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U.S. COURTS, THE DEATH PENALTY, AND THE
DOCTRINE OF SPECIALTY: ENFORCEMENT IN
THE HEART OF DARKNESS

Speedy Rice* & Renée Luke**

The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

—Chief Justice Rehnquist in United States v. Alvarez-Machain¹

I. INTRODUCTION

Imagine the following hypothetical. Carlos Pravia, a Mexican national, breaks into a home in Dallas, Texas, assaults two people inside, and then steals their belongings. He flees to Monterrey, Mexico. In Texas, the grand jury indicts Pravia for burglary and assault. The United States requests his extradition from Mexico based only on these charges. Mexico consents. Before the indictment was issued, however, the prosecutor had reason to believe that Carlos Pravia was involved in another break-in that resulted in a murder. Having already experienced Mexico's requirement of an assurance of no death penalty before approving an extradition, the prosecutor does not take any steps to pursue the criminal connection.

After Mexico extradites Mr. Pravia to Dallas, the prosecutor picks up the investigation of the earlier break-in and

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murder, arguing that newly discovered evidence proves Carlos Pravia committed both crimes. In a separate indictment, the prosecutor charges Carlos Pravia with capital murder. In addition to these changes, the prosecutor also discovers Mr. Pravia is involved in drug trafficking. The prosecutor amends the first indictment to add various drug trafficking charges. Mr. Pravia argues he cannot be prosecuted for murder and drug trafficking under the doctrine of specialty because he was not extradited for those charges. Mexico consents to the drug trafficking charge, but argues the United States may not seek the death penalty for the murder charge, as the death penalty is unconstitutional in Mexico and under no circumstances would it have extradited Carlos Pravia without an assurance of no death penalty.

What is the United States required to do in such a circumstance? What should a foreign government that has rejected capital punishment realistically expect from the multi-sovereign U.S. system of justice when faced with an extradition request from a state or the federal government of the United States? What steps can the foreign government take to protect its national policies and international interests in such circumstances?

Foreign governments must understand the general aversion in American jurisprudence to apply international law, even when such a decision flies in the face of formal extradition treaties and international norms. For example, only a very small number of cases have acknowledged the Vienna Convention on Consular Relations, a document the United States voluntarily ratified. No more than a handful of cases have affirmatively applied the doctrine of specialty, which would bar a charge that was different than the one for which the defendant had been extradited. This opposition to international principles is especially worrisome when an extradited defendant faces a new charge in the United States for which he could receive the death penalty.

This article will analyze the application of the doctrine of specialty in international extradition proceedings, with special emphasis on cases involving the death penalty. The article first gives a brief description of extradition and the doc-

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trine of specialty. Second, it examines the details of the doctrine of specialty that pose the greatest problems in courts in the United States. Third, the article briefly explores the Vienna Convention on Consular Relations, and its treatment by U.S. courts as a predictor of how the doctrine of specialty will be handled by U.S. courts. Finally, it shows what foreign governments can and should do before agreeing to any extradition request.

II. EXTRADITION—AN OVERVIEW

"Extradition is 'the surrender by one nation to another of an individual accused or convicted of an offense outside its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.'" The rationale underlying extradition is the facilitation of capturing fugitives outside the country’s jurisdiction. Extradition is generally carried out through an extradition treaty, which is essentially a mutual agreement between two governments to promote the prosecution of an accused. On an international level, "[t]reaties may provide for the rendition of criminal fugitives between states, but it is for [provincial] law to determine whether the fugitive is to be surrendered in accordance with the extradition treaty." A government must present evidence of probable cause in order to extradite and try an individual.

In the United States, there are five substantive requirements that must be satisfied for extradition to and from the United States: (1) reciprocity; (2) double criminality; (3) an

3. See infra Parts II, III.A.
6. See Puentes, 50 F.3d at 1572 (citing 1 M. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 359-60 (2d rev. ed. 1987)).
9. Reciprocity "essentially requires that either (a) the states involved in an extradition reciprocally recognize their respective judicial processes, or (b)
extraditable offense;\textsuperscript{11} (4) non-inquiry;\textsuperscript{12} and (5) specialty.\textsuperscript{13} This article will concentrate on the fifth, and perhaps most controversial, requirement—the doctrine of specialty.

III. DOCTRINE OF SPECIALTY

A. A General Overview of the Doctrine of Specialty

The United States Supreme Court created the doctrine of specialty more than a century ago in United States v. Rauscher.\textsuperscript{14} In Rauscher, the defendant was convicted of murder and was extradited pursuant to a formal extradition treaty.\textsuperscript{15} Murder was the only extraditable charge.\textsuperscript{16} After the defendant was extradited, however, he was charged with "cruel and unusual punishment."\textsuperscript{17} The court held it was unreasonable to allow the requesting country to prosecute the extradited defendant "without any limitation, implied or otherwise."\textsuperscript{18} If a surrendering country is not able to limit the extradition charges, it would undermine the requirement that an extradition request state with particularity the charge

\begin{itemize}
  \item "Double criminality requires the offenses for which extradition is requested be a crime in both the requested and requesting states." \textit{Id.} at 1332.
  \item "The extraditable offense requirement necessitates either (1) that the offense be specifically listed in the extradition treaty, or (2) that the offense falls within the definition of an extraditable offense as created by a formula set forth in the extradition treaty." \textit{Id.}
  \item Hugh Thatcher states the following:
    The duty of non-inquiry is placed upon U.S. courts when considering an extradition request from another state. The court may not inquire into the procedures used by the requesting state to obtain probable cause for extradition, question the means by which a criminal conviction is obtained under the system of the requesting state, or inquire about the penalty that the relator will be subject to upon conviction.
  \item \textit{Id.}
  \item The doctrine of specialty mandates that an extradited defendant "shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up." United States v. Rauscher, 119 U.S. 407, 424 (1886).
  \item 119 U.S. 407 (1886).
  \item \textit{See id.} at 410, 418-19.
  \item \textit{See id.} at 409-10.
  \item \textit{Id.} at 409.
  \item \textit{Id.} at 419-20.
\end{itemize}
upon which the defendant is to be extradited. The Rauscher Court held that an accused
shall be tried only for the offense 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 a charge of any other crime committed previous to his extradition.

This provision is typically integrated into extradition treaties. The countries entering into such a treaty may choose to either narrow or broaden the protection afforded an accused, as they choose. Thus, it is imperative to analyze the plain language of the pertinent treaty to determine the amount of protection the doctrine provides an extradited defendant.

This Rauscher principle has since been labeled the doctrine of specialty. The name comes from the legal term “specialty,” meaning “[a] contract under seal.” The specialty provision in an extradition treaty is a sealed agreement between two countries; it ensures that the charges upon which the extradition was based will not waiver. The doctrine is now implicitly recognized by federal statute.

The three goals of the doctrine of specialty are (1) “to protect the sovereignty of the surrendering country by stopping the indiscriminate prosecution of an individual for crimes separate and unrelated to the extradition request,” (2) in-

19. See id. at 421.
20. Id. at 424.
21. See, e.g., McMichael, supra note 5, at 211.
22. United States v. Andonian, 29 F.3d 1432, 1435 (9th Cir. 1994).
26. McMichael, supra note 5, at 210; see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: DOCTRINE OF SPECIALTY § 477 (1987); see also United States v. Riviere, 924 F.2d 1289, 1300 (3d Cir. 1991) (citing United States v. Diwan, 864 F.2d 715, 720 (11th Cir. 1989)).
ternational comity,\textsuperscript{27} and (3) "to protect the interests of the extradited individual."\textsuperscript{28}

First, the doctrine protects the surrendering country. "A state using the doctrine of specialty can condition its discretion to extradite based on concrete requirements, ensuring that the policies supporting extradition are satisfied in a manner that is consistent with both the state's legal paradigm and any necessary political considerations."\textsuperscript{29} For example, if the death penalty is unconstitutional in the surrendering country, that country may elect to limit extradition to only non-capital offenses. Such extradition assurances serve to protect the laws and fundamental principles of the surrendering country.

