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NOTES

THE DOCTRINE OF SPECIALTY: A TRADITIONAL APPROACH TO THE ISSUE OF STANDING

John J. Barrett III*

URUGUAYAN AUTHORITIES arrested Ramon Puentes on February 17, 1991 on several narcotics charges.¹ The United States then requested the Uruguayan Government extradite Puentes to stand trial for conspiracy to import cocaine into the United States.² The extradition request stated that the United States intended to charge Puentes with conspiracy dating from 1982 until November 29, 1988.³ The Uruguayan government granted the extradition request pursuant to an extradition treaty between the United States and Uruguay.⁴ On September 30, 1991, Puentes was arraigned before a U.S. magistrate.⁵

On December 13, 1991, a grand jury returned a supervening indictment charging Puentes with conspiracy to import cocaine into the United States from 1982 to December 13, 1991.⁶ This increased the period during which the United States alleged that Puentes conspired to violate U.S. drug laws by three years. On May 21, 1992, a jury found Puentes guilty as to the supervening indictment.⁷

Puentes subsequently filed a post-conviction motion for the arrest of judgment pursuant to Federal Rule of Civil Procedure 34, arguing that the United States violated the doctrine of specialty⁸ under which a "nation that receives a criminal defendant pursuant to an extradition treaty may try the defendant on those offenses for which the other nation granted

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¹ United States v. Puentes, 50 F.3d 1567, 1569-70 (11th Cir. 1995).
² Id. at 1569.
³ Id.
⁴ Id. at 1569-70.
⁵ Id. at 1570.
⁶ Id.
⁷ Id.
⁸ Id. at 1571; Fed. R. Civ. P. 34 (regarding the production of documents and entry upon land for inspection).
Puentes also filed a motion to enjoin his sentence. On December 22, 1992, the court rejected these motions, and Puentes subsequently appealed. In United States v. Puentes, the Eleventh Circuit Court of Appeals held that the United States did not violate the doctrine of specialty. But, the Court further held that in upholding the Court's prior decision in United States v. Rauscher, Puentes had standing to assert that the United States violated specialty.

The federal courts are widely divided on the question of whether an individual should be given standing to assert a violation of specialty. Although not all circuits grant individuals standing to assert violations of specialty, those that do almost uniformly base their decisions on Rauscher. This Note addresses whether individuals should have standing in U.S. courts to assert violations of specialty. Part I explores the limited role individuals have played in the international law forum in challenging treaty violations. Part II reviews the genesis of extradition during the last 350 years. Part III argues that the Rauscher court departed from established law without offering a rationale for its holding. It also illustrates that Rauscher is internally inconsistent because it quotes language from the Head Money Cases about treaties expressly conferring rights upon individuals, but fails to examine the treaty in question before resolving

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9 Id. at 1572.
10 Id. at 1571.
11 Id.
12 Id. at 1576.
13 Id. at 1572. The court stated that “Rauscher establish[ed] that when personal jurisdiction over a criminal defendant is obtained through extradition proceedings, the defendant may invoke the provisions of the relevant extradition treaty in order to challenge the court’s exercise of personal jurisdiction.” Id. at 1573.

The rationale for the doctrine rests on the following factors which bear on the requesting and requested states:

1. the requested state could have refused extradition if it had known 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 would be abusing the formal process of the requested state in securing the surrender of the person for reasons other than the ones disclosed in the extradition request.
4. the requested state used its processes in reliance upon the representations made by the requesting state and is entitled to the observance of these representations.
5. the relator is entitled to be tried for the crime or crimes for which he was extradited and thus to be free from prosecutorial abuse once he is within the jurisdictional control of a requested state.

the issue. Part IV contends that a separation of powers conflict arises when U.S. courts give individuals standing to assert violations of specialty. Finally, part V proposes that individuals be given standing to assert violations of specialty only when the provisions of the applicable extradition treaty expressly authorize such a right.

I. CRIMINAL DEFENDANTS: PASSIVE PARTICIPANTS IN THE FORUM OF INTERNATIONAL LAW

The doctrine of specialty and the issue of whether individuals have standing to assert its violation have caused considerable discord in the lower courts of the United States. For instance, the First, Second, Third, Fifth, and Seventh Circuits have held that individuals do not have standing to assert violations of specialty. These circuits practice what is called political realism with respect to treaty law. The realists' main

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14 See United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (stating that treaties are made for the benefit of signatory nations and that under international law the contracting foreign government, not the defendant, has the right to complain about a violation of a treaty); Shapiro v. Ferrandina, 478 F.2d 894, 906 (2d Cir. 1973) (“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.”); United States v. Riviere, 924 F.2d 1289, 1301 (3d Cir. 1991) (stating that “the mere existence of a treaty does not create individual rights in fugitives found within the borders of a party’s nation.”); United States v. Kaufman, 858 F.2d 994, 1007 n.3 (5th Cir. 1988) (quoting United States v. Zabaneh, 837 F.2d 1249, (5th Cir. 1988) (“Where no party to a treaty protests a treaty violation, an individual lacks standing to raise the treaty as a basis for challenging the court’s jurisdiction.”)); United States v. Miro, 29 F.3d 194, 200 n.5 (5th Cir. 1994) (stating that “a criminal defendant has no standing to argue the specialty doctrine when the asylum state has failed to raise an objection to the proceeding”); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985) (“The right to insist on the application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested.”); see also Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.C. Cir. 1979) (“It is clear that the concept of extradition has certain well-defined parameters. One such limitation is the “rule of specialty,” a principle of international law that prohibits the requesting country from prosecuting or punishing the extradited party without the permission of the surrendering country for any offense committed prior to his extradition, except that for which he was extradited.”); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990) (“It is well-established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved . . . . [E]ven where a treaty provides certain benefits for nationals of a particular state — such as fishing rights — it is traditionally held that “any rights arising from such provisions are only derivative through the states.”).

