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A License to Mislead: *United States v. Abello-Silva*

Mark S. Weinstein

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CASENOTE

A LICENSE TO MISLEAD: *UNITED STATES v. ABELLO-SILVA*

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I. INTRODUCTION

On November 6, 1991, the United States Court of Appeals for the Tenth Circuit held, in *United States v. Abello-Silva*, that the international extradition "doctrine of specialty," which requires that an extradited accused felon not be tried for any charges be-

yond those specified in the extradition request, bars only the introduction of different "offenses," and not the introduction of different "facts."¹ Reasoning that no violation of the doctrine occurred when the prosecution secured a drug conspiracy conviction against an extradited Colombian citizen with facts different from those specified in its extradition request to the Colombian government, the court affirmed the conviction.²

Because it is well established that an asylum country will "extradite only those individuals against whom a substantial case lies,"³ the *Abello-Silva* decision may encourage U.S. prosecutors to tender trumped-up charges to foreign governments when a case is weak and likely to be met with a refusal to extradite. By using the rule that an extradited criminal defendant may be tried on facts completely different from those specified in an extradition request, prosecutors may under color of U.S. law affirmatively mislead foreign governments as to the nature and quality of the evidence obtained. Although there is little doubt that the holding will help the government in its self-declared "War on Drugs," ethical questions abound over this extraterritorial license to mislead.

This Note discusses the specialty doctrine's theoretical justification and history. Next it analyzes *Abello-Silva* and focuses on its narrow holding. The Note then examines the decision's practical implications and concludes that the court's effort to aid the government's war on drugs produced a result which violates the specialty doctrine's spirit and offends international moral norms.

II. THE SPECIALTY DOCTRINE

When a host country grants another country's extradition request, the specialty doctrine requires that the defendant be tried

1. *United States v. Abello-Silva*, 948 F.2d 1168, 1174-76 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992), and *reh'g denied*, 113 S. Ct. 1068 (1993).

2. In doing so, the court also determined that: (1) the defendant *Abello* had standing to raise the doctrine (as opposed to reserving that right exclusively to the government of Colombia); and (2) that American law, not Colombian law, applied to determine whether different facts were tantamount to different offenses. *Id.* at 1173-74.

Beyond the scope of this Note are the court's rulings that: (1) pre-trial publicity did not render the Northern District of Oklahoma an improper venue; (2) the defense was not denied access to exculpatory "Brady" material; and (3) the trial was not tainted by alleged inflammatory comments made by the prosecutor during closing arguments. *Id.* at 1176-84.

3. *Id.* at 1173-74 (following *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962)). The court went on to say, "In other words, we examine whether there is sufficient evidence in the request for extradition" *Id.* at 1174.

only for offenses specified in the request.⁴ The doctrine holds that, when a requesting state attempts to prosecute an extradited defendant for any offense not indicated in the request for extradition, the defendant must be afforded an opportunity to leave the prosecuting state.⁵ Although the traditional view was that violation of the doctrine could only be raised by the surrendering state,⁶ courts have expressly held that the extradited defendant also has standing to raise violations of the doctrine, even when the surrendering country apparently has raised no objection.⁷

The doctrine's rationale rests on procedural and political considerations. M. Cherif Bassiouni, in his treatise on extradition, lists five precise factors justifying the rule that extradited defendants may only be tried for the offenses specified in the extradition request: 1) The surrendering country might not have extradited the defendant for prosecution of the omitted offense; 2) the requesting

4. *United States v. Rauscher*, 119 U.S. 407, 424 (1886); M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 359-60 (rev. 2d ed. 1987).

5. *Rauscher*, 119 U.S. at 424; BASSIOUNI, *supra* note 4, at 359-60.

6. See, e.g., *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Berenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979).

7. *United States v. Levy*, 905 F.2d 326, 328 n.1 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 759 (1991); *accord United States v. Abello-Silva*, 948 F.2d at 1173 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992) (reaffirming *Levy* holding that "a criminal defendant may raise the issue himself"); *United States v. Vreeken*, 803 F.2d 1085, 1088 (10th Cir. 1986), *cert. denied*, 479 U.S. 1067 (1987); *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 477 reporters' note 1 (1987); see also *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987).

Traditionally, the defendant lacked standing and could not raise any objection to prosecution; such an objection was "a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." *Shapiro*, 478 F.2d at 906. Yet the Tenth Circuit, in *Levy*, suggested that such a tradition was ill-founded, citing 104-year-old language in *Rauscher* which declared that the doctrine was a "right conferred upon persons brought from a foreign country," *Levy*, 905 F.2d at 328 n.1 (quoting *Rauscher*, 119 U.S. at 424), and that "any person prosecuted in any court within the United States has the right to claim the protection" of the doctrine, *id.* (quoting *Rauscher*, 119 U.S. at 433 (Gray, J., concurring)). As noted above, the Eighth and Ninth Circuits agree with the Tenth Circuit's position on standing. In *United States v. Cuevas*, 847 F.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), the Ninth Circuit first cited the traditional rule against standing and then decided to "adhere to the opposing position, allowing petitioner to raise claims which might have been raised by the asylum state." *Id.* at 1427 n.23.

In addition, Bassiouni views the doctrine as a rule of international law, "the breach of which gives rise to a relator's right to object to prosecutorial variance . . . even without the intervention or objection of the requested state." BASSIOUNI, *supra* note 4, at 368 n.147. It appears that Bassiouni's view of the traditional rule for standing in specialty cases is taking hold, and as *Abello* is a Tenth Circuit case, this Note assumes that a criminal defendant has standing at trial to raise the doctrine of specialty even in the absence of objection by the former asylum state.

state would lack *in personam* jurisdiction over the defendant had the host country not surrendered him; 3) the requesting state would not have been able to prosecute the defendant were he not surrendered by the host country; 4) "the requesting state would be abusing a formal process to secure the surrender of the person it seeks by relying on the requested State, which will use its processes to effectuate the surrender;"⁸ and—perhaps most important for the purposes of this Note—5) the host country allows extradition solely in reliance upon the representations made to it by the requesting country.⁹

Extradition treaties usually incorporate the specialty doctrine, but when no treaty exists, courts enforce the doctrine as a rule of international law¹⁰ or as a matter of international comity.¹¹ Naturally, when a treaty controls, its language determines the doctrine's procedural effect. Treaties may limit prosecution to: 1) the specific offense alleged in the extradition request; 2) "any extraditable offense" appended to the offense which secured extradition; or 3) the offense indicated in the request and any other offense upon proof of the facts on which the extradition request was based.¹²

A. *The Polestar*: United States v. Rauscher

The United States Supreme Court adopted the specialty doctrine in 1886 in *United States v. Rauscher*.¹³ Rauscher was a United States seaman who fled to England after indictment for inflicting "cruel and unusual" punishment upon another.¹⁴ Because the extradition treaty between the United States and England did not recognize such a crime, federal prosecutors tendered an extradition request charging Rauscher with "murder."¹⁵ On that basis, England extradited Rauscher. The U.S. government subsequently

8. BASSIOUNI, *supra* note 4, at 360.

9. *Id.*

10. See *United States v. Kaufman*, 858 F.2d 994, 1007 n.4, (5th Cir. 1988) (noting that "[t]he rule of specialty is a general rule of international law"), *cert. denied*, 493 U.S. 895 (1989); *Shapiro*, 478 F.2d at 906; see also BASSIOUNI, *supra* note 4, at 368 n.147; Steven A. Bernholz et al., *International Extradition in Drug Cases*, 10 N.C. J. INT'L L. & COM. REG. 353, 365 (1985).

11. See *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988) ("The doctrine is based on principles of international comity."), *cert. denied*, 489 U.S. 1012 (1989); *United States v. Thirion*, 813 F.2d 146, 151 (8th Cir. 1987).

12. Bernholz, *supra* note 10, at 365.

13. 119 U.S. 407 (1886).

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

15. *Id.*

tried and convicted him on the "infliction of 'cruel and unusual' punishment" offense alleged in the indictment. He was not tried for "murder."¹⁶ The United States Supreme Court reversed the conviction, upholding the rule of specialty "that [the defendant] shall be tried only for the offense with which he is charged in the extradition proceedings."¹⁷

In *Abello-Silva*, the Tenth Circuit faced an issue similar to that in *Rauscher*, but with a twist.¹⁸ The offense for which the government prosecuted Abello was nominally the same offense as alleged in the request, right down to the statute number.¹⁹ However, the facts used at trial, which had been alleged in a second superseding indictment issued *after* extradition, were facts *different* from those alleged in the extradition request.²⁰ The court faced a question of first impression: Did the specialty doctrine apply to the utilization of different "facts," as opposed to the imposition of different offenses? That is, did the specialty doctrine proscribe prosecution where the facts used at trial were different from the facts used to request and secure extradition?

