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Note

International Extradition, the Principle of Specialty, and Effective Treaty Enforcement

Kenneth E. Levitt

On September 2, 1985, a grand jury indicted Joel Davis for mail fraud, interstate transportation in aid of racketeering, conspiracy to murder an Internal Revenue Service (IRS) agent, and tax fraud.¹ Immediately after the indictment of his co-conspirator, but before his own indictment, Davis moved to Israel.² At the request of the United States government, Israel extradited Davis to the United States.³ The charges listed in the extradition order were mail fraud, arson (the Israeli court's interpretation of the racketeering charge), and conspiracy to murder an IRS agent.⁴ The extradition order did not list the charge of tax fraud.⁵

Davis was convicted of mail fraud and racketeering and pleaded guilty to conspiracy to murder.⁶ Although he was not convicted of tax fraud, the sentencing memorandum which the judge considered did mention the tax fraud charges.⁷ Davis appealed, contending that the judge had taken the tax charges into account in setting the sentence.⁸ He argued that because Israel did not extradite him to face trial for tax fraud, the United States could not punish him for tax fraud.⁹

1. *United States v. Davis*, 954 F.2d 182, 183-84 (4th Cir. 1992). The charges of mail fraud and racketeering were based on an episode in which Davis fraudulently collected insurance proceeds after hiring an arsonist to burn Davis's summer bungalow colony. *Id.* at 184. The IRS agent Davis was conspiring to kill had discovered Davis's arson scheme and illegal accounting practices. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 186.

8. *Id.*

9. *Id.*

Because extradition¹⁰ is not a part of customary international law,¹¹ a state must extradite only when obliged by treaty to do so.¹² Under the "principle of specialty,"¹³ a state which has received a criminal defendant¹⁴ pursuant to an extradition treaty¹⁵ may try the defendant only for those offenses for

10. Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender." *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

The requirement that the requesting state have jurisdiction to prescribe and to adjudicate is most easily and directly satisfied when the offense was committed in the requesting state. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 cmt. d (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

11. 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 319 (2d rev. ed. 1987). Under customary international law, a duty to extradite exists only for some international crimes. *Id.* at 32. Examples include war crimes, crimes against peace, and crimes against humanity. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 315 & n.97 (4th ed. 1990).

12. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933); see also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 475 cmt. a (stating that extradition is not required by customary international law). As early as 1840, a majority of Supreme Court justices recognized that there is no duty to extradite except as established by treaty. Both Chief Justice Taney and Justice Thompson indicated that there is no obligation to surrender an individual in the absence of a treaty. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (Taney, C.J., plurality opinion); *id.* at 582-83 (Thompson, J., separate opinion).

Although there is no duty to extradite in the absence of a treaty, except for certain international crimes, see *supra* note 11, other legal bases for extradition include reciprocity, comity, and national legislation. 1 BASSIOUNI, *supra* note 11, at 40. Treaties and international law regarding some crimes also serve as legal bases for extradition. *Id.* at 319. In the United States, defendants may be extradited only pursuant to a treaty. 18 U.S.C. §§ 3181, 3184 (1988); see also *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936) (stating that the judicial and executive branches cannot extradite without authority expressly conferred by treaty or statute).

13. Specialty is also spelled "speciality."

14. Criminal defendants subject to extradition proceedings are often termed "fugitives." Defendants subject to extradition proceedings may be in custody, in flight, or living openly in a known location while resisting the extradition request. See John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1455-56 (1988). Therefore, this Note uses the general term "defendant."

15. As a matter of domestic law, the principle of specialty also applies to extradition not granted pursuant to a treaty. *Fiocconi v. Attorney Gen. of the United States*, 462 F.2d 475, 479-80 (2d Cir.) (holding that specialty applies to proceedings against a defendant whose extradition was an act of comity of the surrendering state), *cert. denied*, 409 U.S. 1059 (1972); see also *United States v. Rauscher*, 119 U.S. 407, 419 (1886) (explaining that a surrendering state which extradites in the absence of a treaty could not be expected to deliver the defendant without some limitation on the requesting state's authority to prosecute the defendant); cf. *Johnson v. Browne*, 205 U.S. 309, 320 (1907) (holding

which he or she was extradited.¹⁶ Most extradition treaty viola-

that specialty applies to proceedings conducted pursuant to an extradition treaty, even if the treaty does not explicitly incorporate the principle of specialty). *But cf.* *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (holding that specialty does not apply when the defendant was not delivered to the U.S. authorities after formal extradition).

Because this Note addresses whether defendants should have standing in a United States court to protest a violation of the principle of specialty, it deals almost exclusively with cases in which the United States is the requesting state. In a small number of cases, however, defendants have attempted to bring challenges based on specialty in United States courts when the United States was the surrendering state. These claims have arisen both before and after the defendants were extradited.

If the United States has not yet extradited the defendant, by definition the principle of specialty, which restricts the prosecutorial latitude of the requesting state, has not been violated. A ruling by a court of the surrendering state which attempts to restrict the courts of the requesting state is irrelevant. *See Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.) (explaining that such rulings "can only be advisory in character"), *cert. dismissed*, 414 U.S. 884 (1973). The most a court can do is ensure that the offenses are extraditable. *See infra* note 27 (explaining the requirement of extraditability).

If the United States has already extradited the defendant, the executive branch is responsible for ensuring that the requesting state complies with the principle of specialty. 4 MICHAEL ABBELL & BRUNO A. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE* § 13-2-2 (1990). Domestic United States law will not create rights which defendants can enforce in the courts of the requesting state, and defendants cannot protest a violation of specialty by the requesting state in a United States court. *See Berenguer v. Vance*, 473 F. Supp. 1195, 1198 (D.D.C. 1979).

Of course, in cases in which the United States is the surrendering state, the defendant may still be able to protest a violation of specialty by the requesting state in that state's courts, depending on that state's laws.

16. Defendants may be tried only for the offenses with which they were charged in their extradition proceedings until they have had time to return to the states from which they were extradited. *Rauscher*, 119 U.S. at 430. "The 'principle of specialty' reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government, especially for political crimes." *Fiocconi*, 462 F.2d at 481. The principle of specialty also forbids unauthorized re-extradition from the requesting state to a third state, *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220, 223 (2d Cir. 1934), and limits the penalty which can be imposed. *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 10, § 477 cmt. f (death penalty); *see also In re Reinitz*, 39 F. 204, 208-09 (C.C.S.D.N.Y. 1889) (holding that specialty protected the defendant, who had been arrested pending trial of the action, from civil suit). *But cf.* *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988) (holding that even if specialty precluded civil service of process, an order denying dismissal on the grounds of immunity was not immediately appealable). *See generally* *RESTATEMENT OF FOREIGN RELATIONS*, *supra* note 10, §§ 475-78 (discussing specialty); 4 ABBELL & RISTAU, *supra* note 15, § 13-6-2 (same); 1 BASSIOUNI, *supra* note 11, at 359-71 (same); MANUEL R. GARCÍA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* 126-33 (1956) (same); Jonathan George, Note, *Toward a More Principled Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309 (1979) (discussing the standing of individuals to raise specialty challenges); Christopher J. Morvillo,

tions claimed by individuals are for violations of the principle of specialty.

