AN EXTRADITED DEFENDANT'S ABILITY TO CHALLENGE SENTENCING: A GLIMPSE INTO AN UNPOLISHED PIECE OF THE TREATY POWER

Candra Connelly

I. INTRODUCTION

A photo taken on January 19, 2017 depicts two DEA agents escorting Joaquïn Guzmán Loera off of plane in Long Island, New York.[1] The famous drug king, most commonly known as "El Chapo," had lost his appeal to block extradition and was being transferred from Mexico to the United States to stand trial for money laundering and running a continuous criminal enterprise.[2] Article IV, Section 2 of the United States Constitution is the source behind modern-day extradition policy.[3] While the general framework for extradition can be found throughout United States statutory law, specific extradition policies between jurisdictions are backed by reciprocal agreements or treaties between nations.[4] The basis behind El Chapo's extradition was a treaty between the United States and Mexico that was entered into force on December 11, 1861.[5]

The broad language and complex history behind extradition policy is the root of an ongoing debate regarding whether a defendant who has been extradited to the United States has proper standing to attack his sentence under a treaty's "specialty" provision. According to this provision, a defendant may only be punished for crimes for which he was extradited.[6] In other words, after a defendant has been extradited to

1. Azam Ahmned, *El Chapo, Mexican Drug Kingpin, Is Extradited to the U.S.*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/world/el-chapo-extradited-mexico.html.

2. El Chapo also faced prosecution for manufacturing and distributing a broad range of drugs and using firearms. *See id.*

3. U.S. Const. art. IV, §2. "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." *See id.* The statutory basis for extradition is found in Title 18, Section 3182 of the United States Code. Cornell Law School, *Extradition*, LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/extradition (last visited Apr. 5, 2018).

4. *Id.* Policies and processes of extradition within the United States exist as well. However, those policies and processes are beyond the purview of this paper.

5. *Extradition Treaty with Mexico; By the President of the United States of America. A Proclamation Treaty Between the United States of America and the United Mexican States, for the Extradition of Criminals*, N.Y. TIMES: ARCHIVES, https://www.nytimes.com/1862/06/29/archives/extradition-treaty-with-mexico-by-the-president-of-the-united.html.

6. *Doctrine of Specialty Law and Legal Definition*, USLegal, https://definitions.uslegal.com/d/doctrine-of-specialty.

the United States, he may only stand trial for the crimes stated in the extradition request. The Sixth Circuit in *United States v. Fontana* found that a defendant possesses the requisite standing to challenge any issues that may present themselves during sentencing under the specialty provision.[7] The court found that although a defendant generally possesses the appropriate standing, this particular defendant did not.[8] Disagreeing with the Sixth Circuit, the defense applied to the Supreme Court for writ of certiorari. In November 2017 the Supreme Court declined the request.[9] The Sixth Circuit's decision in *Fontana* is at odds with the Third Circuit's decision in *United States ex rel. Saroop v. Garcia*.[10] where the court held that a habeas corpus[11] petitioner lacked standing to invoke rules of specialty to challenge a violation of an extradition treaty existing between the United States and Trinidad and Tobago.[12]

This article seeks to reconcile whether a defendant possesses standing to challenge sentencing through an extradition treaty's specialty provision. The answer to this question cannot be reached without a look into whether a foreign citizen should be allowed to proceed with claims involving the violation of an international treaty generally. Therefore, Part II of this article provides a brief overview of the treaty power, discusses the history of extradition policy as a general matter, and provides a more centralized look into particular extradition treaties between the United States and other countries through case law. To aid in the analysis of specific treaties, *United States v. Fontana* and *United States ex. rel. Saroop v. Garcia* will be delved into. Part III analyzes both sides of the argument of whether a foreign individual should have the power to challenge a violation of a treaty. This analysis more specifically involves an answer to whether a foreign defendant possesses standing to attack his sentencing under the specialty provision, ultimately concluding that he does. Part IV concludes with a brief glance into what the treaty power and a foreign defendant's rights may look like going forward under the specialty provision.