B. Interplay Between Facts and Offenses: The Precedent

Before *Abello-Silva*, courts had skirted, but never squarely faced the "fact-offense" dilemma. On one hand, if courts did not wish to reward *Rauscher*-type prosecutors who allege one offense to secure extradition, only to try the defendant on another, why should they reward a prosecutor who might use facts in the same way? On the other hand, if an offense is an extraditable one and the defendant's trial is for that offense, doesn't this end the inquiry? The latter approach makes sense, especially since it is inevitable that facts will be disproved as new evidence comes to light between the time of extradition and the trial itself.

No case until *Abello-Silva* specifically dealt with the "different facts" question. Some courts, however, had touched upon it.

16. *Id.*

17. *Id.* at 424.

18. *United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991), *cert. denied* 113 S. Ct. 107 (1992).

19. *Id.* at 1176.

20. *Id.* at 1172.

1. *United States v. Sensi*

In *United States v. Sensi*,²¹ the defendant, extradited from Great Britain, appealed his conviction of various offenses, including mail fraud, larceny, embezzlement, and receipt of stolen securities.²² He argued that the charges for which he was convicted violated the specialty doctrine either because the extradition request did not name them or because the British extradition order did not include them.²³ The court held that the specific facts in the extradition request justified all the charges.²⁴

Article XII of the Extradition Treaty²⁵ between the United States and Great Britain proscribed a defendant's prosecution "for any offense other than *an extraditable offense established by the facts in respect of which his extradition has been granted.*"²⁶ Sensi argued that the Treaty required prosecutors to establish a nexus between the "facts" and an extraditable offense specifically included in the extradition request and order.²⁷ The court held that facts used in the request, which reasonably supported an extraditable offense, also satisfied the Treaty's requirements.²⁸

Although the facts/offenses distinction was tangential to the holding—Sensi challenged the "offenses" rather than the facts—the court did address it. Stressing the importance of studying whether the "facts" supporting the request sufficiently justified extradition under the Treaty, the court stated: "[T]he charges against Sensi must have been 'established by the facts in respect of which his extradition was granted.' *Thus, the test focuses on the evidentiary material that was submitted to the [British] magistrate.*"²⁹

Had the facts in the extradition request not established an offense, the court would have reversed Sensi's conviction. This suggestion, implicit in *Sensi*, follows from Bassiouni's fifth justifica-

21. 879 F.2d 888 (D.C. Cir. 1989).

22. *Id.* at 891-92.

23. *Id.* at 895.

24. *Id.* at 896.

25. Extradition Treaty, June 8, 1972, art. XII, U.S.-U.K., 28 U.S.T. 227, 233 [hereinafter U.S.-U.K. Treaty].

26. U.S.-U.K. Treaty, *supra* note 25, art. XII(1), 28 U.S.T. at 233 (emphasis added).

27. 879 F.2d at 895.

28. *Id.* at 896.

29. *Id.* 879 F.2d at 896 (emphasis added) (quoting the U.S.-U.K. Treaty, *supra*, note 25, art. XII, 28 U.S.T. at 233).

tion for the specialty rule: the surrendering country allows extradition solely in reliance upon the representations made to it by the requesting country.³⁰ When those representations are inadequate or misleading, prosecution is impermissible.³¹

2. *United States v. Cuevas*

*United States v. Cuevas*³² was a multi-count narcotics and currency reporting conspiracy case. The defendant argued for dismissal of the currency-related counts because the extradition order enjoined prosecution for any "fiscal aspects" of an alleged crime.³³ The court's specialty inquiry, therefore, centered not on the charged offense, but on whether the facts alleged encompassed those "fiscal aspects" of conduct protected from prosecution.³⁴

As in *Sensi*, the defendant in *Cuevas* challenged prosecutorial variance of alleged offenses,³⁵ rather than facts. *Cuevas* is important in that it shows that a U.S. court may address the adequacy of facts underpinning an extradition request and may assess whether the request violated principles of what the *Cuevas* court termed "international comity."³⁶ The Ninth Circuit held that no violation of the specialty doctrine occurred when the narcotics and currency reporting conspiracies alleged in the extradition request were on their face "integrally related."³⁷ However, it is significant that the court framed the "appropriate test" as "whether the extraditing country would consider the acts for which the defendant was pros-

30. BASSIOUNI, *supra* note 4, at 360; see also *supra* text accompanying note 9.

31. An interesting question raised by *Abello-Silva* is whether there is any substantive difference between facts in an extradition request which "inadequately" support an alleged offense and facts in an extradition request which are false in their entirety.

32. 847 F.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

33. *Cuevas*, 847 F.2d at 1426. The United States extradited Cuevas from Switzerland. The relevant treaty section prohibited the United States from prosecuting a person "for any offense, committed before the demand for extradition, other than that for which the extradition is granted." Treaty on Extradition, May 14, 1900, U.S.-Switz., art. IX, 31 Stat. 1928, 1932 [hereinafter U.S.-Swiss Treaty]. The Swiss court's extradition order contained an injunction against prosecution "of the fiscal aspect of the factual circumstances of the indictment." 847 F.2d at 1427 (citation omitted).

34. 847 F.2d at 1427.

35. *Cuevas*'s argument was not that the factual introduction of the "fiscal aspects" of a crime triggered the specialty doctrine's protection, but rather that the introduction of those aspects triggered the doctrine when the alleged offense itself served to criminalize the fiscal conduct introduced. *Id.* at 1426-28.

36. *Id.* at 1426.

37. *Id.* at 1428.

ecuted as independent from those for which he was extradited."³⁸

3. *United States v. Paroutian*

In *United States v. Paroutian*,³⁸ the case from which the *Cuevas* court derived its "test,"⁴⁰ Lebanon extradited the defendant to the United States in response to a request which included a copy of an indictment issued in the Southern District of New York.⁴¹ The government tried Paroutian, however, on an indictment issued in the Eastern District of New York after his extradition.⁴² Both indictments contained the same facts, but alleged somewhat different drug offenses.⁴³

Rejecting Paroutian's specialty argument, the court wrote that the term "separate offense" under the doctrine should be broadly construed; the term's construction should not be left to "some technical refinement of local law," but rather, should turn on "whether the extraditing country would consider the offense actually tried 'separate.'"⁴⁴ The court ruled that in an acceptable, albeit general sense, Paroutian's conviction was for the same type of offense for which Lebanon expected him to be tried—illegal trafficking of drugs.⁴⁵

The doctrine, the court wrote, was "designed to protect the extraditing government against abuse of its discretionary act of extradition."⁴⁶ Consequently, the court explicitly based its holding on the firm belief that the Lebanese government was, via the extradition request, "fully apprised of the facts" upon which the conviction was secured.⁴⁷ Had the Lebanese government *not* been "fully apprised of the facts" by the request, it seems likely that the court

38. *Id.* (citing *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962)).

39. 299 F.2d 486 (2d Cir. 1962).

40. *Cuevas*, 847 F.2d at 1428.

41. *Paroutian*, 299 F.2d at 490.

42. *Id.*

43. *Id.* Paroutian was convicted of "knowingly and unlawfully receiving and concealing" heroin and "conspiring with another to import [the drug] into the United States, to receive, conceal, and sell it, and to facilitate its transportation, concealment, and sale—all in violation of 21 U.S.C. § 174." 299 F.2d at 487. The original indictment sent to Lebanon did not include the first two counts, receiving and concealing heroin. But during the extradition proceedings, the United States provided Lebanese officials with all the factual information supporting the two counts. *Id.* at 490.

44. 299 F.2d at 491.

45. *Id.*

46. *Id.* at 490.

