to allow extradition of United States nationals in spite of the lack of reciprocity. The clause allows the extradition of United States nationals without either accepting or deprecating the internal extradition law of the other contracting party.¹⁵² Moreover, this policy allows for flexibility without renegotiation, in case the foreign country changes its internal extradition law to allow extradition of its own nationals.

B. *Special Exemptions From Extradition*

The amended Extradition Treaty between France and the United States also exempts a fugitive from extradition, even though he may be extraditable otherwise if one of the following conditions is found to exist:

1. When the person whose surrender is sought is being proceeded against or has been tried and discharged or punished in the territory of the requested party for the acts for which his extradition is requested.
2. When the person whose surrender is sought establishes that he has been tried and acquitted or has undergone his punishment in a third State for the acts for which his extradition is requested.
3. When the person claimed has, according to the law of either the requesting or the requested Party, become immune by the reason of lapse of time from prosecution or punishment.

151. See, e.g., BOUZAT & PINATEL, *supra* note 6, at 1325; SHEARER, *supra* note 6, at 94; MERLE & VITU, *supra* note 2, at 329, n.2.

152. The writer saw the extradition of several United States citizens, in spite of a lack of reciprocity, during his two-year stay in the Legal Adviser's Office of the Department of State.

4. If the offense for which the individual's extradition is requested is of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offense of a political character. If any question arises as to whether a case comes within the provisions of this subparagraph, the authorities of the Government on which the requisition is made shall decide.

5. When the offense is purely military.¹⁵³

It is important to remember that it is the law of the requested state that determines whether or not any of the exemptions will apply.¹⁵⁴ Each of the exemptions will be analyzed briefly.

1. Double Jeopardy

The first two exemptions protect against the fugitive's being put in jeopardy twice for the same offense. Even though the rule prohibiting double jeopardy is part of the fabric of the internal criminal justice systems of both France and the United States, it was previously possible, under certain circumstances, for a person to be extradited, prosecuted, and punished for offenses for which he had already been punished in the requested state or some third state. This was possible because, in both France and the United States, foreign judgments are not a bar to prosecution, although they may be considered by the local court.¹⁵⁵ Of course, prosecution is not possible unless the offense occurs within the jurisdiction of the prosecuting state.¹⁵⁶ It now appears that the Treaty's double jeopardy exemptions are extant and controlling. There is a note of confusion in the 1909 Extradition Treaty, as amended, however. Article IV of the 1970 Proclamation added the exemptions quoted above, but neglected to abrogate article VIII of the 1909 Treaty, which also relates to exemption from extradi-

153. 1909 Extradition Treaty, as amended by the 1970 Proclamation, *supra* note 5, art. IV.

154. *Id.* art. VIII; see MERLE & VITU, *supra* note 2, at 334.

155. See art. 692, C. PR. PÉN. and discussion of problem, in BOUZAT & PINATEL, *supra* note 6, at 1343. In *People v. Papaccio*, 140 Misc. 696, 251 N.Y.S. 717 (1939), the accused was prosecuted, although he had already been convicted by an Italian court for a crime committed in New York.

156. Jurisdiction over offenses is not limited to territorial jurisdiction in either France or the United States. Offenses committed outside the sovereign territory of either state may be prosecuted under certain circumstances, although the French notion of jurisdiction over offenses committed outside its territory is broader in scope than that of the United States.

tion for situations of double jeopardy and lapses of the statute of limitations.¹⁵⁷ Thus, to the extent that these two articles are not consistent, disputes may arise from situations that they are designed to cover. No such dispute has arisen to date.

2. Statute of Limitations

The Treaty between France and the United States is similar to most extradition treaties in exempting from extradition fugitives, otherwise extraditable, when the statute of limitations for the offense committed in the law of either party has run.¹⁵⁸ Professor Shearer argues that this formulation of the exemption is wasteful and inimical to the best interests of criminal justice because the forum state is not equipped to understand the foreign requesting state's laws of prescription.¹⁵⁹ This may or may not be true in the abstract, but the issue is rendered moot by the requirement that the requesting state provide an affidavit of its relevant laws, including those on prescription, along with its documentation for extradition. If it is not clear whether the prescriptive period has run, the requested state may request clarification on the issue. This is not an onerous task. The burden certainly is not sufficient to risk the possibility that an individual may be put through the arduous experience of imprisonment and transfer to the requesting state or the possibility that the requested state may expend time, money, and effort in representing the requesting state, when the law of prescription of the requesting state will ultimately disallow prosecution once the extradition is accomplished.

157. Article VIII of the 1909 Extradition Treaty reads:

Extradition shall not be granted if the person claimed has been tried for the same act in the country to which the requisition is addressed, or if legal proceedings or the enforcement of the penalty for the act committed by the person claimed have become barred by limitation, according to the laws of the country to which the requisition is addressed.

Cf. paras. 1-3 of art. IV of the 1970 Proclamation, quoted *supra* in text accompanying note 153.

158. None of the United States extradition-related statutes mentions prescription. Accordingly, if a treaty has no provision exempting extradition when the statute of limitations has run, no limitation of United States law is applied in the case, at least when the United States is the requested state. *Caputo v. Kelley*, 96 F.2d 787, 789 (2d Cir. 1938).

159. SHEARER, *supra* note 6, at 140. Article VIII of the old 1909 Treaty applies only the statute of limitations of the requested state. The 1970 Proclamation applies the statute of limitations of either party.

3. Purely Military Offenses

Purely military offenses are exempted from extradition by article 4, paragraph 6 of the French Extradition Law of 1927.¹⁶⁰ The exemption applies to offenses committed by members of the military or those assimilated therein,¹⁶¹ when the crime is committed on a military establishment or within the scope of the individual's service.¹⁶² It also includes the equivalent of Selective Service violations and desertions.

4. Fiscal Offenses

Most extradition treaties contain a flat exemption of fiscal or tax offenses. The United States delegation to the negotiations of the 1970 Supplementary Convention to the Extradition Treaty between France and the United States opposed such a flat exemption. The result was that, although extradition is still not allowed for fiscal offenses, the language of the European Convention on Extradition was chosen so as to provide flexibility to include fiscal irregularities in the extradition scheme, if either party's internal law develops so as to allow agreement to extradite. Thus, article VI *bis* of the proclamation of 1970 reads "extradition shall be granted, in accordance with the provisions of this Convention, for offenses in connection with taxes, duties, customs and exchange only if the contracting Parties have so decided in respect of any such offense or category of offenses."¹⁶³

5. Political Offenses

Three basic types of political offenses may be exempted from extradition.¹⁶⁴ The exemption applies to those charged with of-

160. Extradition Law of 1927, *supra* note 6.

161. Arts. 66-74, Code de Justice Militaire, Loi No. 65-542, 8 July 1965. Art. 68 defines which persons are assimilated in the military, including civilians working for the military and their charges as well as dependents of military personnel. BOUZAT & PINATEL, *supra* note 6, at no. 1739.