II. BACKGROUND

Article II, Section 2 of the United States Constitution vests the power

7. 869 F.3d 464 (6th Cir. 2017).
8. *Id.* at 472.
9. 138 S. Ct. 490 (Mem).
10. 109 F.3d 165 (3d Cir. 1997).
11. 28 U.S.C.S. § 2255.
12. 109 F.3d at 168.

to make treaties in the President.[13] This enumerated power is not absolute; the Senate serves as the regulating body to the treaty power by giving "the president . . . advice and counsel, [serving as a] check [on] presidential power, and [working to] safeguard the sovereignty of the states by giving each state an equal vote in the treaty making process."[14] While the Senate serves to police the treaty power, it does not frequently reject a treaty.[15] Section (A) provides a general overview of the treaty power. Subsection (i) looks at the difference between self-executing and non-self-executing treaties and discusses the important distinctions between the two. Subsection (ii) looks at how treaties are generally interpreted. Subsection (iii) provides a more direct look into extradition and the specialty provision. Lastly, Section (B) discusses relevant extradition case law to help guide the discussion as to whether a defendant possesses or should possess the requisite standing to challenge sentencing under a treaty's specialty provision.

A. An Overview of the Treaty Power

"A treaty is 'primarily a compact between independent nations.'"[16] The President, in making a treaty, is bound by three limitations: "(1) two-thirds vote of the Senate must approve the treaty; (2) the treaty cannot violate an independent constitutional bar; and (3) the treaty cannot disrupt our constitutional structure by giving away sovereignty reserved to the states."[17] The first two are widely accepted norms in treaty creation and implementation, but many constitutional scholars believe that Justice Holmes struck down the third limitation in *Missouri v. Holland*.[18] In Federalist Paper Number 75, Alexander Hamilton stated, "the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the

13. U.S. Const. art. II, §2, cl. 2.

14. United States Senate, *Treaties*, https://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm.

15. *Id*.

16. Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93 (2014) (quoting Edye v. Robertson, 112 U.S. 580, 598 (1884)).

17. *Id*. at 105.

18. *Id*. *See* Missouri v. Holland, 252 U.S. 416, 433-34 (1920). In delivering his Missouri v. Holland opinion, Justice Holmes stated that "if a treaty is valid, 'there can be no dispute about the validity of the statute [implementing it] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." Many scholars believe that it is this iteration that struck down the third requirement that a "treaty cannot disrupt our constitutional structure by way of giving sovereignty reserved to the states." Under Justice Holmes rationale, Congress has the authority via the Necessary and Proper Clause to pass any legislation it sees fit to implement a treaty, a contention that many scholars disagree with, arguing that Justice Holmes got it wrong. Cruz, *supra* note 16, at 118. *See also* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868 (2005).

office of making them."[19] For the Senate to approve a resolution of ratification, the partisan divide must be overcome.[20] This divide is frequently overcome when a treaty is being contemplated, as evidenced by a two hundred year period where the Senate approved more than 1,500 treaties and rejected only 21. The majority of the rejected treaties were denied approval more than once,[21] often as a result of the leaders of the Senate finding that the specific treaty lacked the requisite support to pass muster.[22] While only 21 treaties were actually rejected by the Senate, 85 were eventually withdrawn because the Senate refused to act on them for an extended period of time.[23]

Treaties are not the sole way for the United States to interact with other countries. The alternative to a treaty is an executive agreement, the existence of which became more popular after World War II.[24] The Senate attributes the increase of executive agreements to an increase in the "sheer volume of business conducted between the United States and other countries, coupled with the already heavy workload of the Senate."[25] The President has authority to enter executive agreements regarding foreign aid, agriculture, and trade.[26] While executive agreements are a relevant part of international law, treaties have been, and will continue to be, the main source of extradition policy between nations.[27]

1. Types of Treaties and Treaty Termination

There are two types of treaties: self-executing and non-self-executing.[28] Self-executing treaties have an immediate binding effect on domestic law at the time of enactment.[29] Non-self-executing treaties do not become binding domestically without some sort of legislation enacted to make them so.[30] In other words, non-self-executing treaties "comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty

19. United States Senate, *supra* note 14.

20. *Id*. The 2/3 majority represents the bipartisan divide being overcome.

21. The rejected treaties included the Treaty of Versailles. *Id*.

22. *Id*.

23. *Id*.

24. In 1952, the United States only signed 14 treaties, after signing 291 executive agreements. *Id*.

25. An executive agreement has essentially the same function as a treaty, but it does not require a two-thirds majority. *See id.*

26. *Id*.

27. *Id*.

28. Cruz, *supra* note 16.

29. *Id*.