47. *Id.* at 491

would have reached the opposite result.⁴⁸

III. THE ABELLO-SILVA CASE

A. *The Facts at Trial*

Colombia extradited its citizen, José Rafael Abello-Silva, to the United States in late 1989 to face drug conspiracy charges.⁴⁹ A federal court convicted and sentenced him to serve two concurrent thirty-year terms and to pay a \$5 million fine.⁵⁰

In May, 1987, Boris Olarte, a Colombian drug-dealer extradited from Panama and jailed in the Northern District of Oklahoma, agreed to cooperate with the United States government.⁵¹ Olarte claimed that in 1986 he had met Abello and two other co-conspirators in Aruba to orchestrate an attempt at smuggling cocaine into the United States.⁵² The parties abandoned that plan, but, cooperating with the F.B.I., Olarte attempted to revive the deal from prison by contacting the participants through Clara Lacle, his common-law wife.⁵³ Consequently, two F.B.I. agents and Lacle travelled to Fort Pierce, Florida⁵⁴ to meet Palmero and Jamieson.⁵⁵ The F.B.I. arrested Palmero and Jamieson and indicted them and Abello on September 2, 1987, on drug trafficking conspiracy charges.⁵⁶ A superseding indictment followed on October 7,

48. This is particularly so because the *Paroutian* court was not result-oriented. It reversed *Paroutian's* conviction on other grounds: admission at trial of evidence obtained in a search prohibited by the Fourth Amendment. *Id.* at 489, 491.

49. *United States v. Abello-Silva*, 948 F.2d 1168, 1172 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992).

50. 948 F.2d at 1171. Abello's conviction was for conspiring to import drugs in violation of 21 U.S.C. § 963 and § 960(b)(1)(B), (G); and for conspiring to possess with the intent to distribute; and distribution of drugs, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(A). *Abello-Silva*, 948 F.2d at 1171.

51. 948 F.2d at 1172. Senior Colorado District Judge John L. Kane, Jr., sitting by designation, blithely wrote that Olarte decided to cooperate because he was "unhappy in his surroundings." *Id.* In fact, before making his deal to cooperate with the U.S. government, Olarte made numerous attempts to escape from prison. Richard L. Fricker, *The Abello Conspiracy*, A.B.A.J., Dec. 1990, at 54, 63.

52. *Abello-Silva*, 948 F.2d at 1172. The two alleged co-conspirators were Francisco Palmero, a Fort Pierce, stockbroker, and Robert Jamieson, a Miami commercial fisherman. See Fricker, *supra* note 51, at 55; *Colombia Hands U.S. A Key Cocaine Suspect*, MIAMI HERALD, Oct. 30, 1989, at A9 [hereinafter *Key Cocaine Suspect*].

53. *Abello-Silva*, 948 F.2d at 1172.

54. *Id.*

55. *Id.*; Fricker, *supra* note 51, at 54-63.

56. Fricker, *supra* note 51, at 54-63.

1987.⁵⁷

On October 20, 1989, the United States formally requested extradition of Abello, citing and including a copy of the indictment of October 7, 1987, in its request.⁵⁸ That indictment contained a "lengthy discussion of the drug conspiracy but *only a brief mention of Abello*."⁵⁹ The extradition request itself only mentioned Abello twice, simply claiming that "Abello-Silva and his associates" planned on this one occasion to smuggle cocaine into the United States.⁶⁰ Pursuant to Colombian Presidential Decree No. 1860 of August, 1989,⁶¹ which permits the extradition of Colombian nationals, Colombia extradited Abello late in October, 1989.⁶² The Decree, as Colombian authorities initially interpreted it, superseded any extradition treaty previously in force.⁶³

In the United States, a flurry of major newspaper reports linked Abello to the infamous Medellín Drug Cartel, claiming he was one of its leaders.⁶⁴ Though the superseding indictment and

57. *Abello-Silva*, 948 F.2d at 1172.

58. *Id.*

59. *Id.* (emphasis added). "In the 31 overt acts listed in the indictment, Palermo is named in 29 . . . Jamieson in four; Abello is named in one—a March 1987 meeting with Jamieson, Palermo and 'others' in Aruba to discuss the importation of cocaine." Fricker, *supra* note 51, at 56.

In a letter published in the *A.B.A. Journal*, Assistant Attorney General Robert S. Mueller responded to Fricker's article on the Abello extradition and trial: "The 1987 indictment did not detail Abello's role in the conspiracy because at that time there was no expectation Abello ever would be extradited to the United States from Colombia." Robert S. Mueller, *The Justice Department Responds to "The Abello Conspiracy"*, A.B.A.J., Mar. 1991, at 16.

60. *Abello-Silva*, 948 F.2d at 1172.

61. Decree No. 1860 of 1989, DIARIO OFICIAL, Aug. 18, 1989, at 5 (Colom.) [hereinafter Colombian Decree No. 1860].

62. *Abello-Silva*, 948 F.2d at 1171, 1175.

63. See Mark Andrew Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia*, 15 NOVA L. REV. 661, 690-95 (1991).

At the time of Abello's extradition, the United States had an extradition treaty in force with Colombia under which it could have sought properly his extradition. Extradition Treaty, Sept. 14, 1979, U.S.-Colom., S. TREATY DOC. NO. 8, 97th Cong., 1st Sess. (1981), reprinted in EXTRADITION LAWS AND TREATIES OF THE U.S. § 140.1 (Igor I. Kavass & Adolf Sprudz eds., 1989) [hereinafter 1979 U.S.-Colom. Treaty].

Five weeks after Abello's extradition, the Colombian Supreme Court of Justice ruled that Decree No. 1860 was subordinate to the 1979 Extradition Treaty between Colombia and the United States. See *infra* text accompanying notes 109-14.

64. See, e.g., *Colombian Drug Suspect Extradited*, WASH. POST, Oct. 30, 1989, at A20; *Key Cocaine Suspect*, *supra* note 52, at A9; *Medellin Suspect Extradited to U.S.*, N.Y. TIMES, Oct. 30, 1989, at A13 see also Sherman, *supra* note 63, at 667 n.12.

The story also spread overseas. See, e.g., *Colombia Hands Over Drug Suspect*, THE TIMES (London), Oct. 30, 1989, at 10.

extradition request did not link Abello with the Cartel,⁶⁵ after Abello's extradition, a spokesman for the United States Drug Enforcement Administration told the press that Abello "was considered a major transporter" and was the number four person in the Medellín organization.⁶⁶

Before their trial commenced, Abello's purported co-conspirators pleaded guilty and promised to testify against him in exchange for lenient sentences.⁶⁷ With the extradited Abello now in U.S. custody, the government issued a second superseding indictment against him as the lone defendant.⁶⁸ Whereas the superseding indictment tendered in the extradition request charged all four co-conspirators for only one event—participating in the abandoned 1986 Aruba plan to import cocaine⁶⁹—the new indictment charged Abello with a range of newly alleged drug activity, including the importation of marijuana.⁷⁰ New factual allegations expanded the mechanics of his "operation," his links to the "Medellín" and "Cali" drug cartels, and his relationships with drug kingpins Pablo Escobar-Gaviria, José Gonzalo Rodríguez-Gacha, and Jorge Ochoa-Vasquez.⁷¹

After a trial where "[t]he only testimony as to Abello's participation in the alleged conspiracy was that of his former co-defendants, persons related to his former co-defendants, other convicts,

65. *Abello-Silva*, 948 F.2d at 1172.

66. See, e.g., *Medellín Suspect Extradited to U.S.*, *supra* note 64, at A13 (Abello "considered a major transporter for the Medellín Cartel" by the U.S.); *Suspect Is Extradited*, *NEWSDAY*, Oct. 30, 1989, at 12 (stating Abello is the number four person in the "notorious Medellín drug cartel").

U.S. officials also told the press that Abello oversaw the entire north coast of Colombia for the Medellín Cartel. See, e.g., *Colombian Drug Suspect Extradited*, *supra* note 64, at A20; *Key Cocaine Suspect*, *supra* note 52, at A17.

67. *Sherman*, *supra* note 63, at 667 n.12.

Palmero was initially sentenced to 16 years in prison, but after Abello's conviction, Judge Brett, who presided over Abello's trial, reduced Palermo's sentence to time served and five years probation. Palermo now works in Florida. Fricker, *supra* note 51, at 68.

Judge Brett delayed Jamieson's sentencing until the Abello trial finished. Although Jamieson faced life in prison, his cooperation in *Abello-Silva* and other cases resulted in a suspended sentence of five years and a six-month stay in a Florida pre-release center. *Id.*

The Judge sentenced Olarte to 10 years in the custody of the U.S. Attorney General in June of 1989. *Corrections*, A.B.A.J., Mar. 1991, at 18. In addition, the government dropped in its entirety a continuing criminal enterprise charge under which he faced a possible 50-year prison term and a \$10.5 million fine. Fricker, *supra* note 51, at 55.

68. See *Abello-Silva*, 948 F.2d at 1172; *Sherman*, *supra* note 63, at 667 n.12.

69. See *Abello-Silva*, 948 F.2d at 1172 (quoting Request for Extradition).

70. 948 F.2d at 1172-73 (explaining the second superseding indictment issued on January 3, 1990).