Second, the doctrine of specialty encourages international comity. If the requesting country ignores the doctrine of specialty, it will fall under scrutiny from the international community. For instance, international courts have begun to intervene in cases in the United States, especially those that involve the death penalty.\textsuperscript{30} Some international treaties condition membership on the ratification and compliance with like doctrines.\textsuperscript{31} These are all mechanisms by which the international community can police countries that choose to ignore treaties or international legal principles such as the doctrine of specialty.

Third, the doctrine protects the extradited individual. "The doctrine of specialty is designed to prevent prosecution

\textsuperscript{27} See United States v. Jetter, 722 F.2d 371 (8th Cir. 1983); see also United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991); Blair v. United States, No. 91-55057, 1992 U.S. App. LEXIS 17742 (9th Cir. June 2, 1992); Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).
\textsuperscript{28} See McMichael, supra note 5, at 211.
\textsuperscript{29} See Thatcher, supra note 9, at 1333.
\textsuperscript{30} See infra Part IV.
\textsuperscript{31} For example, The Council of Europe's parliamentary assembly passed a resolution late Monday saying the two countries should be removed as observers at the 43-nation organization unless they make "significant progress" on abolishing executions by Jan. 1, 2003.

The abolition of capital punishment has been a condition for full membership in the Council of Europe since 1994. The United States, Japan, Mexico and Canada have been observers since 1996.

for an offense for which the person would not have been extradited or to prevent punishment in excess of what the requested state had reason to believe was contemplated. The doctrine guarantees the “integrity of the extradition process,” as a country may not request extradition under false pretenses and later charge the defendant with a different, and possibly more severe, crime. The goal of protecting the rights of the extradited defendant, however, is often undermined by provisions in extradition treaties that permit the surrendering country to waive the doctrine. This problem will be addressed in the following section.

B. Post-Rauscher Cases

Case law following Rauscher is erratic, contradictory, and oftentimes dismissive of international law. The decisions reveal, among other things, the misunderstandings surrounding the doctrine, the inherent complications in extradition proceedings, and sadly, the general aversion of the United States to comply with international law.

In general, cases since Rauscher have diluted the Court’s holding. Rauscher established the general principle that an extradited defendant may not be prosecuted for an offense different from the one for which he was extradited. Yet, the doctrine of specialty set forth in the Rauscher opinion raises several questions that subsequent courts have struggled to answer. Does the doctrine of specialty apply only to cases involving formal extradition? What tests do (or should) courts use to determine whether the doctrine of specialty has been violated? Does a defendant automatically have standing to claim a violation of the doctrine of specialty? And finally, can a country waive the doctrine of specialty? This section will address each of these questions.

1. Does the Doctrine of Specialty Depend on Formal Extradition?

Federal courts are split on this question. Some have ruled that the doctrine of specialty is only applicable where
there has been a formal extradition. Others have maintained any legal transportation of an accused from a foreign country—even kidnapping by the requesting country—is sufficient to bring the doctrine into play. Courts that do not limit the doctrine to formal extradition under a treaty usually invoke terms such as “international comity.”

a. Rauscher and Its Progeny

The doctrine of specialty enunciated in Rauscher was factually limited to extradition pursuant to a formal treaty—not extradition based solely on international comity. In making this distinction, the Rauscher Court invoked the Supremacy Clause of the United States Constitution. It held that extradition based solely on international comity, while possible, “has never been recognized as among those obligations of one government towards another.”

The United States Supreme Court has limited Rauscher in other decisions applying the doctrine of specialty. On the very day it decided Rauscher, the Supreme Court also decided Ker v. Illinois. In Ker, the defendant was indicted in the United States for larceny. The defendant, who was living in Peru at the time of the indictment, was kidnapped and forcibly transferred to the United States. The kidnapping was not government-sponsored because the kidnapper was not acting pursuant to an extradition treaty; Peru did not object to the kidnapping or prosecution. The Ker Court distinguished Rauscher:

If Ker had been brought to this country by proceedings under the treaty... with Peru, it seems probable... that he might have successfully pleaded [under the doctrine of specialty] that he was extradited for larceny, and con-

36. See, e.g., id.
37. See, e.g., United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988).
38. See id. Comity is defined as “courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligations but out of deference and mutual respect.” BLACK’S LAW DICTIONARY 267 (6th ed. 1991) (citing Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (1977)).
39. See Rauscher, 119 U.S. at 419.
40. Id. at 236.
41. 119 U.S. 436 (1886).
42. See id. at 437-38.
43. See id.
44. See id.
victed by the verdict of a jury of embezzlement. . . . But it is quite a different case when the plaintiff in error comes to this country [by manner of a kidnapping], clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty. 45

Later cases, however, chose to adopt the narrow view implicit in Ker rather than the broader Rauscher view. One such case held that extradition based on international comity does not invoke the doctrine of specialty. 46

Similar decisions have refused to apply the doctrine of specialty to cases where there was no formal, specific extradition request. 47 In United States v. Trujillo, English officials deported the defendant from England to his native Colombia. 48 During the transport, he was routed through the United States. 49 When he entered the United States, he was arrested on another charge separate from the one for which he was removed from England. The Court held that because he was not extradited to the United States, the doctrine of specialty did not apply to the charges he faced in the United States. 50 Unfortunately, many courts are following this trend; they are using this distinction as an excuse to avoid the doctrine of specialty. 51

b. Beyond the Bounds of Rauscher

In a more recent decision, the Court held the doctrine of specialty does not apply in cases where the defendant is brought to the United States by forcible government-sponsored kidnapping. 52 In United States v. Alvarez-Machain, the defendant was a Mexican doctor who was indicted for the kidnapping and murder of a United States Drug Enforcement Administration ("DEA") special agent. 53 After the indictment, DEA agents abducted the defendant from Mexico and flew

45. Id. at 443.
48. See id. at 219.
49. See id.
50. See id.
52. See Alvarez-Machain, 504 U.S. at 659-60.
53. See id. at 657.
him on a private plane to Texas, where he was arrested and formally charged.  

The Alvarez-Machain Court held that the United States had jurisdiction, irrespective of the fact that such jurisdiction arose as a result of a government-sponsored kidnapping.  

It distinguished Rauscher because Mr. Alvarez-Machain was not before the court by virtue of a treaty, but rather as a result of a forcible kidnapping.  

It held that absent language in an extradition treaty prohibiting forcible abduction by the United States for the purpose of criminal prosecution, courts have jurisdiction to try individuals abducted from another country.  

The Court followed Ker and held that the defendant was not entitled to rights such as the doctrine of specialty, as he would have been if he had been extradited pursuant to a formal extradition treaty.  

It found that the factual differences in Ker—such as the fact that the kidnapping was not government-sponsored and the surrendering country did not object to the kidnapping or prosecution—were irrelevant.  

It adopted Ker and held that a government-sponsored abduction does not deprive the kidnapped defendant of liberty without due process of law, nor does it limit jurisdiction of courts of the kidnapping country, even considering the objections of the offended country.  

