Fordham International Law Journal

Volume 14, *Issue* 4 1990 *Article* 5

Individual Rights and the Doctrine of Speciality: The Deteriorations of the United States v, Rauscher

Christopher J. Morvillo*

*

Individual Rights and the Doctrine of Speciality: The Deteriorations of the United States v, Rauscher

Christopher J. Morvillo

Abstract

This Note argues that U.S. courts must permit an extradited individual to invoke treaty rights under the doctrine of speciality. Part I traces the history of extradition and the development of the doctrine of speciality. Part II analyzes the cases that address the issue of individual rights and the doctrine of speciality. Part III argues that extradition treaties vest defendants with the right to invoke the doctrine of speciality's protection. This Note concludes that defendants must be granted the right to raise violations of the doctrine of speciality to protect the integrity and purpose of extradition treaties.

INDIVIDUAL RIGHTS AND THE DOCTRINE OF SPECIALITY: THE DETERIORATION OF *UNITED STATES v. RAUSCHER*

INTRODUCTION

The doctrine of speciality[1] represents one method by which parties to an extradition treaty control, and insure the integrity of, the extradition process.[2] The doctrine of speciality embodies the theory in international law that compels the requesting state to prosecute the extradited individual upon only those offenses for which the requested country granted extradition.[3] Accordingly, extradited individuals often claim

---

1. The term "speciality" often appears as "specialty." In fact, significant disagreement exists over which term to use. *See* Blakesley, *Extradition Between France and the United States: An Exercise In Comparative and International Law*, 13 VAND. J. TRANSNAT'L L. 653, 706 n.187 (1980). This Note adopts the historical and international approach taken by the many authorities who have chosen to use the term "speciality" as a closer approximate of "spécialité," the original term used by the French. *See* I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 146 n.3 (1971); *see also* Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1466 (1988) (using term speciality); 6 BRITISH DIGEST OF INTERNATIONAL LAW 577-649 (1965) (using speciality). *But see* M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 359-71 (2d rev. ed. 1987) (using specialty); *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Extradition*, 29 AM. J. INT'L L. 1, 213 (Supp. 1935) (using specialty) [hereinafter *Harvard Research Project*]; Note, *Toward a More Principled Approach to the Principle of Specialty*, 12 CORNELL INT'L L.J. 309 (1979) (using specialty). It appears that the term "spécialité," as used by the French, refers to the "special" or "specific" character of extradition that prevents trial of the defendant on charges unlisted in the extradition agreement. *See* 1 J. MOORE, TREATISE ON EXTRADITION AND INTERSTATE RENDITION 234-37 n.1 (1891). The usage of the term speciality is also helpful to distinguish its use from other branches of law.

2. *See* M. BASSIOUNI, *supra* note 1, at 360.

3. *See, e.g., Harvard Research Project, supra* note 1, at 231. Article 17 of the extradition treaty between the United States and Mexico provides an example of how speciality is incorporated into the terms of the treaty:

> 1. A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:
>
> (a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;
>
> (b) He has not left the territory of the requesting Party within 60 days of being free to do so; or
>
> (c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

treaty rights under the doctrine of speciality.[4] Many courts and authorities, however, believe that extradition treaties, and therefore the doctrine of speciality, confer rights only upon nations as parties to the treaties, and not upon the individuals subjected to the extradition.[5] Some courts adhering to this view have proceeded to deny extradited individuals the right to raise violations of the doctrine of speciality.[6]

This Note argues that U.S. courts must permit an extradited individual to invoke treaty rights under the doctrine of speciality. Part I traces the history of extradition and the development of the doctrine of speciality. Part II analyzes the cases that address the issue of individual rights and the doctrine of speciality. Part III argues that extradition treaties vest defendants with the right to invoke the doctrine of speciality's protection. This Note concludes that defendants must be granted the right to raise violations of the doctrine of speciality to protect the integrity and purpose of extradition treaties.

I. *THE HISTORY OF EXTRADITION AND SPECIALITY*

A. *Extradition Through the Ages*

Extradition represents the formal diplomatic process by which one country petitions a second country to apprehend and return a fugitive from the former country living within the

---

2. If, in the course of the procedure, the classification or the offense is changed for which the person requested was extradited, he shall be tried and sentenced on the condition that the offense, in its new legal form:

(a) is based on the same group of facts established in the request for extradition and in the documents presented in its support; and

(b) is punishable with the same maximum sentence as the crime for which he was extradited or with a lesser sentence.

Extradition Treaty, United States-Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656.

4. *See* United States v. Rauscher, 119 U.S. 407 (1886); United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *see also* Kester, *supra* note 1, at 1467.

5. *E.g.*, United States ex. rel. Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935); *see* 1 L. OPPENHEIM, INTERNATIONAL LAW 702 (8th ed. 1955); *infra* notes 75-152 and accompanying text (discussing courts viewing speciality as exclusive right of requested country).

6. *E.g.*, United States v. Kaufman, 874 F.2d 242 (5th Cir. 1989) (denying petition for rehearing); *see infra* notes 129-52 and accompanying text (discussing courts denying individual right to raise speciality violations).

legal jurisdiction of the latter country.[7] In extradition law the terms "requested country" and "requesting country" pertain to the extraditing country and the petitioning country respectively.[8] The individual subject to extradition is called the relator.[9] While considerable debate surrounds the history of extradition, most authorities agree that some form of extradition has existed since antiquity.[10]

The first documented extradition agreement in history dates back to the year 1280 B.C.[11] Ramses II, Pharaoh of

---

7. *See* Blakesley, *supra* note 1, at 654-55. In many situations, however, extradition may present problems of feasibility. *See* M. BASSIOUNI, *supra* note 1, at 190. This may occur, for example when extradition is sought from countries which do not extradite their own nationals. *See* Blakesley, *supra* note 1, at 690-91 (discussing problems with clauses barring extradition of nationals); *see also Harvard Research Project*, *supra* note 1, at 236-39 (discussing non-extradition of nationals). These problems also arise when the government of a country seeking a fugitive from its laws believes that the diplomatic channels of the country where the fugitive resides do not adequately protect the information contained in an extradition request. *See* Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991). It is believed the fugitive may discover his pending extradition and flee to a safer country before he is apprehended. *Id.* at 181. These obstacles to prosecution by way of extradition have given rise to the unorthodox and highly controversial use of officially sanctioned unilateral abductions. *See, e.g.*, United States v. Yunis, 924 F.2d 1086 (D.C. Cir 1991); United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990) (divesting jurisdiction after finding abduction of defendant violated extradition treaty between United States and Mexico).

8. *See, e.g.*, M. BASSIOUNI, *supra* note 1, at 359-60 (using terms "requested" and "requesting" country).

9. *See, e.g.*, *id.* at 361 (using term relator).

10. *See* Blakesley, *The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History*, 4 B.C. INT'L & COMP. L. REV. 39 (1981). According to Professor Blakesley, the debate surrounding the history of extradition focuses on the characteristics of the extradition process in antiquity as compared with modern extradition. *Id.* at 41-47. He concludes that

> although there was no constant practice or development of a science of extradition in antiquity, many ancient societies sought the return of common criminals. These renditions had some characteristics similar to those of modern extradition. Often the request was made "officially" through the respective "sovereigns." Rendition was sought for "common" and political type crimes.

Id. at 47. Some authorities argue, however, that the arbitrary and predominantly political nature of ancient extradition supports the conclusion that modern extradition has little in common with its ancient version. *See* M. BASSIOUNI, *supra* note 1, at 7. This argument contends that the objects of ancient extradition were the political and religious enemies of the requesting state, and not common criminals as in modern international law. *See* L. OPPENHEIM, *supra* note 5, at 704. Commentators agree that extradition "originated in early non-Western civilizations such as the Egyptian, Chinese, Chaldean, and Assyro-Babylonian." M. BASSIOUNI, *supra* note 1, at 5.

11. M. BASSIOUNI, *supra* note 1, at 6; Blakesley, *supra* note 10, at 42.

Egypt, frustrated an attempt by the Hittite King Hattusili III to conquer Egypt.[12] The defeat of the Hittites resulted in the formation of a peace treaty with the Egyptians.[13] This treaty contained an express provision authorizing the exchange of each sovereign's fugitives taking asylum within the other's dominion.[14]

Formal conventions served as the basic vehicle for extradition agreements in the Middle Ages.[15] The treaties resulting from these conventions essentially provided for the return of political enemies to their respective sovereigns, although common criminals, to a much smaller extent, also fell under the agreements.[16] The ancient concept of rendition as a tyrannically motivated device for vengeance of political wrongs thrived in the Middle Ages.[17] Not until the Convention of March 4, 1376, did an extradition agreement in the Middle Ages expressly address non-political fugitives.[18] The emphasis

---

12. THE COLUMBIA HISTORY OF THE WORLD 86 (J. Garraty & P. Gay eds. 1972) [hereinafter COLUMBIA HISTORY]. The *Columbia History* describes Ramses II as

> the last imperial ruler of Egypt. His fame reached Greek tradition and, through it, English poetry. He is the Ozymandias of Shelley. He fathered 162 children during his reign of 67 years, raised the most colossal of colossi (his statue at Abu Simbel is about 66 feet high), and covered the walls of his enormous temples with vainglorious pictures and inscriptions. "Look on my works, ye Mighty, and despair!" Today the tourists view his legless statue, 34 feet long, lying in the sand near Cairo, and stare at his mummy in the Cairo Museum. "Nothing beside remains."

Id.; *see* M. BASSIOUNI, *supra* note 1, at 6; Blakesley, *supra* note 10, at 42.

13. *See* M. BASSIOUNI, *supra* note 1, at 6.

14. *See id.* Ramses II had the treaty carved, in hieroglyphics, on the Temple of Ammon at Karnak. *Id.* The document is also preserved on clay tablets in Akkodrain in the Hittite archives of Boghazkoi, about 110 miles to the east of Ankara, the capital of Turkey. *See id.*; *see also* COLUMBIA HISTORY, *supra* note 12, at 86.

15. *See* Blakesley, *supra* note 8, at 48.

16. *See id.* The Treaty of 1174 between England and Scotland, and the 1303 Treaty of Paris between England and France, provide examples of treaties requiring the return of political fugitives. *See id.*

17. *See id.* at 49.

18. *See id.* at 48. Professor Blakesley describes the Convention of March 4, 1376, between Charles V, King of France, and the Count of Savoy, as the

> most similar to the modern conceptualization of extradition. It was the most non-political convention of the time period. The Convention called for the reciprocal rendition of "malefactors promptly upon the first request" specifying that the perpetrators of common crimes would be delivered up. The purpose of the Convention was to combat crimes and common criminals in general more than to punish or persecute political enemies.

Id.

of this Convention weighed more heavily on common criminals than on political enemies, thus becoming analogous to the purposes of modern extradition treaties.[19]

The 1376 Convention foreshadowed the extradition agreements of the modern era.[20] Until the middle of the eighteenth century, however, most extradition agreements remained essentially political in purpose.[21] Beginning in the 1700s the focus of extradition began to shift towards preserving the world public order.[22] Still, the extradition treaties of the eighteenth century did not relinquish the possibility of rendition for political and military offenses.[23] The treaties of the late eighteenth and early nineteenth centuries did, however, create many of the rules and procedures followed in extradition law today.[24]

With the advent of the nineteenth century, extradition law became predominantly concerned with the suppression of common crime.[25] Acting as a harbinger of this shift, the political offense exception became commonplace in the extradition treaties of that century.[26] Philosophies advocating penal re-

---

19. *See id.*

20. *See id.*

21. *See* M. BASSIOUNI, *supra* note 1, at 7. Constant threat of war between the European nations in the Middle Ages betokened the futility of pursuing other treaties for cooperation. *See id.* at 8. Extradition mandates cooperation between sovereigns. *See id.* The absence of such cooperation during the Middle Ages led to little development away from the limited concept of extradition as a tool for revenge on political enemies. *See id.*

22. *See id.*

23. *See* Blakesley, *supra* note 10, at 51.