162. Law of July 8, 1965, art. 56. During the time of war, all common crimes committed by the military anywhere are considered military crimes, art. 72, Code de Justice Militaire (found in Petits Codes, Dalloz, C. PR. PEN., 21st 79-80).

163. 1970 Proclamation, *supra* note 5, art. VI Bis.

164. See generally, Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 AM. SOC'Y INT'L STUD. L.J. 1 (1977). The topic of the political

fenses that may be called purely political offenses such as treason, sedition, or espionage. It may apply to "offenses of a political character" or common crimes like burglary, when committed with a political motivation. It may apply when the requested state's officials believe that the extradition was requested for a political purpose.

Virtually all extradition treaties contain this exemption. Yet, in spite of its universality, no extradition treaty and no legislative act, except one, attempts to define what is meant by the terms political offense and offense of a political character.¹⁶⁵ Thus, courts have had to provide the guidelines for determining whether or not an offense committed in a particular case falls within the exemption. There does not appear to be a problem with exemption of the so-called purely political offense.¹⁶⁶ For ex-

offense in extradition is worthy of extensive analysis. As no definition of the term "political offense" for purposes of exemption from extradition exists, the topic provides interesting ground for comparative study of French and United States judicial and doctrinal consideration of the problem, but is beyond the scope of this article.

165. The German Extradition Law of Dec. 23, 1929, art. 3(2), attempted to define political offenses. It stated that they are:

those punishable offenses . . . which are directed immediately against the existence of the security of the State, against the head or member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign states.

Quoted in *Harvard Research*, *supra* note 141, at 385. This definition has been criticized as being both too broad and too narrow, in light of the modern totalitarian states. See S. SCHAFER, *THE POLITICAL CRIMINAL* (1977); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230 (1962); Kolson, Memorandum Concerning Political Offenses provision in United States Extradition Treaties, July 26, 1968 (unpublished memorandum in Extradition File, Office of the Legal Adviser, Dep't State, Washington, D.C.).

166. *Harvard Research*, *supra* note 141, and Garcia-Mora, *supra* note 165, at 1239, provide some examples. Even purely political offenses have caused wavering on the part of the judiciary during certain periods of time. For example, article 84, para. 3, of the French Penal Code of 1939, and treaties between France and Luxembourg executed at about the same time, provided that for the application of penalties, crimes, and dilects against the security of the state would be considered as common crime. This created hesitation and considerable dispute in French jurisprudence.

During this dispute, certain *chambres d'accusations* allowed extradition for these offenses, thus abrogating the political offense exemption as far as these offenses were concerned. These courts proclaimed the validity of this type of

ample, when the Allies sought the extradition of William II of Germany from the Netherlands after World War I by invoking article 227 of the Versailles Treaty, the Government of the Netherlands rejected the request as being based on a political offense.¹⁶⁷

Difficulty does arise, however, when the fugitive is charged with having committed a common crime, the circumstances of which give it a political character. In 1891 a British judge provided, perhaps, the earliest Anglo-American definition of these "relative political offenses,"¹⁶⁸ ruling that political offenses are those which are "incidental to and form a part of political disturbances."¹⁶⁹ The political offense clause was applied in *Castioni* to deny the extradition of the fugitive who was being sought by the Swiss Government for a fatal shooting allegedly committed by him while he was participating in a violent political demonstration.

A United States decision in 1894 held that the political offense exemption applied to government agents seeking to suppress an uprising as well as to the participants.¹⁷⁰ In so holding, the court stated that a political offense is "any offense committed in the course of or furthering of civil war, insurrection, or political commotion."¹⁷¹ This political disturbance test is still the foundation of the predominant United States definition of the relative political offenses. The District Court for the Southern District of California gave the following definition: "Generally speaking it is an

accord and affirmed that, since 1939, offenses against the security of the state had lost their political character for all intents and purposes.

Finally, after much dispute, French jurisprudence opted for the opposite view. It was determined that the offenses of this order would be considered political for the purposes of extradition, although they would be considered nonpolitical for purposes of punishment.

The *ordonnance du 4 Juin 1960* completely resolved the question when it reinstated the political nature of these violations even for purposes of punishment. See discussion in MERLE & VITU, *supra* note 2, at 333. Today, France is very careful to apply the political exemption even in cases of common crimes done for a political purpose. See decision on the extradition of Holder and Kerkow, reported in 1975 DIC. U.S. PRAC. INT'L L. 168-75, and discussed at note 178 *infra*.

167. See Kolsen, *supra* note 165, which provided a base for the development of this section on the political offense.

168. *In re Castioni*, 1 Q.B. 149 (1891); see Kolsen, *supra* note 165, at 5.

169. *In re Castioni*, 1 Q.B. 149, 166 (1891).

170. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894).

171. *Id.* at 998.

offense against the government itself or incident to political uprisings. . . . The crime must be incidental to and form a part of political disturbances. It must be in furtherance of one side or another of a bona fide struggle for political power."¹⁷²

Some modern decisions have appeared to detract from this political disturbance test, however, by hinting that the motivation behind the offense may be considered as a separate test for determining the political character of the offense.¹⁷³ In approving the

172. *Karadzole v. Artukovic*, 170 F. Supp. 383, 392 (S.D. Cal. 1959). Here a Yugoslav extradition request for a man charged with murdering a Croatian government official during World War II was denied on the basis of insufficient evidence. After determining that the evidence was insufficient, the court considered the political offense question, and offered its dictum that the offense, if committed as alleged, would be political.

173. *In re Gonzales*, 217 F. Supp. 717 (S.D.N.Y. 1963). The State Department action memorandum explaining the decision for extradition in the Gonzalez case and recommending that the Secretary of State approve the extradition is an interesting expression of the attitude of the Executive Branch on the political offense clause. It states:

On October 15, 1962, the Embassy of the Dominican Republic formally requested the extradition from the United States of Clodoveo Ortiz Gonzalez for the crime of murder Ortiz was brought before United States Commissioner John B. Garrity for an extradition hearing.

In support of its request, the Dominican Republic submitted affidavits of witnesses who state that they were present in La Quarenta prison on August 12, 1960, when they saw Ortiz, a lieutenant in the Dominican Navy and an agent of the SIM (Military Intelligence Service), pursuant to the orders of a superior, seat one Jose Lantigua Deschamps in an electric chair and applying [sic] electric shocks to Lantigua until he was dead. Like testimony was submitted with respect to the killing of Jose Espertin Oliva by Ortiz.

At the extradition hearing Ortiz' attorneys did not contest the evidence of guilty (in fact, curiously, indicated that he had similarly dispatched fifty or sixty others) but argued at length that the offenses were political in character and thus not extraditable.

On March 7, 1963, Commissioner Garrity issued his decision, together with an opinion . . . that there was sufficient evidence of the criminality of Ortiz, but that the offenses were of a political character. He ordered the discharge of Ortiz from custody.

