NOTE

IN RE EXTRADITION OF LUI KIN-HONG: EXAMINING THE EFFECTS OF HONG KONG’S REVERSION TO THE PEOPLE’S REPUBLIC OF CHINA ON UNITED STATES-UNITED KINGDOM TREATY OBLIGATIONS

JONATHAN A. DEMELLA*

TABLE OF CONTENTS

Introduction ........................................................................................................ 188
I. Facts ............................................................................................................. 191
II. Background ............................................................................................... 194
   A. One Country, Two Systems: A Plan for Hong Kong’s Future ....................... 194
   B. Impact of Treaty, Statutes and Case Law .................................................. 197
      1. Relevant treaty provisions .................................................................. 197
         a. The Article XII specialty provision ................................................. 198
         b. The Article IV capital offense exception ...................................... 199
      2. Federal statutes controlling the extradition process ..................... 200
      3. Case law involved in Lui’s reversion defense ............................ 201
         a. Interpretation of the Article XII specialty provision .......... 202

* Senior Note & Comment Editor, The American University Law Review, Volume 47; J.D. Candidate, May 1998, American University, Washington College of Law; B.A., 1992, University of Connecticut. I would like to thank the editors of The American University Law Review, and in particular, Carolyn Prince and Stephen Tarolli for their time and effort throughout the editing process. I remain forever thankful for the enduring support of my parents, John and Susan DeMella. For Jennifer Monahan, without whose boundless patience and inspiration this Note would not have been written.

187
b. Interpretation of the Article IV capital offense exception

C. United States Policy on Hong Kong and the Future HKSAR

III. Why Judicial Certification of Extraditability in *In re Extradition of Lui Kin-Hong* was Improper

A. Hong Kong’s Contingent Status as Party to the Treaty...

B. The Prohibition of Constructive “Re-extradition” to the People’s Republic of China

C. The Reversion’s Effect on Securing Assurances Against Capital Punishment

D. The Rule on Non-Inquiry, Judicial Deference, and the Need for Senate Ratification

Conclusion

---

**INTRODUCTION**

On July 1, 1997, after ninety-nine years under British rule, the Crown Colony of Hong Kong became a Special Administrative Region under the sovereignty of the People’s Republic of China (“PRC”). Consider the following comments by Jeffrey A. Bader, Assistant Secretary for East Asian and Pacific Affairs.

---

1. Hong Kong’s former colonial status was the result of three agreements reached during extensive negotiations which took place during the middle and late-nineteenth century between Britain and China. The last of these agreements resulted in Britain’s lease of the territory known formerly as Hong Kong for a period of ninety-nine years, from 1898 to midnight on June 30, 1997. See Convention of Respecting an Extension of Hong Kong Territory, June 9, 1898, China-Gr. Brit., 90 Brit. For. St. Pap. 17, 186 Consol. T.S. 310. For discussion and background relating to the nature of these negotiations and Hong Kong’s peculiar history leading to its reversion to the People’s Republic of China (the “PRC”), see generally Shawn B. Jensen, *International Agreements Between the United States and Hong Kong Under the United States-Hong Kong Policy Act*, 7 Temp. Int’l L. & Comp. L.J. 167, 167-71 (1993); Hungdah Chiu, *Introduction: Hong Kong, Transfer of Sovereignty*, 20 Case W. Res. J. Int’l L. L. 1 (1988); John H. Henderson, *Note, The Reintegration of Hong Kong Into the People’s Republic of China: What It Means to Hong Kong’s Future Prosperity*, 28 Vand. J. Transnat’l L. 503, 506-15 (1995). As of February 1997, “[w]ith a land area of only 420 miles and a population of just 6.3 million, Hong Kong has become the world’s eighth-largest trading economy and the leading international financial center.” *See Reversion of Hong Kong to China: Hearings on Feb. 13, 1997, Before the Subcomm. on Asia and the Pacific of the House Int’l Relations Comm., 105th Cong. (1997)* (statement of Jeffrey A. Bader, Assistant Secretary for East Asian and Pacific Affairs). At the end of 1996, Hong Kong recorded only 2.6% unemployment, accumulated more than $63 billion dollars (U.S.) in foreign exchange reserves, and enjoyed one of the world’s most liberal trade and investment regimes. *See id.* In concert with the Heritage Foundation’s rating of Hong Kong as the freest economy in the world for the past three years, Hong Kong’s citizens live in a framework of law and justice without economic, social, or political repression, benefiting from a well established rule of law where freedom of expression is guaranteed. *See id.*

2. Article 31 of the Constitution of the People’s Republic of China confers on its main legislative body, the National People’s Congress, the authority to create a “Special Administrative Region” within the sovereignty of the PRC when it is deemed necessary or proper. *See XIANFA, art. 31, § 1 (1982).* The Crown Colony of Hong Kong became the Hong Kong Special
Deputy Assistant Secretary for East Asian and Pacific Affairs at the United States Department of State:

And what of the future? In the runup to reversion, a plethora of views on Hong Kong's future abound. Some contend that Hong Kong will be contaminated by a repressive system intolerant of dissent and any form of democratic government. Others claim that nothing will change, and that Hong Kong will continue as an economic dynamo, a major center for business and finance, and an entrepot and incentive for continued economic and political liberalization in China. Post-reversion media and scholarly debate continue to reflect these opposing perceptions.

It is against this tumultuous legal, political, and economic backdrop that on May 16, 1997, after protracted U.S. legal proceedings, acting Secretary of State Strobe Talbot certified the extraditability of Hong Kong national Lui Kin-Hong for allegedly accepting nearly four million dollars (U.S.) in bribes. Hong Kong's reversion to the PRC on July 1, 1997, raises a number of complex legal issues regarding Lui's extradition because the relationship between the United Administrative Region ("HKSAR") upon China's resumption of sovereignty on July 1, 1997. See Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Preamble, 29 ll.M. 1520, 1520 (1990) (hereinafter Basic Law] (establishing and identifying Hong Kong's status in the post-reversion period as a Special Administrative Region).


6. Within the scope of the Lui adjudication, these issues were first raised by Chief Judge Tauro during Lui's initial bail proceedings, which preceded his actual extradition hearing. See Lui Kin-Hong v. United States, 926 F. Supp. 1180, 1189 (D. Mass.) (holding that reversion constituted "special circumstance," thereby justifying Lui's release on bail, and suggesting that legal questions presented by reversion within context of Lui's case would undoubtedly complicate and protract his United States legal proceedings), rev'd 913 F. Supp. 50 (D. Mass.), rev'd, 85 F.3d 528 (1st Cir. 1996).

For the sake of clarity, the case that is the subject of this Note, or more specifically, the case in which Magistrate Judge Karol certified Lui extraditable, In re Extradition of Lui Kin-Hong, 939
States and Hong Kong was governed by a treaty between the United States and the United Kingdom. The most compelling issue concerning Lui's domestic judicial proceedings is whether an individual may be extradited when the requesting sovereign is not the sovereign that will try, sentence, and punish the accused. The United States has a well developed body of case law and an extensive statutory scheme addressing the substantive and procedural law of international extradition. In addition, Congress enacted legislation dealing specifically with Hong Kong's reversion. Nevertheless, many of the questions rising from Lui's rather unique situation remain unanswered.

This Note focuses on In re Extradition of Lui Kin-Hong, in which the United States District Court for Massachusetts certified Lui extraditable to Hong Kong, despite the high probability that he would be tried, sentenced, and punished under the sovereignty of a country.

F. Supp. 934 (D. Mass. 1996), will hereinafter be referred to in its short citation form as Lui I. Chief Judge Tauro's decision on appeal, Lui Kin-Hong v. United States, 959 F. Supp. 1280 (D. Mass. 1997), granting Lui's petition for habeas corpus will be short-cited as Lui II, and the decision of the First Circuit reversing the decision of Chief Judge Tauro, Lui Kin-Hong v. United States, 110 F.3d 103 (1st Cir. 1997) will be short-cited as Lui III. Full citations to these three cases will remain unchanged. Short citations to "Lui Kin-Hong" will refer to any in the line of cases constituting Lui's bail proceedings.


8. See Lui I, 926 F. Supp. at 1188 (examining difficult matters that United States courts must address in determining Lui's extraditability); see also infra note 39 and accompanying text (quoting Justice Breyer's summation of the issues presented by Lui).

9. See infra note 59 and accompanying text (discussing extradition cases heard by Supreme Court, some dealing with issue of change in sovereignty of treaty partners, which is central theme in Lui I).

10. See infra notes 80-86 and accompanying text (explaining role of federal statutes in United States extradition proceedings).


12. See Lui Kin-Hong, 926 F. Supp. at 1188 (proffering that even if Lui does not prevail at his extradition hearing, it is likely that issues of his case will prompt "circuit split," possibly causing United States Supreme Court to grant certiorari).


14. See id. at 962 (finding nine charges out of ten sustainable by evidence, thereby rendering Lui extraditable under Treaty and Supplementary Treaty).

15. See Lui Kin-Hong v. United States, 957 F. Supp. 1280, 1284 (D. Mass.) (discussing "Hong Kong reversion timetable" and concluding that uncontroverted evidence establishes that Hong Kong will be unable to try and punish Lui before reversion to China), rev'd, 110 F.3d 103 (1st Cir.), stay denied, 117 U.S. 1491 (1997).
that at the time did not share an extradition treaty with the United States. Part I outlines the facts leading to Lui's arrest and summarizes his U.S. legal proceedings. Part II discusses the history of Sino-British relations, and U.S. law and policy involving extradition to Hong Kong. Part III comments on, and suggests alternatives to, those portions of the *Lui Kin-Hong* decision that merit reconsideration in light of the unique and compelling facts surrounding Lui's extradition.

I. FACTS

The events leading to Lui's extradition to Hong Kong span a number of years. From August 1988 to May 1993, Lui was employed by the Brown & Williamson Tobacco Corporation, a wholly owned subsidiary of British American Tobacco Industries PLC ("BAT-PLC"). BAT-PLC manufactures and distributes to the world a number of popular cigarette brands including Kent, Lucky Strike, and Viceroy. On January 1, 1992, while still employed by Brown & Williamson, Lui assumed the position of Export Director for the British American Tobacco Corporation in Hong Kong ("BAT-HK"), also a wholly owned subsidiary of BAT-PLC. At that time, BAT-HK maintained exclusive rights to distribute cigarettes in a substantial number of Asian countries, and Lui was alleged to be responsible for the allocation of cigarettes to selected Hong Kong trading companies.

The extradition request for Lui alleges that in conjunction with other BAT-HK Executives, Lui exploited his title and position to solicit and receive bribes in excess of three million American dollars from one trading company in particular, Giant Island, Limited ("GIL"), and certain GIL affiliates, namely, Wing Wah Company and Pasto Company, Limited. Lui and his associates allegedly accepted these bribes in return for granting GIL a monopoly over the export of BAT-HK cigarettes.