15 See Mary-Rose Papandrea, Comment, Standing to Allege Violations of the Doctrine of Specialty: An Examination of the Relationship between the Individual and
concern is that stability and peace are maintained between nations, and they adopt the view that states are the only subjects of international law.  

On the other hand, under certain circumstances, the Eighth, Ninth, Tenth, and Eleventh Circuits allow individuals to assert violations of specialty. The Eighth, Ninth, and Eleventh Circuits afford individuals standing only when the requested state can allege such a violation. Under this approach, the individual’s right to assert a violation is derivative of the requested state. However, the requested state can nullify the individual’s objection to specialty by consenting to the additional charges. In the Tenth circuit, individuals have the right to assert violations of specialty regardless whether the requested sovereign can raise a violation of the doctrine. Although these circuits differ slightly as to the circumstances under which individuals shall acquire standing, their underlying legal justification for granting standing is almost uniformly grounded in United States v. Rauscher.

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1. See id.
2. See United States v. Puentes, 50 F.3d 1567, 1571 (11th Cir. 1995) (holding that individuals have standing to allege violations of specialty only when the surrendering state can also allege such a violation); United States v. Diwan, 864 F.2d 715, 721 (11th Cir. 1989) (stating that the individual has standing to allege any violation the extraditing state may consider a breach of the extradition treaty); United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (stating that individuals have standing to raise whatever violations that the surrendering state may raise); Leignor v. Turner, 884 F.2d 385, 389 (8th Cir. 1989) (stating that the defendant’s right to allege violations of specialty is strictly derivative); United States v. Thirion, 813 F.2d 146, 151 (8th Cir. 1987) (stating that the individual can raise whatever objections the extraditing state can allege).

3. See Leignor, 884 F.2d at 389.


5. See United States v. Levy, 905 F.2d 326, 328 n.2 (10th Cir. 1990) (citing Rauscher which stated that the doctrine of specialty is a “right conferred upon persons brought from a foreign country into this [country]”).

6. See Puentes, 50 F.3d at 1573 (“Rauscher demonstrates that even in the absence of a protest from the requested state, an individual extradited pursuant to a treaty has standing to challenge the court’s personal jurisdiction under the rule of specialty.”); Najohn, 785 F.2d at 1422 (citing Rauscher for the proposition that the individual can raise the same objections that a requested state may raise); Levy, 905 F.2d at 328 n.1 (stating that “Rauscher gave extradited defendants a right to claim the [doctrine of
At the center of the debate is the individual's role in international law. There are two schools of thought on this subject, one narrow, the other broad. Courts adhering to the horizontal or realist view argue that states, not individuals, play a role in international law. This well-established narrow view argues that signatory nations are the beneficiaries of extradition treaties. By extension, individuals do not have standing to assert violations of extradition treaties specifically including the doctrine of specialty.

22 See Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2297 (1991) ("Under the horizontal view, the proper subjects of international law are the states themselves. Individuals do not have rights; if they are protected, it is only because states have chosen to act on their behalf."). Those who embrace the horizontal view argue that "the equality and dignity of sovereign states would be compromised if states were sued by private parties . . . [International law imposes duties and confers rights only upon states, its sole 'subjects.']" HENRY J. STEINER & DETLEV F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 244-45 (3rd ed. 1986); see also Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 n.10 (1991) (stating that "[t]he [dualist] school . . . denies a meaningful role to both individuals and domestic courts . . . [I]ndividuals injured by foreign states . . . have no right to pursue claims directly against those states in either the domestic or international fora. Instead, their states . . . pursue those claims for them on a discretionary basis . . . ").

23 See Brilmayer, supra note 22, at 2295; see L. OPPENHEIM, *INTERNATIONAL LAW* 19 (H. Lauterpacht ed., 8th ed. 1955) (stating that "[s]ince the Law of Nations is based on the common consent of individual States, States are the principle subjects of International Law. . . . As a rule, the subjects of . . . the Law of Nations are States solely and exclusively."); Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 102 (1985) (stating that Jeremy Bentham's "phrase 'international law' . . . seemed to call for an exclusive state-oriented view of that body of law."); see generally BASSIOUNI, supra note 13, at 391 ("Extradition is still regarded primarily as an instrument of interstate cooperation designed to inure to the benefit of the interested state.").