The decision and the opinion seemed to us . . . entirely contrary to law and likely to be an unfortunate precedent. For one thing, no evidence was submitted concerning the political situation existing at the time in the Dominican Republic, the position of the victims or the reason for their killing. The commissioner apparently based his opinion on the testimony of one of the witnesses that La Quarenta was a prison where political prisoners were kept and the testimony of the accused that he was an agent of

extradition to the Dominican Republic of an alleged former agent of the late dictator Trujillo's intelligence service, a United States court declared that "nothing in the record . . . suggest[s] that Ortiz acted with such essentially political motives or political ends as might justify substantial relaxation of the political disturbance requirement [T]he political offense principle is inapplicable here."¹⁷⁴ French legislation extends the political offense exemp-

SIM. In fact, the decision reached by Commissioner Garrity seemed to be contrary to the criteria for political offenses he cited in his opinion.

At our and the Department of Justice's request, the United States Attorney filed a new extradition complaint and the case was heard again before United States District Judge Tyler. At the second hearing testimony was offered by the Dominican Government regarding the political situation in the Dominican Republic at the time. Extensive briefs and memoranda regarding political offenses and the Dominican law on the responsibility for crime of one obeying orders (an issue raised by the District Judge himself) were suggested by the U.S. Attorney, prepared by Justice and State. On May 23, 1963, Judge Tyler issued his decision . . . that sufficient evidence of criminality had been presented and that the offenses were not political in character.

Ortiz did not bring habeas corpus proceedings to challenge this finding. He has written the Department claiming his innocence and that his extradition is sought by the high officials of the present and former Governments in order to silence him because of his knowledge of Trujillo's assassination as the only surviving member of the investigating group. We queried our Embassy at Santo Domingo with regard to the allegations of Ortiz and the nature of the treatment which would likely be accorded him should he be extradited. Our Embassy replied that while there might be a possibility that if, as Ortiz claims, he possesses sensitive and potentially damaging information he might not be brought to trial for an extended period, it does not appear that any information he claims to have would be seriously embarrassing to the present Government nor that he would be a victim of foul play, mistreatment or an unjust trial.

Accordingly, it is recommended that this Government agree to Ortiz' extradition to the Dominican Republic for trial on the charge of murder.

(Unpublished State Dep't memorandum.)

174. *Id.* British cases also indicate a tendency to consider the political motivation of fugitives: see *Ex parte Kolczynski*, [1955] 2 Q.B. 540, in which extradition was denied for seven Polish seamen who had revolted aboard ship, wounded a political officer of the Polish Government, and forced the ship into a British port where the crew asked for political asylum. See *Garcia-Mora*, *supra* note 165, at 1242-43; and *Schtraks v. Government of Israel*, [1962] All E.R. 529 (House of Lords), in which the Government of Israel had sought the extradition of an Israeli national who had helped his parents in refusing to surrender a child left with them temporarily, because they feared the child would not be given a religious education. Extradition was granted.

tion to deny extradition when French officials believe the request was politically motivated. The Extradition Law of 1927 provides that extradition will be denied "when the crime or the offense has a political character or when it results from circumstances indicating that the extradition is requested with a political purpose."¹⁷⁵

In the absence of any legislative definition of the political offense, French jurisprudence has attempted to develop tests to determine when the political offense exemption will be applied. For example, the decision in the *Gatti* extradition case¹⁷⁶ rejects the political motivation test and applies a political objective test. This test requires the criminal action to be directed against the political organization of the state. In the *Gatti* case, the Republic of San Marino sought the extradition of a person accused of attempting to murder a member of a local communist cell. The French court held that the offense was not of a political nature, stating,

The fact that the reasons of sentiment which prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense. The offense does not derive its political character from the motive of the offender but from the nature of the rights it injures.¹⁷⁷

The *Gatti* case appears to have been an anomaly in French jurisprudence. Other French decisions have, however, considered the political motivation of the fugitive to be dispositive or at least

175. Extradition Law of 1927, *supra* note 6, art. 5(2). The European Convention on Extradition, *supra* note 86, article 3, goes beyond both the Extradition Law of 1927 and the United States - French Extradition Treaty by providing that extradition will be denied: when the offense is of a political nature; when it is connected to other political offenses; or when the requested state has reason to believe that the request is presented with a view to punish the fugitive for considerations of race, religion, or nationality, or for his political opinions. It even provides for refusal of extradition when the requested state has reason to believe that the accused's treatment by the requesting state risks being aggravated because of his race, religion, nationality or political opinion. *See generally* Schultz, *La Convention Européenne d'Extradition et le Delit Politique*, M-LANGES CONSTANT 313 (1971).

176. Judgment of Jan. 13, 1947, (Cour d'appel). 1947 ANN. DIG. 145 (no. 70, France).

177. *Id.* at 145-46. The French Court of Appeal also stated: "We can only demand that the motive which inspired the agent should not be considered an aggravation of the offense, and that the extradited person should not be tried by an extraordinary tribunal." *Id.* at 146.

a factor to be weighed in deciding whether or not the political motive of the offense predominates over the common nature.¹⁷⁸

178. *In re Holder*, reprinted in 1975 DIG. U.S. PRAC. INT'L L. 168-75. This is the case of an extradition request by the United States for the alleged hijacker of a Western Airlines aircraft from San Francisco to Algeria. Holder was indicted for violation of several Federal criminal statutes arising out of the hijacking of a plane in June 1972, during a domestic commercial flight. Threatening to set off a bomb during flight, the accused allegedly obtained complete control of the plane. It landed in San Francisco where a replacement flight crew and a second plane were obtained. Holder demanded and received \$500,000; some 40 passengers were transferred to the second aircraft, which then flew to New York. That plane refueled in New York, and the passengers disembarked before the flight continued to Algeria.

The United States extradition request was denied by the Paris *Chambre des Mises en Accusation*, apparently on the basis of either the fugitive's political motives or the believed risk of aggravated treatment because of his race (a European Extradition Convention criterion, note 175, *supra*). Record of extradition request and its denial are in the extradition files of the Office of the Legal Adviser to the Department of State. The legal briefs in opposition to the *Holder* decision and the diplomatic note protesting it are reported in 1975 DIG. U.S. PRAC. INT'L L. 168-75. See also *In re Henin*, Cours d'appel (Paris 1967), La Semaine Juridique 15274.