24. *See* I. SHEARER, *supra* note 1, at 18. The French extradition treaties of the late 18th century and the early 19th century set forth many of the modern principles of extradition law. *See id.* at 17. The 1834 treaty between France and Belgium, for example, for the first time in history included provisions for the political offense exception and the non-extradition of nationals. *See id.* at 18. The treaties of this era also established the requirements that requests for extradition come through diplomatic channels accompanied by an act of accusation, and the concept of reciprocity—the giving of reciprocal effect to the procedures of the sovereigns with whom treaties are maintained. *See* Blakesley, *supra* note 8, at 51; *see also* M. BASSIOUNI, *supra* note 1, at 321 (discussing reciprocity).

25. *See* M. BASSIOUNI, *supra* note 1, at 7.

26. *See* Blakesley, *supra* note 10, at 51. The political offense exception to extradition treaties denotes a class of

> crimes which are incidental to and form a part of political disturbances; but it might also be understood to include offenses consisting in an attack upon the political order of things established in the country where committed, and even to include offenses committed to obtain any political object.

form occasioned these changes in extradition.[27] As the focus of extradition began to center on common criminals, concern for the protection of the relator's human rights under extradition treaties also developed.[28] Thus, the procedural complexities of extradition today reflect concerns for human rights.[29]

B. *The Doctrine of Speciality*

The doctrine of speciality developed to protect the requested country from abuse of its discretionary act of extradition.[30] A violation of speciality occurs when, after extradition, the requesting nation charges and prosecutes, or seeks to pros-

---

> Under extradition treaties, [it] is an offense committed in the course of and incidental to a violent political disturbance, such as war, revolution and rebellion; an offense is not of a political character simply because it was politically motivated.

BLACK'S LAW DICTIONARY 158 (6th ed. 1990). Today, the United States includes the political offense exception as standard language in extradition treaties. *See, e.g.*, Extradition Treaty, *supra* note 3, art. 5, 31 U.S.T. at 5063-64, T.I.A.S. No. 9656; *see* Blakesley, *supra* note 10, at 52 n.56.

27. M. BASSIOUNI, *supra* note 1, at 8. The philosophers of the Age of Enlightenment provided much of the impetus necessary for change. *Id.* Beccaria's *On Crimes and Punishment*, published anonymously in 1764, challenged existing conceptions of justice and inspired penal reform. COLUMBIA HISTORY, *supra* note 11, at 704. Beccaria's conclusions reflect the utilitarian ideals of modern criminal justice: "In order that punishment not be invariably an act of violence committed by one or many against a citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crime, and in accordance with the law." *Id.* (quoting Beccaria's *On Crimes and Punishment*).

28. *See* M. BASSIOUNI, *supra* note 1, at 8.

29. *See id.* at 8-9. Professor Bassiouni states that

> [t]o a large extent, the processes and its participants have not changed much in the course of time, but the rationale and purposes of the practice have, as have the formal aspects of the proceedings. But the emergence of humanitarian international law has given rise to a new legal status to one of the participants, i.e., the individual, thus placing some limitations on the power of respective sovereigns that did not exist historically.

Id.

30. *See* M. BASSIOUNI, *supra* note 1, at 360. Professor Bassiouni offers five factors as the basis for the doctrine of speciality:

1. The requested state could have refused extradition if it knew that the relator would be prosecuted or punished for an offense other than the one for which extradition was granted.
2. The requesting state would not have *in personam* jurisdiction over the relator, if not for the requested state's surrender of that person.
3. The requesting state could not have prosecuted the offender, other than *in absentia*, nor could it punish him without securing that person's surrender from the requested state.
4. The requesting state would be abusing a formal process to secure the

ecute, the relator for a crime not agreed to by the requested nation in the extradition proceedings.[31] Implicitly, the doctrine provides the relator with assurances against unexpected prosecution.[32]

By the 1870s, international law had generally accepted the validity of the doctrine of speciality.[33] Many U.S. extradition treaties, however, contained no speciality provisions because their creation predated the principle's acceptance.[34] The absence of express provisions for the doctrine of speciality in U.S. extradition treaties created a reluctance in many U.S. courts to apply the principle.[35] Thus, the domestic law of the

---

surrender of the person it seeks by relying on the requested state, which will use its processes to effectuate the surrender.

5. The requested state would be using its processes in reliance upon the representations made by the requesting state.

Id.

31. *See id.*

32. *See id.* An 1844 treaty between France and Luxembourg initiated the development of the doctrine of speciality. *See* I. SHEARER, *supra* note 1, at 18. This treaty provided that the relator could only stand trial for offenses specifically listed in the extradition treaty and not for other offenses committed before extradition. *See id.* Incorporation of the doctrine of speciality by the United States began with an 1868 treaty with Italy. 1 J. MOORE, *supra* note 1, at 194. The 1868 treaty provided that the relator "shall in no case be tried for any ordinary crime committed previously to that for which his or their surrender is asked." United States-Italy Extradition Treaty, *reprinted in part at* 1 J. MOORE, *supra* note 1, at 194.

33. *See generally* 1 J. MOORE, *supra* note 1, at 194-96 (discussing incorporation of speciality clauses into U.S. treaties).

34. *See Harvard Research Project*, *supra* note 1, at 213. The 1842 Ashburton Treaty with Great Britain, for example, contained no speciality provision. *See* BIRON & CHALMERS, THE LAW AND PRACTICE OF EXTRADITION 30 (1981) (discussing judicial incorporation of speciality into 1842 treaty); *see also* 1 J. MOORE, *supra* note 1, at 196-239 (discussing tension between United States and Great Britain resulting from absence of speciality provision in 1842 treaty).

35. *See* 1 J. MOORE, *supra* note 1, at 196-239. In *United States v. Caldwell*, the Circuit Court of the United States for the Southern District of New York denied the existence of the doctrine of speciality in criminal prosecutions. United States v. Caldwell, 8 Blatchf. 131 (C.C.S.D.N.Y. 1871). Mr. Caldwell was extradited from Canada under the Ashburton Treaty of 1842 on charges of forgery. *Id.* at 132. He protested his trial on charges of bribery. *Id.* Notwithstanding deceit in the extradition process, the court noted that

> while abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two Governments, such complaints do not form a proper subject of investigation in the Courts, however much those tribunals might regret that they should have been permitted to arise. To hold otherwise, would, in a case like the present, permit a person accused of crime to put the Government on trial for its dealings with a foreign power.

United States did not uniformly recognize the doctrine.[36] This failure to adopt the doctrine of speciality eventually created severe diplomatic tensions between Great Britain and the United States.[37] Great Britain maintained that trial of the relator on unextradited charges breached the requesting country's treaty obligations.[38] The United States, however, took the position that no such obligation existed absent an express provision in the treaty.[39] These tensions culminated with a six month period in 1876 when neither Great Britain nor the United States made any requisitions, thereby resulting in the escape of many

---

Id. at 133; *see* 1 J. MOORE, *supra* note 1, at 220. Three years later, the New York Court of Appeals, in *Adriance v. Lagrave*, similarly held that the doctrine of speciality had no application to criminal proceedings. Adriance v. Lagrave, 59 N.Y. 110 (1874); *see infra* note 37 (discussing other U.S. cases involving doctrine of speciality).

36. *See* 1 J. MOORE, *supra* note 1, at 219-33 (discussing various approaches of U.S. courts to speciality).

37. *See id.* at 196-219. The diplomatic tension between the United States and Great Britain arose in part from the case of *Lawrence*. In February 1875, Charles Lawrence was indicted in New York on charges of forgery, conspiracy, and smuggling. *Id.* at 203. Subsequently, he fled to England. *Id.* at 202. In April 1875, Great Britain extradited Mr. Lawrence to the U.S. District Court for the Southern District of New York on charges of "forging and uttering a certain bond and affidavit." *Id.* Once in New York, however, it became apparent that the government intended to try Mr. Lawrence for the unextradited charges of conspiracy and smuggling. *Id.* at 203. Mr. Lawrence claimed immunity from prosecution on charges not included in the extradition agreement. *Id.* at 204. The United States, through the Solicitor-General, took the position that no law or treaty prevented the trial of Mr. Lawrence on the unextradited offenses. *Id.*

In November 1875, Lord Derby, Great Britain's Foreign Secretary, instructed the British Minister at Washington to protest formally if the U.S. government attempted to try Lawrence on the unextradited charges. *Id.* at 205. U.S. Secretary of State Fish responded that while the government had the right to try Mr. Lawrence for unextradited crimes, prosecution would proceed first on the extradited charges. *Id.* at 206. A decision as to further prosecution on the unextradited charges hinged upon the outcome of the first prosecution. *Id.* As a result, the government brought a new indictment against Mr. Lawrence that included only those offenses listed in the extradition agreement. *Id.* at 207.

This did little to placate the British government. *Id.* In late February of 1876, the United States requested the extradition of Ezra Winslow on charges of forgery and utterance of forged paper. *Id.* at 196. The British government denied this request absent an agreement limiting Mr. Winslow's trial to the extradited offenses. *Id.* at 200.

38. *Id.* at 200-01. Lord Derby took the position that a proper construction of the treaty imposed this obligation on the parties to the treaty. *Id.*

39. *Id.* at 199. Secretary Fish took the position that Great Britain had no right to impose conditions on extradition other than those expressly provided for in the treaty. *Id.*

criminals.[40]

The diplomatic polemic over speciality between Great Britain and the United States provoked great debate among U.S. and British legal scholars.[41] The preponderance of scholarly authority supported the position taken by Great Britain.[42] As a result, a number of U.S. courts began to adopt the views of Great Britain in their rulings.[43] Although some courts continued to consider whether, absent an express treaty provision, speciality constrained prosecutions in the U.S. courts,[44] other courts concerned themselves with the question of individual rights under the doctrine.[45]

---

40. *Id.* at 210-11. In October 1876, Great Britain abandoned its demands, stating that

> Her Majesty's Government, having regard to the very serious inconvenience and great encouragement to crime which would arise from the continued suspension of the extradition of criminals between the British dominions and the United States, will be prepared, as a temporary measure, until a new extradition treaty can be concluded, to put in force all powers vested in it for the surrender of accused persons to the Government of the United States under the treaty of 1842, without asking for any engagement as to such persons not being tried in the United States for other than the offenses for which extradition has been demanded.

Id. at 210-11. The United States accepted Great Britain's new position and again requested the extradition of Mr. Winslow. *Id.* at 211. By this time, however, Mr. Winslow had escaped, and as a result, his extradition was never completed. *Id.*

41. *See id.* at 212-19. Assistant U.S. Secretary of State Moore presented the opinions of authorities regarding the Winslow controversy and concluded that "there is an almost uniform concurrence in the opinion that a person surrendered for one offence should not be tried for another . . . ." *Id.* at 217-18; *see* United States v. Rauscher, 119 U.S. 407, 416-17 (1886) (discussing legal authorities).

42. *See* 1 J. MOORE, *supra* note 1, at 212-19 (discussing opinions of authorities).

43. *E.g.*, United States v. Watts, 14 F. 130 (S.D. Cal. 1882); *see* 1 J. MOORE, *supra* note 1, at 222-33 (discussing cases after Winslow controversy).

44. In re Miller, 23 F. 32 (W.D. Pa. 1885). *In re Miller* involved an escaped convict returned to the United States from Canada on charges fabricated to secure his return. *Id.* at 33. The court reviewed existing authority on the subject and determined that the question of whether speciality applied absent an express treaty provision was still open. *Id.* The court went on to hold, however, that a defendant could not acquire a right to contend his previous convictions by fleeing to a foreign jurisdiction. *Id.* at 34; *see* 1 J. MOORE, *supra* note 1, at 230.