Although Lui admitted to having received the money, he contended that it was legitimate business income paid in consideration for his assistance in establishing GIL's profitable business relation-

16. For a listing of countries with which the United States has entered into bilateral extradition treaties, see U.S. DEP'T OF STATE, TREATIES IN FORCE (1997). This annual publication lists treaties and other international agreements of the United States on record in the Department of State at the outset of each year.
20. *See id.*
21. *See id.*
22. *See id.*
ships. In support of this contention, Lui relied on the undisputed fact that GIL's first payment to him occurred well before he was in any position to influence the allocation of BAT-HK cigarettes. Hong Kong authorities maintained that the payments to Lui commenced as early as they did because Lui and GIL had the foresight to anticipate Lui's eventual accession to an influential position within BAT-HK.

Following his departure from BAT-HK in May 1993, Lui pursued his interests with the Subic International Cargo Center, Incorporated ("SICCI"), a company Lui began forming at some point prior to May 1993. SICCI, located in the Philippines, was involved in the warehousing and shipping of cigarettes. Lui owned approximately 35% of SICCI stock, and until the time of his arrest, managed SICCI's day to day operations. In the Spring of 1994, agents of Hong Kong's Independent Commission Against Corruption ("ICAC") were invited to meet Lui in the Philippines. Although the ICAC agents did travel to the Philippines, the meeting, for some unknown reason, did not occur.

Based on a tip from an informant, ICAC agents attempted to arrest Lui on April 26, 1994, after investigating his business activities; Lui was out of the country at the time. Hong Kong Magistrate Ian Candy issued an arrest warrant for Lui on January 23, 1995; a second arrest warrant with expanded charges was issued on December 12, 1995.

On December 19, 1995, Lui flew from Manila, in the Philippines, to Boston to visit a hospitalized friend. Hong Kong authorities learned of the trip and solicited the assistance of U.S. authorities, eventually leading to Lui's arrest on December 20, 1995, at Logan Airport.

Lui's numerous court appearances in support of his request for release on bail proved unsuccessful; on August 29, 1996, Magistrate

23. See id.
24. See id. at 1282-83.
27. See id.
28. See id.
29. See id.
30. See id.
31. See id.
32. See id.
33. See id.
34. See id.
Judge Zachary R. Karol of the United States District Court of Massachusetts concluded that Lui was extraditable on nine of ten charges against him ("Lui I"). Lui then filed a petition for a writ of habeas corpus. Chief Judge Joseph L. Tauro granted his petition, concluding that Magistrate Judge Karol lacked jurisdiction to authorize Lui's extradition ("Lui II"). The government of Hong Kong then filed an appeal with the First Circuit that was well received; on March 20, 1997, the First Circuit reversed Judge Tauro's decision granting Lui's habeas petition, and on April 17, 1997, denied Lui's suggestion for a rehearing en banc. Concluding Lui's American legal proceedings, on May 12, 1997, the Supreme Court denied Lui's petition for a stay of mandate. Acting Secretary of State Strobe Talbot signed Lui's extradition order on May 16, 1997, and Lui was returned to Hong Kong shortly thereafter. Lui's case was committed to the Hong Kong Special Administrative Region's Court of First Instance on July 9, 1997. As of the date this writing was sent to the publisher, Lui was

---


37. See Lui II, 957 F. Supp. at 1280.

38. See United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir.), stay denied, 117 S. Ct. 1491 (1997). Circuit Judge Stahl filed a comprehensive dissent with the April 17, 1997, denial of Lui's suggestion for a rehearing en banc, which follows the March 20, 1997, decision of the First Circuit reversing Chief Judge Tauro. See id. at 121.

39. See Lui Kin-Hong v. United States, 117 S. Ct. 1491 (1997). Justice Breyer, joined by Justice Stevens, filed a dissent that captured the essence of Lui's concerns:

The petition for certiorari that Lui intends to file would likely raise three questions. First, the treaty with the United Kingdom... grants the United Kingdom the power to seek extradition of a fugitive offender. This Court has defined "extradition" to mean "the surrender by one nation to another... which being competent to try and punish him, demands the surrender." Since Hong Kong will revert to the People's Republic of China on July 1, 1997, and as the government admits, no trial could be held before that date, does the United Kingdom have the "competence to try and punish" Lui? And if not, can it now seek extradition?

Second, the Treaty provides that no person extradited shall "be extradited by [the requesting Party] to a third State. Does this prohibit Lui's extradition?

Third, under the terms of 18 U.S.C. §§ 3184 and 3186, does the Executive Branch have the exclusive power to interpret these provisions of the treaty?

In essence, the petitioner says that the United States intends to extradite him, not to the United Kingdom or to a crown colony of the United Kingdom, for trial, but rather to the People's Republic of China. In my view, the papers accompanying this motion for stay raise questions about the lawfulness of doing so, at least to the point where I would issue the stay, pending a response from the Solicitor General. For that reason I dissent from the Court's denial of the petitioner's application.

Id. at 1491 (Breyer, J., dissenting) (internal citations omitted).


in jail awaiting trial, which is scheduled to commence on March 16, 1998.42

II. BACKGROUND

A. One Country, Two Systems: A Plan for Hong Kong's Future

In order to successfully integrate Hong Kong's capitalist economy and common law jurisprudence into the PRC's socialist, civil law structure, the Chinese government adopted a policy towards Hong Kong known as "one country, two systems." The policy governs the post-reversion relationship between the Hong Kong Special Administrative Region ("HKSAR") and the Chinese government by granting the HKSAR a high degree of executive, legislative, and judicial autonomy, including a court of final adjudication.44

The "one country, two systems" policy is at the core of the two most significant documents responsible for the future of Hong Kong: the Sino-British Joint Declaration on the Question of Hong Kong,45 ("Joint Declaration"), and the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China46 ("Basic Law"). The Joint Declaration is an international agreement through which the United Kingdom and China share the obligation to ensure the prosperity and future stability of the HKSAR.47 Its enactment followed years of negotiation, addressing such concerns as the HKSAR's relationship with the Central People's Government, the role of the

42. See id.
43. Since the inception of the People's Republic of China in 1949, it has adhered to a socialist legal system with a single legal district. See Jin Huang & Andrew Xuefeng Qian, "One Country, Two Systems," Three Law Families, and Four Legal Regions: The Emerging Inter-Regional Conflicts of Law in China, 5 DUKE J. COMP. & INT'L L. 289, 292-99 (1995) (explaining difficult conflict of laws issues facing China in reclaiming sovereignty over Hong Kong including China's relationship with Macao and Taiwan). "One country, two systems" was put forth by Deng Xiaoping to remedy the inherent incompatibility that China's legal system would undoubtedly face upon the absorption of Hong Kong, a common law territory. See id.; see also infra notes 44-58 and accompanying text (discussing incorporation of "one country, two systems" into legal documents governing Hong Kong's reversion).
44. The Judiciary of the HKSAR should have a court of final appeal pursuant to the enactment of the Hong Kong Court of Final Appeal Ordinance. See Hong Kong Court of Final Appeal Ordinance, 35 I.L.M. 211 (1995).
46. See Basic Law, supra note 2, at 1521.
47. The governments of the United Kingdom and China sought to secure this prosperity in part through the formation of the "Sino-British Joint Liaison Group," whose main purpose was to ensure the smooth transfer of government and implement the goals of the Joint Declaration. See Joint Declaration, supra note 45, art. 4(5).
United Kingdom in post-reversion Hong Kong, and most importantly, the future of Hong Kong's political, economic, judicial, and social structure. The Basic Law, promulgated by the National People's Congress to serve primarily as the constitution for the HKSAR, directly incorporated many of the drafting objectives of the Joint Declaration. The drafting objectives of the Basic Law were twofold: first, to ensure the return of Hong Kong to Chinese sovereignty, and second, to preserve the prosperity that the territory had enjoyed under British rule.

Although the PRC expressly pledged to honor the unprecedented form of autonomy outlined in the Joint Declaration and Basic Law for at least fifty years following the July 1, 1997, reversion, "one country, two systems" is not without its limitations. The Chinese government unequivocally maintains that the HKSAR is an "inalienable part of the People's Republic of China," and that the "Chief Executive of the [HKSAR] shall be accountable to the Central People's Government." The high degree of autonomy granted to the HKSAR does not include jurisdiction over acts of state such as defense and foreign affairs. These and similar provisions unquestionably articulate the limited and contingent nature of the HKSAR's independence from the Central People's Government.

The Joint Declaration and Basic Law also contain provisions directly addressing the scope of the HKSAR's international autonomy.

48. See id., art. 3(3).
49. See Basic Law, supra note 2, Preamble, at 1520 (endorsing doctrine of "one country, two systems," and elaborating basic policy propositions that China accepted pursuant to its commitment to uphold and abide by Joint Declaration).
50. See id. at 1511. The Basic Law attempts to balance the authority of the Chinese government against the ability of the HKSAR's to continue economic, judicial, political, and social prosperity. See id.
51. See Joint Declaration, supra note 45, art. 3(12) (promising that policy of the Chinese government, which currently supports Hong Kong's high degree of autonomy, "will remain unchanged for 50 years"); Basic Law, supra note 2, ch. I, art. 5, at 1521 (incorporating Article 3(12) of Joint Declaration verbatim).
52. Basic Law, supra note 2, ch. I, art. 1, at 1521.
53. Id., ch. IV, § I, art. 43, at 1527; see also Joint Declaration, supra note 45, art. 3(2) (stating that HKSAR will be "directly under the authority of the Central People's Government").
54. See Basic Law, supra note 2, ch. II, art. 13, at 1522 (explaining that central People's Government will be responsible for Hong Kong's defense).
55. See id., ch. II, art. 14, at 1522 (noting that Central People's Government will be responsible for Hong Kong's foreign affairs).
56. In the United States, concern has often surfaced regarding China's sincerity to limit its authority over Hong Kong to issues involving foreign affairs and defense in accordance with Articles 13 and 14 of the Basic Law. See, e.g., 138 CONG. REc. H9116 (daily ed. Sept. 22, 1992) (statement of Rep. Dymally) (expressing concern over federal district court's decision to extradite individual to Hong Kong in light of reversion). Particularly compelling, Article 23 of the Basic Law prohibits "foreign political organizations or bodies from conducting political activities in the [HKSAR], and . . . political organizations or bodies of the [HKSAR] from establishing ties with political organizations or bodies." Basic Law, supra note 2, ch. II, art. 23, at 1524.
Both documents expressly permit the HKSAR to arrange for "reciprocal juridical assistance" with foreign states upon approval from the Central People’s Government. Specifically, Article 153 of the Basic Law maintains that international agreements formerly in force in Hong Kong, to which China was not a party, may continue with the assistance or authorization of the Central People’s Government. If Lui had been delivered after July 1, 1997, pursuant to the existing treaty with the United Kingdom or a new extradition treaty applicable to the HKSAR, his extradition would have violated the Basic Law as well as U.S. law, which preclude extradition in the absence of an enforceable treaty. Although Lui’s actual delivery before July 1, 1997, sidestepped issues concerning the continuity of existing Hong Kong law in the PRC, it raises compelling questions regarding