30. *Id*. at 108.

itself conveys an intention that it be 'self-executing' and is ratified on such terms."[31] Therefore, a non-self-executing treaty is simply the United States making a promise to another country that something will later be enacted into law; the promise itself does not constitute an obligation on United States citizens, without the actual enactment of accompanying legislation.[32] The President is aware that such promises to other nations are permissible, but that they may not necessarily ever become domestic law, and thus binding on citizens, until there has been explicit Congressional authority.[33] Extradition treaties, however, are self-executory—meaning that no domestic legislation must be forced for extradition to be permissible.[34]

While the power to create a treaty is granted by the Constitution, the Constitution is silent when it comes to a treaty's termination. President Carter terminated two treaties during his tenure as President[35] and only on a single instance has Congress terminated a treaty by joint resolution.[36] A peaceful process of terminating treaties has yet to be determined.[37]

2. Treaty Interpretation

To determine how a treaty shall be interpreted, it must first be determined whether or not the treaty is self-executing. As stated above, a treaty has no direct impact on, nor does it impose any duty on, a United States citizen if the treaty is non-self-executing. However, if a treaty is self-executing or when legislation is enacted to make it so,[38] the starting point to treaty interpretation is with the text of the treaty.[39] Beyond the text, a treaty should be interpreted by usage of the negotiation and drafting history, as well as "the post-ratification understanding" of all signatory nations.[40] The topic of treaty interpretation is highly unlikely to arise when a treaty is not being challenged. Since many international treaties, like extradition treaties,

31. Igartua-de la Rose v. United States, 417 F.3d 145, 150 (1st Cir. 2005).

32. Cruz, *supra* note 16, at 108.

33. This explicit congressional authority is in the form of enacted legislation. *Id*.

34. International Extradition, USLegal, https://extradition.uslegal.com/international-extradition/.

35. President Carter terminated a U.S. defense treaty with Taiwan and replaced three previous treaties with Panama with a new one regarding the Panama Canal. United States Senate, *supra* note 14.

36. Congress terminated a mutual defense treaty with France and in doing so dubbed the United States "free and exonerated." The termination of this treaty almost sent the US to war, later ultimately resulting in "authorized hostilities against France." *Id*.

37. *Id*.

38. A non-self- executing treaty must have legislation in place to force citizens to abide by it. If there is no legislation in place for a non-self-executing treaty than we do not reach the text of the treaty.

39. Medellin v. Texas, 552 U.S. 491, 506 (2008).

40. *Id*. at 507 (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)).

are self-executing, if a signatory nation disagrees with the terms, the treaty will not go into effect.[41] Therefore, a treaties terms are only likely to be in dispute when an issue arises that a signatory party perceives is unfair or against their original intent.[42] Furthermore, the majority of today's jurisprudence suggests that only signatory nations can challenge treaty provisions. This suggests that for the signatory nation to challenge a provision on behalf of an individual, the nation must be made aware that a violation may have occurred, otherwise the alleged violation may likely go unnoticed.[43]

The Supreme Court recognized in *Sumitomo Shoji Am v. Avagliano*[44] that the signatory nation's interpretation and intent will ultimately be the source of a treaty's meaning.[45] The Supreme Court's dicta reveals this in *Medellin v. Texas*: "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation."[46]

Since treaties are agreements between nations, individual citizens of signatory countries generally cannot challenge treaty interpretations in the absence of an express provision within the treaty, unless the action is brought by the signatory nation on behalf of the citizen.[47] The Third Circuit in *United States ex rel. Saroop* stated: "[i]t is well established that individuals have no standing to challenge violation of international treaties in the absence of a protest by the sovereigns involved."[48] This piece of 1997 dicta is currently at the center of a current circuit split involving the Sixth Circuit, where the court found this *United States ex rel. Saroop* dicta to be incorrect in *Fontana*.[49]

3. Introduction to Extradition and the Specialty Provision

Chapter 18 of the United States Code enunciates the extradition power and its policy.[50] A concise definition of what constitutes

41. It is generally accepted that treaties will not be entered into until all signatory nations agree to the terms. Once the terms are agreed upon, the treaty will be signed by the nations.

42. This issue, as well as the issue of how signatory nations can be the only parties to dispute a treaty, will be addressed in the discussion section of this paper.

43. *See generally United States ex rel. Saroop*, 109 F.3d 165 (3d Cir. 1997); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

44. 457 U.S. 176 (1982).

45. *Id*. at 185.

46. *Id*.

47. *United States ex rel. Saroop*, 109 F.3d at 167.

48. *Id.* at 168 (quoting United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981)).

49. *See Fontana*, 869 F.3d at 464.