45. *See, e.g.*, Commonwealth v. Hawes, 13 Bush 697 (Kent. 1877) (holding that speciality protects international agreement and not personal rights of accused); *see* State v. Vanderpool, 39 Ohio St. 273 (1885) (stating that "[i]f, as we hold, the question is one of personal right under the treaty, as well as international law, it follows that the courts can hear and determine such right when it is invaded").

1. *United States v. Rauscher*

The U.S. Supreme Court first addressed the doctrine of speciality in the landmark case of *United States v. Rauscher*.[46] Mr. Rauscher, the second mate of a U.S. ship, murdered a crew member while at sea.[47] Subsequently Mr. Rauscher fled to Great Britain.[48] At the request of the United States, Great Britain apprehended and extradited Mr. Rauscher to the Circuit Court of the United States for the Southern District of New York on the charge of murder.[49] Pursuant to an indictment a jury convicted Mr. Rauscher for inflicting cruel and unusual punishment, and not the charge of murder for which Great Britain had extradited him.[50]

Mr. Rauscher argued that his conviction on the charge of cruel and unusual punishment constituted a violation of the extradition treaty because the extradition agreement charged him only with murder.[51] The judges sitting in the circuit court differed in opinion as to the proper resolution of the conflict and thus referred the matter to the U.S. Supreme Court.[52]

---

46. 119 U.S. 407 (1886).

47. *Id.* at 409. The incident occurred in the admiralty and maritime jurisdiction of the United States, thereby vesting subject matter jurisdiction in the U.S. courts. *Id.* While the speciality doctrine may appear to limit the subject matter jurisdiction of the United States, because it bars the trial of the defendants on some charges, it is actually a restraint on the personal jurisdiction of the extradited individual. *See* United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *infra* notes 183-90 and accompanying text (discussing *Vreeken* and personal jurisdiction); *infra* notes 221-27 and accompanying text (analyzing *Vreeken* jurisdictional argument).

48. *Rauscher*, 119 U.S. at 409.

49. *Id.*

50. *See id.* Mr. Rauscher was convicted under section 5347 of the Revised Statutes of the United States. *Id.* The statute, entitled "Maltreatment of crew by officers of vessels" provides that

> [e]very master or other officer of any American vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, who, from malice, hatred, or revenge, and without justifiable cause, beats, wounds, or imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than five years, or by both.

Rev. Stat. § 5347, *reprinted at* 18 Stat. 1039 (1878) (repealed).

51. *See* United States v. Rauscher, 119 U.S. 407 (1886); *see also* 1 J. MOORE, *supra* note 1, at 234.

52. *Rauscher*, 119 U.S. at 409. The judges of the circuit court certified four questions to the Court:

The Court prefaced its analysis by noting that while a treaty is contractual by nature, it is also "the supreme law of the land" under article VI of the U.S. Constitution.[53] Following this reasoning, the Court equated treaties with legislative acts.[54] The Court then found that when treaty provisions af-

---

> First. The prisoner having been extradited upon a charge of murder . . . had the Circuit Court . . . jurisdiction to put him to trial upon an indictment . . . charging him with cruel and unusual punishment . . . [when] such punishment consist[s] of the identical acts proved in the extradition proceedings?
>
> Second. Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, *acquire a right* to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?
>
> Third. Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment . . . charging the accused with cruel and unusual punishment . . . it having been established upon said plea that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder . . . ?
>
> Fourth. Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was investigated, and the same witnesses examined, as at the trial?

Rauscher, 119 U.S. at 409-10 (emphasis added). *Rauscher* presented the Court with two general problems. First, the Court had to determine whether the doctrine of speciality should bind U.S. courts when the treaty contains no express speciality provision. *See id.* Second, the Court had to determine the remedy that would correct a violation of the doctrine of speciality. *See id.*

53. *Rauscher*, 119 U.S. at 418-19. Article VI of the U.S. Constitution provides that

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

54. *Rauscher*, 119 U.S. at 418-19. Extradition treaties require no implementing legislation to become effective, thereby making them self-executing. *See* M. BASSIOUNI, *supra* note 1, at 74. Self-executing treaties bind the judiciary with the obligation to enforce them as they would the U.S. Constitution or a federal statute. *Id.* Executory treaties, on the other hand, require implementing legislation in order to become effective. *Id.* The terms of executory treaties convey obligations that need legislative execution before enforcement by the courts is possible. *Id.*

Although the judiciary does not require the authority of Congress to adjudicate extradition proceedings, Congress has passed several extradition statutes which seek to regulate and assist the judiciary in such proceedings. *Id.* at 39-42. Congress passed the first extradition statute in 1848. *See id.* at 41-42. The 1848 act underwent ten amendments over the course of the next 135 years. *See id.* at 42. In 1984, the

fect the rights of individuals, courts have the power to enforce and uphold those rights.[55]

Exploring the nature of extradition, the Court next found that the intent behind extradition treaties reflects the principle of speciality.[56] The Court equated a violation of this principle with a violation of the relator's rights under the treaty.[57] Thus,

---

1981-1984 Extradition Act was enacted. *See* 18 U.S.C. §§ 3181-3195 (1988). This legislation has been criticized as falling short of its potential because it leaves many issues for the judiciary to decide. M. BASSIOUNI, *supra* note 1, at 52. For example, the U.S. Congress has provided the courts with no statutory guidance concerning the right of relators to claim the protection of the doctrine of speciality. *Id.*

Additionally, when the provisions of an extradition treaty conflict with federal legislation, the one that was adopted later in time prevails. *See* Head Money Cases, 112 U.S. 580 (1884). The U.S. Supreme Court stated that "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." *Id.* at 599; *see* M. BASSIOUNI, *supra* note 1, at 75.

55. *Rauscher*, 119 U.S. at 418-19. The Court relied on its decision in the *Head Money Cases* to distinguish the effect of treaties as the law of the land from their contractual aspects. *Id.*; *see Head Money Cases*, 112 U.S. at 598-99. According to the Court, central to this distinction is the fact that

> a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country .... A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

Rauscher, 119 U.S. at 418-19; *see Head Money Cases*, 112 U.S. at 598-99.

56. United States v. Rauscher, 119 U.S. 407, 420 (1886). The Court found it

> very clear that this treaty did not intend to depart . . . from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the process by which it is carried into effect, confirms this view of the subject.

Id.

57. *Id.* at 420. The Court stated that

> as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, *without an implication of fraud upon the rights of the party extradited*, and of bad faith to the country which permitted his extradition.

the Court held that Mr. Rauscher had acquired a right to exemption from trial upon charges not listed in the extradition agreement without the opportunity of first returning to Great Britain.[58] The Supreme Court remedied the violation of the speciality doctrine by stripping the trial court of personal jurisdiction over Mr. Rauscher to try him for the unextradited charge of cruel and unusual punishment.[59]

2. Application of the *Rauscher* Principle

The U.S. Supreme Court's opinion in *Rauscher* repeatedly referred to the rights conferred upon the defendant by the extradition treaty.[60] The Court reiterated this position in *Ker v. Illinois*,[61] decided on the same day as *Rauscher*. In *Ker*, a private detective kidnapped the defendant in Peru and forced him to return to the United States for trial.[62] The defendant protested the trial court's exercise of personal jurisdiction as a violation of the extradition treaty.[63] The defendant argued that the existence of an extradition treaty between Peru and the United States prohibited rendition by abduction.[64]

The *Ker* Court distinguished *Rauscher*, noting that the extradition proceedings through which Mr. Rauscher had come to the United States provided him with a right to face prosecution for only those charges listed in the extradition agreement.[65] The *Ker* Court held that the defendant, unlike Mr.

Id. at 422 (emphasis added).

58. *Id.* at 424. Referring to the right conferred upon Mr. Rauscher by the doctrine of speciality, the Court stated that

> [t]hat right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

Id.

59. *Id.* at 433. The Court also pointed out, however, that the trial court had subject matter jurisdiction over the case. *Id.*

60. United States v. Rauscher, 119 U.S. 407 (1886); *see supra* notes 46-59 and accompanying text (discussing *Rauscher*); *infra* notes 206-20 and accompanying text (analyzing *Rauscher*).

61. 119 U.S. 436 (1886).

62. *Id.* at 438-39.

63. *Id.* at 439.

64. *Id.* at 441.

65. *Id.* at 443. Discussing *Rauscher*, the Court in *Ker* stated that "[o]ne of the rights with which he was thus clothed, both in *regard to himself* and in good faith to the

Rauscher, had no right to protest a violation of the extradition treaty because he did not come to this country clothed with the protection of an extradition treaty.[66]

Rauscher incorporated into U.S. law the international legal doctrine that binds U.S. courts to recognize the applicability of the doctrine of speciality to all U.S. extradition treaties.[67] Eventually the United States routinely began to incorporate the doctrine into the terms of all extradition treaties.[68] Many U.S. courts, however, have had difficulty applying the doctrine to protect the rights of relators.[69]

II. *INDIVIDUAL RIGHTS AND THE DOCTRINE OF SPECIALITY*

An analysis of individual rights under the doctrine of speciality involves two seemingly intertwined issues. The first issue concerns to whom the right of speciality belongs.[70] The second issue, whether the defendant has standing[71] to raise objections to violations of the doctrine of speciality, exists as an

---

country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings." *Id.* (emphasis added).

66. *Id.* The Court stated "[w]e think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right." *Id.*

67. *See* United States v. Rauscher, 119 U.S. 407 (1886); *see also* United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991) (discussing *Rauscher*).

68. *See, e.g.*, Extradition Treaty, *supra* note 2, 31 U.S.T. 5059, T.I.A.S. No. 9656, (citing speciality provision of United States-Mexico extradition treaty); *see* Extradition Treaty, June 20, 1978, United States-Germany, 32 U.S.T. 1485, T.I.A.S. No. 9785; Extradition Treaty, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468.

69. *See infra* notes 70-200 and accompanying text (discussing treatment of speciality and individual rights by U.S. courts).

70. *See infra* notes 75-152 (discussing courts denying individual rights under doctrine of speciality); *infra* notes 153-200 (discussing courts granting individual rights under doctrine of speciality).

71. Standing is "the legal right of a person or group to challenge in a judicial forum the conduct of another, especially with respect to governmental conduct." BARRON'S LAW DICTIONARY 451 (1984). The Supreme Court stated that the issue of standing concerns whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962).

extrapolation of the first issue.[72]

The U.S. courts finding that defendants do not have rights under the doctrine view speciality as a right of the requested country, and, therefore, not as a justiciable issue absent a protest from the requested country.[73] Other courts, however, hold that individuals may invoke the doctrine of speciality regardless of whether the requested country protests.[74]

A. *Courts Granting Relators No Rights Under Doctrine Of Speciality*

Most U.S. courts agree that the doctrine of speciality protects the requested country from abuse of its discretionary decision to grant an extradition.[75] The fact that treaties impose contractual obligations on the signatory nations underlies this conclusion.[76] Some U.S. courts, however, adhere to the traditional view of treaties which provides that only parties to the treaty may invoke treaty protections like the doctrine of speciality.[77] Under this view, only nations receive the protection of the doctrine of speciality, because only nations make treaties.[78]

---

72. *See infra* notes 129-52 and accompanying text (discussing doctrine of speciality and standing). It should be noted that courts which grant rights to individuals under the doctrine of speciality have no need to reach the issue of whether the defendant has standing to raise objections to its violation.

73. *See infra* notes 75-128 and accompanying text (discussing courts denying individual rights under doctrine of speciality); *infra* notes 129-52 and accompanying text (discussing courts questioning or denying relator's standing to raise violations of doctrine of speciality).

74. *See infra* notes 153-200 and accompanying text (discussing courts recognizing speciality as right of individuals).