71. *Id.*

and Federal Bureau of Investigation Agents,"⁷² the jury convicted Abello and the court sentenced him to the maximum thirty years in prison allowed under Colombian Decree No. 1860.⁷³

B. *The Appeal*

On appeal, Abello sought to overturn his conviction under the doctrine of specialty. Abello argued that though the nominal "offenses" at both the trial and in the extradition request were the same, they were not truly identical as a matter of substance.⁷⁴ Abello claimed that the imposition, after extradition, of what amounted to an entirely new set of facts and alleged acts, violated the spirit of the doctrine. The U.S. government's actions, he argued, deprived Colombia of the ability to consider the extradition request under Colombian law with the requisite knowledge of the true scope and nature of the pending charges. Such consideration would ignore whether the "refinement[s] of local [U.S.] law"⁷⁵ were such that the two sets of facts fell—or could be made to fall—within the same pigeon-holed "offense."⁷⁶

Additionally, because the broad facts alleged at trial differed so fundamentally from the facts in the extradition request (which only charged Abello for his participation in the "Aruba" incident), Abello argued that under *Paroutian*,⁷⁷ the United States should have afforded the Colombian government an opportunity to decide whether the new charges constituted a new and separate matter.⁷⁸ Finally, Abello cited *Sensi*⁷⁹ and *Cuevas*⁸⁰ for the proposition that the facts supplied in an extradition request are germane to any

72. Sherman, *supra* note 63, at 667 n.12.

73. 948 F.2d at 1171, 1171 n.1; see Colombian Decree No. 1860, *supra* note 61, art. 8(a).

74. 948 F.2d at 1172-73.

75. United States v. Paroutian, 299 F.2d 486, 491 (2d Cir. 1962).

76. 948 F.2d at 1173. Although Abello based his argument on articles 650 and 651 of the 1987 Colombian Code of Criminal Procedure, 948 F.2d at 1173, plainly not lost on him was the unique, purely political process of extradition under Colombian Decree No. 1860. The Decree transferred sole discretion to extradite to the executive branch and withdrew the judiciary's power under Colombian extradition treaties. Colombian Decree No. 1860, *supra* note 61; see Sherman, *supra* note 63, at 694-95. Thus, political rather than legal considerations would control any decision to extradite. And as this Note later discusses, politically there is a great difference in Colombia between extraditing a "low-level" importer and extraditing a reputed Medellín Cartel leader.

77. 299 F.2d 486, 490-91 (2d Cir. 1962).

78. *Abello-Silva*, 948 F.2d at 1173.

79. 879 F.2d 888, 895-96 (D.C. Cir. 1988).

80. 847 F.2d 1417, 1428 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

judicial determination of whether it violates the doctrine of specialty.⁸¹

The government responded that the only relevant inquiry is whether the defendant's conviction was for the same "offenses" alleged in the extradition request.⁸² The doctrine of specialty, argued the government, relates only to prosecutorial variance of "offenses," not of "facts."⁸³ When the charged offense was the same, there was no violation of the doctrine, regardless of whether the actual "facts" alleged in the extradition request had been expanded or narrowed between the time of extradition and the time of trial.⁸⁴ The Tenth Circuit agreed.

Regarding Abello's argument that under Colombian law the new facts constituted separate offenses, the court reasoned that Colombian law would be relevant only in two situations: (i) when U.S. precedent required application of foreign law; or (ii) when a treaty so mandated.⁸⁵ The court found neither situation existed.⁸⁶ It said that the passage from *Paroutian* cited by Abello, that "the test whether trial is for a 'separate offense' should be not some technical refinement of local law, but whether the extraditing country would consider the offense actually tried 'separate,'"⁸⁷ referred only to Colombia's interest in preventing prosecutions wholly beyond the ambit of the charged offense for which it extradited the defendant.⁸⁸ The passage was not "a statement about international choice of laws."⁸⁹

Of particular significance was the court's characterization and subsequent application of the test for specialty doctrine violations:

The *Paroutian* court recognized the asylum country's desire to extradite only those individuals against whom a substantial case lies. A reviewing court places itself in the position of the asylum country and inquires whether the asylum state would consent to the extradition. In other words, we examine whether there is sufficient evidence in the request for extradition to grant the

81. *Abello-Silva*, 948 F.2d at 1174-75.

82. *Id.* at 1173.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Paroutian*, 299 F.2d. at 490-91.

88. *Abello-Silva*, 948 F.2d at 1173.

89. *Id.*

request.⁹⁰

Applying the "sufficient evidence" test of the final sentence above, the court found that Colombia had reviewed the extradition request and clearly decided that sufficient evidence existed to extradite Abello for the offense alleged.⁹¹ It reasoned that the different, more inculpatory, evidence introduced at trial would have only bolstered Colombia's decision to extradite Abello.⁹²

The court also wrote that the doctrine of specialty is not "a vehicle for discovery" and that therefore it is permissible to introduce some evidence at trial which was not included in the extradition request.⁹³ The extradition request, the court wrote, is not the "definitive document" in the government's case.⁹⁴

Finally, regarding the rule that the treaty's language bound the United States, the court noted that Colombian Decree No. 1860 included "few limitations."⁹⁵ It used that observation to distinguish the cases of *Sensi* and *Cuevas*, raised by Abello.⁹⁶

The Tenth Circuit candidly acknowledged that the *Sensi* and *Cuevas* courts focused on the facts underpinning the extradition request in determining whether the request violated the doctrine.⁹⁷ However, those cases fell under the doctrine's "bound by Treaty" prong because both involved extradition treaties whose language drew a "facts-offenses" nexus which the court found lacking in Decree No. 1860.⁹⁸ Although *Sensi* did "requir[e] a correspondence between the charges . . . and the facts presented" to the extraditing country, it was distinguishable from *Abello-Silva* because the Extradition Treaty between the United States and Great Britain provided that an offense must be "established by the facts in re-

90. *Id.* at 1173-74. Curiously, the court treated the last sentence as a restatement of the second sentence. To suggest that a question which asks "whether the asylum state would consent to extradition" is the same as asking "whether there is sufficient evidence in the request" conflates two distinct inquiries. It ignores that an asylum state may deny extradition for a host of political reasons and other legal considerations unique to that state. This is true even if "sufficient evidence" reasonably supports the contention that the accused is guilty of the claimed offense. See discussion *infra* notes 120-38 and accompanying text.

91. 948 F.2d at 1175.

92. *Id.*

93. *Id.* at 1174. The court relied on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. c (1987).

94. 948 F.2d at 1174.

95. *Id.*

96. *Id.* at 1174-75.

97. *Id.* at 1175.

98. *Id.* at 1174-75.

spect of which . . . extradition has been granted," whereas Decree No. 1860 did not.⁹⁹ Discussing *Cuevas*, the *Abello-Silva* court took a similar view of the Swiss extradition order's unique "fiscal aspect" bar in the context of the Extradition Treaty between the United States and Switzerland.¹⁰⁰

Therefore, the *Abello-Silva* court held:

[T]he doctrine of specialty requires the defendant be tried only for those offenses which appear in the extradition request. . . . Count one of the second superseding indictment charges Abello with committing the same offenses and lists the identical code sections

. . . .
Count two of the second superseding indictment also charges Abello with the same offenses and refers to the identical code sections. Because both counts of the second superseding indictment charge Abello with the same offenses as are mentioned in the extradition request, we find no violation of the specialty doctrine.¹⁰¹

IV. DIFFICULTIES WITHIN THE CONFINES OF *ABELLO-SILVA*

The *Abello-Silva* court's rigid interpretation of the specialty doctrine might well give an ostensible boost to the federal government's "War on Drugs." The decision offers little, however, in precedential substance or theoretical soundness to American law. It misapprehended both the spirit of the specialty doctrine and principles of international comity. One fantastic leap of faith, central to the court's holding, resulted in a finding grounded solely in wishful thinking.

A. *Use of Legal Precedent*

The Tenth Circuit distinguished those cases cited by Abello. As the court "acknowledged," those cases affirmatively scrutinized the facts tendered in an extradition request to determine whether the specialty doctrine had been violated.¹⁰² The basis of the court's

99. *Id.* at 1174-75, 1175 n.3 (citing U.S.-U.K Treaty, *supra* note 25, art. XII(1), 28 U.S.T. at 233).

100. *Abello-Silva*, 948 F.2d at 1175.

101. *Id.* at 1175-76.