In Davis's case, the United States would have violated the principle of specialty and hence the treaty by trying or punishing Davis for any crimes other than those for which he was extradited.¹⁷ If Israel had protested the treaty violation, the United States, as a matter of international law, would have been obliged to comply with the treaty.¹⁸

This Note addresses whether individuals have standing in United States courts to protest violations of extradition treaties and seek dismissal of all charges other than those for which they were extradited. It also discusses the standard courts should use to determine whether specialty has been violated. Two doctrines are relevant. The positivist doctrine dictates that only the ratifying states themselves may enforce the treaty obligations unless the states have explicitly agreed otherwise. A natural law approach, on the other hand, views the treaty rights as inuring both to the surrendering state and to the individual.

This Note attempts to bridge the conceptual gap between the two doctrines. Part I explores the principle of specialty and the bases for the doctrine. Part II critiques the reasoning of court opinions addressing a defendant's standing to protest violations of the specialty doctrine. It also discusses the standards used by courts for determining compliance with specialty. Part

Note, *Individual Rights and the Doctrine of Specialty: The Deterioration of United States v. Rauscher*, 14 *FORDHAM INT'L L.J.* 987 (1991) (same).

17. The extradition treaty between the United States and Israel specifies that:

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

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;
2. He has not left the territory of the requesting Party within 60 days after being free to do so; or
3. The requested Party has consented to his detention, trial, punishment or extradition to a third State for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

Convention on Extradition, Dec. 10, 1962, U.S.-Isr., art. XIII, 14 *U.S.T.* 1707, 1712.

18. The *Davis* court declined to decide the specialty issue, holding instead that Davis had waived the defense by failing to raise it. *United States v. Davis*, 954 *F.2d* 182, 186-87 (4th Cir. 1992).

III proposes a framework for determining whether defendants have standing and whether specialty has been violated. Part III maintains that extradition will function effectively only if courts treat specialty as a right of both defendants and surrendering states. This Note argues that even if individuals are objects, not subjects, of international law,¹⁹ allowing individuals to enforce the agreements made by the states is the best way to ensure that international law is enforced.

I. INTERNATIONAL LAW AND EXTRADITION

A. THE INDIVIDUAL IN INTERNATIONAL LAW

Courts disagree about the theoretical position of individuals in international law. Courts that take a narrow view of the rights and obligations arising from a treaty are unlikely to find that states or individuals have rights or protections other than those listed in the treaty. Hence, under this view, when the terms of a treaty do not explicitly give individuals enforcement power, individuals lack standing. This is the positivist approach. On the other hand, courts that view treaties as embodying a comprehensive set of rights and obligations flowing to all involved parties likely will allow an individual to enforce the treaty's terms. This is a natural law approach.

The positivist doctrine derives from the old, dominant tenet of absolute state sovereignty.²⁰ It maintains that all international law must be positive law, created either by treaty or custom, and that international law applies only to states.²¹ The positivist doctrine stands for the proposition that individuals are objects, not subjects, of international law and thus cannot derive rights directly from it.²² Of course, states could create a

19. Unlike an "object," a "subject" of international law has an international legal personality: A subject has international rights and duties and the ability to operate on the international level. Although individuals, as objects of international law, may be the beneficiaries of international law, international law historically has not applied to them. See BROWNLIE, *supra* note 11, at 58-70; D.W. GREIG, INTERNATIONAL LAW 115-17 (2d ed. 1976).

20. See GARCÍA-MORA, *supra* note 16, at 7.

21. See J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 23-24 (10th ed. 1989).

22. See GARCÍA-MORA, *supra* note 16, at 7. Positive law directly results from treaties and customary international law. The positivist doctrine became dominant in the 18th century. Some positivists deny the existence of a natural law of nations. 1 L. OPPENHEIM, INTERNATIONAL LAW § 56 (H. Lauterpacht ed., 8th ed. 1955). The influence of the positivist doctrine on international law is currently on the decline. Karen Parker & Lyn B. Neylon, *Jus Cogens*:

positive rule which granted individuals enforceable rights.²³

Natural law is the converse of positive law. It views humans as reasonable beings guided by universal senses of justice.²⁴ Naturalists maintain that there is no positive law of nations because all international law is but a part of natural law.²⁵ Under a natural law approach, individuals are subjects of international law.²⁶ Hence, under natural law, individuals have enforceable rights.

B. SPECIALTY

In general, extradition has five substantive elements: reciprocity, double criminality, extraditable offenses, specialty, and non-inquiry.²⁷ The principle of specialty allows requesting

Compelling the Law of Human Rights, 12 HASTINGS INT'L & COMP. L. REV. 411, 422 (1989).

23. The positivist doctrine posits that a state may limit its absolute sovereignty. GREIG, *supra* note 19, at 4. For example, some recent international agreements grant standing to individuals to protest human rights violations. See STARKE, *supra* note 21, at 63-65.

Because the duty to extradite is not part of customary international law, states that adopt a positivist view maintain that they are not obliged to comply with any procedures other than those in the applicable treaty. As a matter of international law, extradition procedures regarded as customary international law do not create rights enforceable by defendants. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 50-51 (1974). There are no aspects of extradition law to which defendants may insist that either the requesting or surrendering states adhere. *Id.* Hence, defendants do not, as a matter of customary international law, have standing to protest violations of specialty.

24. See GERHARD VON GLAHN, LAW AMONG NATIONS 26 (6th rev. ed. 1992). Natural law, which was initially closely intertwined with theology and was dominant in the 17th and 18th centuries, has been gaining followers in the 20th century. See STARKE, *supra* note 21, at 22-23; VON GLAHN, *supra*, at 33 (referring to "principles of justice and general principles of law"). In the 19th and 20th centuries, secular natural law became predominant over ecclesiastical natural law. Parker & Neylon, *supra* note 22, at 421.

25. See 1 OPPENHEIM, *supra* note 22, § 55.

26. GARCÍA-MORA, *supra* note 16, at 13-14.

27. 1 BASSIOUNI, *supra* note 11, at 320. These "stringent protections have been included in international extradition treaties . . . because systems of justice may vary widely between treaty signatories." Brief for Amicus Curiae Lawyers Committee for Human Rights at 9, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam) (No. 90-50459), *cert. granted*, 112 S. Ct. 857 (1992).

Reciprocity is either similarity between the processes of the two states or mutual recognition of their respective processes. 1 BASSIOUNI, *supra* note 11, at 321. It is a precondition to extradition. *Id.* at 324.