75. *E.g.*, Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.) (stating "principle of specialty [sic] has been viewed as a privilege of the asylum state"), *cert. dismissed*, 414 U.S. 884 (1973); *see* M. BASSIOUNI, *supra* note 1, at 360-61. Professor Bassiouni states that the doctrine of speciality "is principally advanced as a means of protecting the requested state from abuse of its processes." *Id.* at 360.

76. *See* M. BASSIOUNI, *supra* note 1, at 9 n.12 (discussing contractual nature of extradition treaties); *see also* Note, *supra* note 1, at 310 (discussing contractual nature of extradition treaties).

77. *See, e.g.*, United States ex rel. Donnelly v. Mulligan, 76 F.2d 511 (2d Cir. 1935). The court stated that "[e]xtradition 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 belong to the state of refuge and not to the criminal." *Id.* at 513; *see* M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 562 (1974).

78. *See* Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); Fiocconi v. Attorney General of the United States, 462 F.2d 475, 479-80 n.8 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); United States v. Paroutian, 299 F.2d 486, 490 (2d Cir. 1962).

Thus, any protection that the individual receives from the doctrine applies derivatively, not commensurately.[79] This rationale also supports a number of cases that find standing to protest a violation of the doctrine of speciality belongs only to the requested country.[80]

1. Test Applied By Some Courts To Determine Violations of the Doctrine of Speciality

Some U.S. courts have developed a test for determining whether a violation of speciality exists.[81] This test examines whether the requested country would protest the trial of the relator on the charges in question as a violation of the doctrine of speciality.[82] Such an inquiry, however, by failing to acknowledge the role of the relator in the extradition proceedings, creates an implication that the relator has no treaty rights.[83]

In *United States v. Paroutian*,[84] one of the first modern decisions in this area, the United States indicted the defendant on charges of narcotics trafficking in the U.S. District Court for the Southern District of New York.[85] Subsequently, Lebanon

---

79. *See* United States v. Riviere, 924 F.2d 1289 (3d Cir.) (holding that because requested country consented to waiver of doctrine of speciality defendant could not avoid prosecution by asserting treaty rights); *see also* United States v. Diwan, 864 F.2d 715, 721 (11th Cir.) (asserting that relator's right to raise violations of speciality is derivative of nation's right), *cert. denied*, 492 U.S. 921 (1989).

80. *E.g.*, United States v. Kaufman, 874 F.2d 242 (5th Cir. 1989); *see infra* notes 129-52 and accompanying text (discussing courts denying individual standing to protest violations of speciality).

81. *See infra* notes 84-112 and accompanying text (discussing courts applying this test).

82. *See* United States v. Paroutian, 299 F.2d 486, 490-91 (2d Cir. 1962).

83. *See* Greene v. United States, 154 F. 401 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907). In *Greene*, Canada extradited the defendants to the United States for trial on charges of fraud and embezzlement. *Id.* at 403. The defendants claimed that the charges for which Canada granted their extradition were not the charges listed in the indictment, and that therefore the court had no authority to subject them to trial on those charges. *Id.* at 403-04. The court found that it could determine whether a violation of the doctrine of speciality had occurred by "considering the demand that had been made on that government and the evidence that was submitted to it by the United States to sustain such demand." *Id.* at 404.

84. 299 F.2d 486 (2d Cir. 1962).

85. *Id.* at 491. The indictment charged Paroutian for conspiring to import, receive, conceal, sell, and facilitate the transportation of heroin in the United States in violation of 21 U.S.C. § 174. *Paroutian*, 299 F.2d at 487.

extradited the defendant to the United States.[86] The trial of Paroutian did not proceed pursuant to the indictment issued by the Southern District.[87] It proceeded under a later indictment from the U.S. District Court for the Eastern District of New York, which included counts not listed in the original indictment.[88] On appeal, the defendant claimed that the trial on the additional counts not listed in the extradition agreement violated the doctrine of speciality as established in *United States v. Rauscher*.[89]

The U.S. Court of Appeals for the Second Circuit held that the doctrine of speciality protects the requested government.[90] With this in mind, the court established a test for determining what constitutes a violation of the doctrine of speciality.[91] By deciding whether the requested country would consider the offense as tried separately from the extradited offenses, the court reasoned, it could ascertain whether a violation of the doctrine of speciality existed.[92] The *Paroutian* court concluded that no violation of the doctrine of speciality had occurred because it believed that Lebanon would not have considered the additional charges as separate from those for which he was extradited.[93]

The Second Circuit, in *Paroutian*, did not address the issue of whether the defendant had a right to object to a violation of the doctrine of speciality.[94] The court only examined whether Lebanon would have considered the trial a violation of the extradition agreement.[95] By providing that the right to determine a violation of speciality belongs to the requested country,

---

86. *Paroutian*, 299 F.2d at 487.

87. *Id.* at 490.

88. *Id.* The indictment from the Eastern District included the two additional counts of receiving and concealing heroin. *Id.*

89. *Id.* at 490-91.

90. *Id.* at 490. The court stated that speciality is "designed to protect the extraditing government against abuse of its discretionary act of extradition." *Id.*

91. *Id.* at 490-91.

92. *Id.* at 491. The court stated that "the test whether trial is for a 'separate offense' should not be some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate'." *Id.* at 490-91.

93. *Id.* at 491. The court was unconvinced "that the Lebanese, fully apprised of the facts as they were, would consider that Paroutian was tried for anything else but the offense for which he was extradited." *Id.*

94. *See generally id.*

95. *Id.*

this test appears to reduce the rights of the individual under the treaty.[96]

Ten years after *Paroutian*, the Second Circuit again addressed the issue of speciality in *Fiocconi v. Attorney General of the United States*.[97] In *Fiocconi*, an indictment from the U.S. District Court for the District of Massachusetts charged the defendants with conspiring to import heroin into the United States.[98] Italian authorities arrested the defendants and, subsequently, the United States requested their extradition.[99] Italy granted the extradition as an act of comity because the extradition treaty between Italy and the United States did not recognize narcotics crimes as extraditable.[100]

The defendants pled not guilty to the Massachusetts indictment.[101] After their release on bail, a grand jury subpoenaed the defendants to appear in the U.S. District Court for the Southern District of New York.[102] Upon arrival in New York, the defendants were arrested pursuant to an indictment returned that day charging them with substantive narcotics crimes.[103] Subsequently, the grand jury returned a superseding indictment, charging the defendants with conspiracy to vio-

---

96. *See infra* note 112 (discussing restrictive view of speciality).

97. 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

98. *Id.* at 476.

99. *Id.* After the issuance of U.S. bench warrants for the arrest of the defendants, Interpol traced them to Italy, where they were apprehended. *Id.*

100. *Id.* at 476-77. Comity is the recognition by one sovereignty of the laws of another sovereignty out of deference and respect. BLACK'S LAW DICTIONARY 267 (6th ed. 1990). In international law the theory of comity attempts to balance a country's international obligation with the rights of those enjoying the protection of its laws. *Id.* If the government of one country feels that the rights of a citizen are jeopardized by a request for comity they may disregard the international obligation by not recognizing the other country's law. *See* United States v. Rauscher, 119 U.S. 407, 419 (1886). Extradition treaties attempt to contractualize comity. *See id.* at 418. The doctrine of speciality provides assurances that indiscriminate prosecution will not result if extradition is granted. *Id.* at 419-20. This insures the rights of individuals under the extradition treaty to the protection they would be accorded under the laws of the country from which they were taken. *Id.*

101. Fiocconi v. Attorney General of the United States, 462 F.2d 475, 477 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

102. *Id.*

103. *Id.* The new indictment in the Southern District of New York charged the defendants with "the substantive crime of receiving, concealing, selling and facilitating the transportation, concealment and sale of 37 kilograms of heroin." *Id.*

late narcotics laws.[104] The defendants argued that their detention on a charge other than that for which the Italian government rendered them violated the doctrine of speciality.[105]

Interpreting *Rauscher*, the Second Circuit first concluded that the principle of speciality governs extraditions granted as an act of comity.[106] The court then applied the test developed in *Paroutian*,[107] taking it a step further by assuming that Italy would have protested had they not consented to the trial of defendants on the additional charges.[108] Upon a finding that Italy had not protested, the court held that no violation of the principle of speciality had occurred.[109]

The court's holding in *Fiocconi*, that a relator may only gain the protection of the doctrine of speciality if the requested country protests, does not deny the defendant the right to

---

104. *Id.* This indictment charged the defendants "with conspiring to violate narcotics laws from January 1, 1970 through January 4, 1972." *Id.*

105. *Id.* The trial court had rejected this argument and the Second Circuit announced its affirmation from the bench. *Id.* The subsequent trial resulted in conviction of the defendants. *Id.* The Second Circuit's opinion followed the conviction. *Id.*

106. *Id.* at 479; *see supra* note 100 (discussing comity). The *Fiocconi* court based this determination on the fact that the *Rauscher* Court initially considered extraditions absent the existence of a treaty. Fiocconi v. Attorney General of the United States, 462 F.2d 475, 479 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *see* United States v. Rauscher, 119 U.S. 407, 419 (1886). In *Rauscher*, the Supreme Court concluded that

> it can hardly be supposed that a government which was under no treaty obligation . . . to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party.

Id., *quoted in* Fiocconi v. Attorney General of United States, 462 F.2d 475, 479 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

107. *Fiocconi*, 462 F.2d at 481; *see supra* notes 84-96 and accompanying text (discussing test in *Paroutian*).

108. *Fiocconi*, 462 F.2d at 481.

109. *Id.* The court stated that "in the absence of any affirmative protest from Italy, we do not believe that Government would regard the prosecution of [the defendants] for subsequent offenses of the same character as the crime for which they were extradited as a breach of faith by the United States." *Id.* It appears that the court based this expansion of *Paroutian* on the fact that Italy knew of the additional charges and did not respond. *Id.* at 477. Subsequent courts, however, have relied on this test absent notification to the requested country. *See, e.g.*, United States v. Kaufman, 858 F.2d 994, 1008 (1988), *reh'g denied*, 874 F.2d 242 (5th Cir. 1989); *see infra* note 146 and accompanying text (discussing application of test in other courts).

raise the issue.[110] It does, however, effectively preclude any remedy to the defendant for a violation of the doctrine unless the requested country views the subsequent proceedings as a violation and protests.[111] While this test adequately serves to protect the interests of the requested country, the rationale supporting it undermines the rights of the relator.[112]

2. Courts Holding that Speciality is Not a Right of the Accused

Some U.S. courts conclude that the underlying wrong resulting from a violation of speciality harms only the requested country.[113] These courts rely on a theory in international law that extradition treaties only protect the requested country.[114] The tests developed in *Paroutian* and *Fiocconi* evidence this po-

---

110. *Fiocconi*, 462 F.2d at 479-80 n.8. The court stated that

> the rule of domestic law conferring a judicial remedy on the extraditee can be a rule according him the remedy only if the surrendering government would object, since the underlying substantive wrong, which grows out of international law, is only to the latter.

Id.

111. *Id.*

112. *See* M. BASSIOUNI, *supra* note 1, at 364, stating that the

> restrictive view of the rule of specialty [taken by the court in *Fiocconi*] fails to take into account the relator as a participant in the extradition process and his right to uphold such a doctrine when a demanding state acts at variance with such obligations, regardless of whether or not the surrendering state protests such actions.

Id.; *see* United States v. Sensi, 879 F.2d 888 (D.C. Cir. 1989). In *Sensi*, the defendant contested his extradition from Great Britain to the United States on eighteen charges of theft as a violation of the doctrine of speciality. *Id.* at 895. The defendant argued that because his trial proceeded on charges not listed before the extraditing magistrate the district court should have dismissed the indictment as a violation of the doctrine of speciality. *Id.* The court, however, adopted the standard set forth in Restatement (Third) of Foreign Relations Law of the United States regarding the applicability of the doctrine of speciality and found that no violation of speciality occurred. *Id.*; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 477 [hereinafter RESTATEMENT (THIRD)].