50. *See* 18 U.S.C.S. § 3181 et. seq.

extradition is: "the surrender of an accused usually under the provisions of a treaty or statute by one sovereign (as a state or nation) to another that has jurisdiction to try the accused and that has demanded his or her return."[51] The extradition provisions apply specifically to those who commit crimes in foreign countries and continues in effect as long as an extradition treaty is in existence between the United States and the country in question.[52] More specifically, the extradition provisions of the Code apply to persons, other than citizens, nationals, or permanent residents of the United States,[53] who have committed some sort of crime against citizens, nationals, or permanent residents of the United States.[54]

Two further requirements are that: (1) the crime committed must be in violation of Section 16 of Title 18 of the United States Code[55] and (2) the offenses alleged cannot be of a political nature.[56] The United States' first extradition agreement was contained in the 1794 Jay Treaty between the United States and Great Britain and only applied to murder and forgery.[57] It was not until the mid-19th century, when travel started to become more prevalent, that an increased number of countries began entering into extradition agreements.[58] Today, the United States is a signatory to over one hundred extradition treaties.[59]

The extradition process varies depending on which country is involved.[60] Once El Chapo was found in Mexico, judicial proceedings[61]

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51. Merriam-Webster, Law Dictionary, *Extradition*, https://www.merriam-webster.com/dictionary/extradition.

52. 18 U.S.C.S. § 3181(a).

53. Extradition of United States citizens can be found in 18 U.S.C. § 3196.

54. 18 U.S.C.S. § 3181(b).

55. These crimes include crimes of violence. *Id.* A "crime of violence" involves "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against a person or property of another may be used in the course of committing the offense." 18 U.S.C.S. § 16.

56. 18 U.S.C.S. § 3181(b)(1). The exclusion of crimes that are of a political nature is referred to as the "Political Offense Exception." There are two categories of political offenses, "pure political offenses" and "relative political offenses." Pure political offenses consist of crimes that are aimed at the government, including crimes of treason and espionage; these crimes do not violate the rights of private individuals. Relative political offenses include crimes committed in connection with a political act or for a political motive. Purely political offenses are usually never extraditable because they are exempted through treaty language, while relative political offenses are more likely to be extraditable. Mark Dell Kielsgard, *The Political Offense Exception: Punishing Whistleblowers Abroad*, BLOG OF THE EUR. J. INT'L L. (Nov. 14, 2013), https://www.ejiltalk.org/the-political-offense-exception-punishing-whistleblowers-abroad/. *See also* Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1971).

57. Claire Suddath, *A Brief History of Extraditions*, TIME (2009), http://content.time.com/time/world/article/0,8599,1926810,00.html.

58. *Id.*

59. U.S. Dept. of Stat., Diplomacy in Action, *Extradition Treaties*, https://www.state.gov/s/l/treaty/faqs/70138.htm.

60. Office of International Affairs, *Frequently Asked Questions Regarding Extradition*, The United States Department of Justice, https://www.justice.gov/criminal-oia/frequently-asked-questions-

began to determine whether the United States extradition request satisfied the requirements of the United States and Mexican extradition treaty, as well as Mexican law.[62] After determining the satisfaction of those elements, an executive phrase began, where an executive member of the Mexican government determined whether Mexico would surrender El Chapo to the United States for extradition.[63] Upon making the decision to extradite, a surrender order was issued and authorities in both countries coordinated transfer.[64] This process can take months or years to complete, as it can be a costly and lengthy process to locate a defendant.[65] Furthermore, usually during the judicial phase, there are multiple opportunities for the defendant to appeal.[66]

Specialty provisions are frequently found within extradition treaties. Under a treaty's specialty provision, the receiving country is barred from detaining or bringing additional charges against a defendant other than the ones for which he was extradited.[67] The specialty provision was drafted with the intent to honor mutual promises of signatory nations to not bring additional charges on an extradited defendant, "[b]ecause the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made to obtain extradition."[68] The existence of the specialty provision, as well as the extent to which it applies, varies between nations and tends to be more treaty specific or fact specific than a general, bright-line rule.[69] Justice Miller, in *United States v. Rauscher*,[70] provides a somewhat concise and focused iteration of the specialty provision's consequence:

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

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regarding-extradition.

61. Judicial proceeding occur in what is referred to as the 'judicial phase,' the first of two phases that take place prior to extradition. *Id*.

62. *Id*.

63. *Id*.

64. *Id*.

65. *Id*.

66. *Id*.

67. United States v. Riviere, 924 F.2d 1289, 1297 (3d Cir. 1991).

68. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986).