24 The reason that horizontal conceptions of international law typically structure cases in such a way that, they fail the standing requirement is that under the horizontal view, rights belong to states and not to individuals. This is true even when an individual has suffered in some way from the violation. Two consequences follow from this proposition. First, an individual coming into court requesting relief is really asserting the rights of a third party, rather than personal rights, because only a state can be a legal rights holder. Second, the court cannot grant effective relief. The appropriate relief (under a horizontal view) would be to the state, because the state is the rights holder. However, if the suit is initiated by an individual, no remedy granted to the individual would redress what is, supposedly, the real international wrong. In order to satisfy standing requirements, the rights holder must be the individual initiating litigation.
On the other hand, courts applying the vertical approach, permit individuals a more active role in international law. Consistent with this approach is the presupposition that the individual, as a rights holder, can initiate judicial action. The challenge to the horizontal view is attributed primarily to a humanitarian concern for individuals' human rights that are not protected when individuals must rely exclusively on their states for protection.

II. EXTRADITION TREATIES

Extradition is the process by which an accused or convicted individual, "located in one country is surrendered to another country for trial and punishment." Throughout history, there has been much debate over whether one sovereign nation owes another a legal duty to return fugitives upon request.

There are primarily two theories under which sovereign nations have historically justified extradition: comity and treaty. In pre-modern times, nations often returned fugitives without having the legal obligation to do so by treaty as a "matter of courtesy and goodwill." Exchanges such as these were perceived to be an integral element of "friendly relations between sovereigns, and sometimes such acts were performed without solicitation." This practice is referred to as comity.

Brilmayer, supra note 22, at 2302.

Vertical refers to the inter-relationship between states and individuals. Brilmayer argues that international law governs more than just inter-state relations. In her opinion, both states and individuals have rights. See Brilmayer, supra note 22, at 2295-96. Brilmayer argues that "the vertical approach is really an expansion of the horizontal model . . . . When it is brought to bear on domestic litigation of international issues, however, it . . . elevate[s] vertical elements of litigation over horizontal elements . . . ." Id. at 2296.

See Brilmayer, supra note 22, at 2298.


Dept. of State, Digest of United States Practice in International Law 690 (1980).

See generally Bassiouni, supra note 13, at 49-53 (discussing extradition by comity and treaty).

Id. at 2; see United States v. Rauscher, 119 U.S. 407, 411-12 (1886) ("It is only in modern times that nations . . . have imposed upon themselves the obligation of delivering up . . . fugitives from justice to the States where their crimes were committed . . . . Prior to [extradition] . . . treaties, there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the govern-
Hugo Grotius, a seventeenth century philosopher-scholar, wrote extensively on the subject of extradition and the legal obligations nations had with respect thereto. In his view, the asylum state should either punish the accused or convicted individual or return him to the nation from which he fled.\textsuperscript{32}

\begin{quote}
Any sovereign state \ldots has a right to require another power to punish any of its subjects \ldots, a right essential to the dignity and security of all governments.\textsuperscript{33}
\end{quote}

\begin{quote}
It is therefore necessary that the power, in whose kingdom an offender resides should upon the complaint of the aggrieved party, either punish him itself, or deliver him up to the discretion of the party.\textsuperscript{34}
\end{quote}

Emerich de Vattel, an eighteenth century scholar, took a different position with respect to extradition. He wrote that states had an absolute duty under international law to surrender fugitives to the states from which they fled.\textsuperscript{35}

The modern approach to extradition does not comport with either Vattel’s “absolute duty” theory or Grotius’ theory of “prosecute or surrender.” Under the modern approach, sovereign nations are legally obliged to return accused or convicted criminals to the state from which they fled only when a treaty mandates such action.\textsuperscript{36} In 1840, the United States gave legal effect to the modern approach in \textit{Holmes v. Jennison}.\textsuperscript{37} In that case, the Court stated:

Since the expiration of the [extradition] treaty with Great Britain, \ldots the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offenses in a foreign nation, have taken shelter in this \ldots. In every instance where there was no engagement by treaty to deliver, and a demand has been made, [the United States] uniformly refused, and have denied the right of the


\textsuperscript{33} \textit{Id.} § 3.

\textsuperscript{34} \textit{Id.} § 4.; \textit{see also} \textit{Henry Wheaton}, \textit{Elements of International Law} 181 (8th ed. 1866) (stating that Grotius’ views were espoused by scholars like Heineccius, Burlemaqui, Vattel, Rutherford, Schmelzing, and Kent).

\textsuperscript{35} See \textit{Bassiouni}, \textit{International Extradition: United States Law and Practice} 7 (2d ed. 1987) [hereinafter \textit{Bassiouni} (2d ed.).]

\textsuperscript{36} \textit{See id.}

\textsuperscript{37} \textit{Holmes v. Jennison}, 39 U.S. (14 Pet.) 540 (1840).}
executive to surrender, because there was no treaty, and no law of Congress to authorize it. And acting upon this principle throughout, they have never demanded from a foreign government any one who fled from this country in order to escape from the punishment due to his crimes.\footnote{Id. at 574.}

By extension, the Court concluded that no legal duty to extradite fugitives exists absent the existence of an extradition treaty.\footnote{Id. at 578-79 (stating that the treaty-making power of the Constitution is competent to bind the states to surrender fugitives from justice where such power is executed by a treaty, but while such power remains dormant or contingent, the obligation does not exist); see also Factor v. Laubenheimer, 290 U.S. 276, 287 (1933).}

Extradition can generally be divided into three substantive parts: extraditable offenses, double criminality, and the doctrine of specialty.\footnote{See BASSIOUNI, supra note 13, at 383-493 (discussing the substantive requirements of extradition including: reciprocity, double criminality, extraditable offenses, and specialty).}