102. *Id.* at 1174-75. The court distinguished *United States v. Sensi*, 879 F.2d 888 (D.C. Cir. 1989); *Caplan v. Vokes*, 649 F.2d 1336 (9th Cir. 1981); and *United States v. Cuevas*, 847

distinction was the lack of a "facts-offenses" nexus requirement in the language of Colombian Decree No. 1860,¹⁰³ a requirement that does exist in the similar U.S. treaties with the United Kingdom¹⁰⁴ and Switzerland.¹⁰⁵ In the absence of the nexus language, the court wrote, United States law would prevail, and therefore if the extradition offense and conviction offense bore the same codified statute number, the doctrine was satisfied.¹⁰⁶

The court acknowledged that "[t]he limitations which appear in Decree No. 1860 are few"¹⁰⁷ and that "[i]n this case, the 'established by the facts language' does not appear in Decree No. 1860."¹⁰⁸ Decree No. 1860 is not an international treaty signed by the United States, but an internal Colombian decree. Article 1 of the Decree provides that extradition shall be dealt with in accordance with public treaties.¹⁰⁹ Thereafter, the Decree, in conflict with the terms of the 1979 Extradition Treaty between Colombia and the United States,¹¹⁰ sets out extradition procedures. Article 15(2)(a) of the 1979 Treaty contains the "same set of facts" language regarding "altered" prosecutions as do the British and Swiss Treaties.¹¹¹ Congress has not terminated the Treaty, and though in June, 1987, the Colombian Supreme Court of Justice ruled the treaty invalid because of procedural errors,¹¹² on October 3, 1989, the court backtracked, holding that under principles of international law, Colombia must honor the treaty and that the treaty trumped any inconsistent provisions in Decree No. 1860.¹¹³ The

F.2d 1417 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

103. *United States v. Abello-Silva*, 948 F.2d 1168, 1175 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992).

104. *See Sensi*, 879 F.2d at 895 (re U.S.-U.K. Treaty, *supra* note 25, art. XII (1), 28 U.S.T. at 223).

105. *See Cuevas*, 847 F.2d at 1426 (re U.S.-U.K. Treaty, *supra* note 25, art. IX, 31 Stat. at 1932).

106. 948 F.2d at 1175-76.

107. *Id.* at 1174.

108. *Id.* at 1175 (emphasis added).

109. Colombian Decree No. 1860, *supra* note 61, art. I.; *see also* Sherman, *supra* note 63, at 695-96.

110. 1979 U.S.-Colom. Treaty, *supra* note 63.

111. *Id.* art. 15(2)(a) (requiring that the offense be based on "the same set of facts contained in the extradition request and its supporting documents").

112. Judgment of June 25, 1987, C.S.J. [Supreme Court of Justice] (Colom.), *reprinted in* 27 I.L.M. 492 (1988); *see also* GERHARD VON GLAHN, *LAW AMONG NATIONS* 291 (6th ed. 1992).

113. Judgment of October 3, 1989, C.S.J., 18 *Jurisprudencia y Doctrina* 882 (Colom.); *see* Sherman, *supra* note 63, at 695-96. The court held that the Decree cured the procedural defects in the 1979 Treaty (presidential approval), that the extradition Treaty was therefore

court rendered this decision 17 days *before* the United States tendered its request for Abello.¹¹⁴ Had the Tenth Circuit reasonably assessed article 15(a)(2) of the 1979 Treaty, as it should have, its attempt to distinguish the cases cited by Abello would have proved difficult. Even were the treaty a nullity, respect for international legal tradition should have required acceptance of the facts-offenses theory by a U.S. court. Satya Bedi points out that the specialty doctrine not only applies to offenses *or* facts, but that in the absence of a treaty, the facts-offenses principle binds civilized nations:

Many national statutes make extradition of the person claimed subject to a guarantee or pledge (by treaty or municipal law of the requesting state) that the surrendered person shall neither be prosecuted nor punished for any *act or offence* other than that which formed the ground of his surrender. *This principle is generally accepted as implied when it is not stated, and strictly observed even in the absence of any treaty . . .*

Such a provision is introduced to operate as a safeguard against the abuse of surrender, because if the surrender would mean full freedom to the requesting state to deal with the offender *on whatever grounds it thought fit*, the whole procedure followed in the asylum state in investigating the nature of the crime before extradition "would be rendered farcical."¹¹⁵

In any case, a U.S. court should not have relied on the absence of facts-offenses language in Colombian Decree No. 1860, a purely internal decree struck in relevant part by the Colombian Supreme Court and not ratified as a treaty by the U.S. Senate. Instead, the court should have followed traditional international norms under which the United States and most Western European states incorporate such language into their treaties.¹¹⁶

reinstated, and that any other provisions in the Decree which conflicted with the Treaty were null and void. Sherman, *supra* note 63, at 695-96.

One U.S. court recently addressed the October 3 decision and the priority it arranges between Colombian Decree No. 1860 and the 1979 Extradition Treaty. See *United States v. Martinez*, 755 F. Supp. 1031, 1034, 1037 (N.D.Ga. 1991) (noting that the Colombian Supreme Court ruled that Decree No. 1860 is trumped by the 1979 Treaty still in effect, but holding that the Colombian decision is not binding on the United States). Considering the nexus between the two documents, the Georgia decision is curious.

114. *United States v. Abello-Silva*, 948 F.2d 1168, 1172 (10th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992) (the extradition request was made on October 20, 1989).

115. SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 149-50 (1968) (citation omitted) (emphasis added).

116. See generally I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971). Shearer

The court rejected Abello's argument that Colombian law should apply under *Paroutian*,¹¹⁷ the case which declared that the determination of what constitutes a "separate offense" should be made not according to a "technical refinement of local law," but by asking "whether the extraditing country would consider the offense actually tried 'separate.'"¹¹⁸ *Paroutian*, however, involved a trial based on a different "offense": importing drugs rather than conspiring to do so. The "facts" tendered to the extraditing authorities were identical to those supporting the ultimate charge. Thus, as the *Paroutian* court expressly declared, no violation of the specialty doctrine had occurred only because the requested country was "fully apprised" of the facts.¹¹⁹ In *Abello*, the problem was precisely that the United States did not fully apprise the extraditing country of the facts.

B. *The Colombian Political Situation*

The *Abello-Silva* court's most extraordinary factual blunder is in its conclusion that "[i]f the Colombian government was satisfied by the first indictment and granted the extradition request, it would not object to prosecution for the same offenses under the second indictment when the second indictment presented an even stronger case."¹²⁰ Such a conclusion is woefully blind to the political realities of Colombia.

In Colombia, the decision to extradite was, under the terms of Decree No. 1860, a political one.¹²¹ Had the indictment tendered to Colombia alleged that Abello was the number four person in the Medellín Cartel, at the level of Escobar, Gacha and Ochoa, it is likely that the political climate in Colombia would have prevented extradition. "Colombians object to having their fellow citizens extradited and tried in the United States, a nation whose culture and legal tradition differ markedly from those of Colombia, and whose

refers to the usage of "specialty" in the United States, "speciality" in Great Britain, "specialite" in France, and "Spezialitat" in Germany, *id.* at 146 nn.1-5, and goes on to write that "[t]he speciality (sic) rule has been held to apply even in the absence of express treaty stipulations." *Id.* at 146 n.4.

117. *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962).

118. *Abello-Silva*, 948 F.2d at 1173-74 (quoting *Paroutian*, 299 F.2d at 490-91).

119. *Paroutian*, 299 F.2d at 491; *Abello-Silva*, 948 F.2d at 1174.

120. 948 F.2d at 1175.

121. Colombian Decree No. 1860, *supra* note 61, arts. 1-2; *see also* Sherman, *supra* note 63, at 695 (Decree No. 1860 "provid[es] for extradition proceedings to be carried out exclusively by the executive branch.").

people are the primary users of cocaine."¹²² This is especially so when a Cartel leader is involved.

Colombian citizens oppose deporting drug kingpins even more stringently, for both symbolic (*i.e.*, a refusal to admit that the Colombian justice system is ineffective) and economic reasons (were the drug business to dry up, many would lose their only income). Witness the impossibility of extraditing temporarily jailed Kingpin Escobar,¹²³ or the murderers of seventeen Colombian Supreme Court justices and presidential candidate Luis Carlos Galán Sarmiento, all of whom apparently were killed for their pro-extradition sentiments.¹²⁴

Galán's murder occurred on August 18, 1989, just two months before the United States tendered Abello's extradition request.¹²⁵ Soon after, the Justice Minister resigned because of threats to her family.¹²⁶ In fact, on the date Escobar turned himself in, all extraditions of Colombian nationals ceased.¹²⁷ Escobar mandated suspension of extraditions to the United States before he would surrender.¹²⁸ He also arranged to serve time in a luxurious "prison" that he built in his hometown of Envigado, Colombia.¹²⁹ These events demonstrate the political power and persuasion wielded by Cartel members over Colombian officials.