57. See Basic Law, supra note 2, ch. IV, § 4, art. 96, at 1535; Joint Declaration, supra note 45, Annex I, art. III.
58. Article 153 provides:
   The application to the [HKSAR] of international agreements to which the [PRC] is or becomes a party shall be decided by the Central People’s Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region.
   International agreements to which the [PRC] is not a party but which are implemented in Hong Kong may continue to be implemented in the [HKSAR]. The Central People’s Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.
   Basic Law, supra note 2, ch. VII, art. 153, at 1544 (emphasis added). The use of the word "may" rather than the word "shall" or its equivalent is significant: "shall" would have expressly conveyed the Chinese government’s intention to keep all international agreements to which Hong Kong is a member unconditionally in force, considering "shall" is used elsewhere in the article. See id. The use of "shall" would have conferred on China a passive role, and Hong Kong’s existing international agreements presumably would have continued without any guidance, approval, or endorsement from the Central People’s Government as a matter of Chinese law and policy. See id. As Article 153 reads now, however, any international agreement to which Hong Kong is a member must be accompanied at a bare minimum by the endorsement of the Chinese government. See id. Absent any notion of acceptance, Article 153 suggests that an existing Hong Kong agreement would not be binding on or necessarily accepted by the Central People’s Government. See id.
59. See 18 U.S.C. § 3181 (1994) (limiting applicability of United States Code sections concerning international extradition to those instances in which request for extradition has been made by a foreign government pursuant to enforceable extradition treaty); see also Valentine v. United States, 299 U.S. 5, 7-9 (1936) (holding that right of foreign power to demand extradition, and the correlative duty to surrender, exists only when created by treaty; no authority exists in any branch of government to surrender accused to foreign government absent treaty or statute); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) ("[A] government may... voluntarily exercise the power to surrender him a fugitive from justice... [but] the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty."); United States v. Rauscher, 119 U.S. 407, 411-14 (1886) (maintaining that extradition in absence of treaty rests on comity, not obligation); Quinn v. Robinson, 783 F.2d 776, 782 (9th Cir. 1986) ("[N]o branch of the United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty."); supra notes 56-58 and accompanying text (explaining how extending the extradition treaty applicable to Hong Kong, to which the PRC is not a party, contravenes Basic Law).
Lui's trial and punishment by a different sovereign than that which requested his extradition.

**B. Impact of Treaty, Statutes and Case Law**

In a United States extradition proceeding, treaties, statutes, and case law each serve a distinct purpose. Treaties contain the legal obligations assumed by each country regarding the manner in which the accused (sometimes referred to as the relator) is extradited, and supply the underlying authority needed to comply with foreign requests. The process of U.S. extradition, including the role and duties of the Executive and Judiciary, is controlled by 18 U.S.C. §§ 3181-3196. Finally, the Judiciary has developed a substantial body of case law (complying with its mandate under 18 U.S.C. § 3184 et seq. to interpret relevant treaties and statutes) in order to determine whether extradition should take place.

1. **Relevant treaty provisions**

Extradition to Hong Kong has been governed since 1972 by the Extradition Treaty ("Treaty") between the United States and the United Kingdom. It was amended in 1986 by the Supplementary Extradition Treaty ("Supplementary Treaty"). Neither treaty makes specific mention of Hong Kong's reversion to the PRC with respect to suspension or termination of treaty obligations; however, they do contain a number of provisions permitting the requested country to deny an extradition request under certain circumstances. In con-
cert with these provisions, which typically invoke judicial interpretation, the Treaty's introductory statement expresses the signatories' desire to facilitate "the reciprocal extradition of offenders." Thus, if either the United States or the United Kingdom determine that the other has not adequately honored the principle of reciprocal extradition, the Treaty provides each party the power to terminate the Treaty six months after written notice. This power of termination is unconditional; in the United States, it resides exclusively with the Secretary of State.

a. The Article XII specialty provision

Article XII of the Treaty, often referred to as the "specialty" provision, confers upon the relator certain protections, or "specialty rights." Article XII contains two substantial provisions. First, it prohibits the requesting party from re-extraditing the relator to a third state. This would prevent Hong Kong from surrendering Lui to PRC authorities, or any other state, after the United States honored its extradition request. Second, it prohibits the requesting country from proceeding against the extradited individual for any offense other than the offense for which the extradition request was made.

67. Treaty, supra note 7, Introduction, art. II(2). The Supplementary Treaty in Article 7 allows for its termination "in the same manner as the Treaty." Supplementary Treaty, supra note 7, art. 7.

68. See Treaty, supra note 7, art. II(2) (lacking any conditions on exercise of termination power); Supplementary Treaty, supra note 7, art. 7.


70. See Treaty, supra note 7, art. XII. Article XII provides as follows:

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State-

(a) until after he has returned to the territory of the request party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party.

(2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matter arising, after the extradition.

Id. Lui incorporated both aspects of this provision into his argument against his extradition. See Lui I, 939 F. Supp. at 956.

71. See Treaty, supra note 7, art. XII.

72. See id. art. XII(1). This is what Lui claimed would happen if extradited. He argued that the reversion, while not constituting an "automatic violation of specialty," imposed proceedings against him under three different sovereigns: the United States, the United Kingdom, and the PRC. See Lui I, 939 F. Supp. at 956-57.
not including post-extradition matters.\textsuperscript{75} In practice, this prevents the requesting country from amending or increasing the severity of charges against a relator, once extradited.\textsuperscript{74}

\textbf{b. The Article IV capital offense exception}

Article IV of the Treaty allows the requested party to deny extradition if: (1) the offense for which extradition is requested is punishable by death under the law of the requesting party, and (2) the death penalty is not available for the corresponding offense under the law of the requested country.\textsuperscript{75} Under PRC law, a state official convicted of bribery, as well as a number of non violent economic crimes, is punishable by death.\textsuperscript{76} For Lui, determining the meaning of “the relevant law of the requesting party”\textsuperscript{77} is of critical consequence. Considering that Lui’s trial, sentencing and punishment will occur after July 1, 1997, “the relevant law” implicates not only the former law of Hong Kong and Great Britain, but also the present law of the HKSAR and the law of the PRC.\textsuperscript{78} Furthermore, the identity of “the requesting party”—the United Kingdom, the HKSAR, or the PRC—remains entirely unclear.\textsuperscript{79} With these considerations in mind,

\textsuperscript{73} See Treaty, supra note 7, art. XII.

\textsuperscript{74} See id. It is this part of Article XII that captures accurately Lui’s prevailing concerns regarding his specialty rights; fears that China may impose additional charges, or sentence him in accordance with Chinese law. See Lui I, 939 F. Supp. at 957. Although the Basic Law expressly states that China will permit the judicial system practiced previously in Hong Kong to be maintained in the HKSAR, the Basic Law is strictly an internal document and it has no binding effect on any other nation. See Basic Law, supra note 2, ch. IV, § 4, arts. 80-81, 84-87, at 1533.

\textsuperscript{75} See Treaty, supra note 7, art. IV. Article IV of the Treaty provides:

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.

\textit{Id.}

\textsuperscript{76} See Criminal Law of the People’s Republic of China, ch. VII, art. 185 (1979), translated in LEXIS, INTLAW Library, CHINAL File, amended by Decision of the Standing Committee of the National People’s Congress Regarding the Severe Punishment of Criminals who Sabotage the Economy, art. (A), §§ 1-2 (1982) [hereinafter Severe Punishment Decision], translated in LEXIS, INTLAW Library, CHINAL File. The relevant provision provides that “[a]ny state functionary who extorts or accepts bribes shall be punished …. [W]hen the circumstances are especially serious, he shall be sentenced to life imprisonment or death.” \textit{Id.}

\textsuperscript{77} See Treaty, supra note 7, art. IV.

\textsuperscript{78} See id. As Lui will be punished in the HKSAR under the sovereignty of the PRC, U.S. judicial interpretation of the “relevant law” within Article IV of the Treaty must have depended in part on the court’s confidence in the PRC’s commitment to allow existing law in Hong Kong to remain unchanged in accordance with the Basic Law. Notwithstanding its certification of extraditability, the court in \textit{Lui I} intimated that Lui’s concerns under Article IV of the Treaty were not without merit. See Lui I, 999 F. Supp. at 952 (acknowledging that court’s certification of Lui’s extraditability did not indicate that Lui’s claims are unimportant, but concluding that they should be addressed by the Secretary of State).

\textsuperscript{79} See Treaty, supra note 7, art. IV. For the same reasons that the “relevant law” under
the Article IV-based arguments that Lui advanced against extradition appear far more powerful than the court in Lui I intimated upon its certification of his extraditability.

2. Federal statutes controlling the extradition process

In the United States, international extradition occurs through a bifurcated proceeding set forth in 18 U.S.C. § 3184. Upon receipt of a foreign government's extradition request, a federal magistrate or judge determines whether the offense is extraditable under the applicable treaty. If the court determines that extradition is warranted, the Secretary of State can uphold or reject the court's certification of extraditability. The Secretary of State cannot, however, authorize extradition in the event that a court finds the offense non-extraditable.

Certain provisions of 18 U.S.C. § 3184 continue to suffer from broad and inconsistent interpretations in the courts. The Judiciary has held that the power of the Secretary of State ranges from mere power of certification over evidence and testimony, in order to forward a complete record to the requesting country, to final discretion over the extradition decision itself. As a result, 18 U.S.C. § 3184 has which Lui will be tried could be the Criminal Law of the PRC and the Severe Punishment Decision, the “requesting party” could have been construed constructively as the HKSAR or China. See Lui I, 939 F. Supp. at 957 n.22 (identifying current Chinese laws that permit death penalty as reasoning and basis underlying Lui's Article IV argument).

80. 18 U.S.C. § 3184 (1994). Section 3184 provides, in relevant part:
Whenever there is a treaty or convention for extradition between the United States and a foreign government any justice or judge of the United States, or any magistrate... may... issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate to the end that the evidence of criminality may be heard and considered... If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same... to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention.

Id.