These “protections have been included in international extradition treaties . . . because systems of justice may vary widely between treaty signatories.”\footnote{Kenneth E. Levitt, Note, International Extradition, the Principle of Specialty, and Effective Treaty Enforcement, 76 Minn. L. Rev. 1017, 1022 n.27 (1992) (quoting Brief for Amicus Curiae Lawyers Committee for Human Rights).}

Extraditable offenses are those criminal offenses enumerated in an extradition treaty for which one signatory will return a fugitive to the other signatory.\footnote{See id.}

Such offenses are usually serious in nature and carry a prison sentence of more than one year.\footnote{See id.}

Double criminality refers to the concept that an offense alleged against an individual by a requesting state must also constitute an offense under the laws of the requested state.\footnote{See BASSIOUNI, supra note 13, at 388.}

Two methods are used to interpret the double criminality requirement, in concreto and in abstracto.\footnote{See id. at 390.}

The former method “relies on the label of the offense and a strict interpretation of its legal elements.”\footnote{Id.}

The latter method “relies on the criminality of the activity regardless of its specific label and full concordance of its elements in the respective laws of the two states.”\footnote{Id.}
DOCTRINE OF SPECIALTY

The doctrine of specialty places certain constraints upon a state requesting the extradition of a fugitive. The Restatement of Foreign Relations Law of the United States defines specialty as follows:

(1) A person who has been extradited to another state will not, unless the requested state consents, (a) be tried by the requesting state for an offense other than one for which he was extradited; or, (b) be given punishment more severe than was provided by the applicable law of the requesting state at the time of the request for extradition. (2) A person who has been extradited to another state for trial and has been acquitted of the charges for which he was extradited must be given a reasonable opportunity to depart from the state.\(^48\)

In essence, the doctrine of specialty "reflects a fundamental concern of governments that persons who are surrendered should not be subject to indiscriminate prosecution by the receiving government . . . ."\(^49\) The U.S. Supreme Court did not, however, recognize the doctrine of specialty until it decided \textit{Rauscher} in 1886.\(^50\)

III. THE RAUSCHER OPINION

On October 9, 1884, William Rauscher, second mate of the \textit{J.F. Chapman}, murdered Janssen while on the high seas within U.S. maritime jurisdiction.\(^51\) Rauscher was subsequently charged with murder; however, he fled to Great Britain before the United States could take him into custody.\(^52\)

Under the Webster-Ashburton Treaty of 1842, the United States and Great Britain set forth certain conditions under which each party was obliged to return fugitives upon request of the other.\(^53\) In accordance with this treaty, the United States requested Great Britain extradite Rauscher to stand trial in the United States for murder.\(^54\) Great Britain complied.\(^55\)

\(^{50}\) \textit{United States v. Rauscher}, 119 U.S. at 407, 419 (1886) (stating that "[a] treaty . . . is a law of the land, as [is] an act of Congress . . . .").
\(^{51}\) \textit{Id.} at 409.
\(^{52}\) \textit{Id.} at 408.
\(^{54}\) \textit{Rauscher}, 119 U.S. at 408.
\(^{55}\) \textit{Id.}
When the United States took Rauscher into custody, however, the murder charge was dropped and he was then charged with assaulting and inflicting "cruel and unusual punishment" upon Janssen. The Circuit Court of the United States for the Southern District of New York subsequently found Rauscher guilty, but could not decide whether the "prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire[d] a right to be exempt from prosecution . . . ." To resolve this dispute, the court certified to the U.S. Supreme Court a request that it decide whether inter alia a person extradited for one crime, pursuant to an extradition treaty, may by tried and convicted of another.

On December 6, 1886, Justice Miller delivered the U.S. Supreme Court’s opinion that Rauscher indeed had standing to raise specialty. Absent from this opinion, however, is any discussion regarding the individual’s limited role in international law. Moreover, Justice Miller failed to discuss the separation of powers dilemma implicit in the Court’s decision to give individuals standing to assert treaty violations notwithstanding executive disapproval. Further, Justice Miller did not address the possibility that permitting individuals to exercise such a right could interfere with the executive’s ability to conduct foreign relations. Instead of providing a detailed analysis in support of his position, Justice Miller failed to justify his significant departure from his earlier opinion in Head Money Cases which was itself inconsistent with Rauscher.

A. Head Money Cases

Justice Miller began his Rauscher opinion by stating that the doctrine of specialty is a general principle of law. He proceeded to hold that individuals have standing to assert its violation. This was a significant

56 Id. Not only did the United States charge Rauscher with a crime other than that for which Great Britain granted extradition, the crime for which he was charged was not one of the crimes enumerated in the Webster-Ashburton Treaty. Id. at 410-11.
57 Id. at 409.
58 Id. at 410.
59 Id. at 430-31 (stating that upon a writ of habeas corpus, federal courts can decide whether an individual is being held in violation of an extradition treaty, and rejecting the notion that redress could only be found in the executive branch).
60 Id.; see also STEINER & VAGTS, supra note 22, at 321-22 (stating that general principles of law refer "to principles of general significance in the legal systems of most civilized or developed countries."); OPPENHEIM, supra note 23, at 29-31 (stating that "intention of the phrase is to authorize the [International Court of Justice] to apply the general principles of municipal jurisprudence").
61 Rauscher, 119 U.S. at 418.
departure from what was thought to be the individual’s proper role in international law. Justice Miller’s weak rationalization of the above conclusion prompted one commentator to opine that “Miller was not merely guilty of unartful drafting; it appears that he was attempting to finesse his way out of a doctrinal predicament of his own making.” The predicament is Justice Miller’s *Head Money Cases* opinion where he stated that absent specific treaty language to the contrary, individuals cannot allege treaty violations.