The Restatement (Third) standard echoes the test developed in *Paroutian* and *Fiocconi*. *Compare* RESTATEMENT (THIRD), *supra*, § 477 *with Paroutian*, 299 F.2d 486 (2d Cir. 1962), and *Fiocconi*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). The Restatement (Third) states that the applicable standard for determining a violation of the doctrine of speciality entails a finding as to "whether the requested state has objected or would object to the prosecution." RESTATEMENT (THIRD), *supra*, § 477.

113. *See Fiocconi*, 462 F.2d at 479-80 n.8.

114. *See id.*; *see also* United States ex. rel. Donnelly v. Mulligan, 76 F.2d 511, 513 (2d Cir. 1935) (holding that extradition treaties only benefit contracting parties).

sition.[115] Legal authorities and subsequent cases, however, have challenged this theory, arguing that the relator maintains certain rights under extradition treaties.[116] Nonetheless, many courts hold that extradition treaties extend no rights to the relator.[117]

Although the approach to the doctrine of speciality taken by courts reviewing extradition requests differs from that of courts examining whether the United States may have violated the doctrine, the theory they expound remains the same.[118] In

---

115. *See* United States v. Paroutian, 299 F.2d 486, 490-91 (2d Cir. 1962); *Fiocconi*, 462 F.2d at 480-81; *supra* notes 91-96 and accompanying text (discussing *Paroutian* test); *supra* notes 107-09 and accompanying text (discussing *Fiocconi* test).

116. *See* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) (allowing defendant to raise objections to violations of speciality), *cert. denied*, 479 U.S. 1009 (1986); M. BASSIOUNI, *supra* note 1, at 364; Kester, *supra* note 1, at 1465-68; Note, *supra* note 1, at 310; *infra* notes 153-200 and accompanying text (discussing cases granting relator right to raise violations of speciality).

117. *E.g.*, Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *see infra* notes 118-51 and accompanying text (discussing courts denying individual rights under speciality).

118. The Supreme Court's decision in *Rauscher* adopted the doctrine of speciality as domestic law, thereby binding U.S. courts to try individuals for only those crimes listed in the extradition agreement. *See Rauscher*, 119 U.S 407 (1886); *see also Shapiro*, 478 F.2d at 905. The *Shapiro* court stated that *Rauscher* "established the rule of domestic law that the courts of this country will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty." *Id.* This law, therefore, only applies to cases where the United States is the requesting country. *Id.* at 906. A number of reasons make it impracticable to apply the same standards in cases where the U.S. acts as the requested country. First, the power to extradite an individual from the United States belongs to the executive, rather than the judicial branch of the government. *See id.* In such a situation, the only role that the courts play concerns an initial determination as to the extraditability of particular offenses. *See id.* The U.S. Secretary of State makes the ultimate decision regarding the charges for which the United States will commit the individual to extradition. *See id.* Usually, the Secretary of State will pay heed to the findings of the extraditing magistrate as to the extraditable offenses. *See id.* The Secretary of State, however, has the duty of protesting if the requesting country violates the limitations to trial imposed on the extradition by the United States through the extradition agreement. *See id.*

Second, the doctrine of speciality becomes violated only after the trial or punishment of the individual for unextradited charges. *See* M. BASSIOUNI, *supra* note 1, at 360-61. Before an extradition occurs, no technical violation of speciality can occur because, in most cases, the defendant has not undergone trial. *See id.* Thus, extraditing magistrates review extradition requests for compliance with the treaty and U.S. law. *Shapiro*, 478 F.2d at 906. A determination by a court before extradition concerning whether a violation of speciality will occur, therefore, entails a prospective rather than retrospective analysis. *See generally* M. BASSIOUNI, *supra* note 1, at 360-61. Accordingly, the standards applied by the courts in cases where the United States acts as the requested nation differ inherently from the tests necessary to determine

Shapiro v. Ferrandina,[119] the defendant contested his pending extradition to Israel as a violation of the doctrine of speciality.[120] The defendant argued that the extradition treaty between the United States and Israel did not include many of the charges for which Israel sought extradition.[121] The U.S. Court of Appeals for the Second Circuit found that under international law, the principle of speciality does not accrue to the accused, but exists only for the protection of the requested country.[122]

Notwithstanding the courts' interpretation of international law on the subject of to whom the principle of speciality applies, the court reviewed Israel's extradition request to insure the extraditability of the charged offenses.[123] The court therefore implicitly assumed that the defendant had the right to object to a potential violation of the doctrine of speciality.[124] By finding that the design of speciality protects only the requested country, and not the accused, however, the court provided the impetus for future courts to deny the individual standing to invoke the doctrine.[125]

---

whether the United States has breached the doctrine of speciality as the requesting nation. *See Shapiro*, 478 F.2d at 905-06. The theory underlying the application of the doctrine of speciality by courts, however, remains the same regardless of whether the United States is the requested or requesting country. *See id.*; *see also* Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979); *see infra* note 127 (discussing speciality and extraditability of charged offenses).

119. 478 F.2d 894 (2d. Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

120. *Id.* at 905.

121. *Id.*

122. *Id.* at 906. The court stated that "[a]s a matter of international law, the principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." *Id.*; *see* 1 L. OPPENHEIM, *supra* note 5, at 702.

123. *Shapiro*, 478 F.2d at 909.

124. *See generally* Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

125. *See infra* notes 129-52 and accompanying text (discussing courts that question or deny relator's standing to invoke protection of doctrine of speciality). Recently, in *United States v. Caro-Quintero*, the U.S. District Court for the Central District of California held that defendants have no right to raise a violation of an extradition treaty. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). In *Caro-Quintero*, U.S. Drug Enforcement Administration agents arranged for the abduction of one of the defendants, Dr. Humberto Alvarez Machain, from Mexico. *Id.* at 603. The court divested itself of jurisdiction on the grounds that the abduction violated the extradition treaty. *See id.* at 601. The district court addressed the issue of defendant's standing to raise the doctrine of speciality. *Id.* at 607. The court concisely noted the split in the circuits concerning a defendant's right to raise the issue. *Id.* at

Taken together, the Second Circuit's rulings in *Paroutian*, *Fiocconi*, and *Shapiro* stand for the proposition that the doctrine of speciality protects only the requested country from abuse of its extradition process.[126] Many courts, however, have interpreted these holdings to limit an individual's right to invoke the protection of the doctrine of speciality.[127] Some courts have interpreted these holdings as precluding the defendant from raising the issue altogether.[128]

3. Courts Questioning Standing

As courts began to adopt the theory that the doctrine of speciality does not belong to the relator, but rather only to the

---

608. In so doing, the court offered a possible explanation as to why some courts grant defendant's standing to raise violations of speciality. *Id.*; *see infra* note 229 and accompanying text (discussing *Caro-Quintero* court's reasoning). By undertaking the extradition proceedings, the court conjectured, the requested country may implicitly vest the relator with the right to protest a violation of the doctrine of speciality by the requesting country. *Caro-Quintero*, 745 F. Supp. at 608. The court stated that

> by affirmatively undertaking extradition proceedings and limiting the scope of the prosecution by the receiving state, the sending state implicitly protests prosecution on any bases not specified by the bill of extradition. This implicit protest thereby vests the individual with the sending state's rights and standing in that regard.

Id.

The court, however, held that the right to raise objections to violations of the doctrine of speciality belongs to the requested country, and not the relator. *Id.* The court maintained that "it is for the state, and not the individual, to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty. The individual's standing to raise this claim is purely derivative of that of the state." *Id.*

126. *See supra* notes 81-125 and accompanying text (discussing restrictive view of individual rights by some courts).

127. *See, e.g.*, Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979). The District Court for the District of Columbia in *Berenguer* followed the holding in *Shapiro* that the doctrine of speciality does not accrue to the accused. *Id.* at 1197. In *Berenguer*, the United States had already extradited the defendant to Italy when the defendant protested the U.S. consent to an expansion of the extradition order without first granting him a hearing to contest such expansion. *Id.* at 1195. The court reviewed the treaty in question and determined that the United States as the requested party could consent to an expansion of the extradition order without violating the doctrine of speciality. *Id.* at 1197. The court in *Berenguer*, however, noted the lucidity with which courts have determined that the principle of speciality is not a right of the accused. *Id.* The court stated that "courts have been clear in their analysis that the rule of specialty is not a right of the accused but is rather a privilege of the asylum state by which its interests are protected." *Id.* The court in *Berenguer* relied predominantly on *Shapiro* as judicial precedent. *Id.*

128. *See infra* notes 129-52 and accompanying text (discussing courts denying relator standing to invoke protections of doctrine of speciality).

requested country, the question whether relators had standing to raise the issue developed.[129] The U.S. Court of Appeals for the Sixth Circuit, in *Demjanjuk v. Petrovsky*,[130] questioned the relator's standing to raise violations of the doctrine of speciality.[131] In *Demjanjuk*, Israel sought the extradition of the defendant for trial under the provisions of the Israeli Nazis and Nazi Collaborators Act.[132] The defendant argued that the principle of speciality protected him from extradition for trial under that law because the United States had no such law.[133] The court, however, rejected this argument by finding the particular statute under which the trial would occur irrelevant so long as the underlying charge was murder.[134]

The court also noted that the defendant may not have had standing to assert the doctrine of speciality.[135] The court based this assertion on findings by other courts that speciality does not accrue to the accused.[136] By questioning the defendant's standing to raise objections to the doctrine of speciality, the Sixth Circuit lent further support to the theory that speciality protects only the requested state.[137]

---

129. *See infra* notes 130-52 and accompanying text (discussing courts questioning or denying relator standing to protest violations of speciality).

130. 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

131. *Id.* at 583-84.

132. *Id.* at 583.

133. *Id.* Mr. Demjanjuk argued that because the United States does not have a statute similar to the Nazis and Nazi Collaborators Act, extradition for trial under that statute would violate the doctrine of speciality. *Id.*

134. *Id.* The court stated that "the principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offense for which the extradition was granted." *Id.*

135. *Id.* at 583-84. The court stated:

> [w]e have discussed the principle of specialty because it was argued by Demjanjuk and we have attempted to deal with every issue raised. However, we feel constrained to note that there is a serious question whether Demjanjuk has standing to assert the principle of specialty. The right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested.

Id.

136. *Id.* The court relied on *Berenguer v. Vance* and *Shapiro v. Ferrandina* as support for this holding. *Id.* at 584; *see* Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979); Shapiro v. Ferrandina, 478 F.2d 894 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *supra* notes 118-25 and accompanying text (discussing *Berenguer* and *Shapiro*).

137. *See supra* notes 113-17 (discussing theory that speciality only protects the requested country).

In *United States v. Kaufman*,[138] the U.S. Court of Appeals for the Fifth Circuit found that a defendant does not have the right to complain about possible violations of the doctrine of speciality.[139] In *Kaufman*, U.S. Drug Enforcement Administration (the "DEA") Agents and Mexican federal judicial police arrested the defendants in Mexico pursuant to a Louisiana indictment charging them with conspiracy to import narcotics to the United States.[140] Mexican authorities did not extradite the defendants, but placed them on a commercial flight to Louisiana with the DEA agents.[141] The Louisiana proceedings resulted in dismissal of the charges against one defendant and conviction of the other.[142] After the completion of the Louisiana proceedings, however, both defendants were transferred to Texas for trial on another indictment.[143] In Texas, convictions resulted against both defendants.[144] On appeal the defendants argued that their trial in Texas violated the doctrine of speciality because their arrest in Mexico took place pursuant to the Louisiana indictment and not the Texas indictment.[145]

The Fifth Circuit applied the Second Circuit's holding in *Fiocconi* to the facts of their case and held no violation of speciality existed.[146] Looking to the underlying purpose of *Rauscher*, the *Kaufman* court determined that trial on a similar offense in a separate jurisdiction would not be "an act of bad faith against the requested country."[147] The *Kaufman* court did not reach the issue of whether the defendants lacked standing to raise the principle of speciality because it found that the

---

138. 858 F.2d 994 (5th Cir. 1988).