The rule of double criminality requires that the offense charged be criminal under the laws of both the surrendering and requesting states. *Id.* The name and "scope of liability" need not be the same for the two offenses, but

states to try or punish defendants only for the offenses for

the "particular act charged" must be "criminal in both jurisdictions." *Collins v. Loisel*, 259 U.S. 309, 312 (1922). Thus, the surrendering state need not extradite a defendant if it does not consider the conduct in question to have been criminal. 1 BASSIOUNI, *supra* note 11, at 325-26. Because courts generally attempt to construe the act in question as criminal, however, this rule has been so weakened that courts consider the requirement to be met if the offense with which the requesting state intends to charge the defendant is roughly the same as an offense in the surrendering state. See *Factor v. Laubenhimer*, 290 U.S. 276, 293 (1933) (holding that although the conduct was not criminal in the state in which the defendant was found, the fact that the conduct was criminal in other states indicated that the nation's jurisprudence recognized the conduct as criminal, and stating that extradition treaties "should be liberally construed"); cf. *McElvy v. Civiletti*, 523 F. Supp. 42, 48 (S.D. Fla. 1981) ("[C]ourts must approach challenges to extradition with a view towards finding the offenses within the treaty."); see also *Kester*, *supra* note 14, at 1462 n.116 (listing marginal cases in which the courts found offenses sufficiently similar to satisfy the double criminality requirement).

The requirement of extraditable offenses ensures that the offense for which the defendant is extradited is itself listed in the extradition treaty. See *United States v. Rauscher*, 119 U.S. 407, 430 (1886); *Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986). If the extradition is pursuant to a treaty, the offense must either be listed in the treaty or derivable from the specified formula as extraditable. 1 BASSIOUNI, *supra* note 11, at 328. Extraditable offenses are generally serious crimes, i.e., those punishable by at least one year in prison. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 475 cmt. c. Although the requirement that the offense be extraditable is separate from that of double criminality, many courts blur the distinction. *Kester*, *supra* note 14, at 1462-63. Courts also sometimes confuse the distinct requirements of extraditable offenses and specialty. In *Davis's* case the requirement of extraditable offenses and the principle of specialty would provide him with separate arguments. *Davis* would raise the argument based on the requirement of extraditable offenses in the surrendering state's courts, but he would raise the specialty argument in the requesting state's courts. First, *Davis* could argue that tax fraud is not an extraditable offense within the terms of the extradition treaty with Israel. *Davis* would make this argument during Israel's extradition proceedings because United States courts will probably not reconsider the surrendering state's decision that the offense is extraditable. *United States v. Van Cauwenberghe*, 827 F.2d 424, 429 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *McGann v. United States Bd. of Parole*, 488 F.2d 39, 40 (3d Cir. 1973) (*per curiam*), *cert. denied*, 416 U.S. 958 (1974). If the Israeli courts agreed that tax fraud does not fall within the list of extraditable offenses, *Davis* would not be extradited for tax fraud and specialty would preclude the United States, as the requesting state, from trying or punishing him for tax fraud; if *Davis* lost the argument, and was extradited for tax fraud, neither doctrine would prevent the United States from trying him for tax fraud.

If *Davis* was not extradited to be charged with tax fraud, it is irrelevant whether tax fraud is an extraditable offense; specialty prevents the requesting state from trying or punishing him for it. *Davis* might be protected by neither principle (tax fraud is both extraditable and listed in the extradition order), only one (either the surrendering state holds tax fraud not extraditable and the requesting state does not subsequently attempt to try or punish him for it, or if tax fraud is extraditable but not listed in the extradition order, specialty

which they were extradited. In addition to denying extradition if one of the substantive requirements is absent, courts deny extradition based on limited defenses and exemptions.²⁸

After a long period of dormancy, there has been a sudden surge of specialty claims raised by defendants. This surge coincides with a sharp rise in the number of extradition requests made by and of the United States.²⁹ The United States Supreme Court has not decided an issue relating to the principle of specialty since before World War I,³⁰ and between then and the early 1980s only scattered specialty cases arose in the federal courts. Since 1980, however, there has been a large number of specialty claims, and for many of the circuits the issue of whether defendants have standing to enforce the extra-

precludes the requesting state from trying or punishing him for it) or both (the surrendering state determines that tax fraud is not extraditable, and specialty prevents a subsequent attempt by requesting state to try or punish him for tax fraud anyway).

The rule of non-inquiry precludes inquiry by the surrendering state into the criminal procedures of the requesting state. 1 BASSIUNI, *supra* note 11, at 372; see *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911). No court has ever denied extradition for reasons contrary to the rule of non-inquiry. See *Arnbjornsdottir-Mendler v. United States*, 721 F.2d 679, 683 (9th Cir. 1983) (explaining that the evaluation of conditions in the requesting state is a matter solely for the executive branch). *But see* *Kester*, *supra* note 14, at 1478-82 (asserting that this exception is widely acknowledged and that a court would likely invoke it if the State and Justice Departments were to present a case with the appropriate fact situation).

28. Broadly stated, these defenses and exemptions include grounds relating to: the offense, e.g., when the offense is a political crime; the defendant, e.g., when the defendant has immunity; the procedure, e.g., when the defendant has been tried in absentia or would be subject to double jeopardy; the penalty, e.g., when the requesting state might subject the defendant to the death penalty and the surrendering state objects to the death penalty; and expected human rights violations by the requesting state. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 476; 1 BASSIUNI, *supra* note 11, at 381-496.

In the 18th and early 19th centuries, most defendants were political revolutionaries. By the late 19th century, it was thought inhumane not to grant asylum to political offenders. Most defendants at this time were common criminals. VON GLAHN, *supra* note 24, at 286. The rise of terrorism, however, has led to recent efforts to narrow the definition of political offenses. *Id.* at 299.

29. During the 1960s, the United States made and received about 20 extradition requests per year. 4 ABBELL & RISTAU, *supra* note 15, § 13-1-2. By 1978, the number had reached 100; four years later it was 338. *Id.* In 1987, 572 requests were made and received by the United States. *Id.*

30. The last opinion in which the Court decided an issue of specialty was *Collins v. O'Neil*, 214 U.S. 113 (1909). The Court summarily reaffirmed this holding in *Collins v. Johnston*, 237 U.S. 502, 511-12 (1915). In 1987, the Court assumed without deciding that specialty forbade civil service of process on an extradited defendant. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 525 (1988).

dition treaty has been a question of first impression. The resulting body of federal common law is internally inconsistent and erratically enforced.

1. Rationales Underlying Specialty

The primary rationale underlying the principle of specialty is that surrendering states should not be induced to return an individual under false pretenses.³¹ Under the principle of specialty, surrendering states may examine the substance of each charge against the defendant, and may choose to grant extradition for only some of the offenses listed in the extradition request.³² Without the principle of specialty, surrendering states would have no control over the charges for which requesting states prosecute defendants, leaving the defendants at the whim of the requesting state.³³ For example, requesting states would be able to prosecute defendants for political offenses although the extradition request listed only common crimes.³⁴

By ensuring that the processes of the surrendering state are not abused, specialty protects the surrendering state's sovereignty.³⁵ Although defendants may benefit from a successful challenge to a violation of specialty, the accepted rule is that specialty protects surrendering states, not defendants.³⁶

31. 1 BASSIUNI, *supra* note 11, at 360.