As Alvarez-Machain demonstrates, the United States is increasingly resorting to subterfuge, deceit and kidnapping, rather than international law norms and formal extradition, to bring foreign nationals under the jurisdiction of U.S. courts. Law enforcement agencies know that bringing a defendant into a U.S. jurisdiction using such methods is the surest way to avoid the complications and limitations of formal extradition. After Alvarez-Machain, U.S. courts likely will deny the seized individuals rights they would have had if they had been formally extradited. The lack of protection of constitutional rights and disrespect for international law en-
courages prosecutors and law enforcement personnel to ignore formal extradition treaties. In so doing, the United States violates international law on many levels.

c. The Individual Rights Position

A few cases have taken a more encompassing view of Rauscher, holding that "[t]he rule of specialty is a general rule of international law that applies with equal force regardless of whether extradition occurs by treaty or comity." The Kaufman court specifically held that a court need not determine whether a defendant was extradited, deported, or just "kicked out" from the surrendering country. Kaufman followed the rule set out in Fiocconi v. Attorney General of the United States, that the doctrine of specialty applies regardless of whether the extradition was based on international comity or a formal extradition treaty: regardless of the basis for extradition, the purpose remains always to protect the surrendering nation from a breach by the requesting nation. This rule is based on the concept that "[t]he 'principle of specialty' reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government, especially for political crimes."

This flux in case law is reflective of both the general misunderstanding of the doctrine of specialty, and a reluctance to abide by international agreements. The Rauscher Court, in first developing the doctrine of specialty in 1886, could not have anticipated every scenario possible in today's world of international law. Hence, the Rauscher opinion should be analyzed with regard to its time period and the realities of modern day communications, travel and diplomacy. It is now easy and fast to fly defendants between countries. U.S. law enforcement personnel can be in and out of any country in the world with speed and relative impunity. The distinctions in how transfers can now be accomplished should not serve as a tool to trump the individual rights of the extradited defendant that were intended by the Rauscher decision.

62. Id. at 1007.
63. 462 F.2d 475 (2d Cir.1972).
64. Id. at 479-80.
65. Id. at 481.
d. An International Perspective

As the U.S. federal courts turn away from honoring international norms, international decisions are becoming more focused on the need to enforce the doctrine of specialty. In *United States v. Bin Laden*, defendant Mohamed was deported from South Africa to the United States. The South African government unconditionally consented to the deportation notwithstanding the fact that the death penalty is unconstitutional in South Africa. There was some evidence that the South African government acceded to the unconditional deportation under intense pressure from the United States and its agents in South Africa. The South African Constitutional Court issued an opinion finding that the South African government erred when it did not condition Mohamed’s deportation on the assurance from the United States that he would not be executed. The court held that whether Mohamed was deported or extradited was irrelevant. Nor did it matter that Mohamed consented to the deportation because he was not fully apprised of his rights under the South African Constitution. Regardless of whether the defendant was deported or officially extradited, “Mohamed’s removal to the United States should have been conditioned on a commitment by the United States not to seek or impose the death penalty.”

The United States District Court for the Southern District of New York chose to ignore the opinion of the South African Constitutional Court as a basis to strike the death notice. The United States should cease using distinctions between extraditions and deportation, and worse yet, kidnapping defendants, as a pretext to escape principles of international law designed to protect the individual and the surrendering country. The decision in *United States v. Bin Laden* foretells that the international community can expect future U.S. courts to act with the same disregard for foreign decisions or opinions especially in the high profile terrorist cases.

67. See id. at 363.
68. See id.
69. See id. at 364.
70. See id.
71. See *Bin Laden*, 156 F. Supp. 2d at 364.
72. Id.
2. What Tests Should be Used to Determine Whether the Doctrine of Specialty Has Been Violated?

When a country requests an extradition, it customarily uses a prosecutor's or investigator's information, or a grand jury indictment, to list the charges and facts upon which the extradition request is based. Sometimes the prosecution gathers additional facts after filing the extradition request, which may occur before or after the accused has been extradited. In a typical case, the prosecution could simply amend the information to include a new charge. In an extradition case, the extradited defendant's right to the doctrine of specialty collides with the requesting country's freedom to amend an indictment to include additional charges against the defendant.

a. Specific Request Test

This scenario is best exemplified in United States v. Khan. In Khan, the defendant was indicted on charges of conspiracy to import heroin. The United States requested his extradition for these charges, and Pakistan granted the request. Before he was extradited, he was convicted of an unrelated charge in Pakistan for which he was incarcerated for one year. Five years after his release from the Pakistani jail, the United States demanded his extradition on the original charges and Pakistan again granted the request. After he was extradited, the prosecutor added the charge of using a telephone to facilitate the commission of a drug felony, a crime that is not punishable in Pakistan unless it is combined with another crime.

The Khan court acknowledged that the doctrine of specialty was incorporated into the United States-Pakistan Extradition Treaty. Under this doctrine, the court cautioned, an agreement to extradite will not be inferred from silence concerning a particular count, but rather an affirmative statement by the surrendering country must be made as to

73. 993 F.2d 1369, 1374 (9th Cir. 1993).
74. See id. at 1370.
75. See id.
76. See id. at 1371.
77. See id.
78. See id. at 1372.
79. See id.
each individual count.\textsuperscript{80} In making this statement, the court declared, "We are not convinced that the doctrine of specialty is satisfied under all treaties as long as the prosecution is based on the same facts as those set forth in the request for extradition."\textsuperscript{81} Instead of inferring consent from silence, the court stated, "We presume, without evidence to the contrary, that Pakistan would object to extradition on the basis of [the superseding count] because the offense charged there is not a crime in Pakistan."\textsuperscript{82} Under extradition treaties, the surrendering country has the right to refuse extradition if the charge upon which the extradition is to be based is not a crime in the surrendering country.\textsuperscript{83} The \textit{Khan} court thus held that the doctrine of specialty was violated unless the surrendering country "unambiguously agreed" to extradite the defendant on \textit{each count}.\textsuperscript{84} In this case, "because Pakistan did not unambiguously agree to extradite Khan on the basis of" the subsequent count, the doctrine of specialty was violated.\textsuperscript{85} His conviction was reversed and dismissed.\textsuperscript{86}

As \textit{Khan} demonstrates, whether the requesting country should be allowed to amend the information is a difficult question. If a court holds that this is permissible, how closely must the new charge relate to the original charge? As the following cases reveal, this has not been an easy question. The following cases bring to light the overwhelming reluctance in American jurisprudence to find a violation of the doctrine of specialty and dismiss a charge. The \textit{Khan} decision is, unfortunately, an exception.

b. \textit{Totality of the Circumstances Test}

Most U.S. courts look to the totality of the circumstances to determine whether there has been a violation of the doctrine of specialty. The rationale for analyzing the case by examining the totality of the circumstances, rather than isolated incidents, facts, or agreements, is that "[t]he doctrine of specialty, as interpreted in our law, does not call for the ex-

\textsuperscript{80} See id. at 1374.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{84} \textit{Khan}, 993 F.2d at 1374.
\textsuperscript{85} See id. at 1375.
\textsuperscript{86} Id.
tradition crime to be handled in a vacuum.\textsuperscript{87}

There are two prongs under the totality of the circumstances test: (1) whether the surrendering country has objected to or would object to the prosecution of the new charge,\textsuperscript{88} and (2) whether the prosecution itself is based on some evidence, facts, or acts as listed in the original request for extradition.\textsuperscript{89} Most courts acknowledge both prongs as part of the totality of the circumstances test; however, some jurisdictions put greater emphasis on one, or even disregard one in favor of the other.

i. Prong One: Would the Surrendering Country Object?

To ascertain whether the surrendering country has objected to, or would object to, the prosecution of the new charge, the court places itself in the position of the surrendering country.\textsuperscript{90} The court determines whether the surrendering country would regard the prosecution of a subsequent charge as a breach of the extradition order.\textsuperscript{91} In fact, according deference to the surrendering country’s intentions in deciding to extradite underlies the very purpose of the doctrine of specialty.\textsuperscript{92} Some courts have held that if the surrendering country intended to charge, or would have charged, the defendant with the subsequent count, the doctrine of specialty is not violated.\textsuperscript{93} Verifying the surrendering country’s intent, however, is a challenging task, especially if the extradition treaty is vague or ambiguous.