*Head Money Cases* involved a dispute between a firm that arranged transportation of passengers between Holland and the United States and a U.S. Customs Officer at the Port of New York. The dispute concerned a Congressional act entitled, “An Act to Regulate Immigration,” enacted August 3, 1882 which authorized a fifty cent duty on all passengers entering the United States through the Port of New York. The defendant firm argued that the act violated several treaty provisions extant between the United States and other “friendly nations.” The Court held, however, that the act did not violate any treaties.

B. *Rauscher*: Internally Inconsistent

Although *Head Money Cases* did not concern the operation of an extradition treaty or a criminal defendant’s standing to raise specialty, Justice Miller imported language from that case into his *Rauscher* opinion. It is this language, and its use in *Rauscher* justifying rather than denying standing, that weakens *Rauscher*’s holding. Justice Miller wrote as follows:

> 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.*

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62 Cf. The Ship Richmond, 13 U.S. 102, 104 (1815).
63 Semmelman, *supra* note 19, at 110.
64 *Head Money Cases*, 112 U.S. 580 (1884).
65 Id. at 587-88.
66 Id. at 589.
67 Id. at 597.
68 Id. at 597-601.
He concluded as follows:

But 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 . . . . The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land."\(^7^0\)

With the above in mind, it is necessary to examine the relevant provisions of the Webster-Ashburton Treaty to see whether "certain rights are conferred upon the citizens or subjects of one of the nations . . . ." to assert specialty.\(^7^1\) An examination of Article 10 which deals exclusively with extradition, clearly confers no private rights of action to assert violations of specialty.\(^7^2\) In fact, Article 10 makes no reference to individual rights at all. Justice Miller, by way of legerdemain, argued for a textual approach to treaty construction and proceeded to ignore that approach entirely by granting Rauscher standing absent specific treaty language providing such a right. For this reason, Rauscher should not be relied upon for the proposition that individuals necessarily have standing to assert specialty.

\(^7^0\) Id. at 418-19 (emphasis added).

\(^7^1\) Id. Article 10 of the Webster-Ashburton Treaty states, in relevant part:

[T]he United States and Her Britannic Majesty shall, upon mutual requisitions by them, . . . respectively made, deliver up to justice all persons who, being charged with the crime of murder . . . , committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive.

Assuming arguendo that Rauscher's premise is correct, the provisions of an extradition treaty, such as the Webster-Ashburton Treaty, expressly authorizing individuals standing to assert its breach are required. Justice Miller highlighted this point in Rauscher by stating that "a treaty may contain provisions which confer certain rights upon the citizens or subjects . . . which are capable of enforcement as between private parties in the courts of the country." Comparing this language with that used in United States v. Puentes, however, shows the danger inherent in reliance on Rauscher's holding alone. Puentes stated that "Rauscher establish[ed] that when personal jurisdiction over a criminal defendant is obtained through extradition proceedings, the defendant may invoke the provisions of the relevant extradition treaty in order to challenge the court's exercise of personal jurisdiction." The court continued by asserting that courts that do not allow individuals to assert treaty violations ignore both the history of extradition and the mandate of Rauscher. However, Justice Miller did not clearly justify his departure from established precedent, leaving Rauscher something less than a mandate. Moreover, legal scholarship supports the conclusion that individuals should only be able to act through their respective governments. Therefore, courts holding otherwise ignore both the analytical shortcomings of Rauscher, the history of extradition law, and the individual's circumscribed role in international law.

IV. SEPARATION OF POWERS

Although Justice Miller wrote that Rauscher had standing to raise specialty, he failed to justify this result analytically. Notwithstanding the above observation, individuals should be denied standing on other grounds as well. Extradition treaties are essentially contracts between two or more nations, each seeking to acquire benefits that accrue by virtue of the contractual relationship. Allowing the judiciary to interfere with such
an arrangement by giving individuals standing absent specific treaty language granting such a right weakens certain prerogatives inherent in the executive branch of the U.S. government.78

78 Judicial interference in treaties can weaken executive prerogatives. See U.S. CONST. art. II, § 2, cl. 2 ("He [the President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties . . . "). This grant of power, coupled with Article II, § 3 vests in the Executive Branch the power to conduct foreign relations. This power is exclusive in that neither the legislature nor the judiciary are empowered to conduct foreign relations. See U.S. CONST. art. III, § 3; Oetjen v. Central Leather Co., 246 U.S. 297, 302 ("The conduct of the foreign relations of our Government is committed . . . to the Executive and the Legislative — "the political" Departments . . . "). Although not always immediately apparent, allowing the federal judiciary to decide when an individual should be given standing to allege the violation of an extradition treaty can create foreign relations problems.

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. As Marshall said in his great argument on March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."