139. *See id.*

140. *Id.* at 998.

141. *Id.*

142. *Id.* at 1006.

143. *Id.* The Texas indictment named the defendants, among others, but did not figure in the arrest of the defendants in Mexico. *Id.* The Texas indictment contained similar charges to the Louisiana indictment. *Id.*

144. *Id.* at 999.

145. *Id.* at 1006-07. The defendants argued that an evidentiary hearing would reveal that their removal to the United States was an extradition and therefore the speciality provision of the United States-Mexico extradition treaty prohibited their transfer to Texas for trial. *Id.*

146. *Id.*; *see* Fiocconi v. Attorney General of United States, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972). The court in *Kaufman* found that the facts in *Fiocconi* were identical to the facts in their case. United States v. Kaufman, 858 F.2d 994, 1008; *see supra* notes 98-112 and accompanying text (discussing *Fiocconi*).

147. *Kaufman*, 858 F.2d 994 at 1008, *reh'g denied*, 874 F.2d 242 (5th Cir. 1989).

principle was not violated, and that therefore the issue was moot.[148]

The defendants in *Kaufman* then petitioned the Fifth Circuit for rehearing.[149] The court reported that it had submitted its prior ruling to the U.S. Department of State for review.[150] The State Department responded that the court correctly denied the defendants the benefits of the principle of speciality because the right only belongs to the requested state.[151] The court subsequently denied the defendants' petition for rehearing, effectively refusing the defendant standing to raise violations of the doctrine of speciality.[152]

---

148. *Id.* at 1009 n.5.

149. United States v. Kaufman, 874 F.2d 242 (5th Cir. 1989).

150. *Id.* at 243. The Fifth Circuit's deference to the State Department seems strange in light of the Supreme Court's finding in *Rauscher*, which specifically rejected the proposition that "the rights of persons extradited under [a] treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress." United States v. Rauscher, 119 U.S. 407, 431 (1886).

151. *Kaufman*, 874 F.2d at 243. The State Department reported that "only an offended nation can complain about the purported violation of an extradition treaty." *Id.*

152. *Id.* Five months after *Demjanjuk*, in *United States ex rel. Cabrera v. Warden, Metropolitan Correctional Center*, the U.S. District Court for the Southern District of New York held that a defendant has no standing to raise the doctrine's protection. United States ex rel. Cabrera v. Warden, Metropolitan Correctional Center, 629 F. Supp. 699, 701 (S.D.N.Y. 1986). In *Cabrera*, Colombia extradited the defendant to Florida to answer various indictments pending there against him. *Id.* at 699. Due to a mistake in Florida, however, the defendant wound up in New York, where indictments against him also existed. *Id.* at 699-700. After arraignment in New York, the court discovered that the extradition agreement only authorized trial of the defendant in Florida. *Id.* at 700. In his application for a writ of habeas corpus, the defendant argued that his transportation to, and arraignment in, New York violated the doctrine of speciality. *Id.*

The court found that the doctrine of speciality requires only that the defendant not stand trial or undergo punishment for offenses not specified in the extradition agreement. *Id.* at 701. The court held that because the defendant did not stand trial or undergo punishment in New York, no violation of speciality had occurred. *Id.* The court, however, also held that the defendant had no standing to raise questions regarding violations of the doctrine of speciality. *Id.* The court agreed "with the government that [the defendant] has no standing to raise questions of the violation of either the treaty or the Rule of Specialty." *Id.* The court then sent the defendant to Florida for trial. *Id.* After the conclusion of the defendant's trial in Florida, a writ of habeas corpus *ad prosequendum* compelled his return to the Southern District of New York to stand trial for the pending indictments there. United States v. Cabrera Sarmiento, 659 F. Supp. 169, 170-71 (S.D.N.Y. 1987).

Interestingly, when the court reviewed, and denied, the defendant's renewed contention that his presence in New York violated the doctrine of speciality, it did not

B. *Courts Granting Individual Rights Under the Doctrine of Speciality*

Courts that restrict, or deny altogether, a relator's right to raise a violation of the doctrine of speciality commonly hold that speciality only protects the requested country.[153] A number of courts, however, have taken the opposite approach to individual rights under extradition treaties.[154] Some of these latter courts follow a constitutional analysis, similar to the rationale of *Rauscher*, while others apply a jurisdictional analysis.[155] The extent of the protection afforded the relator varies according to the facts. Some courts, for example, acknowledge the relator's right to raise violations of speciality, but find that the consent of the requested country to the trial of the relator on additional charges, or a waiver of extradition by the relator,[156] effectively cuts off these rights.[157]

---

mention the issue of standing. *See id.* This may reflect the fact that the Second Circuit had addressed the issue in the interim. In that case, *United States v. DiTommaso*, a defendant, arrested in Bermuda, attempted to argue that his trial in New York violated the doctrine of speciality. United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987). The defendant, however, was deported, not extradited, to the United States. *Id.* at 212. He had waived his right to extradition from Bermuda. *Id.* The court noted that:

> [t]he form signed by the defendant was titled "WAIVER AND CONSENT" and recited as followed: "I, VITORIANO MOLINA CHACON, having been charged with an extradition crime within the jurisdiction of the United States of America, hereby freely and voluntarily waive and forego *all my rights under the Extradition Act of 1870*. . . . "

Id. at n.14 (emphasis in original).

The court in *DiTommaso* held that because the defendant had waived extradition the doctrine of speciality did not limit the scope of prosecution. *Id.* at 212. The court pronounced that "[w]e need not and therefore do not reach the separate issue of whether an extradited defendant is ever entitled derivatively to raise whatever objections the extraditing country might have." *Id.* at 212 n.13. Thus, the district court in *Cabrera Sarmiento* may have abandoned the contention that the defendant had no standing to raise questions regarding the doctrine of speciality in light of the Second Circuit's decision in *DiTommaso*. *See Cabrera Sarmiento*, 659 F. Supp. 169 (S.D.N.Y. 1987).

153. *See supra* notes 81-152 and accompanying text (discussing courts finding speciality to protect only requested country).

154. *See infra* notes 158-200 and accompanying text (discussing courts granting relators right to raise violations of speciality).

155. *E.g.*, United States v. Vreeken, 803 F.2d 1085 (10th Cir. 1986) (applying jurisdictional analysis to speciality), *cert. denied*, 479 U.S. 1067 (1987); United States v. Sensi, 664 F. Supp. 566 (D.D.C. 1987) (applying constitutional analysis), *aff'd*, 879 F.2d 888 (D.C. Cir. 1989).

156. *See, e.g.*, United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987); *see supra* note 151 (discussing *DiTommaso*).

1. Consent by Requested Country or Waiver by Relator Exception

In 1986, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Najohn*[158] relied on *Rauscher* for the proposition that an extraditee may raise whatever objections to his extradition the sending country might have.[159] In *Najohn*, Switzerland extradited the defendant to the U.S. District Court for the Eastern District of Pennsylvania on charges of interstate transportation of stolen property.[160] While serving a four-year sentence in Pennsylvania, after entering a plea of guilty to one of the extradited charges, the U.S. District Court for the Northern District of California indicted the defendant on similar charges.[161] The defendant claimed that trial in California would violate the doctrine of speciality as expressed by the extradition treaty and the specific language of the Swiss court's extradition order.[162] The court in *Najohn* found no violation of the speciality doctrine because Switzerland had expressly waived its application.[163]

The *Najohn* court provides an example of how individual rights under extradition treaties derive from those of the requested country.[164] When the requested country consents to an expansion of the extradition order, or waives the doctrine altogether, the defendant has no recourse through the doctrine of speciality.[165] Thus, the rights of the requested country

---

157. *See infra* notes 158-77 and accompanying text (discussing consent cases).

158. 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

159. *Id.* at 1422. The court held that "the person extradited may raise whatever objections the rendering country might have." *Id.*; *see* United States v. Rauscher, 119 U.S. 407 (1886).

160. *Najohn*, 785 F.2d at 1421.

161. *Id.*

162. *Id.*

163. *Id.* at 1422. A letter from the Swiss Embassy to the United States agreed to the suspension of the principle of speciality. *Id.* In rejecting the defendant's argument that the Swiss Embassy to the United States did not possess the authority to suspend the doctrine, the court declared that

> [t]o do otherwise would ignore the precept that courts do not intervene in foreign affairs. While the specialty doctrine, conceived as a means for enforcing American treaty obligations, is a recognized exception to this doctrine, there is no reason to extend this exception to require courts to initiate an investigation into the workings of foreign governments.

Id. at 1423.

164. *See id.* at 1422.

165. *See id.*

under extradition treaties surpass those of the individual subjected to extradition.[166]

In *United States v. Riviere*,[167] the U.S. Court of Appeals for the Third Circuit undertook an extensive analysis of the doctrine of speciality, and the meaning of *Rauscher*.[168] In *Riviere*, the Commonwealth of Dominica extradited the defendant to the U.S. District Court of the Virgin Islands on charges of narcotics exportation.[169] Subsequently, the government dropped the narcotics charges and filed an information[170] in the district court charging the defendant with seven counts of firearms offenses.[171] The defendant entered a conditional plea on some of the firearms charges.[172] The defendant claimed that because he was charged with a crime for which he was not surrendered, his extradition violated the doctrine of speciality.[173]

The *Riviere* court's analysis of the doctrine of speciality included a lengthy discussion of *Rauscher* and individual rights under extradition treaties.[174] The court found that the U.S. Supreme Court's opinion in *Rauscher* suggested that individuals maintain rights under extradition treaties.[175] The court recognized that the defendant's rights derived from those of

---

166. *See* United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991); *infra* notes 167-77 and accompanying text (discussing *Riviere* and priority of rights under extradition treaties); *see also*, United States v. Diwan, 864 F.2d 715, 721 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989). The *Diwan* court asserted that

> [i]n determining whether the prosecution of Diwan was a breach of the extradition treaty, it is essential that we determine whether [the requested country] would regard the prosecution as an affront to its sovereignty, for the remedy which Diwan seeks, and the arguments that she advances in support thereof, are derivative in nature.

Id. at 721.

167. 924 F.2d 1289 (3d Cir. 1991).

168. *Id.* at 1297-1301.

169. *Id.* at 1292.

170. An information is a "written accusation of crime signed by the *prosecutor*, charging the person with the commission of a crime." BARRON'S LAW DICTIONARY 231 (2d ed. 1984) (emphasis in original).

171. *Riviere*, 924 F.2d at 1292. Apparently the firearms offenses were not extraditable charges under the extradition treaty, and the defendant was thus extradited on the narcotics charges. *Id.*

172. *Id.*

173. *Id.* at 1296.

174. *Id.* at 1297-1301.

175. *Id.* at 1297. The court stated that "[m]uch of the [*Rauscher*] opinion suggests that the rights described in the treaty are conferred upon individuals rather than the government." *Id.*

the requested country.[176] The *Riviere* court distinguished *Rauscher* on the grounds that Dominica had expressly waived its right to protest any post-extradition proceedings in the requesting country.[177]

2. Theories For Granting Defendants Rights

Courts that grant individuals the right to invoke the protection of the doctrine of speciality usually cite *Rauscher* for support.[178] The courts in *Najohn* and *Riviere*, for example, cited *Rauscher* for the proposition that some treaties contain provisions conferring enforceable rights upon individuals.[179]

---

176. *Id.*

177. *Id.* at 1300. The court stated that

> [w]hile a treaty limits a nation's discretion to *grant* asylum, it does not change its power to *deny* asylum. When a nation waives its right to enforce extradition treaty provisions, it essentially refuses to grant asylum to the fugitive for the offence involved. Inasmuch as Dominica expressly waived its rights under the treaty to object to this country's proceedings after extradition, it effectively expressed its intention that it would not grant asylum to [the defendant] for any offense for which the United States intended to prosecute him, an act completely within Dominica's discretion as a sovereign nation.