The French courts appear to have begun to follow the "predominance test" developed by the Swiss jurisprudence. This test appears to use both subjective and objective criteria to determine whether a given offense is of a sufficiently political character to warrant exemption of its perpetrator from extradition. The test was developed in a series of cases, the most important of which are: *In re Vogt*, 2 Ann. Dig. 285 (Tribunal federale, Switz., 1924); *In re Kaphengst*, 5 Ann. Dig. 292 (Tribunal federale, Switz., 1930); *In re Ockert*, 19 I.L.R. 369 (Tribunal federale, Switz., 1951). The test was refined by the opinion in the *Ockert* case, where the court defined as being political offenses, those "acts which have the character of an ordinary crime appearing in the list of extraditable offenses but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion." *Id.* at 370. The definition of the political offense was modified by the Swiss again in 1952, so as to provide the flexibility to allow exemption from extradition for those who commit a crime, such as air piracy, in order to escape from a "modern totalitarian regime." *In re Kavic, Bjelanovic & Arsenijevic*, 19 I.L.R. 371 (Tribunal federale, Switz., 1952). In 1961, the Swiss Federal Tribunal summarized the jurisprudential development of the basic tenets of the preponderance test and further refined the definition of political offense so that even when the motive is largely political, the means employed must be the only means available to accomplish the end pursued. *Ktir v. Ministere Public Federal*, 34 I.L.R. 143 (Tribunal federale, Switz., 1961). In *Ktir*, the court granted a French extradition request for a French national who was a member of the Algerian *Front de Liberation Nationale* (F.L.N.) who had been charged with having murdered another member of the F.L.N. The court stated:

With regard to offenses relating to insurrections or internal wars, article 5(2) of the Extradition Law of 1927, provides,

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance [*dans l'interet*] of its purpose, they *may not* be grounds for extradition *unless* they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.¹⁷⁹

This provision has been criticized by French commentators¹⁸⁰ because both the commencement and termination of civil war are so difficult to determine in the present era. Moreover, the commentators find a moral flaw in the provision. After a civil war, the people extradited would not necessarily be criminals in the non-political, common crime, sense of that term, but vanquished partisans of a cause.¹⁸¹ French tribunals have become sensitive to

[A]lthough . . . he acted for political, not personal, reasons, [i]t does not, however, follow that the act had a predominantly political character. For this to be the case it is necessary that the murder . . . [be] the sole means of safeguarding the more important interests of the F.L.N. and of attaining the political aim of that organization. That is not so [here] . . . That murder was primarily an act of vengeance and terror. Its relationship to the political aims of the F.L.N. is too loose to justify it and to give it a predominantly political character . . .

Id. at 145.

The court makes it clear that for the political offense exemption to apply, the circumstances to be considered, the motives inspiring the acts by the accused fugitive, and the purpose behind them must all indicate that the acts were predominantly political in character. The test,

presuppose[s] that the act was inspired by political passion, that it was committed either in the framework of a struggle for power or for the purpose of escaping a dictatorial authority, and that it was directly and closely related to the political purpose. A further requirement is that the damage caused be proportionate to the result sought, in other words, that the interests at stake should be sufficiently important to excuse, if not justify, the infringement of private legal rights.

Id. at 144. For a thorough analysis of the Swiss predominance test, see Carbonneau, *supra* note 164.

179. Extradition Law of 1927, *supra* note 6, art. 5(2), para. 2 (emphasis added).

180. See, e.g., MERLE & VITU, *supra* note 2 at 334 n.1, and DONNEDIEU DE VABRES, *supra* note 7 at No. 1795.

181. One commentator in the United States believes that the vanquished "heroes" of a civil conflict are, by definition, political criminals. They would thus not be extraditable, although the "mere followers" or partisans are not "heroes"

these criticisms and have denied extradition under circumstances that would appear to be covered by the terms of the exception to the political crime exemption described in article 5(2) of the Extradition Law of 1927.¹⁸² Most of the *chambres d'accusations*, for example, refused to extradite Spanish Republicans, sought by the Franco regime after the Spanish Civil War, on the ground that their offenses were of a political character.¹⁸³

Most French extradition treaties provide for exceptions to the political exemption clause. Extradition is allowed, for example, for counterfeiting, even for political ends, and for many forms of terrorism.¹⁸⁴ The famous *clause Belge* allows extradition for the murder of the head of state or anyone in his family.¹⁸⁵ Extradition is also allowed for offenses falling within the French term "*infraction sociale*." This term represents those offenses directed toward the social organization, rather than the government per se.¹⁸⁶

and hence, when they fail they are not real political criminals; if this were a legal definition, they would be extraditable. See SCHAFFER, *supra* note 165. Obviously, this is not a legal definition.

182. Extradition Law of 1927, *supra* note 6.

183. Judgment of June 6, 1941, G.P. 1953.2.113 (Toulouse); *but see* Judgment of Oct. 19, 1941, G.P. 1942.1.16 (Alger), in which extradition was allowed although it was for offenses related to civil war.

184. MERLE & VITU, *supra* note 2, at 333.

185. This is also called the "assassination clause" ("*clause d'attentat*").

186. See MERLE & VITU, *supra* note 2, at 334. This is quite similar to what the Third Reich developed and several socialist regimes have frankly espoused; the ideology-directed social defense, perhaps, recognizes crimes as being political, yet punishable because they are attacks against the "supreme ideology." Thus, the social danger of "anarchy" makes it a punishable "non-political" crime in France and a punishable "political crime" in the Soviet Union. Indeed, the essence of any crime in German and Soviet criminal law is its "social dangerousness." G. FLETCHER, *RETHINKING CRIMINAL LAW* 864, § 10.5 (1978). See SCHAFFER, *supra* note 165. On the political offense exemption, see generally Carbonneau, *supra* note 164. See also Travers, *La Loi Francaise d'extradition du 10 mars 1927*, 54 *JOURNAL DU DROIT INTERNATIONAL* 595, 600 (1927), for an analysis of the political offense exemption in the French Extradition Law of 1927. GRIVAZ, *L'EXTRADITION ET LES DELITS POLITIQUES* (1894); LAIRE, *L'EXTRADITION ET LES DELITS POLITIQUES* (1911); SOLDEN, *L'EXTRADITION DES CRIMINELS POLITIQUES* (1882); Deere, *Political Offenses in the Law and Practice of Extradition*, 27 *AM. J. INT'L L.* 247 (1933); de Hart, *The Extradition of Political Offenders*, 2 *L.Q. REV.* 177 (1886); Evans, *Reflections Upon the Political Offenses in International Practice*, 57 *AM. J. INT'L L.* (1963); Garcia-Mora, *Crimes against Humanity and the Principle of Nonextradition of Political Offenders*, 62 *MICH. L. REV.* 927 (1964); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 *VA. L. REV.* 1226 (1962); Garcia-Mora, *Treason, Sedition*

These exceptions notwithstanding, French extradition practice tends to apply more readily to the political offense exemption than does that of the United States.