To confirm the surrendering country’s intent, one court has noted that the doctrine of specialty “requires an affirma-

\textsuperscript{87} United States v. Garcia, 208 F.3d 1258, 1261 (11th Cir. 2000), vacated, 531 U.S. 1062 (2001) (citing United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995), United States v. Abello-Silva, 948 F.2d 1168 (10th Cir. 1991), United States v. Rossi, 545 F.2d 814 (2d Cir. 1976), and United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962)).


\textsuperscript{89} See Sensi, 879 F.2d at 895-96 (stating both requirements).

\textsuperscript{90} See United States v. Jetter, 722 F.2d 371 (8th Cir. 1983); see also United States v. Rauscher, 119 U.S. 407, 432 (1886).


\textsuperscript{92} See United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir. 1987).

\textsuperscript{93} See United States v. Levy, 905 F.2d 326 (10th Cir. 1990).
tive statement by the surrendering country of counts on which extradition is based,” and that agreement to extradite will not be inferred from silence concerning a particular count.94 Other jurisdictions, in determining whether the surrendering country has objected to or would object to the prosecution of the new charge, have not gone as far as Khan. Rather than presuming the surrendering country would object to the superseding charges, these jurisdictions seem to have presumed consent unless there is evidence to the contrary.

For example, in United States v. Jetter, the defendants were charged with “conspiracy to distribute cocaine and possession with intent to distribute cocaine.”95 They were arrested in Costa Rica, which granted extradition.96 In its extradition ruling, Costa Rica mentioned all the requested extraditable crimes except for conspiracy.97 The Jetter court presumed the Costa Rican court meant to include the conspiracy charge in the extradition ruling because its opinion did not indicate it had limited the extradition request in any way.98 Without investigating the matter further, the court held that it had jurisdiction over the defendants for the crime of conspiracy.99

In a recent case, Gallo-Chamorro v. United States, the court stated that the main focus of the doctrine of specialty remains on the prosecution and conduct of the defendant, rather than on the view of the rendering country.100 In Gallo-Chamorro, the defendant was convicted of conspiracy to import, a charge which is “specifically prohibited [for] prosecution” in the surrendering country, Colombia.101 Following its stated principle, the court found that the doctrine of specialty was not violated, even though the defendant was convicted of a charge that was not included in the extradition request, and was specifically prohibited by the surrendering country, Co-

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94. United States v. Khan, 993 F.2d 1368, 1374 (9th Cir. 1993). No other courts have followed Khan.
95. Jetter, 722 F.2d at 372.
96. See id.
97. See id. at 373.
98. See id.
99. See id.
100. Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).
101. Id.
The court held that “even though the asylum country had specifically denied extradition on a conspiracy charge, no specialty doctrine violation occurred when the district court instructed the jury on co-conspirator liability under [Pinkerton v. United States].” The court agreed “that a Pinkerton instruction . . . permitted the government to establish the defendant’s membership in a conspiracy as an evidentiary fact to prove guilt in the related substantive offenses.” The importance of the surrendering country’s input was dismissed in a footnote:

We are mindful that some courts and other authorities state the test as ‘whether the requested state has objected or would object to prosecution.’ . . . While this language seems to lend importance to the view of the rendering country, the main focus remains on the prosecution and the conduct of the defendant.

This is the same rationale used in United States v. Bin Laden. If courts refuse to allow the surrendering country to limit extradition, then the court is violating the doctrine and degrading the respect between nations. Further, and equally as serious, the courts are also emasculating the rights of the extradited defendant.

The Khan case, instead of being the exception, should be the norm. U.S. courts should look to the surrendering country for guidance at all stages of the proceeding. If the prosecutor discovers new facts upon which he or she would like to charge a defendant who has already been extradited, the prosecutor should be required, under this first prong, to demonstrate two things to the court: (1) that the crime and/or penalty exists in the surrendering country, and (2) that the surrendering country has acquiesced to the new charges or penalty, just as if it had for the original extradition request. This requirement is straightforward and not unduly burdensome on prosecutors. Further, this practice would acknowledge legitimate respect for international law, relations, and reciprocity.

102. See id.
103. Id. at 1306 (citing United States v. Thirion, 813 F.2d 146 (8th Cir. 1987)); see generally Pinkerton v. United States, 328 U.S. 640 (1946).
104. Gallo-Chamorro, 233 F.3d at 1306.
105. Id. at 1306 n.20.
ii. Prong Two: Is the New Charge Based on the Same Facts?

Almost every court deciding a doctrine of specialty issue has analyzed whether the prosecution is based on some evidence, facts, or acts as listed in the original request for extradition. Often, even if the superseding charge does not meet the first prong, courts use the second prong to find there was no violation of the doctrine of specialty. Decisions that have concentrated on this second prong have ranged from courts finding a violation if the facts and charges are not exactly like those set out in the extradition request, to those courts which would only find a violation if the superseding charges were "totally unrelated." The general rule is, instead of requiring exact uniformity between the information in the extradition request and the actual indictment, the specialty doctrine mandates that the indictment be "based on the same facts as those set forth in the request for extradition." Many jurisdictions have concentrated on the term "separate offenses." For a crime to be considered "separate," it need not have a different name in each country. "[T]he appropriate test is whether the [surrendering or] extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which the defendant was extradited . . . ."

107. See Restatement (Third) of the Foreign Relations Law of the United States § 477 cmt. a; see also United States v. Cabrera Sarmiento, 659 F. Supp. 169 (S.D.N.Y. 1987); United States v. Evans, 667 F. Supp. 974 (S.D.N.Y. 1987) (holding that attempted arms sale to terrorist groups—allegedly described by the U.S. to Bermudian authorities—was of the same character as the conspiracies to sell and transfer American-made defense articles to a putative Iranian buyer with which the defendants had been charged).


110. See United States v. Cuevas, 847 F.2d 1417, 1428 (9th Cir. 1988) (citing Paroutian, 299 F.2d at 491); see also United States v. Evans, 667 F. Supp. 974 (1987); United States v. Levy, 947 F.2d 1032 (1991) (stating that it is necessary to look at totality of the circumstances); United States v. Sturtz, 648 F. Supp. 817, 819 (S.D.N.Y. 1986) ("[T]he general character of the crime for which the fugitive was extradited is used to determine whether the superseding indictment adds a separate offense."). The Sturtz court noted that a "fundamental concern of the principle of specialty was that persons who were surrendered should not be subject to indiscriminate prosecution by the receiving government, especially for political crimes." Sturtz, 648 F. Supp. at 819.
For example, in *United States v. Andonian*, the defendant was extradited from Uruguay to face charges of money laundering.\(^\text{111}\) After the defendant was extradited, the prosecutor filed a new indictment that listed additional facts and counts that were only "roughly parallel" to the original extraditable charge.\(^\text{112}\) The *Andonian* court followed the Second Circuit case of *United States v. Paroutian*.\(^\text{113}\) The *Paroutian* case took the term "separate offenses" to its extreme, remarking that only a "totally unrelated" offense would violate the doctrine of specialty.\(^\text{114}\) In *Paroutian*, both the original and the superseding indictments contained charges of narcotics trafficking, but the later indictment, issued in another district, included two counts not covered in the original indictment.\(^\text{115}\) The *Andonian* court declined to follow the Ninth Circuit case, *Khan*, which held that it is not sufficient that the new charge be based on the same facts that the original charged but rather, the surrendering country must "unambiguously agree" to each count.\(^\text{116}\) The *Andonian* court found that the new counts were not based on a "separate offense," and held that there was no violation of the doctrine of specialty.