Id. (emphasis in original). The court concluded that

> in light of the Dominican waiver, [the defendant] had no right under the treaty to return to Dominica at the conclusion of his case on the offense for which he was extradited before the disposition of the other charges. Our result, of course, does not emasculate the rule of specialty in the treaty because it still restricts the conduct of requesting nations when the asylum country invokes its rights under the treaty.

Id. at 1301.

178. *E.g.*, *id.* at 1297; United States v. Diwan, 864 F.2d 715, 721 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989); United States v. Herbage, 850 F.2d 1463, 1466 n.7 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027 (1989).

179. *See* United States v. Riviere, 924 F.2d 1289 (3rd Cir. 1991); United States v. Najohn, 785 F.2d 1420 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *see also* United States v. Rauscher, 119 U.S. 407, 419 (1886); United States v. Levy, 905 F.2d 326 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 759 (1991); United States v. Diwan, 864 F.2d 715 (11th Cir.), *cert. denied*, 492 U.S. 921 (1989); United States v. Herbage, 850 F.2d 1463 (11th Cir. 1988), *cert. denied*, 489 U.S. 1027 (1989); United States v. Cuevas, 847 F.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987).

In *United States v. Thirion*, Monaco extradited the defendant on charges of fraud. *Thirion*, 813 F.2d at 150. The extradition agreement specifically provided that the defendant could not stand trial on charges of conspiracy. *Id.* At trial, however, the judge would not dismiss the conspiracy count, but, instead instructed the jury that they could not return a verdict under that count. *Id.* at 151. The trial judge did not dismiss the conspiracy count because the trial could proceed on the count should the defendant remain in the country for one month after having the liberty to leave. *Id.*

Depending on the facts and circumstances of cases that raise speciality, however, courts tend to adhere to different aspects of the *Rauscher* decision. Some courts, for example, apply a personal jurisdiction analysis,[180] while others approach the issue from a constitutional perspective.[181] Additionally, some courts just assume, without deciding the issue, that the defendant maintains the right to raise violations of speciality.[182]

The defendant protested that this violated the extradition agreement and the doctrine of speciality. *See id.* The court, however, disagreed because the defendant was tried only for the extradited charges. *Id.*

Notwithstanding the outcome of the case, *Thirion* is important because the Eighth Circuit allowed the defendant to raise whatever objections to his prosecution Monaco could have raised. *Id.* (citing *Rauscher*). Moreover, the court dismissed as "without merit" the government's argument that the defendant lacked standing to complain of a violation of the treaty. *Id.* Previously, no other U.S. court had so found. *See id.*

In *United States v. Cuevas*, the defendant was extradited from Switzerland to the United States. *Cuevas*, 847 F.2d at 1419. He was subsequently convicted on charges of conspiracy to distribute cocaine and conspiracy to violate currency reporting laws. *Id.* at 1421. Claiming that the currency related offenses were non-extraditable, the defendant argued that the doctrine of speciality prohibited his prosecution thereon. *Id.* at 1426. The court held that the defendant could raise whatever objections to his prosecution that the extraditing country would have been entitled to raise. *Id.*

In *Cuevas*, the U.S. Court of Appeals for the Ninth Circuit noted the views of other courts which deny the defendant standing to invoke the protection of the doctrine of speciality. *See id.* at 1426-27 n.23. The court, however, further noted that it followed the opposite position. *Id.*

In *Herbage*, the court assumed without deciding that an individual has standing to allege a violation of the speciality doctrine. *Herbage*, 850 F.2d at 1466. The court noted that "there is a debate about whether, theoretically, the principle of specialty is a right of the individual." *Id.* at 1466 n.7. The court, however, pointed out that *Rauscher* "speaks of a violation of the principle as involving both the party extradited and the surrendering country." *Id.*; *see Rauscher*, 119 U.S. at 422.

In *Diwan*, the Eleventh Circuit stated that the objective of the principle of speciality is to ensure that the treaty is faithfully observed by the contracting parties. *Diwan*, 864 F.2d at 721. Therefore, the court reasoned, the extradited individual is permitted to raise any objections that the asylum country might raise. *Id.* The court based this finding on *Najohn* and *Fiocconi*. *Id.*; *see* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); Fiocconi v. Attorney General of the United States, 462 F.2d 475, 479-80 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972).

Most recently, in *Levy*, the Tenth Circuit flatly rejected the government's contention that the defendant lacked standing to raise the issue. *Levy*, 905 F.2d at 328 n.1. The *Levy* court cited *Rauscher* as the case that created this right. *Id.*

180. *See infra* notes 183-90 and accompanying text (discussing jurisdictional analysis).

181. *See infra* notes 191-200 and accompanying text (discussing constitutional analysis).

182. *See Herbage*, 850 F.2d 1463. In *Herbage*, the court stated that "[f]or the purposes of this case, we assume without deciding, that an individual has standing to

a. Jurisdictional Analysis

The U.S. Court of Appeals for the Tenth Circuit, in *United States v. Vreeken*,[183] used *Rauscher* to hold that the defendant had a right to claim speciality's protection.[184] In *Vreeken*, the defendant waived his pending extradition to the United States from Canada on charges of wire fraud.[185] Subsequent to his return to the United States, a superseding indictment charged the defendant with thirty-nine counts of tax fraud.[186] The defendant claimed that prosecution on the tax charges violated the doctrine of speciality.[187]

The court in *Vreeken* applied a novel analysis to the doctrine of speciality.[188] Finding that speciality limits the court's power to exercise personal jurisdiction over the defendant, the court held that the defendant therefore had the right to raise the doctrine of speciality.[189] The court held, however, that the

---

allege a violation of the specialty [sic] principle." *Id.* at 1466. The court further stated that *Rauscher* was "[t]he Supreme Court opinion which recognize[d] this principle as involving both the party extradited and the surrendering country." *Id.* at 1466 n.7.

183. 803 F.2d 1085 (10th Cir. 1986) (defendant extradited from Canada on charges of wire fraud failed to raise speciality objections in timely manner), *cert. denied*, 479 U.S. 1067 (1987).

184. *Id.* at 1088.

185. *Id.* *But see* United States v. DiTommaso, 817 F.2d 201 (2d Cir. 1987) (defendant waived extradition and court therefore did not address issue of standing).

186. *Vreeken*, 803 F.2d at 1088. The indictment consisted of thirty-six counts of aiding and abetting in the preparation of false and fraudulent income tax returns in violation of 26 U.S.C. § 7206(2), and three counts of willful failure to file income tax returns in violation of 26 U.S.C. § 7203. *Vreeken*, 803 F.2d at 1088.

187. *Vreeken*, 803 F.2d at 1088.

188. *See id.*

189. *Id.* The court stated that

> [t]he specialty rule may initially appear to limit the court's subject matter jurisdiction, because it bars trial of an extradited defendant on some charges but not on others. But the extradition process is one whereby a court gains personal jurisdiction over a defendant. Insofar as a defendant has a right to claim the rule's protection, it functions to limit the court's personal jurisdiction over the defendant.
>
> This point is emphasized in the very case that gave extradited defendants a right to claim the rule's protection, *United States v. Rauscher*. There, in applying the rule of specialty, the Court concluded: "[W]hile the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, *it did not have jurisdiction of the person at that time, so as to subject him to trial* (emphasis added)."

Id. (citations omitted). The court held that the doctrine of speciality is an issue of personal jurisdiction and, further, that because individuals can consent to personal jurisdiction they can also waive it. *Id.*

defendant in this case had waived his right to protest his prosecution by failing to object in a timely manner.[190]

b. Constitutional Analysis

In another approach to the doctrine of speciality, the U.S. District Court for the District of Columbia found that the defendant in *United States v. Sensi*[191] had a constitutionally protected right to invoke speciality's protection.[192] In *Sensi*, the defendant was indicted for transportation of stolen property and was subsequently extradited from England.[193] Prior to trial, the U.S. government filed additional charges, including mail fraud and possession of stolen securities.[194] At trial the defendant claimed that the non theft-related charges violated the doctrine of speciality.[195] The government argued that the defendant had no rights under the treaty to challenge his extradition.[196]

The court rejected the government's contentions, reasoning that, although the treaty in question was a contract between sovereign governments, it also acted as the supreme law of the United States.[197] The court found that placing a person on trial for non-extradited charges would not only be a violation of the treaty, but also a violation of the defendant's personal rights.[198] The court concluded, therefore, that the de-

190. *Id.* Federal Rule of Criminal Procedure 12(f) provides:

(f) EFFECT OF FAILURE TO RAISE DEFENSES OR OBJECTIONS. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver.

FED. R. CRIM. P. 12(f), 18 U.S.C. app. (1988).

191. 664 F. Supp. 566 (D.D.C. 1987), *aff'd*, 879 F.2d 888 (D.C. Cir. 1989).

192. *Id.* at 570. It should be noted that this is the same district that, six years earlier, found the defendant in *Berenguer v. Vance* to be without rights under the rule of speciality. Berenguer v. Vance, 473 F. Supp. 1195 (D.D.C. 1979); *see supra* notes 34-42 and accompanying text (dicussing *Berenguer*).

193. United States v. Sensi, 664 F. Supp. 566, 568 (D.D.C 1987), *aff'd*, 879 F.2d 888 (D.C. Cir. 1989).

194. *Id.*

195. *See id.*

196. *Id.* at 570.

197. *Id.*; *see* U.S. CONST. art. VI; *supra* note 53 (setting forth relevant text of article VI).

198. United States v. Sensi, 664 F. Supp. 566, 570 (D.D.C. 1987), *aff'd*, 879 F.2d

fendant could invoke the doctrine of speciality to challenge his prosecution.[199] The court went on to hold, however, that no violation of speciality had occurred, because sufficient facts were proved to the extraditing magistrate to allow a valid prosecution of the defendant on all the charges in the indictment.[200]

III. *COURTS SHOULD RECOGNIZE A RELATOR'S RIGHT TO PROTEST VIOLATIONS OF THE DOCTRINE OF SPECIALITY*

The constitutional analysis employed by the Supreme Court in *Rauscher* established a relator's right to face prosecution on only those charges for which the requested country granted extradition.[201] Since then, other arguments have emerged that reinforce the Court's holding in *Rauscher*. First, because extradition serves as a method through which courts obtain personal jurisdiction over defendants, relators have a statutory right to file a timely objection to protest a defect in the court's exercise of jurisdiction.[202] Second, by affirmatively undertaking the procedures required to extradite an individual, the requested country implicitly vests the relator with the right to protest possible violations of the extradition treaty.[203] Finally, courts refusing to recognize a relator's right to protest a violation of speciality construe *Rauscher* too narrowly by relying on a purely contractual analysis of extradition treaties.[204]

---

888 (D.C. Cir. 1989). The court stated that trial of an individual on non-extradited charges would not only serve as an "infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving [a defendant's] personal rights." *Id.*; *see* United States v. Lehder-Rivas, 668 F. Supp. 1523 (M.D. Fla. 1987) (applying same constitutional analysis thereby allowing defendant to raise principle of speciality to contest trial on charges not listed in extradition agreement).

199. *Id.* The court went on to find that the indictment did not violate the doctrine of speciality. *Id.* at 572.

200. *Id.* at 572.