C. Principle of Speciality

The virtually universal principle of speciality requires that the fugitive returned by way of extradition be tried only for the offense(s) for which he was extradited.¹⁸⁷ Before he may be tried for

and Espionage as Political Offenses under the Law of Extradition, 26 U. PITT. L. REV. 65 (1964); Martens, *L'extradition pour delits politiques*, 11 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 44 (1881); Rolin, *Du principe de la non-extradition pour delits politiques*, 24 REVUE DE DROIT INTERNATIONAL ET DE LEGISLATION COMPAREE 17 (1892); Rolin, *Les infractions politiques*, 15 REVUE DE DROIT INTERNATIONAL 545 (1887); Scott, "Political Offense" in *extradition treaties*, 3 AM. J. INT'L L. 459 (1909); Weiss, *Les crimes et delits politiques dans les rapports de l'Autriche-Hongrie et de la Russie*, 10 JOURNAL DU DROIT INTERNATIONAL PRIVE 247 (1883); Yoshitomi, *Extradition de coupables politiques chinois par les autorites britanniques de Tien-Tsin en novembre 1926*, 34 REVUE GENERAL DE DROIT INTERNATIONAL PUBLIC 85 (1927). Objectivized definitions of the notion of "political crime" have been attempted by many writers. Some are listed by SCHAFER, *supra* note 165, at 10-11, n.5.

187. I agree with Professor Shearer that the term "speciality" is preferable to the more often used "specialty." Speciality avoids confusion and approximates more closely the French term "specialite" which was the original term used for the principle. For general discussions of the subject, see MERLE & VITU, *supra* note 6, at 1337-39; HSU, *DU PRINCIPE DE LA SPECIALITE EN MATIERE D'EXTRADITION* (1950); *Harvard Research*, *supra* note 141, at 213-17; SHEARER, *supra* note 6, at 146-47, 237-38, 242-43.

There are many cases in both France and the United States in which the principle of speciality is pivotal. See, e.g., *In re Millet*, 9 Ann. Dig. 400 (Tribunal Correctionnel, Fr., 1937) in which the accused was extradited from Belgium to France for the offense of obtaining money by false pretenses. He was convicted in France on these charges. While out on appeal bond, he was arrested on the basis of a conviction for fraud, handed down in his absence, prior to his extradition from Belgium. His petition for release from this latter arrest contended that his arrest was illegal under the Extradition Law of 1927, *supra* note 6, which prohibits prosecution for prior offenses of a person extradited, other than those for which he had been extradited, unless he "has for 30 days from the time of his definite release had the opportunity to leave the territory of the requesting State," article 26, Extradition Law of 1927. *Id.* The French court granted the accused's petition for release because he could not be considered to have obtained his definite release while an appeal in the action for which he was extradited was still pending. Cited in WHITEMAN, *supra* note 17, at 1106.

In a Venezuelan decision, France had requested the Government of Venezuela to agree to French prosecution of the accused just extradited from Venezuela to France on offenses committed prior to extradition other than those for which he

additional offenses committed before his extradition, he must be released from custody and allowed to leave the country. He will not be subject to prosecution on these additional charges unless he decides not to leave after having been given notice and adequate time to leave the territory of the prosecuting state.¹⁸⁸ The rule of speciality allows prosecution of the returned fugitive for any extraditable offense established by the facts of the extradition documentation, even though the denomination of the offense may not be within the extradition request.¹⁸⁹

Article VII of the Extradition Treaty between France and the United States provides the principle of speciality. It reads,

No person surrendered by either of the High Contracting Parties to the other shall be triable or be punished for any crime or offense committed prior to his extradition, other than the offense for which he was delivered up, nor shall such person be arrested or detained on civil process for a cause accrued before extradition, unless he has been at liberty for one month after having been tried, to leave the country, or, in the case of conviction, for one month after having suffered his punishment or having been pardoned.¹⁹⁰

The rule of speciality applies in France to voluntary return as well as to the more common non-voluntary extraditions,¹⁹¹ but in

had been extradited from Venezuela. The Venezuelan Court of Cassation refused the French request, although the extradition had been granted by comity and not pursuant to a treaty of extradition. *In re Dilasser*, 9 I.L.R. 377 (Fed. and Cassation Court, Venez. 1952). See also *United States v. Rauscher*, 119 U.S. 407 (1886); *Fiocconi v. Attorney General*, 339 F. Supp. 1242 (S.D.N.Y.), *aff'd*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

188. Judgment of July 13, 1939, Cour de cassation, Fr. [1939]; MERLE & VIRU, *supra* note 2, at 344.

189. See discussion of the importance of the activity giving rise to the offense in relation to the denomination of the offense in the law of the requesting state or in the extradition request, *supra* notes 193-202, and accompanying text. See also *Collins v. Loisel*, 259 U.S. 309 (1922); *Bryant v. United States*, 167 U.S. 194 (1897); 4 J. MOORE, DIGEST OF INTERNATIONAL LAW 316 (1906). The law of both France and the United States will usually apply the principle of speciality even in the absence of a treaty stipulation requiring it, as in *United States v. Rauscher*, 119 U.S. 407 (1886).

190. 1909 Extradition Treaty, *supra* note 5, art. VII.

191. This is controlled by articles 15 and 21 of the Extradition Law of 1927, *supra* note 7. See Judgment of Nov. 23, 1972, [1973] *Recueil Juris-Classeur Périodique [J.C.P.] II 17428 note A.P.*, in which the observer notes the importance of the rule that even voluntary extraditions require compliance with the rule of speciality.

The rationale for this is that the extradition, although acquiesced in by the

the United States there have been decisions allowing prosecution contrary to the rule of speciality when the extradition is waived or voluntary.¹⁹² The principle of speciality apparently does not apply in the United States for cases of rendition by means other than extradition pursuant to treaty.¹⁹³ Furthermore, in France it does not violate the rule of speciality for the tribunal prosecuting an extradited fugitive to modify the *qualification* or characterization of the offense, based on the facts, so that certain aggravating circumstances or legal excuses or justifications brought out in the proceedings can be applied even though they were not known during the process of extradition.¹⁹⁴

Even in cases of extradition pursuant to treaty, the laws of both

accused, is still considered a sovereign act, and the strictures of the extradition treaty in general and the specific extradition request granted by the requested sovereign in particular must be complied with. See MERLE & VITU, *supra* note 2, at 341.

192. Dep't of State of Am. Embassy, Ottawa, telegram, Oct. 16, 1962, MS Dep't State file 242.1115, Surratt, Lonnie Rayvon/9-2562, cited in WHITEMAN, *supra* note 1, at 1107; Letter from Assistant Legal Adviser Whiteman to Theodore C. Brown, Office of Attorney General of N.C., Nov. 5, 1962, MS Dep't State file 242.1115, Surratt, Lonnie Rayvon/10-2462, *id.* MS Dep't State file 211.60E15, Rautiainen, Kaarlo Leo/3-3154, April 26, 1954, cited in WHITEMAN, *supra* note 1, at 1106.

193. For example, extradition as a matter of comity. See *Fiocconi v. Attorney General*, 339 F. Supp. 1242 (S.D.N.Y.), *aff'd*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), in which fugitives were prosecuted for offenses against United States narcotics laws which had not been included in the extradition request approved by the foreign country as a matter of comity.