69. *Id*. Meaning that the extent to which a specialty provision applies in different countries will depend on the language of the treaty itself, or it will point to a more fact or case specific analysis.

70. United States v. Rauscher, 119 U.S. 424 (1886).

committed previous to his extradition."[71]

While there seems to be a rational explanation for the existence of the treaty power and extradition generally, the main focus of the specialty provision appears to be one of purely policy.[72]

B. Extradition Case Law

At numerous points throughout history, courts have been asked: (1) to interpret the provisions of specific extradition treaties; and (2) to rule on the ability of an individual citizen to challenge the treaty's power. The following case law explores the judiciary's response.

1. *United States v. Rauscher*: The Seminal Case[73]

United States v. Rauscher, decided by the Supreme Court, is a seminal case in defining extradition policy and the specialty provision.[74] The defendant was indicted for murdering a ship crew member while he was within admiralty jurisdiction.[75] He was extradited from Great Britain to the United States on "[a] treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals fugitive from justice, in certain cases."[76] The court noted that prior to treaties such as these, there was "no well-defined obligation on one country to deliver up such fugitives."[77]

The Court continued to examine numerous past cases from around the country, specifically noting that in the case of *Commonwealth v. Hawes*[78] the Court of Appeals of Kentucky found that "extradited criminals cannot be tried for offenses not named in the treaty, or for offenses not named in the warrant of extradition."[79] After evaluating other case law, the *Rauscher* court concluded that while Rauscher's extradition was originally lawful, it became unlawful at the point in which they prosecuted him for offenses that were not listed in the

71. *Id*.

72. *Id*.

73. *Id*. at 407.

74. *Id*.

75. *Id.* at 409.

76. *Id*. at 410. *See* Foreign Treaties and International Agreements; Great Britain, 8 Stat. 576 (Aug. 9, 1842).

77. *Rauscher*, 119 U.S.at 412.

78. 76 Ky. 697 (1878).

79. 119 U.S. at 428.

extradition treaty between the United States and Great Britain, thus violating what we now know as the "doctrine of specialty."[80]

2. Challenging Overall Treaty Validity in *US ex rel. Saroop v. Garcia*[81]

The Sixth Circuit's *United States v. Fontana* decision is at odds with the Third Circuit's decision in *US ex rel. Saroop v. Garcia*. In challenging the basis for extradition, the defendant petitioned for habeas corpus.[82] The petition was denied, and the defendant appealed to the Third Circuit.[83] On appeal, the court found that a valid extradition treaty existed between the United States and Trinidad and Tobago, thereby mooting the defendant's habeas argument on the validity of the treaty.[84]

The defendant, a citizen of Trinidad and Tobago, was charged with supplying illegal drugs for a conspiracy based in St. Croix and as a result, profiting from their sale.[85] She was later indicted in the United States Virgin Islands for drug trafficking and conspiracy.[86] The United States sought the defendant's extradition based on the treaty entered into between the United States and Great Britain in 1931.[87]

The defendant's petition rested upon proving the invalidity of the treaty that the United States claimed as the basis for extradition.[88] Her claim centered on proving the treaty was invalid because it was never ratified upon Trinidad and Tobago's independence from Great Britain.[89] The courts of Trinidad and Tobago did not find this argument persuasive, surrendering the defendant to the United States for transport to St. Croix.[90] Awaiting trial, the defendant appealed to both the governments of Trinidad and Tobago and the United States that her holding was unlawful, eventually filing a motion for relief under 28 U.S.C. § 2255.[91] The district court, following Trinidad and Tobago's earlier decision, found the existence of a valid treaty and denied the defendant's petition.[92]

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80. *Id*. *See also* Charles D. Siegal, *Individual Rights under Self-Executing Extradition Treaties – Dr. Alvarez- Machain's Case*, LOYOLA OF L.A. INT'L AND COMP. L. REV. (June 1, 1991).

81. 109 F.3d 165 (3d Cir. 1997).

82. *Id* at 167.

83. *Id.*

84. *Id*. at 166.

85. *Id.*

86. *Id.* at 166.

87. *Id.* at 167.

88. *Id*.

89. *Id*.

90. *Id*.

91. *Id.* at 167.

92. *Id*.