Combining the explanations "independent" and "separate" with "totally unrelated," a number of courts in the United States will find a violation of the doctrine of specialty only if an additional charge or indictment is based on a completely isolated fact or occurrence. Yet, *Rauscher* anticipated this conundrum in 1886. That decision pronounced that a country could not evade the doctrine of specialty by listing a greater charge in the extradition request and then prosecuting a lesser charge that was not so listed.\(^\text{117}\) The Court held that the defendant, who was extradited on the charge of murder, could not be prosecuted for the lesser offense of "cruel and unusual punishment."\(^\text{118}\) Although the charge was based on the same facts, it was separate and therefore prohibited by the doctrine of specialty.\(^\text{119}\) This was true even though the

\(^{111}\) United States v. Andonian, 29 F.3d 1432, 1434 (9th Cir.1994).

\(^{112}\) Id.

\(^{113}\) United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962).

\(^{114}\) Id. at 490-91.

\(^{115}\) See id. at 491.

\(^{116}\) Andonian, 29 F.3d at 1436.


\(^{118}\) See id.

\(^{119}\) See id.
new charge was lesser than the original charge. Hence, in light of \textit{Rauscher}, separate offense should mean \textit{any} separate charge, whether or not it arises out of the same offense.

An excellent example of a decision that followed in the footsteps of \textit{Rauscher} and found the new charge constituted a separate offense is a Washington Supreme Court case, \textit{State v. Pang}. In \textit{Pang}, the defendant was extradited to the United States from Brazil to face charges of arson. Once in the United States, the prosecuting attorney attempted to charge the defendant with capital murder for the deaths of the individuals who died in the fire. The court found that Article XXI of the United States-Brazilian Extradition Treaty specifically limited the possible charges to only those “which gave rise to the request.” The court held that the murder charge was a separate offense, and the doctrine of specialty was thereby violated.

Unfortunately, \textit{Pang} is one of the few cases in which a court found a violation of the doctrine of specialty. Most ignore precedent and circumvent this prong of the test. Some have even gone so far as to look at the “nature of the offenses, rather than the different facts alleged in support of the offenses.” Consequently, the overwhelming majority of cases have refused to find a violation of the doctrine of specialty.

\begin{itemize}
\item 120. \textit{See id.}
\item 121. 940 P.2d 1293 (Wash. 1997).
\item 122. \textit{See id. at 1030.}
\item 123. \textit{See id.}
\item 124. \textit{Id.}
\item 125. \textit{See id.}
\item 126. The only other cases where courts found such a violation were \textit{United States v. McDonald} and \textit{United States v. Khan}. \textit{See} United States v. McDonald, 172 F. Supp. 2d 941, 946 n.1 (W.D. Mich. 2001) (stating that additional charges against the defendant were dismissed because the surrendering country had not granted extradition as to those charges); United States v. Khan, 993 F.2d 1369, 1374 (9th Cir. 1993).
\item 127. \textit{See} United States v. Abello-Silva, 948 F.2d 1168, 1174 (10th Cir. 1991).
\item 128. \textit{See generally} Gallo-Chamorro v. United States, 233 F.3d 1298 (11th Cir. 2000); United States v. Bowe, 221 F.3d 1183 (11th Cir. 2000); United States v. LeBaron, 156 F.3d 621 (5th Cir. 1998) (finding additional count permissible because it was based on the original extraditable charge); United States v. Tse, 135 F.3d 200 (1st Cir. 1998); \textit{In re Extradition of Lahoria}, 932 F. Supp. 802 (N.D. Tex. 1996); United States v. Jurado-Rodriguez, 907 F. Supp. 568 (E.D.N.Y. 1995); United States v. Marconi, 899 F. Supp. 458 (C.D. Cal. 1995); United States v. Puentes, 50 F.3d 1567 (11th Cir. 1995) (finding that the additional count did not “materially alter[ ] the substance of the offense for which Puentes ha[d] been extradited.”); United States v. Gallo-Chamorro, 48 F.3d 502
\end{itemize}
3. Does the Extradited Defendant Have Standing to Claim a Violation of the Doctrine of Specialty?

One of the chief problems with the doctrine of specialty is determining who has the power to invoke, challenge or waive it. Courts have disagreed as to whether an extradited criminal defendant has standing to raise a claim that the doctrine of specialty has been violated. Standing decisions fall into three categories: (1) cases holding that an extradited defendant has unlimited standing to raise a violation of the doctrine of specialty claim; (2) cases holding that an extradited defendant has limited standing; and (3) cases holding that an extradited defendant has no standing whatsoever.

A minority of cases falls into the first category. The Tenth Circuit has held that an extradited defendant has standing to claim that the doctrine of specialty was violated. "[T]he dispute over [whether it was the surrendering country or else the defendant] who raised the objection is irrelevant."\(^{129}\)

The next two categories of cases are divided evenly. The second category of cases arises in jurisdictions that have granted an extradited defendant limited standing. These jurisdictions have held that "the protection afforded by the doctrine of specialty exists only to the extent that the surrendering country wishes."\(^{130}\) Under this line of cases, an extradited individual may raise only those objections the surrendering country would have raised.\(^{131}\) An extradited defendant's

\(^{129}\) United States v. Abello-Silva, 948 F.2d 1168, 1173 (10th Cir. 1991) (citing United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990)).

\(^{130}\) Sandhu v. Burke, 2000 WL 191707, at *14 (S.D.N.Y. Feb. 10, 2000) (quoting United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986)) (internal quotation marks omitted); see also United States v. Lazarevich, 147 F.3d 1061, 1064 (9th Cir. 1998).

\(^{131}\) See United States v. Nosov, 153 F. Supp. 2d 477, 480 (S.D.N.Y. 2001); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (holding that "the person extradited may raise whatever objections the rendering country might have"); United States v. Levy, 905 F.2d 326, 328 n.1 (10th Cir. 1990); United States v. Cuevas, 847 F.2d 1417, 1426 (9th Cir. 1988); United States v. Puentez, 50 F.3d 1567, 1572 (11th Cir. 1995) ("We hold that a criminal defendant has
standing is limited because the objective of the doctrine of specialty is to ensure that the contracting parties—the requesting and surrendering countries—faithfully observe the treaty. Although this position expressly limits the rights of the extradited defendants, these courts justify such a limitation because it preserves the contractual, and hence diplomatic, relationship between the two countries.

The final category of cases has granted standing on this issue only to the surrendering country; the extradited defendant has no standing whatsoever. These cases have reasoned that as “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.”

This last line of cases, limiting standing to the surrendering country, is particularly vexing because most foreign countries are reluctant to file or appear in domestic criminal cases. The surrendering country’s preferred method of addressing such an issue would be diplomatic communication with the U.S. State Department. There, the surrendering country likely will receive a diplomatic response claiming that the separation of powers in the U.S. federal and independent standing to allege a violation of the principle of specialty. We limit, however, the defendant’s challenges . . . to only those objections that the rendering country might have brought.”).

134. Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973) (citation omitted).
state jurisdictions prevents the State Department from compelling the State to enforce the extradition agreement. While the State Department may share the concerns of the surrendering country, it also will contend that it is powerless to provide legitimate relief. The result is that the terms of extradition would be rendered meaningless.

4. Can the Doctrine of Specialty Be Waived?

The majority of jurisdictions have held that the doctrine of specialty “is a right that belongs to the country that authorized extradition . . . and it may be waived by that nation.” The accepted rule is that the doctrine of specialty applies unless the protection is expressly waived. For example, in Tse v. United States, the defendant was extradited to the United States from Hong Kong. The American defense attorney advised Tse that he could plead guilty because the doctrine of specialty barred additional counts from being charged against him. At the time the defense attorney made these statements, Hong Kong had not indicated that it would waive the doctrine of specialty. Tse relied on his counsel’s advice and pled guilty. The court found that the plea was given without informed consent; Tse withdrew his plea and the case proceeded to trial. The Consul General of the United States immediately asked Hong Kong for permission to prosecute Tse on additional charges. Hong Kong consented, thereby waiving the doctrine of specialty. Because Hong Kong waived the doctrine of specialty, Tse lost his standing to claim a violation of the doctrine. He was prosecuted and convicted on every charge.