81. See id.
82. See id.
83. See Scharf, supra note 4, at 260 (explaining that Secretary of State may decline to honor judicial order in response to foreign request for extradition, but may not order extradition of a relator if court denies a extradition request).
84. 18 U.S.C. § 3186 clarifies the role of the Secretary of State pursuant to 18 U.S.C. § 3184: “[t]he Secretary of State may order the person committed under sections 3184... to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.” 18 U.S.C. § 3186 (emphasis added). The discretionary authority granted the Secretary of State through both statutes' use of the word "may" has been the topic of much legal discussion. See infra notes 85-86 and accompanying text (presenting and discussing cases interpreting 18 U.S.C §§ 3184 and 3186).
85. Compare Lui I, 939 F. Supp. at 960 (stating that “the Secretary of State has complete discretion to extradite or not"), and Escobedo v. United States, 625 F.2d 1098, 1105-1106 (5th
engendered extensive litigation regarding the proper role of each branch, even eliciting a constitutional challenge grounded on a separation of powers theory.  

3. Case law involved in Lui’s reversion defense

The political and social uncertainty surrounding Hong Kong’s future have yielded only a small number of extradition cases in which the reversion was raised as a defense. The court in Lui I cited only three cases in this respect: *In re Extradition of Tang Yee-Chun*, 76 Yin-Choy v. Robinson, 84 and Cheng Na-Yuet v. Hueston. 89 Although the court in Lui I identified these cases as directly on point, there are significant factual differences between these precedents and Lui’s case. Notwithstanding these differences, a brief exposition of each...
case's findings within the context of the Treaty will prove helpful in later analysis.

a. Interpretation of the Article XII specialty provision

Each of these three cases addressed a claim raising specialty rights under Article XII of the Treaty. In *Tang Yee-Chun*, the petitioner argued that she was not being extradited to Hong Kong, but rather that the broader effects of the reversion constituted a de facto extradition to China. She argued further that she might be tried for additional offenses for which she was not extradited. Although *Tang Yee-Chun* did not address the issue of incarceration beyond July 1, 1997, as an element of the petitioner's specialty claim, the petitioners in *Oen Yin-Choy* and *Cheng Na-Yuet* distinguished and refined their specialty argument by asserting that, if extradited, their probable incarceration beyond the reversion would constitute a direct violation of Article XII. The court in *Tang Yee-Chun* held simply that the proper scope of judicial inquiry precluded the petitioner from raising the argument based on Article XII specialty rights, claiming that such considerations could be heard only by the Secretary of State. In significant cases despite court's strong reliance upon them).

91. Regarding extradition proceedings in the United States, it is well established that a petition for writ of habeas corpus is the only avenue for review of a magistrate judge's order certifying extradition; the scope of review is available "only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and ... whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Romeo v. Roache*, 820 F.2d 540, 542-43 (1st Cir. 1987) (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). The Ninth Circuit clarified the Supreme Court's language regarding the proper scope of collateral review by habeas corpus in an international extradition proceeding, setting forth a five-part test in *Caplan v. Vokes*, 649 F.2d 1336, 1340 (1981):

[T]he court is not permitted to inquire beyond whether (1) the extradition judge had jurisdiction to conduct extradition proceedings; (2) the extradition court had jurisdiction over the fugitive; (3) the treaty of extradition was in full force and effect; (4) the crime fell within the terms of the treaty; and (5) there was competent legal evidence to support a finding of extraditability.

*Id.*

92. See *Tang Yee-Chun*, 674 F. Supp. at 1068 (presenting Tang Yee-Chun's argument that "she will effectively be extradited to Hong Kong but to the People's Republic, in violation of Article XII of the Treaty").

93. See *id.* (stating Tang's argument that "she might be subject to prosecution for offenses for which she was not extradited").

94. See *Oen Yin-Choy*, 858 F.2d at 1403 (stating Oen's argument that "if he is extradited and convicted, he may remain incarcerated in Hong Kong beyond July 1, 1997 ... He will in effect have been extradited to China"); *Cheng Na-Yuet*, 734 F. Supp. at 992 (reciting Cheng's argument that "if Petitioner were to remain incarcerated at the time of the Reversion, then she argues that she will, in effect, have been extradited to a third state, in violation of Article XII").

95. See *Tang Yee-Chun*, 674 F. Supp. at 1068. In this case, Petitioner did not develop her specialty argument beyond the simple claim that the reversion, on its face, violated Article XII of the Treaty. *See id.* The court formulated the petitioner's argument simply as "[petitioner would] effectively be extradited not to Hong Kong but to the People's Republic, in violation of Article XII." *Id.*
contrast, the courts in *Oen Yin-Choy* and *Cheng Na-Yuet* declined to defer the specialty issue to the Secretary of State; they upheld the petitioners' extraditrability on the merits. Adopting a rather formalistic style of reasoning, the courts in *Oen Yin-Choy* and *Cheng Na-Yuet* focused on the express language defining the term 'extradition' set forth in *Terlinden v. Ames*.

*Terlinden* defines extradition as "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of another, which, being competent to try and to punish him, demands the surrender." Therefore, even if the petitioners, following their delivery to Hong Kong authorities became subject to Chinese control, the United States would not have extradited the petitioners to the PRC.

*Oen Yin-Choy* and *Cheng Na-Yuet* afford considerable attention to the second specialty argument raised by the petitioners, namely, that they would be subject to trial for additional offenses for which they were not extradited. Relying on *Tang Yee-Chun*, the court in *Cheng Na-Yuet* held that the Treaty constitutes commitments between

---

97. 184 U.S. 270 (1902).
98. *Id.* at 289. *Terlinden* further refines this definition by stating that "neither deportation nor surrender other than in response to a demand pursuant to a Treaty constitutes extradition." *Id.*
99. See *Oen Yin-Choy*, 858 F.2d at 1403-04; *Cheng Na-Yuet*, 734 F. Supp. at 992. It appears that both courts employed a temporally guided, or, strictly "chronological" interpretation of the definition of extradition presented in *Terlinden*. See *Oen Yin-Choy*, 858 F.2d at 1404; *Cheng Na-Yuet*, 734 F. Supp. at 992. Thus, the courts reasoned that because surrender by the requested state must undoubtedly occur before incarceration by the requesting state in any international extradition proceeding, the requested state has fully and completely extradited the individual upon surrender in accordance with *Terlinden*; whatever may be in store for the relator following surrender can only occur after the requested nation has already completed its extradition. See *Oen Yin-Choy*, 858 F.2d at 1403-04; *Cheng Na-Yuet*, 734 F. Supp. at 992-93. This approach fails to acknowledge that in the United States, the requesting nation's competency to try and punish the relator, also mentioned in the *Terlinden* definition, must be approved by two thirds of the Senate before any foreign request for extradition can be honored. See U.S. CONST. art. II, § 2, cl. 2.
100. See *Oen Yin-Choy*, 858 F.2d at 1404; *Cheng Na-Yuet*, 734 F. Supp. at 992. The circularity in the courts' reasoning cannot be overlooked. The petitioners argued that they were essentially being extradited to the PRC. See *Oen Yin-Choy*, 858 F.2d at 1404; *Cheng Na-Yuet*, 734 F. Supp. at 992. The argument realized that because the United States did not have an extradition treaty with the PRC, such an extradition would have violated U.S. law. The courts responded that it was not possible for the United States to extradite the petitioners to China, for if the United States has no extradition treaty, the petitioners could not possibly be extradited to China under United States law. See *Oen Yin-Choy*, 858 F.2d at 1404; *Cheng Na-Yuet*, 734 F. Supp. at 992.
the United States and the United Kingdom, and “does not purport to include commitments by successor governments or third states” against imposing additional charges or harsher punishments.\textsuperscript{101} The court in \textit{Oen Yin-Choy} clarified this reasoning, stating that “[w]here the Treaty to be interpreted as Oen asks, extradition to Hong Kong would be the exception rather than the rule because it would be limited in practice only to extradition for crimes which could be punished for a term expiring before the reversion date.”\textsuperscript{102}

b. \textit{Interpretation of the Article IV capital offense exception}

Only in \textit{Tang Yee-Chun} and \textit{Cheng Na-Yuet} did the petitioners mount a defense against extradition based on the Article IV capital offense exception of the Treaty.\textsuperscript{103} In \textit{Tang Yee-Chun}, the petitioners attempted to reinforce the validity of their Article IV argument by submitting an expert’s affidavit claiming that “[the] possibility of eventual capital punishment awaits the relators if extradited.”\textsuperscript{104} In rejecting the petitioners’ argument, the court reasoned that, as with petitioners’ specialty provision allegations, such “humanitarian” arguments were beyond the scope of judicial inquiry.\textsuperscript{105} The court concluded that if such concerns had any validity, proper appeal should be made to the Executive and not the Judiciary Branch.\textsuperscript{106}

The court in \textit{Cheng Na-Yuet} held similarly that the scope of its inquiry precluded a holding favorable to the petitioner based on Arti-

\textsuperscript{101} \textit{See Oen Yin-Choy}, 858 F.2d at 1404. In \textit{Tang Yee-Chun}, the court deferred to the Secretary of State all issues regarding the petitioner’s arguments related to the reversion. \textit{See In re Extradition of Tang Yee-Chun}, 674 F. Supp. 1058, 1068 (S.D.N.Y. 1987). It indicated that the petitioner’s concerns were “too remote and too speculative to justify any action by this Court.” \textit{Id.} It was this same reasoning that the courts in \textit{Oen Yin-Choy} and \textit{Cheng Na-Yuet} used to dismiss the petitioners’ claims on the merits. \textit{See Oen Yin-Choy}, 858 F.2d at 1404; \textit{Cheng Na-Yuet}, 734 F. Supp. at 993.

\textsuperscript{102} \textit{Oen Yin-Choy}, 858 F.2d at 1404; \textit{see also supra} notes 99-100 and accompanying text (raising possible weaknesses of the courts’ reasoning).

\textsuperscript{103} \textit{See Cheng Na-Yuet}, 734 F. Supp. at 992; \textit{Tang Yee-Chun}, 674 F. Supp. at 1068. It is not entirely clear why the petitioner in \textit{Oen Yin-Choy} did not raise Article IV as a defense. Arguments based on the exception to extradition in Article IV in \textit{Tang Yee-Chun} and \textit{Cheng Na-Yuet} did not require that their crimes be punishable by death under current Chinese law, but rather, that they might be subject to the death penalty if the PRC changed its own laws “retroactively” to include the death penalty for their crimes. \textit{See id.} at 1068.

\textsuperscript{104} \textit{Tang Yee-Chun}, 674 F. Supp. at 1068.