United States v. Curtiss Wright Export Corp., 299 U.S. 304, 319 (1936). See also United States v. Belmont, 301 U.S. 324, 325 (1937) (stating "[t]his court held that the conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision . . . "); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) ("The crucial element of the separation of powers . . . is the principal that the conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative — "the political" Departments." Separation of powers stands for the "proper — and properly limited — role of the courts in a democratic society, a role that includes judicial respect not only for the coordinate branches of the national government but also for the other governmental members of the federal system."); Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 805 n.7 (D.C. Cir. 1987) (stating that the separation of powers doctrine is "necessary to prevent the virtually limitless spread of political authority.").
A. **Conduct of Foreign Relations**

Judicial activism in treaty enforcement can detrimentally affect the president’s ability to conduct foreign relations. These dangers are well presented by Judge Robert Bork in his *Tel-Oren* opinion.

The potential for interference with governments conducting their foreign relations is central to both separation of powers limits on jurisdiction and to international law’s general refusal to grant private rights of action. The existence of such a potential in any case must count strongly against international law’s providing a private right of action... If this power is ceded to the federal judiciary, treaties, and by extension, foreign relations, could become vulnerable to overreaching in an area constitutionally reserved for the executive branch. In other words, U.S.

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79 For lack of a more illustrative definition, judicial conferral of standing is referred to as judicial activism. This captures the essence of such practice in that absent express language in the extradition treaty, federal courts remain under an obligation to construe treaties — not to rewrite them. See The Amiable Isabella, 19 U.S. (1 Wheat.) 1, 72 (1821). Justice Story declared that “this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.” *Id.* at 72.

80 *Tel-Oren*, 726 F.2d at 805.

81 To many, this argument may seem counter-intuitive. For instance, it can be argued that two parties enter into an extradition treaty [contractual arrangement] to provide certainty that would not exist in the absence of the treaty. In this narrow sense, the existence of such a treaty implies that the signatories want it enforced. However, this is too simple an argument, and fails to consider basic principles of contract law. In contract law, as well as treaty law, it is incumbent upon the non-breaching party to challenge the breach. “[W]here a party fails to perform a promise, it is important to determine if the breach is material. If the breach is material, the aggrieved party may cancel the contract. However he also has the option of continuing with the contract . . . .” JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 458 (3d ed. 1987) (emphasis added); see also United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1982); United States v. Shapiro, 478 F.2d 894, 906 (2d Cir. 1973); United States v. Riviere, 924 F.2d 994, 1301 (3rd Cir. 1991); United States v. Kaufman, 858 F.2d 994, 1006-09 (5th Cir. 1988); United States v. Miro, 29 F.3d 194, 200 (5th Cir. 1994); Demjanjuk v. Petrovsky, 776 F.2d 571, 584 (6th Cir. 1985); Berenguer v. Vance, 473 F. Supp. 1195, 1197 (D.C. Cir. 1979); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990). Choosing not to enforce a treaty’s provision is similar to making an election not to enforce a contract once breached. “The word *election* signifies a choice, one that is often binding on the party that makes it. When the time for occurrence of a condition has expired, the party whose duty is conditional has a choice. That party can take advantage of the nonoccurrence of the condition and treat
conduct of foreign relations, as constitutionally determined by the president, could be made contingent upon the federal judiciary’s interpretation of relevant terms of extradition treaties, irrespective of the signatory’s intentions not to enforce those terms. If the federal judiciary decided that an extradition treaty can be challenged by individuals, without considering the actual text of the treaty or the intent of the signatories, the president’s ability to conduct foreign relations could be jeopardized, if not devastated.\textsuperscript{82} To underscore the danger, consider the following hypothetical scenario.

The Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland (Extradition Treaty) does not expressly confer standing on the individual to allege its violation.\textsuperscript{83} On January 1, 1998, an Israeli national (the Bomber), who was also a member of a fundamentalist Jewish organization intent on halting peace negotiations between the State of Israel and the Palestinian Liberation Organization (P.L.O.), blew up a mosque in New York City killing three people.\textsuperscript{84} Before being apprehended by U.S. authorities, the Bomber fled to London where he was subsequently apprehended by British authorities.

On January 5, 1998, the U.S. State Department formally asked the British government to extradite the Bomber. However, during negotiations leading to the formal extradition request, Britain stated that such a request would be granted pursuant to the Extradition Treaty if the United States

\begin{quote}
the duty as discharged or can disregard the nonoccurrence of the condition and treat the duty as unconditional. Courts often hold that a party that chooses to disregard the nonoccurrence of a condition is bound by an election to treat the duty as unconditional . . . .” E. Allan Farnsworth, Contracts 590 (3d ed. 1990).
\end{quote}

\textsuperscript{82} Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) (stating that “the meaning given [to treaties] by the departments of government . . . charged with their negotiation and enforcement is given great weight”).

\textsuperscript{83} Article XII provides, as follows:

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect to which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third state- (a) until after he has returned to the territory of the requested Party; or (b) until the expiration of thirty days after he has been free to return to the territory of the requested Party. (2) The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition.