Tse demonstrates the inherent problem in allowing a sur-

136. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. b; United States v. Puentes, 50 F.3d 1567, 1574 (11th Cir. 1995).
138. See id. at 193-94.
139. See id. at 194.
140. See id.
141. See id. at 191.
142. See id.
143. See id.
144. See id.
rendering country alone to waive the doctrine. If a surrendering country waives the doctrine, the extradited individual loses his individual right to challenge a doctrine of specialty violation. This practice puts the extradited individual at the mercy of the surrendering country's government.

In justifying such a result, courts have proffered that because international comity is a guiding principle behind the doctrine of specialty, the surrendering country—and not the extradited individual—has the right to waive its application. Courts have further submitted that the doctrine of specialty, as previously mentioned, is "a privilege of the asylum state, designed to protect the interest of the asylum state, and is not a right accruing to the accused." Since this is the view of most U.S. courts, surrendering countries must begin to take responsibility for the defendants they extradite if they wish to oppose the addition of death penalty counts after the extradited individual is in a U.S. jurisdiction.

IV. THE VIENNA CONVENTION ON CONSULAR RELATIONS: A PARALLEL RIGHT TO THE DOCTRINE OF SPECIALTY

The United States ratified the Vienna Convention on Consular Relations ("VCCR") in 1969. The purpose of the Convention was to "codify the rights and obligations of member states with respect to consular relations." The VCCR provides that "consular officials shall be free to communicate with, and have access to, their nationals at all times," and vice versa. Consular officials have the unlimited right to correspond with and visit the detained national, and to arrange for legal representation. This right to unrestricted communication between consular officials and foreign nationals is especially important when a foreign national is arrested

149. Id.
150. See VCCR, supra note 147, art. 36(1)(c); see also Aceves, supra note 148, at 259.
while abroad; in such a situation, the VCCR provides unequivocally that the proper authorities must immediately inform the detained foreign national of his right to have the consulate contacted without delay if the national so desires.\textsuperscript{151} The police and prosecutors are charged with this responsibility.

If the United States fails to abide by the VCCR, a defendant may raise this issue to seek relief.\textsuperscript{152} To have an issue on appeal, the defendant must prove three factors: (1) that he did not know of the VCCR rights; (2) that he would have availed himself of his rights under the VCCR if he had known about them; and (3) that he suffered prejudice by not availing himself of his VCCR rights.\textsuperscript{153} No federal U.S. court to date has honored the language or intent of the VCCR by issuing a ruling resulting in suppression of certain evidence or dismissal of the case, even where all of the above requirements were clearly met.\textsuperscript{154}

There are several prime examples of U.S. courts eviscerating the individual international rights intended under the VCCR. One of the most flagrant violations of the VCCR was the case of the LaGrand brothers. Karl and Walter LaGrand were German nationals sentenced to death in Arizona after being convicted of murder during an attempted robbery in 1982.\textsuperscript{155} Neither brother received the proper notifications required under the VCCR.\textsuperscript{156} When the case came to the attention of the German government, a number of legal and diplomatic steps were taken to halt the pending executions.\textsuperscript{157} Unfortunately, no court allowed the VCCR to be a basis for staying the pending executions and the Arizona Governor rebuffed all pleas by the German government with tacit ap-

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\textsuperscript{151.} VCCR, \textit{supra} note 147, art. 36(1)(b); see also Aceves, \textit{supra} note 148, at 259.
\textsuperscript{152.} \textit{See} Converse, \textit{supra} note 147.
\textsuperscript{153.} \textit{See} id.
\textsuperscript{154.} \textit{But see} State of Delaware v. Reyes, 740 A.2d 7, 14 (Del. 1999) (suppressing a confession on precisely these grounds).
\textsuperscript{155.} \textit{See} Amnesty International USA, \textit{USA—Execution of Foreign National Continues, DEATH PENALTY NEWS} (Mar. 1999), \textit{available at} http://www.amnestyusa.org/abolish/1999/foreignexec.html; \textit{see also} Cassel, \textit{supra} note 2.
\textsuperscript{156.} \textit{See} Amnesty International USA, \textit{supra} note 155.
\textsuperscript{157.} \textit{See} Arizona to Execute German Despite International Pleas, \textit{AGENCE FRANCE-PRESSE}, Mar. 3, 1999, 1999 WL 2556785 [hereinafter \textit{Arizona to Execute German}].
\end{flushright}
proval of the U.S. Secretary of State. On February 24, 1998, Karl LaGrand was executed by lethal injection. Less than a month later, on March 3rd, his brother Walter was executed in the gas chamber.

After Karl's execution, but before Walter's, the German government petitioned the International Court of Justice ("ICJ") for a stay of execution pending a full hearing. The ICJ granted the German request for a stay and specifically sought assurance from the United States that Walter would not be executed until the ICJ had an opportunity to have a full hearing on the alleged violations of the VCCR. The United States and the State of Arizona, however, rejected the ICJ request.

Subsequently, Germany lodged a full complaint with the ICJ, contending that Arizona never advised the LaGrand brothers of their rights under the VCCR. After extensive briefing and oral argument, the ICJ ruled that

- First, . . . individuals have rights under the treaty.
- Second, when governments fail to notify detained foreigners of their consular rights without delay, courts may not later tell them they are too late when they belatedly claim violations of consular rights.
- And third, if a foreigner not notified of consular rights is sentenced to a "severe penalty"—death or lengthy imprisonment—courts must review and reconsider the conviction and sentence.

The U.S. courts ignored the World Court decision and continue to do so today.

In Texas, the situation of foreign nationals on death row

158. See id.
159. See Amnesty International USA, supra note 155.
160. The ICJ is also referred to as the World Court.
161. See Arizona to Execute German, supra note 157.
162. See id.
163. See id.
164. See Amnesty International USA, supra note 155; see also Cassel, supra note 2.
166. Amnesty International USA, supra note 155; see also Cassel, supra note 2.
is more acute than in any other state. For instance, three cases—Santana v. State, Faulder v. State, and Fierro v. State—involves foreign nationals who were sentenced to death after being convicted of murder. In all of these cases, the foreign defendants were denied their right to consular access under the VCCR. They did not know such rights existed. The authorities never informed them of these rights and never contacted the appropriate consular officials. Santana, a Dominican Republic national, was executed in 1993. The Canadian, Faulder, was executed in 1999. Fierro, a forty-six year old Mexican national, is still on death row in Texas, notwithstanding strong evidence regarding his innocence. This year marks his twenty-third year on death row.

Despite public outcry—both on an international and national level—the majority of recent "U.S. court decisions on consular rights do not even mention the World Court [decision in the LaGrand Case]. None rely on it." This is frightening when approximately 118 foreign citizens of thirty-four nationalities are under a death sentence in the United States. Since 1993, at least fifteen foreign nationals have been executed in the United States without ever having been notified of their rights under the VCCR. Even today, as the number of VCCR violations are still increasing, U.S. courts show no inclination of respecting international law when

172. See id.
173. See id.
174. Id. at 722.
175. See Amnesty International USA, supra note 155. A list of pending executions is maintained by Rick Halperin at http://web.cis.smu.edu/~deathpen.
176. See Cassel, supra note 2.
177. This information is maintained at the Death Penalty Information Center Web site at http://www.deathpenaltyinfo.org/foreignnatl.html#REPORTED DEATH-SENTENCED (last updated Apr. 11, 2002).
faced with the politics of the death penalty.