122. Sherman, *supra* note 63, at 666; *see also id.* at 692 (discussing the "strong, anti-extradition feeling within Colombia").

123. Joseph B. Treaster, *Drug Baron Gives Up in Colombia as End to Extradition is Approved*, N.Y. TIMES, June 20, 1991, at A1.

124. *See* Richard L. Fricker, *A Judiciary Under Fire*, A.B.A.J., Feb. 1990, at 54; *see also* Scott A. Otteman, *Jurists Alone, Unprotected, Slain Colombian Judge Warned*, MIAMI HERALD, Aug. 19, 1989, at A20 (claiming that a Colombian appellate court judge overseeing drug cases foreshadowed his own death in an interview two months before he was murdered).

125. *See Colombian Presidential Candidate is Slain at Rally*, N.Y. TIMES, Aug. 19, 1989, at A3; *Presidential Front-Runner Assassinated in Colombia*, WASH. POST, Aug. 19, 1989, at A15.

126. Fricker, *supra* note 124, at 54.

127. Escobar turned himself in on June 19, 1991, but only after the Constituent Assembly voted overwhelmingly (51 for; 13 against; 10 abstaining) to ban extradition of Colombian citizens to face trial. Peter B. Heller, *Colombia*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, at viii (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

128. *See* Treaster, *supra* note 123, at A1.

129. *See* James Brooke, *Drug Baron's Prison Has Every Comfort, Even Mom and TV*, N.Y. TIMES, June 22, 1991, at A1; Treaster, *supra* note 123, at A14.

C. When Precedent and Politics Collide—Practical Ramifications

In 1989 any decision by Colombia to extradite was a political rather than a judicial one. Decree No. 1860 is not an international agreement between the United States and Colombia, but a Colombian executive decree issued under a state of siege declared five years earlier by Colombian President Barcos's predecessor, Belisario Betancur Cuartas.¹³⁰ Article 1 of Decree No. 1860¹³¹ suspended Colombian law that required extradition be in accordance with public treaties (e.g., in accordance with the 1979 Treaty) solely with regard to drug-related crimes.¹³² It also established extradition procedures that conflicted with the terms of the 1979 Extradition Treaty between Colombia and the United States.¹³³

Article 2 of Decree No. 1860 vested full discretion to extradite in the executive branch. The decree expressly eliminated judicial review of requests for extradition.¹³⁴ Thus, the decision to extra-

130. Decree No. 1038 of 1984, DIARIO OFICIAL, May 14, 1984, at 673. For a thorough account of the events leading to and the basis in Colombian law for the state of siege, as well as the circumstances surrounding the promulgation of Decree No. 1860 of 1989, see Sherman, *supra* note 63, at 683-94.

Sherman presents compelling arguments that U.S. domestic and international drug policy since the 1970s—particularly its extradition of foreign citizens to the United States for trial on charges of violating U.S. domestic criminal laws abroad—is largely responsible for the deterioration of the social, political, and legal order in Colombia and other Latin-American nations. *Id.* at 662-693.

131. Article 1 provides:

Artículo 1° Mientras subsista turbado el orden público y en estado de sitio el territorio nacional, suspéndese la vigencia del inciso 2°, del de narcotráfico y conexos y, en consecuencia, para efectos de la extradición de nacionales colombianos y extranjeros requeridos por estos delitos, podrá aplicarse el trámite previsto en el Código de Procedimiento Penal, con las modificaciones que en el presente Decreto se establecen.

Colombian Decree No. 1860, *supra* note 61, art. 1; see also Sherman, *supra* note 63, at 693 (discussing Decree 1860).

132. Sherman suggests that after the 1988 Presidential election, the Bush Administration pressured President Barcos to resume extraditions to the United States, ending the two-year hiatus between the Colombian Supreme Court's revocation of the 1979 Treaty in 1987 and the U.S. election. Caught between overwhelming popular and legislative anti-extradition sentiment and an equally hostile U.S. government, members of Barcos's cabinet allegedly bowed to American pressure and teamed with U.S. Department of Justice officials to draft the text of the Decree. The assassination of Presidential candidate Carlos Luis Galán on August 14, 1989, which Barcos attributed to drug traffickers, temporarily stunned Colombians and forestalled major political opposition to the Decree, which issued four days later. Sherman, *supra* note 63, at 691-93.

133. Colombian Decree No. 1860, *supra* note 61; 1979 U.S.-Colom. Treaty, *supra* note 63.

134. Under Article 2 of the decree, the judicial branch has no controlling influence:

dite rested solely with political officers, who are constantly fighting to maintain—or merely to acquire—control of a violent and turbulent nation.

If the purpose of the specialty doctrine is to protect the “security and sovereignty” of Colombia, as the *Abello* court wrote, how could that court have concluded that Colombia would not be adversely affected¹³⁵ by the United States’ failure to present the second superseding indictment in lieu of the first? In terms of “security and sovereignty,” especially after the murder of the justices and the presidential candidate, the Colombian Executive’s consent to extradite a low-level trafficker have far less severe effects than would a decision to extradite a Cartel leader. The Colombian public, with its easy access to American media, has little tolerance for a government which turns over such people. The Colombian government’s surrender of a minor criminal as a small, unnoticed gesture to appease the Americans placed the it in a difficult political squeeze, because the United States alleged that the defendant was involved in illegal endeavors far greater than those specified in the extradition request. Trusting the U.S. government, Colombia quickly found itself sold out for an American political victory.

Colombia’s supposed failure to object at the second superseding indictment’s issue is irrelevant to the question of whether Colombia would have objected at the outset of the process had the extradition request been more truthful. Although Colombia might not have extradited *Abello* due to political factors had it known the true nature of the prosecution, an objection after extradition would require the Colombian government to face a far different political equation. The diplomatic debit incurred from requesting the return of an already extradited “Cartel leader” (which would anger the Bush administration, as it would cause much embarrassment in the eyes of the American press and public), would be far greater than the harm incurred by merely refusing to extradite him in the first place (which could be done through quiet diplomatic channels).

Artículo 2.º La concesión de extradición de nacionales colombianos o extranjeros por los delitos de narcotráfico y conexos, no requerirá de concepto previo de la Sala de Casación Penal de la Corte Suprema de Justicia.

Colombian Decree No. 1860, *supra* note 61, art. 2; see also Sherman, *supra* note 63, at 694.

135. Cf. *Abello-Silva*, 948 F.2d at 1175 (“There is, of course, nothing . . . touching upon the dignity, security or sovereignty of [Colombia] itself which might give rise to diplomatic considerations.”).

In spite of the political factors that tended to prevent an objection by Columbia, it is important to recognize what the court briefly mentioned, but never addressed: evidence suggests that Colombia *did* quietly object to the expanded prosecution through diplomatic channels.¹³⁶ On March 8, 1990, the Colombian Embassy in Washington, D.C., sent Diplomatic Note EJ-024 to the U.S. Department of State, objecting to the prosecutorial expansion:

The Embassy in Colombia . . . wishes to manifest its knowledge regarding . . . the Colombian citizen Jose Rafael Abello Silva who has been extradited The Colombian Embassy has official knowledge that the United States Embassy in Colombia has not submitted a request to the Colombian Government in order to amend or complement this [i]ndictment.¹³⁷

Although an objection by the extraditing country is not needed in the Tenth Circuit for standing to raise the doctrine,¹³⁸ such an objection is assuredly evidence that the requested country might have reached a different decision had it known of the allegations in the post-extradition indictment.

The *Abello-Silva* court made a leap in logic when it characterized the *Paroutian* court's test for specialty violations.¹³⁹ The *Abello-Silva* court wrote that a question which asks "whether the asylum state *would consent* to extradition" is the same¹⁴⁰ as asking "whether there is *sufficient evidence* in the request."¹⁴¹ Equating these questions assumes that a nation would base its "consent" substantially on the existence of "sufficient evidence" for an alleged offense in the request. That is nonsense in the context of Colombian Decree No. 1860, where the executive branch makes extradition decisions on political factors rather than on legal grounds. "Sufficiency of the evidence" is a judicial concept, and under Decree No. 1860, the judiciary plays no role in the process. While "sufficient evidence" to extradite may have existed, the executive branch was much more likely to weigh the evidence stated

136. *Id.* at 1173; see also Fricker, *supra* note 51, at 59 (discussing Diplomatic Note EJ-024 from Colombian Embassy in Washington, D.C., to U.S. Department of State (Mar. 8, 1990)).