\textsuperscript{105} \textit{See id.} The court consolidated each of the petitioners’ concerns raised under Articles XII and IV of the Treaty into a single argument, from which the court posed the question of whether “these possibilities, remote as they are, should so shock this Court’s sense of decency that it should not grant extradition.” \textit{Id.} Before holding that the judicial determination regarding that question was precluded by the Executive’s exclusive right to grant or deny extradition on humanitarian grounds, the court dismissed the issue as too speculative and too remote to justify judicial action. \textit{See id.; see also supra} note 101 and accompanying text (discussing similar reasoning in \textit{Cheng Na-Yuet} and \textit{Oen Yin-Choy}).

\textsuperscript{106} \textit{See Tang Yee-Chun}, 674 F. Supp. at 1068.
Clarifying the manner in which Article IV operates, the court explained that Article IV cannot bar a court from certifying or upholding a request for extradition, because it "merely provides a discretionary basis for denial of extradition by the [requested] government." Despite this reasoning, the court conducted an extensive analysis into the merits of the petitioner's claim, conceding eventually that it was "moved by Petitioner's fears of capital punishment."

C. United States Policy on Hong Kong and the Future HKSAR

The United States-Hong Kong Policy Act of 1992 ("Policy Act") is the most prominent statement of U.S. policy concerning Hong Kong's transfer of sovereignty. It fully endorses the implementation of the Joint Declaration and formally recognizes the "continued vitality, prosperity and stability of Hong Kong" as a critical interest to the United States. It likewise establishes that the United States should play an active role before and after reversion to protect its existing ties with Hong Kong.

The Policy Act also provides a distinctive statement concerning the continued application of United States law in the HKSAR, including

108. Id. at 994. Article IV of the Treaty allows the requesting country to exercise its discretion in refusing extradition if the death penalty can be imposed against the petitioner in the requesting state for a crime not punishable by death in the requested state. See Treaty, supra note 6, art. IV. The court in Cheng Na-Yuet acknowledged this by correctly stating that a simple discrepancy in capital sentencing between the requested and requesting country would not bar an extradition outright. See Cheng Na-Yuet, 734 F. Supp. at 994. Under the circumstances present in Cheng Na-Yuet, Oen Yin-Choy, Tang Yee-Chun, and Lui Kin-Hong, however, the ability of the requested country to obtain assurances from the requesting state is severely hindered. See infra notes 163-77 and accompanying text (discussing the significant impact of Hong Kong's reversion on U.S. ability to protect Lui from capital punishment if tried in the HKSAR).
109. Cheng Na-Yuet, 734 F. Supp. at 994. Arguably, a court conducting such an analysis would appear ambivalent as to whether the Judicial or Executive Branch should render the determination of extraditability with respect to a relator's Article IV concerns. See supra notes 84-85 and accompanying text (discussing the conflicting sources of law regarding the role of the Executive and Judiciary in an extradition proceeding).
111. See id. § 2(1).
112. See id. § 2(4). Specifically, this section states that the United States is interested in maintaining Hong Kong's "important role in today's regional and world economy, which is reflected in its strong economic, cultural, and other ties with the United States." Id. Section 5 further states that "[s]upport for democratization is a fundamental principle of United States foreign policy"; inasmuch as this policy has applied to Hong Kong previously, "[i]t will continue to remain true after June 30, 1997." Id. § 2(5).
113. Section 101(1) states in full, "[t]he United States should play an active role, before, on, and after July 1, 1997, in maintaining Hong Kong's confidence and prosperity, Hong Kong's role as an international financial center, and the mutually beneficial ties between the people of the United States and the people of Hong Kong." Id. § 101(1).
the following excerpt from section 201(a):

Notwithstanding any change in the exercise of sovereignty over Hong Kong, the laws of the United States shall continue to apply with respect to Hong Kong on and after July 1, 1997, in the same manner as the laws of the United States were applied with respect to Hong Kong before such date unless otherwise expressly provided by law or by Executive order ....

Section 201(b) elaborates further that this policy shall be directly applicable to United States courts. Thus, unless the Policy Act is repealed or amended in accordance with law, a court required to determine whether a treaty extends beyond the reversion date cannot consider the reversion as a factor. Further, the Act is highly suggestive of Congress' intent that existing treaties applicable to Hong Kong, including those treaties involving extradition, should remain enforceable. The Policy Act does not, however, usurp the Judiciary's power to interpret provisions of a treaty and render determinations as provided by law. Within an extradition proceeding, this means that courts may continue to take into account considerations such as specialty rights afforded the relator, the capital offense exception, and, ultimately, whether an enforceable treaty exists between the parties as a matter of law.

114. Id. § 201(a).
115. See id. § 201(b). Section 201(b) provides:

For all purposes, including actions in any court in the United States, the Congress approves the continuation in force on and after July 1, 1997, of all treaties and other international agreements ... entered into before such date between the United States and Hong Kong, or entered into before such date between the United States and the United Kingdom and applied to Hong Kong, unless or until terminated in accordance with law. If ... the President determines that Hong Kong is not legally competent to carry out its obligations ... or that the continuation of Hong Kong's obligations or rights under any such treaty or other international agreement is not appropriate under the circumstances, such determination shall be reported to the Congress ....

Id. At the time the decision in Lui I was rendered, the President had yet to make any report to Congress regarding the propriety of continuing Hong Kong's rights under the Treaty. See In re Extradition of Lui Kin-Hong, 999 F. Supp. 934, 961 (D. Mass. 1996), petition for habeas corpus granted sub nom. Lui Kin-Hong v. United States, 957 F. Supp. 1280 (D. Mass.), rev'd, 110 F.3d 103 (1st Cir.), stay denied, 117 S. Ct. 1491 (1997).


117. See id. (claiming that section 201(b) of the Policy Act clearly expresses Congress' intention that the Treaty remain in effect indefinitely beyond reversion, unless otherwise terminated by Executive).

118. Pursuant to 18 U.S.C. § 3184, a judge may extradite if "he deems the evidence sufficient to sustain a charge under the provisions of the proper treaty or convention ...." 18 U.S.C. § 3184 (1994).

119. See Treaty, supra note 7, art. XII.

120. See id. art. IV.

121. These analyses are typical to extradition proceedings. See generally Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1405-04 (9th Cir. 1988) (discussing whether extradition treaty purports to include commitment by successor governments or third states); Lui I, 999 F. Supp. at
The tenor of the Policy Act suggests that the United States is confident that the PRC will honor the provisions of the Joint Declaration and Basic Law protecting the HKSAR's autonomy.\(^1\) In fact, this is the reasoning adopted by the court in *Lui I* as the basis for determining that the Treaty should remain in force and applicable to the HKSAR.\(^2\) Other sources of policy emanating from the U.S. government suggest, however, that this confidence is not widespread. The Congressional Record is replete with instances of U.S. leaders voicing concern over the PRC's sincerity in honoring HKSAR autonomy.\(^3\) The State Department's *Country Reports for Human Rights Practices* catalogued continuing and serious human rights violations in China in 1996.\(^4\) Even within the proceedings against Lui, at least one court...

---

958; Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 992-94 (S.D. Fla. 1990) (discussing extradition treaty's enforceability where possibility of capital punishment existed because of Hong Kong's impending reversion to the PRC); *In re* Extradition of Tang Yee-Chun, 674 F. Supp. 1058, 1068-70 (S.D.N.Y. 1987). *Tang Yee-Chun* concluded with an enumerated list of findings, which included "a valid treaty exists"; "the crimes . . . are provided for by [the] Treaty"; the relators "are the persons sought to be extradited"; the relators "were found within the Court's jurisdiction," and finally, "[t]here is probable cause to believe that [the relators] committed the crimes with which they have been charged by Hong Kong authorities." *Id.* at 1070.

122. By stating that "the laws of the United States shall continue to apply with respect to Hong Kong in the same manner, on and after July 1, 1997," Congress made an implicit vote of confidence that the PRC will not significantly alter the existing legal structure. See United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, § 201(a), 106 Stat. 1448, 1452 (codified in part in scattered sections of 22 U.S.C.); see also supra note 115 and accompanying text (citing section 201 (b) of United States-Hong Kong Policy Act of 1992).

123. See *Lui I*, 939 F. Supp. at 960 (discussing reasons why extradition of Lui Kin-Hong would not thwart the will of Executive and legislative branches).


If Mr. Chan is extradited, his criminal case will likely still be pending in court when the Hong Kong judicial system reverts to the control of the Chinese Government . . . . If Mr. Chan's trial is completed and his case is on appeal when the Communist government assumes control, he will face the real danger of having his case reviewed by a Judiciary that is isolated from and indeed antagonistic toward the Western legal tradition . . . . Even if Mr. Chan were exonerated of the charges against him, arising under present Hong Kong law, he faces the danger of being subject to prosecution in the People's Republic of China on new charges . . . . Although Hong Kong has a treaty obligation to the United States not to charge Mr. Chan with any offense beyond that set out in the extradition request, China has no similar duty because it is not a signatory to any extradition treaty with the United States. Thus, the People's Republic of China is free to prosecute Mr. Chan as it sees fit.

*Id.*


The Chinese Government continued to commit widespread and well-documented human rights abuses, in violation of internationally accepted norms, stemming from the authorities' intolerance of dissent, fear of unrest, and the absence or inadequacy of laws protecting basic freedoms. The Constitution and laws provide for fundamental mistreatment of prisoners, forced confessions, and arbitrary and lengthy incommunicado detention. Prison conditions remained harsh. The Government continued severe restrictions on freedom of speech, the press, assembly, association, religion,
noted in dicta that Lui’s arguments concerning potentially harsh punishment under Chinese sovereignty are well-founded.\(^6\)

Judicial interpretation of United States policy regarding the reversion, and particularly its impact on Lui’s defenses against extradition, is tremendously significant. It is implicated in the analysis of specialty rights, the capital offense exception, the questionable existence of an enforceable treaty, and ultimately, the determination of the proper scope of judicial inquiry in responding to these concerns. Each of these issues will be addressed below.