V. WHAT TO EXPECT FROM THE UNITED STATES WHEN THE DOCTRINE OF SPECIALTY STANDS TO LIMIT A DESIRE TO SEEK THE DEATH PENALTY

The issue of capital punishment in the United States is so emotional and always wrapped in the disturbing facts of the individual crime, that seldom does a court give full consideration to any doctrine which will limit or restrict the use of the death penalty. In the United States, thirty-eight states retain the death penalty. Unfortunately, a growing number of executions ignore "international cries for mercy." The question arises, "[why does the world's wealthiest country, the self-appointed guardian of human rights outside its borders; allow this most inhuman of punishments to continue?"

The answer, simply put, is political expediency.

The political reality in the United States is that courts and individual judges feel powerless when confronted with the crowd mentality pressure to impose the death penalty. The "policy of death" in the United States "keeps the victims of terrible tragedy on puppet strings operated by prosecutors, politicians and victims rights groups. They are paraded out and danced before the media in order to maintain a climate of rage and support for executions."

Ken Shulman eloquently commented on the American "death community":

It bears remembering that the plaintiff in a criminal suit is not the family of the victim, but the people of the commonwealth. Our justice system does not exist to barter revenge or blood lust. It exists to uphold the law, without which our society cannot function. The death penalty subverts that law. And not only in the sanctioning of homicide. Due process is compromised in a myriad ways, by elected officials pandering to the voting public with stepped up executions, by prosecutors avid enough to conceal evidence in order to wrest yet one more death conviction from a jury.

179. See Death Penalty Information Center Web site, supra note 177.
180. OLIVIERO TOSCANI, BENETTON, WE, ON DEATH ROW, 5-6 (2000).
181. Id.
182. Id.
183. Id. at 7-8.
However, this "culture of death" is increasingly subject to political criticism from the international community. Public opinion abroad, particularly in Europe, is strongly opposed to the imposition of the death penalty in the United States and elsewhere. "The European Union and the U.N. High Commissioner for Human Rights (UNCHR) have both called for a worldwide moratorium on the death penalty; and the forty-one member Council of Europe has made abolition of the death penalty a condition of membership." In South Africa, the death penalty was declared unconstitutional in 1995. In Canada, the death penalty was removed from the criminal code in 1976. The Mexican Constitution takes this concept even further; it forbids the death penalty as well as prison sentences over forty years. Just recently, in the summer of 2001, Chile and Ireland both abolished the death penalty, although neither country had resorted to capital punishment in years.

The private sector is also putting pressure on the United States. European companies, responding to public opinion in Europe, have begun expressing their concerns to political figures in the United States. For example, in 1998 "a visiting representative of the European Parliament warned Texas's [then] governor, George W. Bush that European companies were under pressure from public opinion and their shareholders to withhold investments in states that use the death pen-

185. See Sue Bailey, High Court Judgment Protects Canadians and Others Facing Death Penalty, CANADIAN PRESS, Feb. 15, 2001, 2001 WL 12576255; see also Mary L. Dudziak, Giving Capital Offense: How America's Addiction to the Ultimate Punishment is Undercutting its Criticism of Injustice in Other Countries, 52 CIVILIZATION 57 (October/November 2000). According Derechos Human Rights, an international organization dedicated to the promotion of human rights, other countries that still impose the death penalty are Japan, China, Pakistan, Iran, Nigeria, Saudi Arabia, Yemen, and India. For additional information, see the Web site maintained by Derechos Human Rights at http://www.derechos.org/dp/#facts.
186. Dudziak, supra note 185.
187. Id.
188. See Bailey, supra note 185.
190. For additional background sources of information, see the Death Penalty Information Center Web site, cited supra note 177.
191. See Dudziak, supra note 185.
This obviously did not change now-President Bush's own opinion regarding the death penalty.

This clash of opinions regarding the death penalty is heightened when these two worlds collide in extradition proceedings. In the past, extradition has been a fairly affable and simple process. Yet, with growing international support for ending the death penalty, foreign countries have gained confidence in insisting on a "no death penalty" provision in agreements to extradite a defendant." In light of the aforementioned facts, it is fair to argue that foreign governments can reasonably expect several things from the United States regarding future extraditions, especially if there is any connection to acts of terrorism.

First, foreign governments can anticipate extradition requests without a full disclosure of the potential charges facing the sought individual. This has already occurred in the case of Lotfi Raissi, the twenty-seven year old Algerian pilot who recently appeared in London's Belmarsh Magistrates Court. Raissi faces extradition to the United States on essentially two minor charges of making a false statement to the Federal Aviation Administration, and was held in custody because of suspected terrorist links to the World Trade Center attack. The United States is not going to obtain Raissi and then try him in the United States for only the false statements. Along these lines, Great Britain must insist on a specific "no death penalty extradition" agreement if the extradition request expressly seeks to try Raissi for the World Trade Center attacks. The country must seek this provision under European Union law.

In Raissi, Great Britain is either going to have to go along with this charade (perhaps a face-saving ploy), or step up and insist on a "no death provision," even where the charges do not warrant more than five years in prison. A demand for "no death penalty" in the face of such a minor charge raises the uncomfortable subtext of distrust in a dip-
lomatic community where trust is currency. 198

Second, foreign governments can expect U.S. courts to ignore their communiqués and legal opinions interpreting the foreign countries’ own laws and policies. An example of this is United States v. Bin Laden. 199 In Bin Laden, Khalfan Mohamed was arrested in connection with the bombings of the American Embassies in Dar es Salaam, Tanzania, and in Nairobi, Kenya. 200 He was charged in the United States for murder, conspiracy and an attack on a United States facility. 201 Shortly thereafter, Mohamed was found in South Africa, where he was interrogated by South African police and the U.S. Federal Bureau of Investigation. 202 He confessed to being part of the plot for the embassy bombings, and was deported, literally overnight, to the United States. 203 The South African government acquiesced to the deportation. 204

Before trial began in the United States, Mohamed’s attorneys brought an action in South Africa in the Cape of Good Hope High Court, requesting that the government intervene on behalf of Mohamed to demand that the United States not seek the death penalty. 205 In May 2001 the Constitutional Court of South Africa ruled that its government erred when it allowed Mohamed to be extradited to the United States to face charges for which he could be sentenced to death if convicted. 206 The basis for the ruling was that the death penalty was declared unconstitutional in South Africa in 1995. 207 The author of the South African opinion, Arthur Chaskalson, wrote, “The rights in issue here are the right to human dignity, the right to life and the right not to be treated or punished in a cruel, inhuman or degrading way.” 208 The South

200. See id. at 362.
201. See id.
202. See id. at 362-63.
203. See id. at 363.
204. See id.
205. Id.
207. See Dudziak, supra note 185.
208. Mohamed v. President of the RSA, 2001 (7) BCLR 685 ¶ 37 (CC); see also ConCourt, supra note 206.
African government had a duty, the court held, to receive assurance from U.S. officials that Mohamed would not face the death penalty.\textsuperscript{209}

To bolster its point, the court drew a correlation with the case involving a second alleged embassy bomber, Mahmoud Mahmud Salim.\textsuperscript{210} Salim was found in Germany after the embassy bombings.\textsuperscript{211} Germany agreed to extradite Salim, but not before receiving an assurance from the United States government that he would not receive the death penalty for any charge.\textsuperscript{212} The South African Court held that its government—like the German government—had a duty to demand such an assurance; it violated that duty when it allowed Mohamed to be deported without assuring his life would be spared.