137. Fricker, *supra* note 51, at 59 (quoting Diplomatic Note EJ-024 from Colombian Embassy in Washington, D.C., to U.S. Department of State (Mar. 8, 1990)).

138. *Abello-Silva*, 948 F.2d at 1173.

139. *Id.* at 1173-74.

140. *Id.* (emphasis added). The court used the term "[i]n other words" to show its belief that the two questions support a single proposition. *Id.*

141. *Id.* at 1174 (emphasis added).

in the request, not with blindfold and balance, but with a clear-eyed bias and inclination for political survival. If the United States had fully apprised Colombia of the "facts," the Colombian government probably would *not* have consented to Abello's extradition.

The Tenth Circuit manipulated reason and rationale, and presumed to place itself in the shoes of a foreign sovereign making an extradition decision. The court seemed to assume that foreign sovereigns look not to their own domestic law and political exigencies, but rather to U.S. legal standards when making internal decisions about their own citizens. In an era of an increasingly conservative—and more dangerously, politicized—U.S. judiciary, the accruing results of diplomatic dishonesty should serve as a warning, especially since all extraditions from Colombia have ceased. The new Colombian Constitution of 1991 guarantees native-born Colombians the fundamental right not to be extradited.¹⁴² Colombia has now made it virtually impossible to extradite its nationals to stand trial in the United States. If dual criminality principles are satisfied, any Colombian national charged with a crime by a foreign nation will be tried and sentenced in Colombia.¹⁴³

V. THE BROADER THEORETICAL IMPLICATIONS OF *ABELLO-SILVA*

This Note has examined problems relating to the facts of the *Abello-Silva* case. The glaring difficulty with the decision is not merely the court's interpretation of those facts, but also the ramifications of its broad holding that "the relevant inquiry is the nature of the offenses in the two indictments, and not the different 'facts' alleged in support of the offenses."¹⁴⁴

As the *Abello* court recognized, an asylum country will "extra-

142. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 35. [hereinafter COLOM. CONST.]; see generally William C. Banks & Edgar Alvarez, *The New Colombian Constitution: Democratic Victory or Popular Surrender*, 23 U. MIAMI INTER-AM. L. REV. 39 (1991).

143. See COLOM. CONST. art. 35.

The doctrine of dual criminality provides that one may only be extradited when the charged offense in the extradition request is recognized as an illegal act under the criminal statutes of both countries. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 579 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *Wright v. Henkel*, 190 U.S. 40, 58 (1903).

For example, in *Freedman v. United States*, 437 F. Supp. 1252, (N.D. Ga. 1977), the court denied extradition to Canada because no United States law recognized the charged Canadian crime of "commercial bribery." *Id.* at 1261-62; see generally Sharon A. Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 NOVA L. REV. 581 (1991).

144. 984 F.2d at 1174.

dite only those individuals against whom a substantial case lies."¹⁴⁵ *Abello-Silva* involved an "expansion" of the facts at trial. The facts in the extradition request were less inculpatory than those introduced at trial. What of the situation where the facts in the extradition request are *more* inculpatory than the facts actually used at trial? Should the conviction stand? The Tenth Circuit's holding that the specialty test applies to "parallel offenses" and not to "parallel facts" may create great problems.

A hypothesis clarifies this point. Were the levels of proof inverted under the *Abello* fact pattern, and therefore under Colombian Decree No. 1860, the defendant would argue that the original, more incriminating allegations in the extradition request were a mere ruse to secure extradition because the real facts did not establish the requisite "substantial case." If the government countered that the specialty doctrine bars only introduction of different offenses, not the introduction of differing facts, under *Abello-Silva* the government would win. Yet that seems to be exactly the type of prosecutorial conduct which *United States v. Rauscher*¹⁴⁶ intended to prevent.

Rauscher invoked the specialty doctrine when a federal prosecutor alleged one offense to secure extradition, but intended to try the defendant on another charge.¹⁴⁷ Under *Abello-Silva*, a prosecutor could allege damning facts to secure extradition, knowing that the defendant would be tried on different, tamer facts. Is the first occurrence necessarily more dastardly than the second? The answer depends on the purpose of the doctrine itself.

If the purpose of the specialty doctrine is to deter misrepresentations between nations,¹⁴⁸ to foster international comity,¹⁴⁹ and to ensure that a host nation may reasonably "rel[y] upon the representations made" to it,¹⁵⁰ then nations should not be rewarded for a deceptive extradition request.

Even if an extradition treaty lacks the language of a "facts-offenses" nexus, the doctrine should control when false representations of fact violate its spirit. The doctrine's purpose "is to prevent

145. *Id.* at 1173-74.

146. *United States v. Rauscher*, 119 U.S. 407 (1886).

147. *Id.*; see *supra* text accompanying notes 13-18.

148. See 119 U.S. at 432.

149. See *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989) ("The doctrine is based on principles of international comity.").

150. BASSIOUNI, *supra* note 4, at 360.

punishment in excess of what the requested state had reason to believe was contemplated.”¹⁵¹ Or as the *Paroutian* court put it, the doctrine “is designed to protect the extraditing government against abuse of its discretionary act of extradition.”¹⁵²

Contrary to the doctrine’s spirit, the *Abello-Silva* holding will encourage prosecutors to trump up or falsify facts to support offenses when requesting extradition from foreign governments, because an asylum country will base its decision whether a “substantial case” exists on an examination of the extradition request. There will be no penalty at the U.S. trial stage for proceeding under facts different from the extradition request. There is no requirement that a prosecutor include a copy of the indictment or arrest warrant in the request for extradition. *Abello-Silva*, therefore, stands in part for the proposition that no nexus need exist between the facts alleged in an indictment and those in an extradition request. For unscrupulous government lawyers, *Abello-Silva* is a license to mislead foreign governments.

Whether or not the government is fighting its “War on Drugs” intelligently,¹⁵³ few question that the purpose itself is noble. Though one might argue that the judiciary has a responsibility to assist the government in conducting that “war,” when decisions like *Abello-Silva* aid the government in a noble cause at the expense of foreign trust and international law, the integrity of the American judiciary must be questioned.

Though moral rules have religious origins and originally applied only to individuals in search of salvation,¹⁵⁴ their application to states soon followed, ostensibly to create societies in tune with the moral values professed by the citizenry.¹⁵⁵ Terry Nardin points

151. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 cmt. b. (1986).

152. *United States v. Paroutian*, 299 F.2d 486, 490 (2d Cir. 1962).

153. The effectiveness of extradition as a weapon in the war on drugs has occasioned vigorous debate. Compare J. Richard Barnett, *Note, Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT’L & COMP. L. 285 (1985) (arguing that extradition is an effective weapon in the war on drugs), with Sherman, *supra* note 63 (arguing that extradition of Colombian nationals makes relations worse in return for a mere symbolic victory).

154. See generally TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983).

155. See H.L.A. HART, *THE CONCEPT OF LAW* 181 (1961) (“[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals . . .”); see also NARDIN, *supra* note 154, at 90-92.

out that states misleading other states inevitably undermines international relations, and it is therefore the role of government to prevent this deception.¹⁵⁶

Mere political interests or even domestic law should not override moral considerations in the context of international law: "the principles of morality are not one among a number of competing interests and . . . cannot be subordinated to other interests. They are, rather, the principles that govern the pursuit of all interests."¹⁵⁷ That international law has often been used to justify morally questionable measures does not undermine the incorporation of moral standards into international law.¹⁵⁸ It proves instead that international law is inseparable from the concept of morality, because morality serves as a measure of justification for a state's act.¹⁵⁹ When a state cannot show that its act satisfied a moral benchmark, political moral pressure upon that state should follow.

The ultimate purpose of morality in international law is not a theoretical pursuit of godliness, but the practical pursuit of peaceful coexistence. This may come at the expense of a state interest. International morality "demands, in its own way, the subjection of substantive purposes to formal constraints"¹⁶⁰ because "international morality and international law provide the basis—often the only basis—on which those who are engaged in pursuing different ends can associate with one another."¹⁶¹

States cannot achieve justice without adhering to concepts of international morality. "Just conduct" is simply conduct which is correct because it satisfies a legal or moral standard.¹⁶² It is possible that justifiable conduct under one set of "standards" may not constitute justifiable conduct under a different set.¹⁶³

The idea of "justice," therefore, may have two prongs. The

156. NARDIN, *supra* note 154, at 39, 305. Nardin argues that governments must prevent the undermining of observed moral limits of conduct and suggests that the idea of morality may be expressed in terms of constraints necessary for cooperation. *Id.*

Similarly, Hart writes, "The common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in the negative form as prohibitions." HART, *supra* note 155, at 190.