32. 4 ABBELL & RISTAU, *supra* note 15, § 13-6-2; *see, e.g.*, Berenguer v. Vance, 473 F. Supp. 1195, 1196 (D.D.C. 1979) (U.S. State Department permitted Italy to proceed on only some of the changes for which it had requested an expansion to the extradition order). States often grant extradition for only some of the offenses listed in the extradition request. 4 ABBELL & RISTAU, *supra* note 15, § 13-6-2.

33. *See* 1 BASSIUNI, *supra* note 11, at 360. The principle of specialty enables the surrendering state to examine the entire list of offenses with which the defendant may be charged in order to ensure that the requesting state complies with the requirements of double criminality and extraditable offenses. *Id.*; *see supra* note 27 (defining these two requirements).

34. One of the powers specialty provides surrendering states is the ability to give up individuals with the assurance that they will be tried only for common crimes, not political offenses. *See* GARCÍA-MORA, *supra* note 16, at 126. *But cf.* Kester, *supra* note 14, at 1476 (arguing that the political offense exception is glamorous but seldom used).

35. Some courts have held that the principle of specialty applies only when the surrendering state has formally granted extradition. *E.g.*, United States v. DiTommaso, 817 F.2d 201, 212 (2d Cir. 1987); United States v. Vreeken, 603 F. Supp. 715, 723 (D. Utah 1984), *aff'd on other grounds*, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

36. *See* GARCÍA-MORA, *supra* note 16, at 129-30.

2. Exceptions and Limitations to the Principle of Specialty

Despite its unequivocal formulation, several exceptions narrow the scope of the principle of specialty. Requesting states may be able to try defendants for lesser included offenses established by the evidence supporting the defendants' extradition. Provided that the requesting states meet the other substantive requirements, they may also try defendants for comparable crimes that are established by the facts in the original request.³⁷ In addition, specialty does not apply to crimes committed after the extradition.³⁸ Requesting states may also try defendants for crimes other than those for which they were extradited if they fail to leave the country when given the opportunity to do so³⁹ or voluntarily return to it.⁴⁰

A major limitation on the application of the principle of specialty is waiver by the surrendering state. Most extradition treaties negotiated by the United States since 1960 allow the surrendering state to expand the extradition order, thus permitting requesting states to try defendants for crimes other than those for which they originally were extradited.⁴¹ Courts have permitted surrendering states to waive specialty even absent such an exception in the treaty.⁴²

The law regarding waivers by individual defendants remains unclear. Some authors argue that allowing defendants to waive the application of the principle of specialty jeopardizes the protections afforded to the surrendering state.⁴³ In many

37. 1 BASSIOUNI, *supra* note 11, at 364; *see also* Decorte v. Société Anonyme Groupe d' Assurances Nedlloyd, 69 I.L.R. 216, 217-18 (Belg. Ct. of Cassation 1971) (holding that requesting states may charge defendants with offenses not in the extradition request if the facts remain the same and the new offense is listed in the treaty).

38. *Collins v. O'Neil*, 214 U.S. 113, 123 (1909).

39. *United States v. Rauscher*, 119 U.S. 407, 424 (1886); *see* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 477 cmt. e (explaining that treaties generally specify the period, such as 45 days, during which defendants may leave the state; specialty no longer protects defendants after the expiration of this period).

40. *See* 4 ABBELL & RISTAU, *supra* note 15, § 13-2-4; *cf.* *Cosgrove v. Winney*, 174 U.S. 64, 68 (1899) (holding that specialty protected a defendant who returned from Canada for trial after being released on bail).

41. *See* 4 ABBELL & RISTAU, *supra* note 15, § 13-2-4. For an example, *see supra* note 17 (excerpting the U.S.-Israeli extradition treaty).

42. *E.g.*, *United States v. Najohn*, 785 F.2d 1420, 1422-23 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 1009 (1986); *United States ex rel. Donnelly v. Mulligan*, 76 F.2d 511, 512 (2d Cir. 1935) (explaining that the surrendering state has complete discretion to withhold asylum for the purpose of re-extradition).

43. *See, e.g.*, GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 107 (1991)

instances, however, courts have allowed defendants to waive the principle of specialty, even over the surrendering state's objections.⁴⁴ These courts' opinions are inconsistent with the positivist notion that specialty protects the surrendering state.⁴⁵

C. EXTRADITION LAW

Extradition law includes both congressional enactments and extradition treaties. Extradition treaties resemble other United States treaties in formation and effect.⁴⁶ Because they are self-executing,⁴⁷ the judiciary must enforce them as law.⁴⁸

Most United States extradition treaties currently in force,

(arguing that, while allowing defendants to waive violations of the principle of specialty "may be a sensible progression, it does seem to go against the spirit of the principle of specialty which is to treat it as part of the bargain between the states").

44. GARCÍA-MORA, *supra* note 16, at 128-30. Courts that have allowed defendants to waive a violation, however, have not treated the principle of specialty as granting the defendants rights. *Id.* at 130-31.

45. One court noted:

And again we are gravely told that Mr. Coy has released the government from this solemn declaration by a waiver. Was Mr. Coy a part of the treaty stipulations with Mexico? Is Mr. Coy able to bind and unbind the government from its duties and obligations towards the other nations by any act that he can perform? The statement of the proposition discloses its absurdity.

Ex parte Coy, 32 F. 911, 917 (W.D. Tex. 1887).

46. Extradition treaties are typically bilateral. *See* 1 BASSIOUNI, *supra* note 11, at 25. The United States has 101 bilateral treaties with foreign countries. 4 ABBELL & RISTAU, *supra* note 15, § 13-2-3. Most other nations also rely on bilateral extradition treaties. *See* 1 BASSIOUNI, *supra* note 11, at 31. Like other United States treaties, extradition treaties are made by the President with the advice and consent of the Senate. U.S. CONST. art. II, § 2, cl. 2.

47. Treaties are either executory (non-self-executing) or self-executing. An executory treaty has been ratified, but requires implementing legislation before it can take effect as domestic law. A self-executing treaty takes effect as domestic law upon ratification. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 6.7 (4th ed. 1986). Extradition treaties are self-executing. 1 BASSIOUNI, *supra* note 11, at 40.