Procedurally, extradition as a matter of comity occurs in the following way: When a fugitive, sought by the United States for a crime considered important, is found in a country with which the United States has no extradition treaty or in which the treaty does not cover the particular offense, the United States will request the extradition as a matter of comity. Documentation is prepared and forwarded through the diplomatic channel in the same way it is done for extradition requests pursuant to treaty. The diplomatic note which formally requests extradition and presents the documentary evidence states clearly that the request is not made pursuant to any extradition treaty and, therefore, the United States could not reciprocate in like circumstances. If the requested state is able under its laws and willing to extradite, the United States follows whatever procedures that state requires for such extraditions. *But see United States v. Rauscher*, 119 U.S. 407 (1886).

194. *E.g.*, recidivism, Judgment of April 28, 1933, Cass. crim., [1934] Recueil Sirey [S. Jur.] I 400; premeditation in murder, Judgment of July 2, 1898, Cass. crim., [1900] Recueil Sirey [S. Jur.] 1959; aggravation of theft, Judgment of Jan. 4, 1934, Cass. crim., [1934] Recueil Périodique et Critique [D.P.] I 121 note Leloir.

France and the United States permit prosecution for offenses other than those for which extradition was granted if the assent of the requested state is obtained. Once new information is obtained, a new extradition request, including the new evidence, is made of the requested state, even though the fugitive is no longer there.¹⁹⁵

In addition, French law permits trial of the accused in absentia by *contumace* or default for offenses other than those for which extradition was made, without any request for approbation. The only requirement is that the prosecution be accomplished just as if the accused were not in the country. The rationale is that the presence of the accused due to extradition ought not prevent prosecution by *contumace*.

V. PROCEDURAL CONSIDERATIONS

A. *Bail or Provisional Liberty*

The accused in an extradition hearing under the law of both France and the United States has no personal right to bail or provisional liberty, but the court hearing the case has the power to grant it if it is believed to be merited. In France, the accused has the right to a separate hearing on the issue of provisional liberty. The tribunal hearing the extradition case will stay the extradition proceeding and decide the issue as in a normal prosecution.¹⁹⁶ The decision on provisional liberty may be appealed by the accused, but not by the state requesting extradition.¹⁹⁷

The federal law of the United States relating to bail was judicially developed.¹⁹⁸ No extradition legislation contains any provi-

195. *Fiocconi v. Attorney General*, 339 F. Supp. 1242 (S.D.N.Y. 1972); Judgment of Dec. 22, 1969, [1972] J.C.P. II 17023, note A.P.

196. Extradition Law of 1927, *supra* note 6, art. 14. On the powers of the *chambre d'accusation* relating to provisional liberty generally, see Judgments of Feb. 9, and Mar. 29, 1965, Cour d'appel, Paris, [1965] Recueil Juris Classeur Periodique [J.C.P.] II 14303 note A.P.; and Judgments of May 24 and Sept. 14, 1971, [1972] Juris Classeur Periodique [J.C.P.] II 17231 note A.P., in which the court was required to hold a full and separate hearing on the issue of provisional liberty. See also BOUZAT & PINATEL, *supra* note 6, at 1334, n.2. Of course, bial as such does not exist in France.

197. See notes 202-06 *infra* and judgments cited therein.

198. *Write v. Henkel*, 190 U.S. 40 (1903); *In re Klein*, 46 F.2d 85 (2d Cir. 1930); *In re Gannon*, 27 F.2d 362 (3rd Cir. 1928); *McNamara v. Henkel*, 46 F.2d 84 (2d Cir. 1912); *In re Mitchell*, 171 F. 289 (2d Cir. 1909). The Federal Rules of Criminal Procedure provide for admission to bail of persons arrested for an of-

sion pertaining to bail. The United States Code, however, does provide that when the magistrate has found sufficient evidence to warrant the extradition of the accused "he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."¹⁹⁹ This language appears to indicate that once the fugitive has been found extraditable, bail is no longer available. The Department of State takes the position that United States extradition treaties

constitute positive engagements by the contracting parties to deliver up to each other persons against whom is made out a prima facie case of guilt in connection with an offense listed therein. The obligation is not to surrender such persons provided they do not, following their arrest and admission to bail, forfeit that bail, but to surrender them in any event should a proper case be made out.²⁰⁰

In 1942, the Advisory Committee on the Federal Rules of Criminal Procedure, appointed by the Supreme Court of the United States, inquired of the Department of State its views on the question of whether the right to bail should be provided for in extradition proceedings. In replying, the Department of State took the position that "it would be inadvisable to incorporate any provision in the Rules of Procedure . . . unless it be negative in character."²⁰¹ Courts hearing extradition cases, nevertheless, usually provide for bail prior to their decision of extraditability, unless the documentation for extradition has been properly presented to the Department of State.

fense (Rule 46). But Rule 54(b)(5) provides that the Rules "are not applicable to extradition and rendition of fugitives." *Write v. Henkel* declared that the predecessor sections of Rule 46 and 18 U.S.C. § 3141, which allow courts and judicial officers to take bail, "were confined in their application to crimes against the United States." 190 U.S. at 45.

199. 18 U.S.C. § 3184 (1976) (emphasis added).

200. Letter from Acting Legal Adviser Meeker to Assistant Attorney General Miller, May 29, 1961, MS Dep't State, file 211.3115, Perez Jimenez, Marcos/5-561, cited in *WHITEMAN*, *supra* note 1, at 1040. The passage was quoted by Mr. Meeker from the State Department reply to a request for a position on a bill, introduced in the Senate to amend former § 5270 (now 18 U.S.C. § 3184 (1976)) to allow bail. The proposed amendment was not adopted. See also Letter from Sec'y of State Hull to Comm'r Bartholomew, July 4, 1944, MS Dep't State, file 211.53, Silva, Manuel Jose Da/17, cited in *WHITEMAN*, *supra* note 1, at 1035-36.