157. Marshall Cohen, *Morality and the Laws of War*, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 71, 88 (Virginia Held et al. eds., 1974).

158. See NARDIN, *supra* note 154, at 308.

159. *Id.*

160. *Id.* at 305.

161. *Id.*

162. *Id.* at 257.

163. *Id.*

first is a formalistic notion, that society intends to distinguish just from unjust conduct in codified law.¹⁶⁴ However, codified laws alone which define what is "just" and "unjust" conduct must have an underlying meaning to fulfil the measure. Otherwise, laws would be merely an Orwellian recitation of rules to follow in the name of order. Codified rules without moral definition, the second prong, would have no real influence beyond the state's power to enforce them because they would be subject to complete abrogation at the whim of the state's leaders.¹⁶⁵

For laws to foster international coexistence, the idea of "just conduct" must have a meaning and force which may not be trumped by codified law.¹⁶⁶ That is why notions of international morality must be preeminent to any state's mere desire to cure the ills which afflict its society. Therefore, the idea of "justice" is empty when defined only in terms of codified law, for the idea has one indispensable, "critical aspect; it allows for the criticism of laws and institutions according to [standards of morality]."¹⁶⁷ Put

164. *Id.* at 257-58.

165. See HART, *supra* note 155, at 189.

[G]iven survival as an aim, law and morals should include a specific content. The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.

Id.

166. This position endorses a "naturalist" view of the law, as opposed to a "legal positivist" perspective. Naturalists prefer law based on moral customs for definition and view treaties as mere expressions of those customs. Harry Brod, *Law Thinking Itself: The Idealism of International Law*, 10 CARDOZO L. REV. 1879, 1881 (1989) (reviewing DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987)). Thus, a naturalist—or to a certain extent even a minimalist like Hart—cares not whether a treaty is or is not "in force," as those customs upon which a treaty is based are by definition *always* in force. See Brod, *supra*, at 1881. To a naturalist, it is irrelevant whether Colombian Decree No. 1860 or the 1979 U.S.-Colom. Treaty is in effect, because standards of international morality and comity bind all nations. The problem arises in deciding whether international conduct itself creates the custom (hence duplicity is moral), or whether traditional moral customs must motivate the conduct to validate that conduct as "just." This is the starting point for the positivists, who prefer a devotion to treaty law because treaty language is based on consent. They view the lack of a treaty as a lack of consent, and thus an absence of international agreement—or responsibility to conform—on the abdicated issue. *Id.* For world society to function, it is not necessarily true that laws must first quench the naturalist thirst for rules based on morality. See HART, *supra* note 155, at 181. Because of its refusal to connect legal validity and moral value, many have rejected legal positivism. *Id.* at 182.

167. NARDIN, *supra* note 154, at 258.

succinctly:

The basis of international association lies in deference to practices that embody recognition of the fact that we must coexist on this planet with others whom we sometimes share little beyond a common predicament. Such coexistence presupposes acknowledgment of certain common standards of conduct: that individuals and states are united on the basis of authoritative common rules and not merely by their possibly convergent desires.¹⁶⁸

Lack of commitment to moral "rules" in the name of satisfying the desires of the state is at the heart of the *Abello-Silva* decision. Unfortunately, it reflects an attitude symptomatic of the U.S. judiciary today. One need look no further for support of this proposition than the U.S. Supreme Court's recent decision in *United States v. Verdugo-Urquidez*,¹⁶⁹ holding that the Fourth Amendment's prohibition against warrantless searches and seizures did not prohibit a warrantless search of a home in Mexico owned by a non-U.S. resident defendant awaiting trial in the United States.¹⁷⁰ The proposition that a right to privacy is a natural, god-given right (the unjust invasion of which is immoral) is the foundation of the Fourth Amendment.¹⁷¹ Yet Chief Justice Rehnquist's opinion for the Court rigidly held that "the people" protected by the Fourth Amendment were only the people of the United States, not all people.¹⁷² The Supreme Court of the United States essentially held that a natural, god-given right accrued to Americans, but to no one else. The *Verdugo* decision is a classic example of desire-driven justice. The Court refused to be guided by higher moral concepts because to do so would have been utterly inconvenient. It would have defeated the State's immediate purpose of rule enforcement in the hallowed name of order.

168. *Id.* at 324.

169. 110 S. Ct. 1056 (1990).

170. *Id.* at 1059.

171. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3 (2d ed. 1988).

Hart defines Natural Law as the proposition "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." HART, *supra* note 155, at 182.

Hart seems to be a minimalist, believing that while there are some "elementary truths concerning human beings," the naturalist view of morality defining the validity of law is too expansive. *Id.* at 189. Many laws are arbitrary yet valid because the need for order and certainty in a society could almost never be obtained if only those laws based on morality were valid. *Id.*

172. 110 S. Ct. at 1066.

Within this context the *Abello-Silva* decision is not surprising. If through narrow textual construction the Supreme Court denies the application of the Fourth Amendment to a foreign drug-dealer defendant brought before a U.S. court, it is likely that the courts will find a way to exonerate a prosecutor who secures that drug dealer's extradition by misleading a foreign government. A thoughtful judiciary would recognize that desire-driven justice exacts too high a price.

VI. CONCLUSION AND PROPOSAL

The problems with the *Abello-Silva* decision are acute, yet curable. Courts should interpret the doctrine of specialty as a bar to prosecutorial variance regarding not only alleged "offenses," but also "facts." Preeminent moral imperatives demand no less.

If courts are not ready to embark on such a radical journey toward the moral higher ground, an alternative course may better address the "offenses-facts," "order-comity" dilemma which current law so inadequately handles. In assessing specialty claims, courts should balance the natural fluctuation in the quality of evidence over a period of time against the need to foster international comity by preventing prosecutorial deception.

This balance should apply only when the facts in the request for extradition and the facts actually used at trial are substantially different. If the facts submitted in an extradition request were perceptibly *less* inculpatory than the facts later introduced at trial, a rebuttable presumption would arise that the variance was due to the natural flow of evidence garnered by prosecutors over time, and therefore absent such a rebuttal, there would be no violation of the doctrine. However, when the facts submitted in an extradition request were *more* inculpatory than different facts actually brought out at trial, a rebuttable presumption of violation would arise. Factors indicating whether there is a violation might include the plausibility of the government's explanation for the variance, differences in the quality of evidence tendered in the request and at trial, whether or not an indictment was included in the request, and the court's overall assessment of the veracity of the participating parties.

In sum, it cannot be reasonably argued that the doctrine of specialty permits federal prosecutors to deceive foreign governments. The spirit of the doctrine, so well articulated by *Rauscher*

over a century ago,¹⁷³ deems the principles of international comity superior to immediate national desires, however noble, however urgent, harbored by well-intentioned prosecutors attempting to better their society with literalist notions of order. Such myopia, so understandable in a society ravaged by drugs, yet ignorant of the relationship between moral conduct and international coexistence, is simply intolerable in a polity which deems itself "just." U.S. courts should beware of aiding ostensibly noble causes when their aid requires a morally blind adherence to stilted formal concepts of order promoted by a government all too willing to sacrifice its long-term integrity for a quick political victory.¹⁷⁴

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173. See *United States v. Rauscher*, 119 U.S. 407, 432. The Court wrote that if it allowed the defendant's conviction to stand, "the Treaty could always be evaded by making a demand on account of the higher offense defined in the Treaty, and then only seeking a trial and conviction for the minor offense not found in the Treaty." *Id.* The deterrence of misleading conduct by federal prosecutors, therefore, is a central tenet of the doctrine.

174. Benjamin Cardozo wrote:

You think perhaps of philosophy as dwelling in the clouds. I hope you may see that she is able to descend to earth. You think that in stopping to pay court to her, when you should be hastening forward on your journey, you are loitering in bypaths and wasting precious hours. I hope you may share my faith that you are on the highway to the goal. Here you will find the key for the unlocking of bolts and combinations that shall never be pried open by clumsier or grosser tools.

BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 23 (1924).

* J.D., *cum laude*, University of Miami School of Law, 1992.

The author would like to dedicate this Note to his mother, Judy Weinstein, who somehow managed to raise three fairly normal children while attending law school.