48. Extradition treaties are on a par with statutes and the Constitution as the supreme law of the land. *See* U.S. CONST. art. VI, cl. 2. The judiciary must enforce self-executing treaties in the same manner as it enforces the Constitution and statutes. A treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936) (quoting *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829)). That extradition treaties are self-executing, however, does not resolve the issue of whether defendants have standing. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 111 cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); *see also* *Cook v. United States*, 288 U.S. 102, 121-22 (1933); *Head Money Cases*, 112 U.S. 580, 598-99 (1884).

and all negotiated within the last one hundred years, incorporate the principle of specialty.⁴⁹ None affirmatively grants standing to defendants.⁵⁰

Congress has not expressly stated whether criminal defendants have standing to protest a violation of the principle of specialty. Federal extradition statutes⁵¹ do not invoke the principle of specialty by name, but appear to adopt its precepts regardless of whether the United States is the requesting or surrendering state.⁵² Courts disagree about whether these provisions grant standing to defendants to protest violations of specialty.⁵³

49. All extradition treaties negotiated since *United States v. Rauscher*, 119 U.S. 407 (1886), have included provisions regarding the principle of specialty. 4 ABBELL & RISTAU, *supra* note 15, § 13-2-4. Most extradition treaties negotiated before *Rauscher*, however, did not expressly incorporate the principle of specialty. *Id.* § 13-2-4.

50. While none grants standing, seven treaties negotiated around the turn of the century allow defendants to waive violations of the principle of specialty. *E.g.*, Treaty on Extradition, Apr. 21, 1900, U.S.-Bol., art. VIII, 32 Stat. 1857, 1861 ("No person surrendered by either of the high contracting parties to the other shall, without his consent, freely granted and publicly declared by him, be triable or tried or be punished for any crime or offense committed prior to his extradition, other than that for which he was delivered up . . .").

51. 18 U.S.C. §§ 3181-3195 (1988).

52. For example, Congress has authorized the Secretary of State to order the extradition of a person to another state to stand trial for the charges for which extradition was granted. *See* 18 U.S.C. § 3186 (1988). This provision allows the Secretary of State to extradite only for offenses certified by the extradition magistrate. 4 ABBELL & RISTAU, *supra* note 15, § 13-2-2.

After a criminal defendant has been extradited from the United States, only the Secretary of State has the authority to ensure that the requesting state complies with the treaty requirements, including the principle of specialty. *Id.* § 13-3-3. The State Department has often demanded that the requesting state abide by the principle of specialty. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 10, § 477, rep. note 2.

In addition, when the United States is the requesting state, Congress has given the President discretionary power to protect defendants while they are being tried for the offenses for which extradition was granted. *See* 18 U.S.C. § 3192 (1988).

53. In *Rauscher*, the Court held that the predecessors to the current statutes granted standing to the defendant. 119 U.S. at 423-24. The Court stated that extradition statutes and the principle of specialty are "a congressional construction of the purpose and meaning of extradition treaties" and are "conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such [extradition] proceedings." *Id.* Justice Gray based his concurrence solely on his belief that the statutes granted the protections of specialty to the defendant. *See id.* at 433 (Gray, J., concurring). Subsequent Supreme Court cases are in accord. *See Johnson v. Browne*, 205 U.S. 309, 317-18 (1907); *Cosgrove v. Winney*, 174 U.S. 64, 68 (1898) (holding that "[t]he treaty and statutes secured to" the defendant the benefits of specialty).

The Second Circuit followed this position in 1934, stating that Congress

II. CRITIQUE OF CURRENT APPROACHES

The question of whether criminal defendants have standing to protest a violation of the principle of specialty has split the federal courts. Some courts have allowed the United States to prosecute defendants despite violations of the principle of specialty. These courts have held either that the surrendering state did not protest or that the violations were overly technical.⁵⁴ Others have avoided the standing issue entirely by acknowledging the controversy and then deciding against the defendant on the merits.⁵⁵

The Second, Fifth, and Sixth Circuits have held that individuals do not have standing to bring claims under the principle

had specifically granted the protection of specialty to the defendant. *United States ex rel. Donnelly v. Mulligan*, 74 F.2d 220, 222 (2d Cir. 1934). However, the Second Circuit later backed down from this unequivocal language, stating that the statutes merely indicate Congress's acknowledgment that the principle of specialty applies when the surrendering state would object to its violation. *Fiocconi v. Attorney Gen. of the United States*, 462 F.2d 475, 482 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

54. *See United States v. Jetter*, 722 F.2d 371 (8th Cir. 1983) (holding that the defendant's conviction did not violate specialty because "the Costa Rican judge apparently inadvertently failed to mention the word 'conspiracy' in his ruling"); *United States v. Rossi*, 545 F.2d 814, 815 (2d Cir. 1976) (*per curiam*) (upholding a conviction for trafficking narcotics over an eight-year period, although the extradition order was granted only for a four-year period, on the grounds that the surrendering state would not object), *cert. denied*, 430 U.S. 907 (1977); *Fiocconi*, 462 F.2d at 476-77 (upholding a conviction for receiving heroin, although the extradition order listed only conspiracy to import, on the grounds that the surrendering state had not and would not object); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962) (holding that specialty was not violated because the surrendering state had not objected and the offense with which the defendant was charged was not totally unrelated to that for which he was extradited).

55. *See e.g.*, *United States v. Sensi*, 879 F.2d 888, 892 n.1 (D.C. Cir. 1989). Although the opinions of the District Court for the District of Columbia are facially inconsistent, *compare United States v. Sensi*, 664 F. Supp. 566, 570 (D.D.C. 1987) (holding that "it is sound to allow defendant to invoke the doctrine" of specialty), *aff'd on other grounds*, 879 F.2d 888 (D.C. Cir. 1989) with *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979) (stating that specialty is a privilege of the surrendering state only), the cases can be reconciled on their facts. In *Sensi*, in the absence of a waiver, the defendant was challenging in the requesting state's courts a purported violation of specialty by the requesting state. *Sensi*, 879 F.2d at 891. In *Berenguer*, the defendant had already been extradited and was trying to challenge, in the surrendering state's court, the surrendering state's expansion of the extradition order. *Berenguer*, 473 F. Supp. at 1195. In a third district court case, *United States v. Yunis*, 681 F. Supp. 909 (D.D.C. 1988), the court held that the defendant, Yunis, had no standing. However, Yunis had been seized, not extradited, hence, under the *Ker-Frisbie* rule, discussed *infra* note 68, the treaty was inapplicable.

of specialty.⁵⁶ In cases in which the United States is a party, the United States government also contends that defendants do not have standing to protest specialty violations.⁵⁷ The Departments of State and Justice take the position that only the surrendering state has the right to object to a violation of an extradition treaty.⁵⁸

The Third, Eighth, Ninth, Tenth, and Eleventh Circuits, on the other hand, have given defendants standing to object under the principle of specialty.⁵⁹ Some of these courts, however,

56. See *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989) (per curiam); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986); *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