The response in the United States to the South African decision was despicable. The South African Court's decision was rendered one day before the jury in the United States returned its verdict.\textsuperscript{213} The United States was quick to acknowledge the judgment. In speaking for the Department of Foreign Affairs and the Justice Department, Ronnie Mamoepa said each department "reiterates its respect for the decision of the Constitutional Court on this matter."\textsuperscript{214} The United States District Court for the Southern District of New York did not share that same respect.

After the South African Court's decision was rendered, Mohamed brought a motion requesting that the United States government be precluded from seeking the death penalty, or in the alternative, that the South African Court's decision at least be considered as a mitigating factor.\textsuperscript{215} The district court denied the first request.\textsuperscript{216} It found that the American officials in Mohamed's deportation acted in good faith, as the extradition treaty in place at the time of his arrest did not specifically permit the South African government to condition an extradition.\textsuperscript{217} The court noted that the current South Afri-
can-United States Extradition Treaty, which provided that “the Requested State may refuse extradition unless the Requesting State provides assurances that the death penalty will not be imposed, or if imposed, will not be carried out,” was ratified after Mohamed’s extradition. 218 The prior Extradition Treaty was silent on a surrendering country’s right to place assurances on extradition requests. 219 The court admitted, however, that the United States had on several occasions granted such requests. 220 Hence, the court implied that the South African government waived this silent, yet implicit, right at the time of deportation. 221 Because this right was not expressly included in the Extradition Treaty, the court refused to reconsider the issue.

This misguided attempt to sidestep an international decision communicating a country’s intent was contemptible. Even in 1886, the Rauscher Court acknowledged that it was “unreasonable” for the requesting country to be able to prosecute the extradited defendant “without any limitation, implied or otherwise.” 222 The Bin Laden court did permit the jury to consider, during the penalty phase, the South African Court’s decision as a mitigating factor. 223 After two days of deliberations, the jurors were “unable to reach a unanimous verdict.” 224 Mohamed was sentenced to life imprisonment without possibility of parole. 225

The Bin Laden case is a good example of the steps that a surrendering government must take in order to preserve the rights of extradited defendants. It proves how important it is for countries to draft very specific language in their extradition treaties, especially when it comes to the death penalty. The Bin Laden court reiterated that it need not discontinue the capital case against Mohamed simply because there was no express provision in the extradition treaty that allowed a surrendering country to condition an extradition or deporta-

218. Id. at 366 n.10 (quoting the South African-United States Extradition Treaty).
219. See id.
220. See id.
221. See id. at 365-66.
224. Id. at 371.
225. See id.
tion request. The court found that such express language was required, even while acknowledging that the United States had acceded to conditions on extradition or deportation requests in other cases.

Any country opposed to the death penalty should take steps to amend its extradition treaty with the United States to clearly state that no extradition will be allowed without assurances that the death penalty will not be imposed. In the meantime, foreign governments opposed to the death penalty should immediately require a standard no death penalty assurance in every extradition document, regardless of how minor the crime or charge in the extradition request appears. This avoids the diplomatic complications inherent in a specific case request, while at the same time closes a significant doctrine of specialty loophole in U.S. domestic law.

Third, absent an express assurance of no death penalty, foreign governments also can expect U.S. prosecutors to amend the charges or file new charges once an extradited individual is under the authority of a U.S. jurisdiction. While Pang would lead one to expect that other courts would not permit the addition of a death count, history tells us that Pang type decisions are rare and seldom followed. The far greater number of courts have found exceptions to allow additional charges, and in the emotionally charged atmosphere surrounding the attacks on September 11, 2001, it is unrealistic to believe a U.S. court will recognize the doctrine of specialty in such cases. Once that door is opened, however justified it may seem in the terrorist cases, it will quickly become the law in the United States to ignore extradition agreement restrictions in any potential capital case.

VI. ESCAPING THE PROBLEMS OF THE DOCTRINE OF SPECIALTY ALTOGETHER—WHAT FOREIGN GOVERNMENTS SHOULD DO BEFORE AGREEING TO ANY EXTRADITION TO THE UNITED STATES

A. Extradition with Written Assurances

Foreign governments must refuse to extradite an indi-
vidual until they first receive a written assurance that the death penalty will not be imposed. A prime example is a recent Mexican Supreme Court case. In October 2001, the Mexican Supreme Court issued a ruling that declared unconstitutional the extradition of an accused into the United States for any capital offense. The Mexican Constitution states that every individual is capable of rehabilitation. Hence, no defendant extradited from Mexico to the United States can receive a sentence greater than forty years (sixty years for extreme cases), and certainly no death penalty. In just two months, the ruling “has stopped the extradition of more than 70 high-profile defendants.” The consequence of this ruling is that prosecutors in the United States are forced to either reduce the sentences extradited defendants receive, or not prosecute the defendants at all.

The second most recent example of “extradition with assurances” is from the Supreme Court of Canada. In 1994, Atif Rafay and Glen Sebastian Burns murdered Rafay’s parents in Bellevue, Washington. After the murder, they fled to Canada. Prosecutors in Washington requested extradition. Following extensive appeals, the Supreme Court of Canada ruled that the criminal defendants in Canada may not be extradited to the United States if they face a death penalty eligible offense. The court held that “assurances [that prosecutors will not seek the death penalty] are constitutionally required in all but exceptional cases.”

As the Canadian and Mexican cases illustrate, the United States is now sandwiched between two countries that have abolished the death penalty, and that have affirmatively established they will no longer extradite potential capital defendants to the United States without expressed assurances that the death penalty will not be imposed.

229. See Weiner, supra note 189.
230. See id.
231. See id.
232. Id.
233. See id.
234. Bailey, supra note 185.
235. See id.
236. Id.
B. Refuse to Waive or Acquiesce to a Violation of the Doctrine of Specialty

Foreign governments also must refuse to consent to a waiver of the doctrine of specialty, and they must not acquiesce to a violation of the doctrine of specialty in any case. As the Tse court demonstrated, if a surrendering country waives the doctrine, the extradited individual loses his individual right to challenge a doctrine of specialty violation. This practice puts the extradited individual at the mercy of the surrendering country's government or worse, the locally-elected prosecutor and judge.

C. Communication

As the Bin Laden case demonstrates, attorneys for an extradited defendant must take steps to communicate with the surrendering country. Defense attorneys must make their clients aware of their rights under both the VCCR and the doctrine of specialty. This is especially true in countries that still enforce the death penalty. In Mohamed's case, but for his attorneys bringing an action in South Africa, the South African government's error would have never been brought to light. Although the South African Court's decision was not completely respected in Mohamed's case, one can argue it is a significant factor in his serving a life sentence instead of waiting on death row.

VII. CONCLUSION

The biggest problem with the doctrine of specialty is that it has been severely limited by U.S. court decisions. Decisions by prosecutors and rulings by courts are subject to public and political pressure. Nowhere in U.S. jurisprudence is this more true than in death penalty litigation. The problems inherent in U.S. court decisions regarding extradition and the doctrine of specialty are numerous. Couple this with the willingness of U.S. courts to ignore or breach international law, such as the VCCR, and the surrendering state, along with the extradited defendant, have little left to protect their rights.

The United States has not demonstrated that it can be trusted to honor the intent or wishes of a foreign government.

237. See supra Part III.B.4.
once a death eligible defendant is in U.S. custody. The doctrine of specialty provides a powerful tool for foreign governments to prevent an individual found in their jurisdiction from being sentenced to death after extradition to the United States. This tool will be effective only if foreign governments are unequivocal and unyielding in requiring written assurance of no death penalty in every extradition and are prepared to appear in U.S. domestic courts to defend their international rights. For our hypothetical defendant, Carlos Pravia, current law in both Texas and the Fifth Circuit indicates that his only hope would be for the Mexican government to bring a legal action on his behalf.