III. WHY JUDICIAL CERTIFICATION OF EXTRADITABILITY IN IN RE EXTRADITION OF LUI KIN-HONG WAS IMPROPER

A. Hong Kong’s Contingent Status as Party to the Treaty

United States extradition proceedings require a judicial determination that there exists an enforceable treaty operating between the requesting country and the requested country.\(^7\) Prior to the reversion, extradition to Hong Kong was accomplished through Article II(1) of the Treaty, which provides that the Treaty shall apply to “any
In Re Extradition of Lui Kin-Hong

It is undisputed that the United States would lack proper authority under the Treaty to extradite relators such as Lui to the HKSAR, now a region of the PRC. This prompted the court in Lui I and the courts hearing Lui's appeal to consider the following question: for the purposes of extradition from the United States to Hong Kong, at what point would Hong Kong cease to be a constructive \(^\text{130}\) party to the Treaty?\(^\text{131}\)

Despite the fact that individuals extradited to Hong Kong before it reverted to the PRC might not be tried or punished until after the reversion, the court in Lui I cited three reasons in support of its holding that the Treaty remained enforceable until the reversion. First, the court claimed that the failure of the Secretary of State to terminate the Treaty in accordance with Article II(1) was indicative of the Executive's intent to continue a treaty relationship with the HKSAR.\(^\text{132}\) Second, the court relied on the Policy Act, which states that treaties shall remain in effect "until terminated in accordance with law,"\(^\text{133}\) as evidence of Congress' desire that the Treaty remain in force.\(^\text{134}\) Finally, the court determined "that the Senate was satisfied that the means available to the Secretary of State for dealing with the reversion situation were entirely satisfactory" because the Supplementary Treaty lacked language regarding the reversion, or the possibility that persons extradited to Hong Kong may serve their sentences beyond the reversion period.\(^\text{135}\)

---

128. Treaty, supra note 7, art. II(1).

129. See supra notes 58-60 and accompanying text (explaining that United States cannot grant foreign extradition requests in absence of extradition treaty, and after July 1, 1997, no extradition treaty will exist between United States and Hong Kong).

130. "Constructive" has been defined as, "[t]hat which is established by the mind of the law in its act of construing facts, conduct, circumstances, or instruments." BLACK'S LAW DICTIONARY 313 (6th ed. 1990); see also infra notes 132-46 and accompanying text (offering argument that Hong Kong will cease to be party to Treaty when it can no longer meaningfully assure trial and sentencing under existing Hong Kong law).

131. See infra notes 140-42 and accompanying text (discussing times at which Hong Kong's status as party to Treaty ceases constructively and officially).

132. See Lui I, 939 F. Supp. at 960. The court suggested three ways in which the Secretary of State could exercise discretion not to extradite: "by giving six months' notice ‘through the diplomatic channel,’ pursuant to Article XVI(4) . . . by giving six months' notice of termination of the Treaty only as it applies to Hong Kong, pursuant to Article II(2) . . . or simply by refusing to extradite [pursuant to 18 U.S.C. § 3186] . . . leaving the Treaty entirely intact." Id.


135. See id. at 961; see also infra note 196 and accompanying text (discussing the particularized intent for which Supplementary Treaty was enacted, which did not include any facet of Hong Kong's reversion).
Notwithstanding the strength or veracity of these claims, none has a direct bearing on whether there exists a legally enforceable treaty; they are merely indicative of executive and legislative intent suggesting that the Treaty remain in force.\(^{136}\) A more thorough and searching legal analysis, relying upon the Treaty language itself, would have led the court to conclude that the Treaty was unenforceable in light of the circumstances that confronted Lui.

Article II(1) of the Treaty, when interpreted in accordance with the definition of extradition in *Terlinden*,\(^{137}\) compels the conclusion that a Hong Kong extradition request pursuant to the Treaty cannot be honored unless either the United Kingdom or Hong Kong is responsible for trial, sentencing, and punishment of the relator.\(^{138}\) Although the courts in *Oen Yin-Choy* and *Cheng Na-Yuet* limited the scope of *Terlinden* to exclude incarceration as part of the extradition process for which the demanding nation must be responsible, neither case explicitly excludes trial or sentencing.\(^{139}\) As time passed it became increasingly probable that Hong Kong's allegiance to the United Kingdom would expire prior to the commencement and conclusion of Lui's trial.\(^{140}\) Because Lui's trial will take place under the sovereignty of a state other than the United Kingdom, it is certain that the United Kingdom will not exhibit the requisite responsibility as prescribed in Article II(1).\(^{141}\) Lacking this responsibility as a nation "competent to try and punish" Lui in accordance with *Terlinden*, the court should have declined issuing a certification of extraditability on grounds that Hong Kong no longer fell within the scope of the

---

136. See Lui I, 939 F. Supp. at 960 (claiming that failure of Secretary of State to terminate Treaty was indicative of the Executive's "desire" to maintain treaty relationship with Hong Kong); see also supra notes 110-26 and accompanying text (outlining broad United States policy considerations contained within Policy Act that weigh in favor of Treaty remaining in force).

137. See *Terlinden* v. Ames, 184 U.S. 270, 289 (1902) (defining extradition as "surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory and within territorial jurisdiction of another, which, being competent to try and to punish him, demands his surrender").

138. For the definition provided, see supra notes 98-99 and accompanying text.

139. See supra note 100 and accompanying text (explaining courts' interpretations of *Terlinden* in *Oen Yin-Choy* and *Cheng Na-Yuet*). Although both courts relied upon the *Terlinden* definition, neither court, in their respective discussions of *Terlinden*'s application, explained how or why "incarceration" falls beyond the scope of "punishment," a duty explicitly stated within the definition as part of the requesting nation's responsibility. See *Terlinden*, 184 U.S. at 289; *Oen Yin-Choy* v. Robinson, 858 F.2d 1400, 1404 (9th Cir. 1988); *Chen Na-Yuet* v. Hueston, 734 F. Supp. 988, 992 (S.D. Fla. 1990).


141. See Treaty, supra note 7, art. II(1).
Treaty, pursuant to Article II(1).\textsuperscript{142}

Although the date upon which Hong Kong’s status as an actual party to the Treaty expired on June 30, 1997,\textsuperscript{143} the foregoing analysis demonstrates that expiration constructively occurred at that moment when Hong Kong could no longer guarantee that Lui would be tried and sentenced under its existing laws.\textsuperscript{144} A U.S. court conducting such an analysis of Hong Kong’s status would implicitly be forced to consider the efficiency and speed of Hong Kong’s judicial processes.\textsuperscript{145} Although such an analysis could not be employed to predict with complete certainty whether Lui’s trial and sentencing would conclude prior to July 1, 1997, the court in \textit{Lui I} declined to recognize that the rapid approach of the reversion date rendered this possibility all but unattainable. The court in \textit{Lui II} did not hesitate to suggest that Lui would not be tried under existing Hong Kong law.\textsuperscript{146} Under these circumstances, a certification of extraditability in the first instance should not have issued.

\textbf{B. The Prohibition of Constructive “Re-extradition” to the People’s Republic of China}

The court in \textit{Lui I} indicated that even if Lui were tried under the sovereignty of the PRC, it would not preclude judicial certification of his extraditability.\textsuperscript{147} The court provided two mutually exclusive lines of reasoning in support of this contention. First, the court viewed Lui’s specialty argument as highly analogous to those raised in \textit{Tang Yee-Chun, Oen Yin-Choy, and Cheng Na-Yuet}, which it had previously de-

\textsuperscript{142} See \textit{Terlinden}, 184 U.S. at 289 (defining extradition as one nation’s surrender of individual accused or convicted of crime to territorial jurisdiction of another nation seeking to try or punish that individual).

\textsuperscript{143} See Treaty, supra note 7, art. II(1); see also \textit{Lui Kin-Hong}, 926 F. Supp. at 1189 (holding that any person held pursuant to an extradition request from Hong Kong in the United States after the date of the reversion will have to be released).

\textsuperscript{144} Hypothetically, if the United Kingdom did concede that Lui’s trial or sentencing would not take place prior to July 1, 1997, a court interpreting \textit{Terlinden} consonant with the preceding analysis would no longer have reason to keep Lui incarcerated. Furthermore, it is not stated in the Treaty whether the Judiciary or the Executive Branch would receive such a guarantee or assurance from the United Kingdom that Lui would be tried and sentenced prior to the reversion. See Treaty, supra note 7. The court that certified Lui’s extraditability speculated that assurances of this type would “very likely” be provided to the Executive branch, and further, that the Secretary of State would retain sole discretion to decide whether such assurances were satisfactory. See \textit{In re Extradition of Lui Kin-Hong}, 939 F. Supp. 934, 961 (D. Mass. 1996), \textit{petition for habeas corpus granted} sub nom. Lui Kin-Hong v. United States, 937 F. Supp. 1280 (D. Mass.), rev’d, 110 F.3d 103 (1st Cir. 1997), \textit{stay denied}, 117 S. Ct. 1491 (1997).

\textsuperscript{145} This would be true only if the United Kingdom did not provide assurances relating to Lui Kin-Hong’s trial and sentencing.

\textsuperscript{146} See supra note 140 and accompanying text.

\textsuperscript{147} See \textit{Lui I}, 939 F. Supp. at 962 (rejecting Lui’s argument that the “impending reversion renders him unextraditable”). The court did not purport to decide whether the reversion should preclude Executive determination of extraditability. \textit{See id.}
terminated to be meritless. Second, the court considered specialty arguments to be political and not judicial in nature, and thus appropriate for the consideration by the Secretary of State, not federal judges.

The court deemed Lui's attempt to distinguish Tang Yee-Chun, Oen Yin-Choy, and Cheng Na-Yuet "immaterial" because the relators in those cases, like Lui, faced the prospect of continued incarceration in the post-reversion period. The court's unwillingness to distinguish "incarceration" from "trial" or "sentencing" sheds light on the strained logic that led the court to declare Tang Yee-Chun, Oen Yin-Choy, and Cheng Na-Yuet "directly on point." The petitioner's specialty argument in Tang Yee-Chun rested on the notion that extradition in light of the reversion constituted a de facto extradition to the PRC, a prima facie violation of Article XII. The court responded by deferring judgment to the Secretary of State. By simply refining this argument to implicate possible incarceration in the post-reversion period, the petitioners in Oen Yin-Choy and Cheng Na-Yuet successfully persuaded their respective courts to consider the issue proper for adjudication and decline to leave it for the Secretary of State. Oen Yin-Choy and Cheng Na-Yuet were closer in time to Lui's proceedings, and closer to the reversion date than Tang Yee-Chun. Therefore, it is unclear why the court in Lui I declined to hear the issue.