Shapiro is the case most frequently cited for the proposition that specialty benefits the states that are party to the extradition treaty, not individuals extradited pursuant to the treaty's provisions. The *Shapiro* court asserted that the language of the treaty in question supported this approach by stating that defendants "shall not be tried 'for any offense other than that for which extradition has been granted,' (emphasis added), rather than for any offenses 'listed in the Treaty.'" *Id.* at 906 (citations omitted, alteration by the court). A more plausible interpretation of this language, however, is simply that it imposes the principle of specialty on the requesting state. The language in the last clause, which the court used in contrast to the treaty language, is properly read as an entirely separate substantive requirement—that of extraditable offenses. See also *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962); *United States ex rel. Donnelly v. Mulligan*, 76 F.2d 511, 513 (2d Cir. 1935) ("Extradition treaties are for the benefit of the contracting parties and are a means of providing for their social security and protection against criminal acts, and it is for this reason that rights of asylum and immunity [from the principle of specialty] belong to the state of refuge and not to the criminal."). The Second Circuit may be reconsidering its position: It recently stated that it did not need to reach the issue of whether the defendant had standing because specialty did not apply to the facts of the case. *United States v. DiTommaso*, 817 F.2d 201, 212 n.13 (2d Cir. 1987)

The First and Seventh Circuits, in different contexts, have also denied individuals the right to enforce extradition treaties. See *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981). In holding that the extradition treaty benefited the signatories only, these courts reasoned similarly to courts which have denied standing to defendants in cases involving the principle of specialty.

57. See, e.g., *Sensi*, 879 F.2d at 892 n.1; *United States v. Kaufman*, 858 F.2d 994, 1009 n.5 (5th Cir. 1988), *reh'g denied*, 874 F.2d 242 (1989) (per curiam); *United States ex rel. Cabrera v. Warden, Metro. Correctional Ctr.*, 629 F. Supp. 699, 700 (S.D.N.Y. 1986).

58. See *Kaufman*, 874 F.2d at 243 ("The State Department has indicated its approval of the denial to the Franks of the benefits of the rule of specialty contained in the treaty between the United States and Mexico since 'only an offended nation can complain about the purported violation of an extradition treaty,' and Mexico has made no protest . . .").

59. *United States v. Riviere*, 924 F.2d 1283, 1297 (3d Cir. 1991); *United*

have held that if the surrendering state acquiesces to the trial of the defendant on additional charges, the defendant cannot raise an objection.⁶⁰

The courts' current analysis of the principle of specialty is both perfunctory and internally inconsistent. This treatment belies the importance of the principle of specialty and its underlying objectives.

A. *UNITED STATES V. RAUSCHER*

In the seminal opinion on the principle of specialty, *United States v. Rauscher*,⁶¹ the United States Supreme Court established that specialty applies to criminal proceedings in the United States. In *Rauscher*, the United States asked Great Britain to extradite William Rauscher, a sailor on an American ship, for the murder of a crew member.⁶² After Great Britain extradited Rauscher, the United States convicted him of assault and infliction of cruel and unusual punishment.⁶³ The Court held that prosecuting Rauscher in violation of the principle of specialty suggested "an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."⁶⁴ Although Great Britain did not expressly protest Rauscher's conviction, the Court presumed that it objected.⁶⁵ Accordingly, Rauscher could be tried only for murder, the charge for which he had been extradited.⁶⁶

The Court explicitly stated in *Rauscher's* companion case,

States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 759 (1991); *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1989); *United States v. Thinion*, 813 F.2d 146, 151 (8th Cir. 1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 1009 (1986).

60. See *Riviere*, 924 F.2d at 1300-1301 (holding that as a sovereign, the surrendering state may waive its right to object to a treaty violation and that defendants have no standing to object to such an action); *Najohn*, 785 F.2d at 1422 ("[T]he extradited party may be tried for a crime other than that for which he was surrendered if the asylum country consents." (quoting *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979))).

61. 119 U.S. 407 (1886).

62. *Id.* at 408.

63. *Id.* at 409. The extradition treaty listed murder as an extraditable offense, but not the charges for which Rauscher was convicted. *Id.* at 411. The Court termed those charges "of a very unimportant character when compared with that of murder." *Id.* at 432.

64. *Id.* at 422.

65. *Id.* at 415-16. Although the *Rauscher* Court did not address whether the surrendering state can waive specialty, the deference it showed to the interests of the surrendering state, see *id.*, suggests that it may have allowed it.

66. *Id.* at 430.

Ker v. Illinois, that an individual extradited pursuant to a treaty has enforceable rights.⁶⁷ The *Ker* Court held that the relevant extradition treaty did not apply because the defendant had been abducted rather than extradited.⁶⁸ The Court distinguished *Rauscher* on the grounds that Rauscher "came to this country clothed with the protections which the nature of such [extradition] proceedings and the true construction of the treaty gave him."⁶⁹ When read together, *Rauscher* and *Ker* establish that extradition treaties provide enforceable rights to both surrendering states and defendants.

This reasoning supports the position that the surrendering state may require the requesting state to satisfy its procedural requirements before granting extradition.⁷⁰ Informing defendants of all charges against them permits them to use the surrendering states' safeguards to avoid extradition for an offense which they did not commit. Without this protection requesting states may dupe surrendering states and defendants by thwarting the defendants' opportunity to avoid extradition. Defendants should thus have standing to protest and avoid prosecution under the principle of specialty.

Rauscher is still a leading case on specialty. Courts frequently cite *Rauscher* in support of the proposition that defendants have standing to challenge proceedings which violate the principle of specialty.⁷¹ Courts which hold that the principle of specialty has not been violated carefully distinguish *Rauscher*.⁷²

67. 119 U.S. 436, 440 (1886).

68. *Id.* at 438. The Court affirmed *Ker's* conviction, giving birth to the *Ker-Frisbie* doctrine that a court will not inquire into how in personam jurisdiction over a defendant was obtained. *See id.*, at 440; *Frisbie v. Collins*, 342 U.S. 519, 522 (1954). The Supreme Court has granted certiorari in a kidnapping case to be heard this term. *See United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *cert. granted*, 112 S. Ct. 857 (1992). The United States sponsored the abduction of the defendant, a Mexican. *Id.* at 1466-67. Mexico protested the abduction and demanded the return of the defendant. *Id.* at 1467.

69. *Ker*, 119 U.S. at 443. *Ker* is often incorrectly cited as standing for the proposition that defendants do not have rights under the treaty. *See e.g.*, *United States v. Riviere*, 924 F.2d 1289, 1301 (3d Cir. 1991).

70. When the United States is the surrendering state, the defendant must receive an extradition hearing. 18 U.S.C. § 3184 (1988). A magistrate must determine whether the defendant is the person the requesting state is seeking, whether all requirements of extradition are satisfied, and whether the defendant was convicted of the crime or whether the evidence presented establishes probable cause. 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 944-45 (1968).

71. *See e.g.*, *Riviere*, 924 F.2d at 1297-98.