201. United States v. Rauscher, 119 U.S. 407, 418-19 (1886).

202. FED. R. CRIM. P. 12(f), 18 U.S.C. app. (1988); *see supra* note 189 (quoting text of rule 12(f)); *see also* United States v. Vreeken, 803 F.2d 1085 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987) (applying jurisdictional approach to speciality).

203. *See* United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal 1990).

204. *See, e.g.*, United States v. Fiocconi, 462 F.2d 475, 479-80 n.8 (2d Cir.) (holding that wrong from violation of speciality only results to requested country), *cert denied*, 409 U.S. 1059 (1972); *see also* M. BASSIOUNI, *supra* note 1, at 364 (discussing restrictive view of doctrine of speciality).

An exception to the relator's right to raise violations of the doctrine of speciality exists only to the extent that the requested country expressly waives any treaty-imposed limitations to trial.[205]

A. *Constitutional Analysis: The* Rauscher *Rationale*

Prior to *Rauscher*, the concerns of many U.S. courts with regard to the doctrine of speciality focused on whether a relator maintains any rights under the doctrine of speciality.[206] *Rauscher* resolved this conflict in favor of the relator.[207] The *Rauscher* Court specifically reviewed whether the relator had "acquired a right" to freedom from prosecution on an offense different from those set forth in the extradition proceeding.[208] The Court answered affirmatively by holding that the treaty had clothed the defendant with a right to exemption from prosecution on the unextradited charge.[209] Furthermore, the Court held that not recognizing the relator's rights under the doctrine of speciality would amount to an "implication of fraud upon the rights of the party extradited."[210]

The Court in *Rauscher* reached this conclusion by applying a constitutional analysis to the issue.[211] Pursuant to the U.S. Constitution, treaties are the supreme law of the land.[212] The Court reasoned that whenever the provisions of a treaty impose a judicially enforceable rule affecting private citizens, the courts may enforce those rights as they would rights growing out of a statute.[213] Thus, by divesting the trial court of jurisdiction to subject the defendant to trial on the unextradited

---

205. *See supra* notes 158-77 and accompanying text (discussing consent cases).

206. *See supra* note 45 (discussing conflict in courts before *Rauscher*).

207. *See* United States v. Rauscher, 119 U.S. 407 (1886); *see also* Ker v. Illinois, 119 U.S. 436, 443 (1886) (referring to *Rauscher* as acknowledging such rights); *supra* notes 55-58 and accompanying text (discussing *Rauscher*).

208. *Rauscher*, 119 U.S. at 407; *see supra* note 52 (listing questions Court reviewed in *Rauscher*).

209. *Rauscher*, 119 U.S. at 422; *see Ker*, 119 U.S. at 443. Interpreting *Rauscher*, the *Ker* Court stated that the extradition treaty in *Rauscher* clothed the defendant with the right of speciality. *Id.*

210. *Rauscher*, 119 U.S. at 422.

211. *Id.* at 418-19; *see supra* notes 53-59 and accompanying text (discussing Court's analysis in *Rauscher*).

212. U.S. CONST. art. VI.; *see supra* note 53 (citing text of article VI).

213. United States v. Rauscher, 119 U.S. 407, 418-19 (1886); *see supra* note 55 (citing Court's language in *Rauscher*).

charge of cruel and unusual punishment, the Court in *Rauscher* held that individual rights under extradition treaties are judicially enforceable.[214]

Justice Gray, in his concurring opinion, pointed out that "any person prosecuted in any court within the United States has the right to claim the protection [of U.S. laws]."[215] *Rauscher* established that the rules imposed on private citizens by extradition treaties are of a nature to be enforced by the courts.[216] Thus, anyone prosecuted in a U.S. court pursuant to extradition has the right to claim the protection of the doctrine of speciality, as if he were claiming the protection of a statute.[217]

Moreover, immediately following the U.S. Supreme Court's decision in *Rauscher*, the Court reaffirmed that the doctrine of speciality is a right of defendants.[218] The Court in *Ker v. Illinois* cited *Rauscher* for the proposition that extradition treaties provide the defendant with the right to avoid prosecution on unextradited charges.[219] Within recent years, a number of U.S. courts of appeals have also held that, under *Rauscher*, relators maintain the right to invoke the doctrine of speciality.[220]

B. *Jurisdictional Analysis*

Extradition provides courts with personal jurisdiction over defendants.[221] Without establishing personal jurisdiction over the defendant, courts are powerless to hear their cases.[222] Ex-

---

214. *Rauscher*, 119 U.S. at 433.

215. *Id.* (Gray, J., concurring). Justice Gray concurred only because he believed the Congressional legislation providing the procedures for dealing with relators spoke of this right. *See id.*

216. *See id.* at 407.

217. *See id.* at 419 (discussing treatment of certain treaties as statutes).

218. *See* Ker v. Illinois, 119 U.S. 436 (1886).

219. *See id.* at 443; *see supra* note 65 (quoting language of *Ker* Court).

220. *See, e.g.*, United States v. Riviere, 924 F.2d 1289, 1297-301 (3d Cir. 1991); United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987); United States v. Vreeken, 803 F.2d 1085, 1088 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987). The court in *Vreeken* stated that *Rauscher* is "the very case that gave extradited defendants a right to claim [speciality's] protection." *Id.*

221. *See Vreeken*, 803 F.2d at 1088; *supra* note 189 (citing court's language in *Vreeken*).

222. *See Pennoyer v. Neff*, 95 U.S. 714 (1877) (setting forth principles of public law governing jurisdictional issues).

tradition treaties are specifically designed to vest courts with jurisdiction over criminal defendants.[223] Thus, the U.S. Federal Rules of Criminal Procedure must be read to allow a defendant to file a timely protest to the court's exercise of jurisdiction.[224] Denying the defendant the right to invoke the doctrine would amount to a denial of the defendant's ability to object to the court's exercise of personal jurisdiction.[225] Furthermore, a party must be permitted to object to a court's exercise of personal jurisdiction in criminal cases to prevent indiscriminate prosecution of individuals.[226] U.S. courts may not deny such motions, if filed timely, because this protection is statutorily provided to all criminal defendants in U.S. courts.[227]

C. *Requested Countries Implicitly Vest the Relator with the Right to Invoke the Doctrine's Protection*

A relator's right to raise a violation of the doctrine of speciality is implicit in the extradition process.[228] Due to the highly formalistic and time-consuming procedures involved in executing and processing an extradition request, requested countries rely on the requesting country to faithfully execute their obligations under the treaty, and thereby implicitly protest any treaty deviations.[229] Thus, if a country initiates its legal and diplomatic processes to arrest and extradite an individual to another country, it implicitly protests any prosecution of that individual to which it did not consent.[230] Moreover, the right to protest violations of the extradition treaty is vested in the relator, because it is impractical to require the requested country to monitor every trial resulting from an extradition.

---

223. *Id.*

224. *See supra* note 190 (setting forth text of rule 12(f)).

225. *See Vreeken*, 803 F.2d 1085; *supra* notes 183-90 and accompanying text (discussing *Vreeken* court's jurisdictional analysis).

226. *See* United States v. Rauscher, 119 U.S. 407, 433 (1886). The Court's holding in *Rauscher* confirms this concept by concluding that the lower court did not have jurisdiction over the person to subject him to trial on those counts. *Id.*

227. *See* United States v. Vreeken, 803 F.2d 1085, 1089 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987).

228. *See* United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

229. *Id.* at 601.

230. *See* United States v. Rauscher, 119 U.S. 407, 422 (1886) (stating that extradition procedures taken by requested country protect rights of relator).

Hence, relators are representatives of the requested country and therefore may always protest a violation of the doctrine of speciality.[231]

D. *Courts Not Recognizing Speciality As a Relator's Right Misinterpret* Rauscher *and Neglect the Unique Nature of Extradition*

While U.S. courts and legal authorities generally agree that the doctrine of speciality is designed to protect the interests of the requested country, it does not follow that the relator therefore maintains no right to protest the doctrine's violation by the requesting country.[232] Nevertheless, the U.S courts that have failed to regard the doctrine of speciality as conferring any rights upon individuals continue to apply a restrictive, or contractual analysis to extradition treaties.[233] This restrictive analysis supposes that only the requested country possesses rights under the treaty.[234] In other words, because individuals do not make extradition treaties, individuals do not receive any protection pursuant to them. This approach to extradition treaties has allowed some courts to deny the relator standing to raise violations of the treaty, specifically, within the area of the doctrine of speciality.[235]

---

231. *See Caro Quintero*, 745 F. Supp. 599. The court's opinion in *United States v. Caro-Quintero*, while not based on *Rauscher*, is an excellent policy argument in support of the implicitness of the right to protest speciality's violation. As it is impractical for the extraditing country to monitor every trial and hearing resulting from an extradition, it necessarily follows that these rights of protest should be vested in the relator. The only problem with this approach is that it would only seem to apply in the cases of formal extradition. Nevertheless, the *Caro-Quintero* court does offer some solution to this dilemma by declaring that unilateral abductions are violations of extradition treaties. *See id.* at 601.

232. *E.g.*, United States v. Najohn, 785 F.2d 1420 (9th Cir.) (stating that "[b]ecause the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition"), *cert. denied*, 479 U.S. 1009 (1986)). *Id.* at 1422; M. BASSIOUNI, *supra* note 1, at 360.

233. *See* Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973); Fiocconi v. Attorney General of the United States, 462 F.2d 475, 479-80 n.8 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *see also* United States ex rel. Donnelly v. Mulligan, 76 F.2d 511, 512-13 (2d Cir. 1935); *supra* notes 81-152 and accompanying text (discussing courts denying relator rights under extradition treaties).

234. *See Shapiro*, 478 F.2d at 906.

235. *See* Kester, *supra* note 1, at 1467. Mr. Kester states that the doctrine of speciality "is the context in which individuals most often claim treaty rights." *Id.*

The rationale of courts that take a restrictive approach to the doctrine of speciality is precarious for two reasons. First, U.S. courts applying a contractual analysis to extradition treaties have misinterpreted *Rauscher*. Although the Court in *Rauscher* addressed the contractual[236] nature of some treaties, it distinguished extradition treaties.[237] The Court held that the basis for determining whether a treaty is merely a compact between nations, or of a judicially cognizable character, turns on whether the treaty confers enforceable rights on the citizens of the nations who are parties to the treaty.[238] Courts that restrict extradition treaties to little more than a contract conferring no rights on the relator therefore misapply *Rauscher*, which recognized the judicial enforceability of individual rights under these treaties.

Second, applying the doctrine of speciality only to the asylum country is neither just nor practical. This approach places an unreasonable burden on the defendant to ensure that the extraditing country protests any violations of the doctrine. Moreover, many countries that extradite individuals to the United States do not have the resources to monitor individual trials. Surely this is an unfair burden to place on a defendant in a system that places the entire burden of proof on the government.

CONCLUSION

Extradition law has evolved from antiquity to reflect a concern for human rights now manifest in the policies which govern extradition. Until there is uniform agreement that the doctrine of speciality protects the rights of individuals, as well as

---

236. United States v. Rauscher, 119 U.S. 407, 418 (1886). In *Rauscher*, the Court stated that

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Id.

237. *See id.* at 407.

238. *Id.* at 418-19; *see* Head Money Cases, 112 U.S. 580 (1884) (for discussion of contractual nature of treaties vs. treaties as law of land).

countries, courts will continue to deny individuals the right to protest violations of the extradition treaty. Courts must, therefore, recognize that relators maintain and can invoke the protection of the doctrine of speciality. This right stems from the U.S. Constitution, U.S. rules of jurisdiction, the implicit protection extended by the extradition process, and the impracticality of requiring requested countries to monitor proceedings following extradition for compliance with the treaty.

*Christopher J. Morvillo**

---

* J.D. Candidate, 1992, Fordham University.