201. Meeker letter, *supra* note 200, quoting the State Dep't 1942 reply to the advisory committee.

B. *Appeal of Extradition Decisions*

Under French law, an international treaty such as that for extradition creates rights and duties only between the contracting parties to the convention. Strictly speaking, then, an accused fugitive has no right to make a grievance or an ordinary appeal on the basis of a violation of any treaty right, even though an extradition decision has a direct bearing on his personal liberty.²⁰² Similarly, in the United States there is no true appeal available to the accused.²⁰³ One exception under French law is the fugitive's right to appeal a decision refusing him provisional liberty pending the decision on extradition, based on article 14, paragraph 2 of the Extradition Law of 1927.²⁰⁴ No such recourse is possible when the refusal to grant provisional liberty is based on late delivery of documentation by the requesting state, as that is considered to be a matter between sovereign states.²⁰⁵ A fugitive found to be extraditable does have the right to appeal certain aspects of the deci-

202. LOMBOIS, DROIT PENAL INTERNATIONAL, note to No. 403 (1971); Judgments of July 4 and 25, 1867, Cass. crim., [1867] Recueil Sirey [S. Jur.] I 409 in which a very short opinion states the rule referred to in the text without equivocation. This is reaffirmed in the Judgments of July 1, 1899, Cass. crim. [1902] Recueil Sirey [S. Jur.] I 55; Apr. 26, 1900, Cass. crim., [1903] Recueil Sirey [S. Jr.] I 382; Feb. 27, 1908, Cass. crim., [1912] Recueil Sirey [S. Jur.] I 68; Judgments of Dec. 20, 1951, [1952] Recueil Juris Classeur Périodique [J.C.P.] II 7014 note Blin; [1952] Recueil de Droit Pénal [S. Jur.] II 66 note G.V., in which the accused persons were extradited to the Netherlands and Great Britain respectively, without right to appeal. See also Judgment of Nov. 10, 1949, Rev. Crit. Dr. Int. Priv. [1951] Recueil Sirey [S. Jur.] II 484 note Loussouarn; Cass. crim., [1950] [G.P.] I 96.

203. *Collins v. Miller*, 252 U.S. 364 (1920). A limited review of extradition decisions is available via the habeas corpus proceeding.

204. *Supra* note 7. See MERLE & VITU, *supra* note 2, at 341, n.2; Judgment of May 11, 1956, [1956] Recueil Juris Classeur Périodique [J.C.P.] II 9382, held that a court hearing an extradition case, based on a request from Greece, violates art. 14 of the Extradition Law of 1927, *supra* note 6, if it doesn't hear the accused's request for provisional liberty at any point in the proceeding.

205. See art. 20, Extradition Law of 1927, *supra* note 6; Judgment of May 11, 1956, [1956] Recueil Juris Classeur Périodique [J.C.P.] II 9382, note 290. On the power of the *chambre d'accusation* to place fugitives at provisional liberty, see Judgments of Feb. 9 and March 29, 1965, [1965] Recueil Juris Classeur Périodique [J.C.P.] II, 14303, Cour d'appel, Paris, note A.P.; and Judgments of May 24, and Sept. 14, 1971, [1972] Recueil Juris Classeur Périodique [J.C.P.] II 17231, note A.P., in which the fugitive from the United States was denied provisional liberty after full hearing of the issue. It was denied on the ground that the fugitive had no residence or other ties to France and was therefore likely to flee.

sion to the *Conseil d'Etat*, but only for the question of whether the decision to extradite was made under proper procedures and conditions.²⁰⁶ In addition, the *garde des Sceaux* may order judicial review of a decision to extradite to assure unity of decisions and interpretation of extradition treaties and the Law of 1927.²⁰⁷

C. Retroactivity of Extradition Treaty

Extradition treaties, of course, do not criminalize actions; they merely recognize offenses as being extraditable. Thus, extradition agreements are generally applied retroactively, without violating the principle of *nulla poena sine lege* or traditional protections against *ex post facto* laws. The 1970 Proclamation contains a specific declaration of retroactivity.²⁰⁸ Obviously, an underlying action must already be criminalized in both contracting parties' law before it will be extraditable or it will violate the double criminality provision,²⁰⁹ and any prosecution for it would violate the prin-

206. See Judgment of May 30, 1952, [1953] *Recueil Juris Classeur Périodique* [J.C.P.] III 33, [1952] *Recueil Juris Classeur Périodique* [J.C.P.] II 7238, in which the accused went to the *Conseil d'Etat* arguing the *chambre d'accusation's* . . . violation of art. 4, paras. 4 and 5(2) of the Extradition Law of 1927. Compare Judgments of Nov. 18, 1955, and Feb. 3, 1956, [1956] *Recueil Juris Classeur Périodique* [J.C.P.] II 9184 with Judgment of Jan. 5, 1957, *Conseil d'Etat*, [1957] *Rev. de Dr. Public* 765. See also MERLE & VITU, *supra* note 2, at 341.

207. Extradition Law of 1927, *supra* note 6, art. 16, para. 1; Judgment of Oct. 19, 1950, [1950] *Recueil Juris Classeur Périodique* [J.C.P.] II 5897 note Aymond, in which a favorable decision on a Belgian extradition request was quashed. This right to review belongs to the *garde des Sceaux*, not the fugitive.

208. 1970 Proclamation, *supra* note 1, art. II. This article was agreed to without discussion during the negotiations. Gaither, *Minutes*, *supra* note 29, at 8. For background on retroactivity in extradition treaties, see WHITEMAN, *supra* note 1, at 753. Several judicial decisions have supported this view: see, e.g., *In re Giacomo*, 7 Fed. Cas. No. 3, 747, at 366, 12 Blatchf. 391; *In re Stupp*, 23 Fed. Cas. No. 13, 562, at 281 and Fed. Cas. No. 13, 563, at 296; *Cleugh v. Strakosch*, 109 F.2d 330, 335 (9th Cir. 1940). Cf. *Gallina v. Frazer*, 177 F. Supp. 856, 864-65 (D. Conn. 1959), *aff'd*, 278 F.2d 277 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960); *In re d'Amico*, 177 F. Supp. 648 (S.D.N.Y. 1959); 4 J. MOORE, *DIGEST OF INTERNATIONAL LAW*, § 589, at 269 (1906).

209. Strictly speaking, it is the requirement of "criminality" rather than "double criminality" that removes the taint of retroactivity, though there have been decisions to the contrary. See *United States v. Hecht*, 16 F.2d 955, 957 (2d Cir.), *cert. denied*, 273 U.S. 769 (1927) (an act not an offense at the time of the making of the treaty held extraditable).

ciple of *nulla poena sine lege* and *ex post facto* laws.²¹⁰

D. Extradition by Other Means

Long-standing tradition, represented in the United States by the "Ker-Frisbie Rule,"²¹¹ allows a court to take jurisdiction over any fugitive offender who has been brought before the court by whatever, even illegal, means. This tradition has been questioned lately by some courts and commentators.²¹² It is not uncommon for the governments of both France and the United States to obtain rendition of a fugitive without meeting the stringent requirements of extradition. These quasi-formal methods of rendition include expulsion, deportation, and exclusion. These are designed to be purely internal methods of self-protection, intended not to provide foreign states with custody over fugitives, but to rid the acting state of undesirable or dangerous individuals. Thus, it is improper for one state to request another to deport or to expel an individual as a means of circumventing extradition procedures.²¹³

210. It is beyond the scope of this study to enter into a lengthy discussion of this interesting topic. The reader is referred to Evans, *Acquisition of Custody over the International Fugitive Offender—Alternatives to Extradition: A Survey of United States Practice*, 40 BRIT. Y.B. INT'L L. 77 (1964); Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition*, 57 OR. L. REV. 51 (1977).