72. *See e.g.*, *United States v. Sensi*, 879 F.2d 888, 896 (D.C. Cir. 1989) (The

B. THE REASONING OF COURTS DENYING STANDING

Courts which deny defendants standing reason that because the principle of specialty exists to protect only the surrendering state, only the surrendering state may insist on strict adherence to specialty. Some courts following this positivist approach have indicated that the defendant would have had standing had the surrendering state objected to the treaty violation.⁷³

The Second Circuit has long been in the vanguard of courts holding that the principle of specialty exists for the benefit of surrendering states, not defendants. In *Fiocconi v. Attorney General of the United States*, the Second Circuit refused to consider a defendant's protest under the principle of specialty.⁷⁴ The court stated that the basis for the principle "was to prevent the United States from violating international obligations,"⁷⁵ and presumed that, absent an "affirmative protest," Italy would not "regard the prosecution of [the defendants] for subsequent offenses of the same character as the crime for they were extradited as a breach of faith by the United States."⁷⁶ The court distinguished *Fiocconi* from *Rauscher* by concluding that unlike Great Britain, Italy could not be presumed to object to the prosecution.⁷⁷ Under the Second Circuit's approach, unless the surrendering state protests, courts will allow the prosecution of defendants for crimes related to those listed in the extradition order.

Other courts which have denied defendants enforceable rights have neither distinguished *Rauscher* nor explained why it was not necessary to do so. In *United States v. Kaufman*, the court denied the defendant's petition for a rehearing on the grounds that the defendant lacked standing to protest a violation of the principle of specialty.⁷⁸ In reaching this conclusion,

Rauscher Court did not "hold the indictment invalid simply because it charged a crime denominated differently from the crime charged before the British Magistrate. Rather, *Rauscher* held that the indictment was invalid because it charged the defendant with a crime not enumerated in the treaty."). This analysis is only partially correct. The *Rauscher* Court discussed both specialty and the requirement of extraditable offenses, but, because they are separate, either would have sufficed.

73. See e.g., *United States v. Evans*, 667 F. Supp. 974, 979 (S.D.N.Y. 1987).

74. 462 F.2d 475, 476 (2d Cir.), cert. denied, 409 U.S. 1059 (1972).

75. *Id.* at 480.

76. *Id.* at 481.

77. *Id.*

78. 874 F.2d 242, 243 (5th Cir. 1989) (per curiam).

the court relied on the State Department's position.⁷⁹ In *Demjanjuk v. Petrovsky*, the defendant raised the principle of specialty as a defense.⁸⁰ Although the court could have explained that it could not rule on a prospective violation of the principle of specialty, it simply stated that because specialty protected only the surrendering state, the defendant could not raise the challenge.⁸¹

C. THE REASONING OF COURTS GRANTING STANDING

Courts that grant defendants standing generally allow individuals only derivative standing (the defendant is allowed to raise the specialty violations on behalf of the surrendering state rather than as a right of the defendant's).⁸² These courts presume that the surrendering state objects to the treaty violation even if it is silent.⁸³ In some cases, the courts did not need to determine whether specialty was violated because the surrendering state waived its application.⁸⁴

In *United States v. Najohn*, for example, the Ninth Circuit cited *Rauscher* in holding that the defendant could raise the surrendering state's objections to the violation of the principle of specialty.⁸⁵ The court reasoned that because the extradition process required the cooperation of the surrendering state, the requesting state had to keep any promises it had made to se-

79. *Id.*

80. 776 F.2d 571, 583 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

81. *Id.* at 584.

82. *E.g.*, *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir.) (holding that defendants "can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty"), *cert. denied*, 492 U.S. 921 (1989).

83. The Ninth Circuit, for example, presumes that the surrendering state objects to the requesting state's prosecution or punishment of the defendant when it has not granted the requesting state the right to do so. It summed up its position in *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1355 n.13 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3378 (U.S. Oct. 21, 1991) (No. 91-670):

[O]nce there has been a formal extradition proceeding in the requested nation, that nation's agreement to extradite only on specific charges must be construed as the equivalent of a formal objection to his trial on other charges. Thus, in specialty cases we do not require an additional formal protest before permitting the defendant to raise the objections of the requested nation. The contrary rule . . . is apparently based on the view that a specific official protest is required *after* the defendant has been extradited to ensure that the government of the requested nation has not changed its mind and that it still wishes to assert the objection it previously entertained.

84. *E.g.*, *United States v. Riviere*, 924 F.2d 1289, 1301 n.13 (3d Cir. 1991).

85. 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

cure the extradition.⁸⁶ Enforcing the requesting state's promise would thus preserve the "institution of extradition."⁸⁷

III. EFFECTIVE TREATY ENFORCEMENT

A. A PROPOSED SOLUTION

A solution to the problem of standing in specialty cases must further treaty enforcement and maximize the protection of the rights of all involved parties. To accomplish this, this Note proposes that both surrendering states and defendants be able to enforce the principle of specialty fully, but that only surrendering states be permitted to waive it. When the surrendering state chooses to expand the extradition order, the court would find no specialty violation. This retroactive waiver would nullify any specialty grounds on which a defendant could object.

1. Objection by the Surrendering State

The surrendering state's objection may be either express or implied. If the objection is express, the defendant should have standing to seek the dismissal of the disputed charges. Permitting the prosecution to continue while the surrendering state presses its claim on the international level undermines the effectiveness of an extradition treaty between the surrendering and requesting states.

The surrendering state may also remain silent on the purported treaty violation. As the Supreme Court did in *Rauscher*, courts should presume that a silent state objects and grant defendants standing to pursue a specialty defense. Instead of gauging whether the surrendering state would object, as with derivative standing, under this proposal a court would look at the substance of the claim. If none of the exceptions or limitations to specialty apply,⁸⁸ the court would simply determine whether the charge in question was listed in the extradition order. This rule would ensure that requesting states comply with the treaty, and in particular, with the surrendering state's restrictions on the grant of extradition.

86. *Id.*

87. *Id.*

88. *See supra* part I.B.2.

2. Consent by the Surrendering State to the Additional Charges

Under this Note's proposal, requesting states could proceed in prosecuting defendants for crimes for which they were not extradited only if they first secured a waiver from the surrendering state. If the surrendering state did not object to the additional charges, it could waive the application of the principle of specialty by expanding the extradition order.⁸⁹

Because allowing defendants to waive the application of the principle of specialty would nullify the protections treaties afford surrendering states, defendants should not be able to do so. Moreover, allowing defendants to waive specialty would create an unhealthy tension between the extradition processes and defendants' rights to a fair trial because it would be difficult to ensure that a defendant had knowingly and willingly waived specialty's protection.⁹⁰

3. Application of the Model to the *Davis* Case

In *Davis*, discussed at the beginning of this Note, the defendant claimed that he was punished for tax fraud, a crime for

89. Ideally, the surrendering state and the requesting state will structure the procedures for expanding the extradition order to minimize direct political influences. Courts can minimize political influences by requiring the expansion of the extradition order to come from the same organ within the surrendering state that originally had the authority to grant the extradition request. For example, if the surrendering state's procedures require some level of judicial scrutiny, absent such scrutiny diplomatic notes from the executive branch would not suffice. This procedure must be simple enough that the courts of one state will not need to examine the political workings of another. There are practical problems, however, with not permitting a political branch of the surrendering state to expand the extradition order. First, the defendant must be able to secure a personal judicial hearing in the surrendering state. Second, it involves courts in foreign affairs, and the executive branch is the United States's voice for foreign affairs. Third, the accepted rule is that the executive or political branch has authority to waive the principle of specialty. This authority may even be incorporated in a treaty. *See e.g.*, Treaty on Extradition, Oct. 13, 1983, U.S.-Italy, art. XVI, T.I.A.S. No. 10,837, at 16 (stating that when the United States is the surrendering state, the executive branch has the power to expand the extradition order).