---

148. See id. at 957.
149. See id. at 958. The court stated that "when the sovereignty of a treaty partner changes, the decision to honor a request for extradition 'is in its nature political and not judicial,' and hence should be decided by the 'political department.'" Id. (quoting Terlinden v. Ames, 184 U.S. 270, 288 (1902)).
150. Id. at 957.
151. Of the three cases that the court declared "directly on point," Cheng Na-Yuet was decided last, on March 27, 1990. See Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 992 (S.D. Fla. 1990). Given the considerable time lapse between the reversion date and these three proceedings, it was extremely unlikely that Petitioners Cheng, Oen, or Tang would have been tried or sentenced under the laws of the PRC. Evidence of this can be seen in that neither Cheng, Oen, nor Tang argued that they might have been subjected to trial or sentencing in the HKSAR. See Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1403-04 (9th Cir. 1988); Cheng Na-Yuet, 734 F. Supp. at 992-94; In re Extradition of Tang, 674 F. Supp. 1058, 1068-69 (S.D.N.Y. 1987). Conversely, this is a central feature of Lui's argument. See Lui I, 939 F. Supp. at 957. These factual differences render the three cases used by the court in Lui I inapplicable to Lui, who awaited a final decision on his extraditability mere weeks from the reversion date.
152. See supra notes 92-95 and accompanying text (discussing Tang's specialty argument).
153. See Oen Yin-Choy, 858 F.2d at 1400 (deciding petitioner's specialty concerns on merits); Cheng Na-Yuet, 734 F. Supp. at 992-94 (deciding petitioner's specialty concerns on merits); Tang, 674 F. Supp. at 1068-69 (deferring judgment on issue of specialty to Secretary of State).
154. See supra notes 92-95 and accompanying text (explaining that petitioners in Oen Yin-Choy and Cheng Na-Yuet raised incarceration as an issue, while Tang did not).
155. One possible reason that may have motivated the court was to "avoid the potential embarrassment to the United States Government of not being able to produce someone who has been ordered to be extradited." Lui Kin-Hong v. United States, 926 F. Supp. 1180, 1186 (D.
Upon his extradition to Hong Kong, Article XII of the Treaty enjoined Hong Kong authorities from surrendering Lui to a third state for the purposes of trial and punishment. Yet this is exactly what Lui faced upon his extradition. The HKSAR is clearly a third state within the terms of the Treaty, and the United Kingdom's relinquishment of control over Lui to the HKSAR is nothing short of a constructive delivery. In addition, because judicial proceedings against Lui were neither commenced nor concluded prior to the reversion, any guarantees offered by the United Kingdom that the HKSAR or the PRC would not charge Lui with additional offenses or apply to him additional penalties would have lacked all sufficiency and authority. Extradition of Lui for trial in the HKSAR was tantamount to a United States extradition to Hong Kong for the purpose of re-extradition by the requesting party to a third state because the HKSAR did not continue as a territory of the United Kingdom. Furthermore, the reversion renders ineffective the United Kingdom's ability to honor the remaining part of the specialty provision, which provides that relators will not face prior charges other than those for which they were extradited. Each part of Article XII thus violated, the request for Lui's extradition should have been refused.

156. See Lui Kin-Hong, 926 F. Supp. at 1204 (noting congressional concern regarding the potential treatment of relators extradited to Hong Kong who may still be incarcerated beyond the reversion).

157. See id. at 1182 (discussing dependence of Hong Kong's power to extradite on its colonial relationship to United Kingdom).

158. Within the circumstances of Lui's proceedings, this is in violation of United States law as it permits extradition to a country with which the United States does not have an treaty. See 18 U.S.C. § 3181 (1994).

159. See Treaty, supra note 7, art. XII.
C. The Reversion’s Effect on Securing Assurances Against Capital Punishment

In concert with the alleged violation of Article XII’s specialty provision, Lui contended that he would be subject to the death penalty under PRC law in violation of the Article IV capital offense exception. This presents two important questions: first, whether Lui’s claim warns of a legitimate violation of Article IV, and second, in what party—Hong Kong, the HKSAR, the United Kingdom, or the PRC—the Treaty vested the authority to issue assurances regarding Lui’s treatment.

The court addressed Lui’s Article IV argument in a footnote, claiming that it merited a response similar to that accorded Lui’s specialty argument. The court reasoned that Tang Yee-Chun, Oen Yin-Choy, and Cheng Na-Yuet supported the notion that extradition of capital crime defendants did not violate Article IV, and concluded that claims implicating Article IV, like specialty claims, should be heard by the Secretary of State.

The court’s cursory analysis failed to recognize that the circumstances surrounding the reversion defeat the possibility for Lui to obtain assurances from any party, regardless of whether they are a party bound by the Treaty. It is assuredly within the PRC’s power to apply the death penalty to Lui’s case as trial or sentencing shall take place after the reversion. Thus, had the United States received assurances from Hong Kong or the United Kingdom that Lui would not be subject to the death penalty, such assurances would have carried little, if any, weight as they would have been effective only until June 30, 1997. Assurances could have been obtained from the PRC.


164. See id.

165. See id. These were the two arguments used by the court to defeat Lui’s specialty claims, see supra notes 147-49 and accompanying text (discussing the nature of Lui’s specialty arguments in greater detail).

166. Upon the reversion, Hong Kong ceased to be a party to the Treaty, and the authority of the United States to extradite individuals to Hong Kong was extinguished completely. See Lui Kin-Hong v. United States, 926 F. Supp. 1180, 1187 (D. Mass.), rev’d, 83 F.3d 528 (1st Cir. 1996); see also Treaty, supra note 7, at 152-94 (lacking terms that might extend the Treaty to the HKSAR).

167. See supra notes 57-60 and accompanying text (suggesting that if China does not formally adopt existing treaty between United States and United Kingdom, China will not be bound by any international agreements protecting Lui from capital punishment).

168. See Joint Declaration, supra note 45, art. 1 (explaining that exercise of United Kingdom’s control over area will cease completely upon reversion date).
on its own behalf, or on behalf of the future HKSAR; however, if such assurances been sought, the communication would be tantamount to an admission by the United States that it was either extraditing Lui to a country with which the United States did not have a treaty, or extraditing him to Hong Kong with full knowledge that he would be subject to Chinese sovereignty in violation of established U.S. extradition law and specialty rights under the Treaty.

Therefore, considering the relative impossibility of Lui obtaining any such assurances, he lacked the protection afforded under Article IV.

Article IV grants the requested country discretion to deny extradition if assurances of just treatment are not provided or are inadequate; Article IV does not state, however, that the requested country must obtain assurances in order to extradite if the relator could face death. Furthermore, Article IV grants the power to the requested country, not the relator, to ask for such assurances. Thus, it is clear that the mere absence of assurances does not violate Article IV, even if the relator might benefit from them. This argument may diminish the merit of Lui’s claims, but it is distinguishable from the circumstance where the requesting party deprives the requested party its right to demand assurances, as was the case throughout Lui’s proceedings. Although this may not be a per se violation of Article IV, there exists plausible legal grounds for a court sensitive to these concerns to deny extradition.

D. The Rule on Non-Inquity, Judicial Deference, and the Need for Senate Ratification

In determining whether the Secretary of State should consider Lui’s reversion defenses, the court relied exclusively on the judi-

169. See supra note 59 and accompanying text (establishing that U.S. law allows international extradition only pursuant to an enforceable extradition treaty).
170. See Treaty, supra note 7, art. IV (permitting requested country to deny extradition request if requesting country does not provide adequate assurances of just treatment).
171. See id.
172. See id. Article IV states explicitly that a requested country "may" request assurances. See id.
173. See id.
174. See supra notes 57-60 and accompanying text.
175. Based on the terms of the Article IV, a per se violation would likely be a demand by the requested country for assurances followed by a failure to provide them. See Treaty, supra note 7, art. IV.
176. Some courts have displayed this sensitivity. See, e.g., Cheng Na-Yuet v. Hueston, 734 F. Supp. 988, 994 (S.D. Fla. 1990) ("The Court is not as convinced as the government that Petitioner’s claim that there exists a possibility that she will receive the death penalty for her crime in Hong Kong sometime after 1997 pushes the notion of what is 'possible' to the limits." (quoting United States Reply Memorandum to Petitioner’s Legal Brief)).
cially-created doctrine known as "the rule of non-inquiry." \textsuperscript{178} Under this rule, evidence introduced regarding the overall unfairness of the requesting country's judicial system is precluded based on the presumption that "countries with which the United States has entered into extradition treaties will treat those extraditions under the treaty fairly." \textsuperscript{179} It is undeniable that upon the Senate's ratification of the Treaty and Supplementary Treaty, the rule would preclude judicial inquiry into the treatment of relators by the United Kingdom and the territories for which it is responsible, \textsuperscript{180} except for those cases involving political crimes. \textsuperscript{181} For those countries with which the United States is a treaty partner, the rule has clear and well reasoned authority and purpose. For those countries with which the United States has yet to commence or even conclude treaty commitments (such as


\textsuperscript{178} \textit{See id.} (finding that courts must, in discharging statutory responsibility to determine extradiability, consider requesting country's motive in seeking extradition, requesting country's willingness and ability to protect the accused, and type of treatment to which requesting country might subject accused if extradition is permitted). The rule of non-inquiry recognizes that some aspects of extradition are legal and call upon the Judiciary Branch, while other aspects are political in nature and require the involvement of the Executive Branch. \textit{See id.} For commentary and discussion analyzing the interpretation of the rule of non-inquiry in federal courts, see Jacques Semmelman, \textit{Federal Courts, The Constitution and the Rule of Non-Inquiry in International Extradition Proceedings}, 76 \textit{CORNELL L. REV.} 1198 (1991).

\textsuperscript{179} Glucksman v. Henkel, 221 U.S. 508, 512 (1911) (stating that court is bound by existence of extradition treaty to assume that lower court's trial was fair); \textit{see also} Scharf, \textit{supra} note 4, at 268 n.46 (providing extensive listing of instances in United States jurisprudence where courts have upheld rule of non-inquiry).

\textsuperscript{180} \textit{See Glucksman}, 221 U.S. at 512 (holding that courts are bound by existence of extradition treaty to assure fair trial).