211. *Ker v. Illinois*, 119 U.S. 436 (1886), is a case in which a fugitive, Ker, was forcibly abducted from Peru by a Pinkerton agent, placed aboard an American vessel and eventually taken to the United States. He was convicted of larceny in Illinois. Ker's contention that the Illinois court had no jurisdiction because his abduction from Peru violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution was rejected. The Court held that due process of law is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. *Id.* at 440. In *Frisbie v. Collins*, 342 U.S. 519 (1952), the defendant contended that the Michigan court had no jurisdiction over him because his forcible abduction from Chicago by Michigan police violated the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act, 18 U.S.C. § 1201 (1970). His contention was rejected.

212. See *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976); *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975); *Lujan v. Gengler*, 510 F.2d 62 (2d Cir. 1975); *United States v. Toscanino*, 500 F.2d 267 (2d Cir.), *reh. denied*, 504 F.2d 1380 (2d Cir. 1974); Abramovsky & Eagle, *supra* note 210.

213. See Evans, *supra* note 210, at 82-89; 4 HACKWORTH, DIGEST OF INT'L LAW 30 (1940).

In reality, however, these matters are often finessed. An official of the state seeking custody of a fugitive will advise the government of the refuge state that the fugitive is, indeed, undesirable due to charges pending against him in the advising state. The foreign country then will decide "as a totally internal matter" based on information obtained, that the fugitive should be deported to the state that had provided the information.²¹⁴ Complicity between the French Government and another government to extradite via deportation or similar processes not meant for extradition may, however, be the basis for dismissal of the prosecution.²¹⁵

E. *Surrender of the Fugitive*

The United States Code vests authority for extradition in the Secretary of State.²¹⁶ When the United States is the requested State, the Secretary of State is authorized to surrender the fugitive to the requesting state only after the fugitive has been found extraditable by a judicial officer of the United States following a proper extradition hearing.²¹⁷ The Secretary of State, however, is not absolutely required to surrender the fugitive when the judiciary has ordered the extradition, as the legislation uses the permissive "may" rather than the imperative "shall."²¹⁸

214. Evans, *supra* note 210, at 84 n.5 cites cases in which the United States has asked the state of refuge to exclude fugitives who had been expelled from third countries in order to force them back into the United States.

215. An unclassified cable, Paris 24226, Dec. 15, 1972, from the United States Embassy, Paris, to the State Department states the following:

According to the Minister of Justice, there are cases in which French authorities are unable to prosecute persons deported to France for offenses with which [they stand] charged in France. This is a result of court interpretations of extradition law and an important distinction between legal and illegal extradition. If [a] person is deported and it appears the deportation is pre-arranged between two governments (*refoulement concert*) to avoid extradition process, the person can claim illegal extradition and [the] case can be dismissed on procedural issues. Ministry states this is not an obscure point of law, but well known to any lawyer

On "irregular renditions" generally in France, *see*, 1 TRAVERS, DROIT PENAL 53; 129 (1929); 3 TRAVERS 155.

216. 18 U.S.C. § 3186 (1964).

217. 18 U.S.C. §§ 3185-86 (1964). The extradition hearing is provided for in 18 U.S.C. § 3184. *See* discussion of extradition hearing *supra* notes 30-33, and accompanying text.

218. 18 U.S.C. § 3184 (1964) states:

If, on such a hearing, the (justice, judge, or magistrate) deems the evidence

Although, as a matter of domestic law, the courts cannot bind the Secretary to grant extradition in contravention of executive prerogative in foreign relations, the Secretary is hard put to rationalize a refusal to extradite. The state requesting the extradition will usually take the position that the favorable judicial decision satisfies the requirements of the extradition treaty and obliges the United States to surrender the fugitive. The law and procedure in France are essentially the same. The judiciary does not bind the executive by its determination of extraditability, although its decision is very persuasive.²¹⁹ On the other hand, the judicial decision denying extradition binds the executive in both France and the United States.²²⁰ In both states, however, extradition may be requested again.

Once a foreign government has approved an extradition request made by the United States, the Department of State issues an agents' warrant empowering named agents to go to the foreign country to take custody of the fugitive and return him to the United States for prosecution.²²¹ A similar procedure takes place

◇ sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all testimony taken before him, to the Secretary of State, that a warrant *may* issue . . . for the surrender of such person

(Emphasis added). 18 U.S.C. § 3186 states: "The Secretary of State *may* order that person committed under section 3184 or 3185 of this title to be delivered to any authorized agent of such foreign governments" (Emphasis added).

219. If the executive refuses to extradite after a tribunal has found the fugitive extraditable, the Prime Minister signs a decree formally declaring the denial. CONST., art. XXI (France). See MERLE & VITU, *supra* note 2, at 340-41.

220. See Extradition Law of 1927, *supra* note 6, art. 17; Brocherieux, *Quelques Questions Particulières en Matière d'Extradition*, 1965 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE 470, 479. The requesting state may always renew its request for extradition and provide additional documentary evidence. Cf., *Affaire Petalas*, Conseil d'Etat, Nov. 18, 1955, J.C.P. 1956.II.9184. See notes 216-18 *supra* and accompanying text for United States law requiring that a fugitive may not be extradited until a judicial officer finds him extraditable in a proper judicial hearing.

221. Exec. Order No. 11,517, signed Mar. 19, 1970, provides that the Secretary of State is designated and empowered to sign and issue warrants designating agents to take delivery of, on behalf of the United States, and return to the United States fugitives whose extradition has been approved by the requested foreign government. By delegation of authority, signed by the Secretary of State on July 22, 1974, the Deputy Secretary of State was empowered to sign these warrants. Before Exec. Order No. 11,517, the President was required to sign these agents' warrants.

in France.

The executive has a specific time period within which the fugitive must be delivered up to the requesting government, once the judicial order of extradition has been made. United States legislation allows a two month time period, after which the fugitive may be discharged from custody, unless sufficient cause for the delay is shown.²²² French law provides that after one month, the fugitive is automatically released and his extradition from France may not be sought on the same charges.²²³

VI. CONCLUSION

An extradition treaty, negotiated and agreed to by the parties, translated, ratified, and published, is not sufficient to ensure the harmonious working relationship for which it was designed. Extradition is a process that functions at the point of interaction of two often disparate legal systems. To understand extradition and to make the process work, one must consider its place in the history, theory, and structure of the municipal criminal justice system. Equally important are the perceptions that each relevant official has of his role in the dynamic. The insights that may result not only are valuable in the effort to effect the prompt extradition of a particular fugitive, but also can be significant in achieving a deeper understanding of two jurisprudential systems.

222. 18 U.S.C. § 3188 (1964):

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed: by the readiest way, out of the United States, any judge of the United States or of any State, upon the application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not be ordered.

223. Extradition Law of 1927, *supra* note 6, art. 18: "[I]f within the period of one month from the communication of this document, the extradited person has not been taken by the agents of the requesting power, he is set free, and may not be claimed for the same act."