90. An inherent weakness of the principle of specialty is that it may be difficult for surrendering states to ascertain whether the requesting state in effect tried the defendant for more crimes than it listed in the extradition order. For example, the requesting may try the defendant for a common crime, but punish him or her for both the common crime and another crime for which extradition could not have been obtained, such as a political offense or a crime not listed in the treaty as extraditable. *See* IVAN A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 188-89 (1971).

which he was not extradited. If Israel had objected to the violation of the principle of specialty, the United States would have been obliged to comply with the treaty. However, had Israel neither objected to nor waived the purported treaty violation, the court nevertheless would have presumed that Israel had objected and Davis would have had standing to raise the specialty issue. The court would then have had to decide whether any exceptions or limitations to specialty applied,⁹¹ and, if not, whether Davis was being tried or punished for a charge for which the surrendering state had not agreed to extradite him. If his prosecution did violate specialty, the court would have had to ensure that the United States complied with the treaty. Israel could have recognized the violation and cured it by expanding its extradition order. The court would give this action full retroactive effect, thus nullifying Davis's grounds for objection.

B. RATIONALES FOR ALLOWING DEFENDANTS TO ENFORCE EXTRADITION TREATIES

Extradition treaties and the extradition process itself are the result of bargaining, much like a business contract. Entering into an extradition treaty limits the sovereignty of the ratifying states by restricting the conditions under which the requesting state may exercise jurisdiction over the defendant and under which the surrendering state may grant asylum.⁹² Although the ratifying states may not intend to make defendants beneficiaries of the agreement, granting them standing to protest treaty violations is the most effective and efficient method of ensuring that the parties comply with their contractual transactions.⁹³

Moreover, this approach is consistent with Supreme Court precedent. Although the Court has not decided many specialty cases, its approach in *United States v. Rauscher*⁹⁴ still controls. *Rauscher* grants defendants standing to protest specialty viola-

91. See *supra* part I.B.2.

92. GARCÍA-MORA, *supra* note 16, at 135.

93. The principle of specialty grants defendants "immunity" for any crimes they committed before they were extradited and which were not listed in the extradition request. While specialty thus also benefits the defendant, it "upholds the contractual nature of the agreement between the two states in that the requesting state has to accept that the asylum state has granted extradition for the specified offenses and no others." GILBERT, *supra* note 43, at 106.

94. 119 U.S. 407 (1886).

tions and permits courts to presume that a surrendering state would object to any violation.

1. Political Factors

Political factors militate against placing the burden of treaty enforcement solely on the surrendering state and dictate that defendants should have standing to protest treaty violations.⁹⁵ Given the conflicting interests of the ratifying states and the political pressures on them to extradite, surrendering states may not protest a treaty violation, especially if it is minor or questionable.⁹⁶ The victims of this lack of protest are the sovereignty of the surrendering state, the extradition process itself, and the interests of the defendant. The defendant, however, is the party best suited to ensure compliance with the treaty.

2. Efficient Treaty Enforcement

Efficiency dictates that defendants must have standing to enforce treaties. If only the surrendering state had standing to protest specialty violations, it would need to keep track of all relevant proceedings.⁹⁷ The surrendering state would then have to examine the current proceedings against the defendant. To do so, it would have to compare the charges in question to the charges listed in the extradition order, while considering the exceptions and limitations to specialty, to determine whether the extradition treaty was violated. The surrendering state would want to have a solid foundation for asserting that

95. The desire to smooth international relations may cause states to go to great lengths to extradite prisoners to each other. For example, Joseph Doherty, an alleged Irish Republican Army terrorist, sought political asylum with the backing of Congress and New York City Mayor David Dinkins. The State Department, however, sought to extradite Doherty, asserting before the Supreme Court that granting asylum to Doherty would damage the United States's relations with the United Kingdom. Wade Lambert, *Extradition Agony: The Drawn-Out Case of an Irish Guerilla Reaches High Court*, WALL ST. J., Oct. 17, 1991, at A1, A14.

96. Because the only practical remedies for the surrendering state are to lodge a diplomatic protest or to deny the next extradition request, either of which may create or heighten political tension between the countries, it is unlikely to protest the more routine treaty violations.

97. See *United States v. Watts*, 14 F. 130, 140 (D. Cal. 1882). In addition, it is hardly practical for the surrendering state to rely on notice from the defendant. A defendant may be willing to waive the protection of specialty, but even if he or she desires the protections of the treaty, "the poor and obscure offender might have no means of drawing the attention of the government." *Id.*

the requesting state had violated the treaty, but its investigation might make any protest untimely.

When the surrendering state complains to the requesting state that it has violated the treaty, it is asserting that the requesting state has violated international law. If the surrendering state is unable to achieve satisfaction, it may take responsive steps. The most natural course for the surrendering state at this step would be to refuse further extraditions under the treaty in question—thus effectively undermining the treaty.

In light of the parameters clearly established by the surrendering state's earlier grant of extradition, these extra efforts by the surrendering state are unnecessary. By agreeing to allow trial only on certain charges, the surrendering state conditioned the grant of extradition on compliance with the principle of specialty. The political pressures on the surrendering state and the efforts it must make to follow and evaluate the proceedings and protest the violation of specialty discourage it from going to the lengths required to protest cases in which the violation seems marginal or questionable.

Because the requesting state has already promised the surrendering state that it will act in a certain way toward the defendant, requiring extra efforts by the surrendering state to ensure this compliance is inefficient. It would be more efficient to allow the defendant, a uniquely interested party, to bring the issue before the court, the body best able to determine whether the principle of specialty has been violated.

CONCLUSION

The principles underlying specialty dictate that violations cannot be made to wait for the surrendering state to protest. If the surrendering state is indifferent or has more pressing matters to which it must attend, the violations will go unimpeded unless the defendant has enforceable specialty rights. The losers will be the extradition process and human rights. Affording defendants standing to protest the treaty violations is the most certain way to minimize the danger of unjust decisions and to ensure that international law is enforced.