\textsuperscript{181} Under what is often referred to as the "political offense exception" the courts can refuse to extradite a relator who has committed an offense of a "political character." \textit{See Scharf, supra} note 4, at 257 n.3. Article 3 of Supplementary Treaty currently governs the application of the political offense exception between the United States and the United Kingdom. \textit{See} Supplementary Treaty, \textit{supra} note 7, art. 3. Article 3 provides that:

\textit{[E]xtradition shall not occur if the person sought establishes to a competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of race, religion, nationality, or political opinions, or, that he would, if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race nationality, or political opinions.}

\textit{Id.} art. 3(a) (emphasis added). Article 3(a), however, is limited to an enumerated list of offenses contained within Article 1 that are not regarded as political crimes, including (but not limited to) murder, manslaughter, assault causing grievous bodily harm, kidnapping, abduction, taking a hostage, and offenses using a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device. \textit{Id.} art. 1; \textit{see also} In re Extradition of Smyth, 863 F. Supp. 1137, 1150 (N.D. Cal. 1994) (interpreting Article 3(a) broadly to permit inquiry into various aspects of criminal justice system, including searches, seizures, arrests, detentions, interrogations, and conditions of confinement as well as the proceedings at person's trial); Lui Kin-Hong v. United States, 957 F. Supp. 1280, 1289 (D. Mass.) (recognizing political offense exception as "powerful evidence that the Senate wished the Treaty to apply only to relators who could be tried and punished by a signatory sovereign whose credentials and trust had been weighed and judged by the United States"), \textit{rev'd}, 110 F.3d 103 (1st Cir.), \textit{stay denied}, 117 S. Ct. 1491 (1997).
the PRC or the HKSAR), however, application of the rule becomes far more dubious.182 The two-part process of United States extradition outlined in 18 U.S.C. § 3184 recognizes the special abilities and sensitivities within each branch of government to respond to an extradition request in a manner that best accommodates competing interests.183 These interests are not limited to those of the treaty signatories, related to foreign policy and affairs, but include the interests of the relator, who is afforded protection through the Executive's right to make and terminate treaties, and the Senate's right of ratification.184 The fact that the United States honors only those requests for extradition supported by an enforceable treaty suggests that the rule of non-inquiry should not be applied in Lui's case.185 Lui argued that judicial deference is owed to the Secretary of State only when the Senate has ratified a treaty.186 He augmented this argument with the claim that his extradition would conflict with the will of the political branches under present circumstances.187 In response, the court held that Lui failed to recognize that the treaty pertinent to his proceedings was in fact ratified by the Senate, and that any further appeal for protection beyond that provided by the Senate's ratification must be made to the Secretary of State.188 The court cited three cases in which judgment of extraditability was deferred to the Secretary of State to address the changing sovereignty of a treaty

182. On December 20, 1996, the United States signed an extradition treaty with the government of the nascent HKSAR, which provides for reciprocal post-reversion extradition. See United States v. Lui Kin-Hong, 110 F.3d 103, 109 (1st Cir.), stay denied, 117 S. Ct. 1491 (1997). The treaty was ratified by the Senate in early November 1997. See Simon Beck, U.S. Senate Ratifies SAR Extradition Treaty, S. CHINA MORNING POST, Nov. 17, 1997, at 6. The treaty was ratified with the caveat that relators extradited to the HKSAR could not be subsequently transferred to the Chinese mainland without the consent of the relator. See id. In addition, the Senate ordered the State Department to produce a report one year from the date the treaty went into effect on the accord's progress, the status of relators extradited to the HKSAR, and the state of the HKSAR's judicial system. See id.

183. See supra note 180 and accompanying text (providing examples of courts' previous responses to extradition requests).

184. See id.

185. See Valentine v. United States, 299 U.S. 5, 7-9 (1936) (holding that statute or treaty must counter power to extradite); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (stating that principles of international law recognize no right to extradition apart from treaty); United States v. Rauscher, 119 U.S. 407, 411-414 (1886) (noting that treaties regulate extradition); see also supra note 59 and accompanying text.

186. See U.S. CONST. art. II, § 2, cl. 2 (indicating that ratification of treaties is constitutional right conferred upon Senate).


188. See id. at 959-60.
In each of these cases, the United States was entertaining extradition requests from the successor state on behalf of the state with which the United States had a treaty. These requests were also made subsequent to the transfer of sovereignty. In present terms, this would translate to the PRC, not Hong Kong, requesting the extradition of Lui after the July 1, 1997, reversion date. Assurances under this scenario could be forwarded to the Secretary of State by the PRC, the sovereign conducting the trial, sentencing, and punishment. The facts of Lui I precluded the possibility of assurances being obtained by the Secretary of State on Lui's behalf, which distinguishes it clearly from these earlier cases. This strengthens the argument that the rule of non-inquiry should not be applied, because the only protection that Lui could have sought against the political insensitivity of the Executive rested solely within the courts.

Had the court in Lui I abandoned the rule, it is debatable whether or not the facts presented by the reversion would have prompted a denial of extraditability. Regardless, this determination must follow an analysis of the propriety of the court's decision not to apply the rule. In certain extradition cases between the United States and the United Kingdom in which the efficacy of the Executive to evaluate assurances is at question, the Supplementary Treaty explicitly permits the court to inquire into the fairness of the foreign judicial system.

189. See Terlinden v. Ames, 184 U.S. 270 (1902); United States v. Tuttle (In re Extradition of Tuttle), 966 F.2d 1316 (9th Cir. 1992); In re Thomas, 23 F. Cas. 927 (C.C.S.D.N.Y. 1874) (No. 13,887). Terlinden and Thomas involved relators challenging extradition from the United States to the newly formed Empire of Germany, on the grounds that existing treaties with the Kingdoms of Prussia and Bavaria, respectively, ceased to be enforceable upon their absorption into the new German Empire; the requests specifically rose from authorities of the Empire of Germany, and not from within the prior Kingdoms. See Terlinden, 184 U.S. at 273, 282; Thomas, 23 F. Cas. at 928, 930. Tuttle concerned a relator who challenged his extradition from the United States to the Commonwealth of the Bahamas, which gained its independence from the United Kingdom in 1973, see Tuttle, 966 F.2d at 1317. The operable treaty existed between the United States and the United Kingdom, and the request was presented by the authorities for the Commonwealth of the Bahamas. See id.

190. See supra notes 167-72 and accompanying text (discussing difficulty of obtaining assurances in Lui's case).

191. See supra notes 169-71 and accompanying text.

192. The First Circuit and Magistrate Judge Karol seemed unsympathetic to Lui's concerns regarding the reversion; Chief Judge Tauro, however, would likely have denied certifying Lui's extradition, had he heard Lui's case in the first instance. Compare Lui Kin-Hong v. United States, 83 F.3d 523, 525 (1st Cir. 1996) (holding that reversion with respect to Lui's extradition did not constitute a special circumstance), and Lui I, 999 F. Supp. at 941 (D. Mass. 1996) (certifying Lui's extraditability despite arguments detailing potentially inhumane treatment of relator if extradited), with Lui Kin-Hong v. United States, 926 F. Supp. 1180, 1187 (D. Mass.) (intimating Lui's probable success on appeal in stating there is "substantial likelihood" that his extradition will not take place), rev'd, 83 F.3d 529 (1st Cir. 1996). See Lui Kin-Hong v. United States, 117 S. Ct. 1491 (1997) (Breyer, J., dissenting); United States v. Lui Kin-Hong, 110 F.3d 103 (1st Cir.) (Stahl, J., dissenting), stay denied, 117 S. Ct. 1491 (1997).

193. See Supplementary Treaty, supra note 7, art. 3(a); see also In re Extradition of Smyth, 863
This inquiry is encouraged despite the Senate’s ratification expressing confidence in the United Kingdom’s legal system. Lui faced a situation devoid of the possibility of both receiving assurances and a legislative vote of confidence in the legal system that will try, sentence and punish him. Therefore, policy inherent within the terms of the Treaty does not preclude, but rather promotes judicial departure from the rule of non-inquiry. To the extent that this may be offset by official sources of policy claiming that U.S. law should continue in the HKSAR as it has previously, such claims should not function to relieve the courts from conducting an analysis guided by the protections traditionally afforded any relator in response to an extradition request.

CONCLUSION

_In re Extradition of Lui Kin-Hong_ is a case in which existing law and processes failed to respond adequately under the burden of extraordinary circumstance. One need look only so far as the purposes underlying our rather intricate extradition processes reflected in the

F. Supp. 1137, 1150 (N.D. Cal. 1994) (abandoning rule of non-inquiry and denying request for certification of extraditability after conducting extensive inquiry regarding the treatment that individual may receive if extradited); _In re Extradition of Howard_, 791 F. Supp. 31, 35 (D. Mass. 1992) (affirming lower court’s certification of extraditability after determining that individual had not met burden of showing sufficient prejudice would exist at his foreign trial if extradited); _In re Extradition of McMullen_, 769 F. Supp. 1278, 1295 (S.D.N.Y. 1991) (reversing lower court’s certification of extraditability on grounds that implicated issues concerning fairness of requesting country’s foreign judicial system); _supra_ note 182 and accompanying text (discussing the impact of Article 3(a) on the political offense exception).

194. The signing of the Supplementary Treaty between the United States and the United Kingdom was a direct response to three “recent cases [in which] the federal courts . . . denied requests by the United Kingdom for the extradition of the Provisional Irish Republican Army (IRA) accused or convicted of committing acts of violence on the grounds that offenses were political.” _Scharf_, _supra_ note 4, at 262 (citing Supplementary Treaty, U.S.-U.K., S. EXEC. REP. NO. 17, 99th Cong., at 2 (1986)). The original version of the Supplementary Treaty would have almost completely abolished the political offense exception. Congress adopted Article 3(a), and in particular the language that allows appeal to a “competent judicial authority,” as a compromise to “mollify critics who questioned the fairness” of the United Kingdom’s judicial system. _See id._ at 264. The legislative history indicates that the adoption of Article 3(a) was motivated in part to “circumvent an uncooperative executive,” and to convey to the judiciary the Senate’s overall feeling that “the standard of justice in Northern Ireland is unacceptable . . . until [it is] changed to reflect basic safeguards for the individual.” _Id._ at 267. Thus, the Lui I court’s inference that the Supplemental Treaty’s failure to address the reversion or its effects on those extradited and sentenced evinced the Senate’s confidence in the Secretary of State to exercise Executive discretion, _see Lui I_, 939 F. Supp. at 961, may not be entirely well-founded.

195. _See Lui I_, 939 F. Supp. at 960 (maintaining that Policy Act is a “powerful statement by Congress that the Treaty shall remain in effect beyond reversion”); _see also supra_ notes 106-24 and accompanying text (discussing Policy Act, and its impact on Lui I).

196. Novel as the circumstances facing the court in _Lui I_ may have been, Magistrate Judge Margolis of the United States District Court of Connecticut rendered a decision dealing with facts nearly identical to _Lui I_, 968 F. Supp. 791 (1997). In certifying the extraditability of Cheung, the court relied extensively on the decision of the First Circuit in _Lui III_.

1997] IN RE EXTRADITION OF LUI KIN-HONG 219
delicate balance of authority conferred to both our Executive and Judiciary and the well-established rule from *Terlinden* and its progeny, to see that Lui should not have been extradited. At the time of Lui’s extradition, there did not exist an enforceable treaty with the sovereign that would try and punish him; moreover, the courts presiding over Lui were without any expression from the U.S. Senate regarding its level of confidence in the PRC’s legal processes. Denial of Lui’s extradition would have required neither a broad reading of applicable case law, nor a departure from the procedural mandates in 18 U.S.C. § 3184 et seq. To suggest that the courts responsible for Lui’s certification of extraditability improperly availed themselves to the pervasive U.S. political climate regarding United States—PRC relations could be supported by nothing more than mere speculation. This notwithstanding, the following conclusion remains incontrovertible. The issues identified in this Note associated with the Judiciary’s seemingly enthusiastic deference to the Executive, apparent throughout Lui’s proceedings, should serve to instruct future courts that the integrity of the judicial power in an extradition matter must be preserved. Equally important, it remains critical that our courts exercise utmost caution when deciding to embrace legal formalism at the expense of protections embedded in our law’s logical and persuasive purposes.