\textsuperscript{84} For purposes of this hypothetical, assume that the Executive Department decided that a Middle East peace treaty between the state of Israel and the P.L.O. is of primary importance to the security of the region and U.S. national security.
formally charged the Bomber only with the unlawful discharge of explosives. Britain's negotiators added this condition because they were concurrently concluding negotiations with Israel for the extradition of an Irish Republican Army (I.R.A.) terrorist sought for the bombing of a pub where three British soldiers were killed. Britain believed that if the Bomber was extradited for murder, Israel would refuse to extradite the I.R.A. terrorist. The United States reluctantly agreed, but with the understanding that Britain would not object to the Bomber being charged with murder sometime after Israel extradited the I.R.A. terrorist. Britain agreed. However, this was not made public as doing so would jeopardize the agreement. Nor was it made public that the United States promised Yassir Arafat that the United States would charge the Bomber with murder after Israel extradited the I.R.A. terrorist.

On January 15, 1998, the Bomber was extradited to the United States and charged with the unlawful discharge of an explosive. On January 17, 1998, Israel extradited the I.R.A. terrorist to Great Britain. On January 18, 1998, under pressure from the P.L.O. who threatened to pull out of the peace talks, the United States charged the Bomber with murder.

To illustrate how judicial activism could interfere in this sphere of foreign relations, consider the following. On January 18, 1998, the United States brought the Bomber before the Second Circuit Court in New York, at which time the government formally added the charge of murder. However, the Bomber's attorney argued that such an additional charge violated the doctrine of specialty. The court agreed without inquiring into the reasons why the executive branch wanted the Bomber charged with murder. Without any objection having been made by Britain on behalf of the Bomber, the court dismissed the charge. On January 19, 1998, the P.L.O. pulled out of the peace negotiations with Israel. Yassir Arafat, speaking on behalf of the P.L.O., stated that because the United States broke its promise to prosecute the Bomber for murder, the P.L.O. would no longer participate in any negotiations with Israel in which the United States played any part.

The above hypothetical underscores several problems with allowing the judiciary to grant individuals standing to assert treaty violations. First,

85 Several circuits have held that in the absence of a protest from the extraditing state, an individual should not be able to allege an extradition treaty violation. See United States v. Zabaneh, 837 F.2d 994, 1249 (5th Cir. 1988) (stating that where no party to a treaty protests a treaty violation, an individual lacks standing to raise the treaty as a basis for challenging the court's jurisdiction); Miro, 29 F.3d at 200; Demjanjuk, 776 F.2d at 584; Berenguer, 473 F. Supp. at 1197; Matta-Ballesteros, 896 F.2d at 259.
if the above scenario occurred, which is not unimaginable, the president’s negotiating power abroad could be weakened. The court’s actions, based upon jurisprudential concerns rather than concerns for foreign relations, would cause the president’s promise to Yassir Arafat to be broken. Now, future negotiations between the United States, Israel, and the P.L.O. would be more difficult because the United States had failed to carry out its promised course of action with respect to the Bomber. Second, judicial abrogation of executive authority could lead to embarrassment, both domestically and internationally.\(^6\) Again, the court’s primary incentive is to promote jurisprudential fairness to the individual, a concern quite different from that of the executive branch. The resultant power struggle created by inapposite incentives consequently would lead to the inability of the United States to fulfill its promise to Yassir Arafat which in turn makes the president look as if he could not effectively conduct foreign diplomacy. Finally, judicial activism in treaty enforcement would preclude the United States from speaking with one voice in matters of national urgency.\(^8\) The conduct of foreign relations, both in the actual negotiations stage and later in the enforcement stage requires continuity. As we have seen, critical negotiations between the United States, Israel, and the P.L.O. could break off because the executive did not live up to his promise to Yassir Arafat. In this case, continuity between the executive and the judiciary was critical. In conclusion, if agreements between the executive branch of the U.S. government and foreign nations are subject to judicial interpretation, as in the hypothetical above, then the president’s foreign policy could be unconstitutionally trumped by an overreaching federal judiciary. As a result, U.S. foreign policy would be unsound. “The courts should not undercut the elected branches by volunteering their own potentially conflicting opinions on what international law requires.”\(^8\)

### B. Institutional Competency

Another question “concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.”\(^8\) The president, a popularly elected official, is

\(^6\) United States v. Curtiss Wright Export Corp., 299 U.S. 304, 320 (1936) (“It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved [the president must be afforded] a degree of discretion and freedom . . . .”).

\(^8\) See id. at 319 (“The nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”).

\(^8\) Brilmayer, supra note 22, at 2290.

DOCTRINE OF SPECIALTY

directly responsible to the electorate. Moreover, he is constitutionally responsible for engaging in negotiations with foreign nations on matters directly affecting all U.S. citizens. Such negotiations encompass areas like treaty agreements on trade, immigration, and extradition. The president necessarily has the physical resources to engage in such negotiations on a regular and often protracted basis. By extension, the president has practical experience and technical expertise in foreign relations. On the other hand, the federal judiciary, a non-elected branch of government, is isolated within the domestic confines of the United States. It does not have the institutional capacity or the constitutional mandate to enter into relations with foreign nations. By extension, this branch does not have practical or technical expertise in the area of foreign relations. Therefore, the best interests of U.S. foreign relations are protected and promoted when the federal judiciary defers to the president on matters implicating U.S. foreign relations. The judiciary should thus defer to the president on matters involving treaty enforcement.

of separation of powers' "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." Id. at 427-28. See Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 805 (1987) (stating that the separation of powers doctrine is necessary to prevent "the virtually limitless spread of judicial authority."); see, e.g., International Assoc. of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358-61 (9th Cir. 1981); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292-93 (3d. Cir. 1979); Hunt v. Mobil Oil Corp., 550 F.2d 68, 77-79 (2d. Cir. 1977); Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 605-08 (9th Cir. 1976).

See U.S. CONST. art. II, §1, cl. 3.
See id.
See id. art. II, §2, cl. 2.
See id. By negative inference, that which is committed solely to one branch of government is not committed to a discordant branch.

The very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government[.]... They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

V. TREATIES DO NOT NECESSARILY CREATE RIGHTS PRIVATELY ENFORCEABLE IN U.S. COURTS

Much of this Note is based on the premise that in most situations, individuals should not be given standing to assert violations of specialty. However, this premise is not so rigid as to foreclose the possibility that under certain conditions individuals should be afforded standing. However, individuals should be given standing to assert violations of specialty only when the provisions of the extradition treaty expressly authorize such a right.

The federal courts rely primarily upon three canons of treaty construction. First, some courts adhere to the view that treaties should be construed "liberally and in good faith." In Geofroy v. Riggs, Justice Field noted that:

It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended . . . .

David J. Bederman, Professor of Law at Emory University, argues that this canon of construction, does not invite the court to determine the intent of the signatories. However, looking at the Geofroy opinion, Justice Field expressly states that treaties "shall be liberally construed, so as to carry out the apparent intention of the parties . . . ." The key term here is "apparent intention." If the federal judiciary is encouraged to give meaning to treaties based on what they believe is the drafters' "apparent intention," the actual intent of the drafters, which can usually be found by strict adherence to the actual text of the treaty may in fact be lost.

The second canon of treaty construction, which resembles the aforementioned canon, calls for the federal judiciary to effectuate the

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97 Bederman, supra note 95, at 967-68.
98 See Geofroy, 133 U.S. at 271-72.
99 Id.
100 See id.
intent of the signatory nations. Courts using this canon of treaty construction attempt to determine the intent of the signatories by closely examining the negotiating history of the parties and any post-ratification practices. However, this canon works smoothly only when the legislative history of the particular treaty is unambiguous. If ambiguity in the legislative history exists, the court could necessarily resort to injecting its subjective opinion as to the signatories' intent.

The third canon of treaty construction requires the federal judiciary to closely examine the actual text of the treaty to determine its meaning. Lending support to this canon of treaty construction are those such as Emmer De Vattel, who stated that "il n'est pas permis d'interpreter ce qui n'a pas besoin d'interpretation or it is not permissible to interpret what has no need of interpretation."

The U.S. federal courts should adopt the textualist canon of treaty construction because it is practicable. It does not force the court to subjectively inject its "best guess" as to the signatory's "apparent" intentions. Simply put, it forces the federal courts to defer to the branch of government that is constitutionally mandated to make treaties.

Critics may argue, however, that the U.S. Constitution gives the judiciary free reign with respect to treaty interpretation. This argu-

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101 Bederman, supra note 95, at 970.
102 See id. at 971. (describing several negotiating materials that litigants use to support their interpretation of relevant treaties, including "statements and speeches by delegates at international codification conferences and renditions of successive drafts of provisions").
104 Id. at 964-65. Those using this canon of treaty construction are called textualists.
105 Id. at 964. (citing 2 EMMER DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE §§ 263-461, at 1565-57, 1 EMMER DE VATTEL, CLASSICS OF INTERNATIONAL LAW (James B. Scott ed., 1916)). See Maximov v. United States, 373 U.S. 49, 55 (1963) (stating that "[w]e cannot . . . read the treaty to accord unintended benefits inconsistent with its words . . . "); Bederman, supra note 99, at 965 (stating that the "unfortunate tendency to deviate from the text [of treaties] has persisted, despite Supreme Court pronouncements that if a treaty's language is clear, no other means of interpretation may be employed").
106 U.S. CONST. art. III, § 1, cl. 1 ("The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under . . . Treaties made, or which shall be made . . . .''); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the
ment, however, is incomplete, and fails to consider the separation of powers envisioned by the Framers of the Constitution who gave the president sole responsibility for foreign relations. It is true that treaties are the supreme law of the land when made under the authority of the United States pursuant to the Constitution. However, the federal judiciary should not grant individuals standing unless the treaty "contain[s] provisions which confer certain rights upon . . . citizens . . . which are capable of enforcement as between private parties in the courts of [the United States] . . . ."

VI. CONCLUSION

Individuals have historically played a limited role in the international law forum. Although Rauscher held that an individual should have standing to assert specialty, the decision was poorly rationalized and significantly departed from established law. Furthermore, Rauscher itself is internally inconsistent. It quotes language from Head Money Cases which held that treaties can expressly confer rights upon individuals, but then fails to examine the treaty at issue for such language conferring standing to assert specialty. A textual examination of the Webster-Ashburton Treaty shows that the drafters did not expressly provide for such a right.

Moreover, a separation of powers conflict can result when courts give individuals standing to assert specialty. To prevent such a conflict, the federal judiciary should confer standing upon individuals to assert specialty only when the provisions of an extradition treaty expressly authorize such a right.

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 . . . .".

Rauscher, 119 U.S. 407, 418 (1886).