On review, the Third Circuit held that even if the defendant had "brought suit invoking the treaty or the Rule of Specialty, she would lack standing."[93] The court reached this answer by examining other case law, all of which concluded that an individual does not possess the proper standing to challenge a violation of an international treaty in absence of protest by their home country.[94] The court further stated: "[w]here the validity of the extradition treaty itself has been challenged, a petitioner like Saroop has standing."[95] By including this statement, the court clarified that while a defendant cannot bring suit alleging the violation of a treaty[96] and does not have standing to invoke the rule of specialty, a defendant does have a viable position to claim that a treaty is invalid all together.[97]

Here, the defendant failed to make an appropriate challenge, but it appears that even if she had, she would have lost.[98] The Third Circuit ultimately found the existence of a valid extradition treaty between the United States and Trinidad and Tobago by looking at the intent and actions of the parties.[99] The court further recognized that the lack of an express confirmation of an extradition treaty between two countries is not dispositive of whether a treaty exists in fact.[100]

3. The Sixth Circuit's Decision in *United States v. Fontana*[101]

In *United States v. Fontana*, a defendant was extradited from Canada on twelve federal child-pornography related charges.[102] He ultimately plead guilty to four of the twelve charges.[103] At sentencing the judge took into account that after he was arrested, investigators discovered images and videos on his computer, of over fifty females, including

93. *Id*. at 168.

94. *Id*. *See also* United States v. Riviere, 924 F.2d 1289, 1300-01 (3d Cir. 1991); Matta-Ballesteros v. Henman, 896 F.2d 255, 259 (7th Cir. 1990). This court noted that in *Riviere*, the defendant alleged that his extradition from Dominica violated the treaty and the Rule of Specialty and thus precluded his prosecution for offenses involving firearms. The court disagreed with the defendant on the ground that he lacked proper standing because the power to challenge a treaty violation and the Rule of Specialty rests with the signatory nation, not individuals.

95. *Id*.

96. If a defendant cannot bring suit alleging the violation a treaty, the defendant therefore cannot possess standing to challenge its terms.

97. *US ex rel. Saroop*, 109 F.3d at 168.

98. *Id.*

99. *Id*. at 171.

100. *Id*.

101. *Fontana*, 869 F.3d at 464.

102. *Id*. at 465.

103. *Id*.

minors, of which he had also victimized.[104] None of the additional materials found on the defendant's computer had been the basis for his extradition.[105]

The defendant in this case posed as a sixteen-year-old boy on Omegle.com, connected with a fifteen-year-old girl in Michigan, convinced her to take off her clothing via webcam, while tricking her into thinking that his webcam was broken.[106] He then recorded this and placed himself into multiple aspects of her life by blackmailing her into performing sexual acts via webcam on her friends, and ultimately emailed the photographs he had taken to her mother and over eighty members of her church.[107]

On the defendant's appeal of the district court judge's discussion of the subsequently discovered crimes, the court looked at 18 U.S.C. § 3553, Imposition of a Sentence.[108] The defense argued that the sentencing judge wrongly considered the additional victims, in violation of the United States and Canada's extradition treaty's "specialty" provision which required that a defendant only be detained, tried, or punished for crimes which he was extradited.[109]

The Sixth Circuit ultimately held that while extradited persons may defend their criminal prosecution as beyond the scope of their extradition,[110] this particular defendant was not to be held accountable for the additional information obtained subsequent to his arrest.[111] Since the information being brought into sentencing was directly related to the crimes for which he was extradited for, discussion of them was proper.[112] The court further held that the treaty between the United States and Canada did not preclude taking into account activity that is the basis for the extradition in determining the punishment for the crimes on which the extradition was based, so long as such consideration does not affect the statutory range of punishment.[113] In this situation, without consideration of the uncharged victims, the defendant's net offense level was already above the possible maximum sentencing guidelines, essentially making any additional information

104. *Id*. at 466.

105. *Id*.

106. *Id.*

107. *Id*.

108. *Id.* Sub-(a) of §3553 refers to factors to be considered in imposing a sentence.

109. *Id*.

110. The holding that extradited persons may defend their criminal prosecution as beyond the scope of their extradition is consistent with United States v. Rauscher, 119 U.S. 407 (1886) and consistent with rulings by the 11th Circuit, 10th Circuit, 9th Circuit, and 8th Circuit. *Id.* at 468.

111. *Id*. at 467.

112. *Id*. at 469.

113. *Id.* at 466.

obtained relating to prior victims irrelevant.[114]

The Sixth Circuit noted that while a defendant may typically possess the requisite standing to object, that power is not absolute. The court stated that an individual has the opportunity to raise any objection that the individual's home nation may have claimed, but the right to object ceases to exist when the individual's home nation waives its objection rights.[115] Therefore, the opportunity given to defendants to attack their sentencing or the addition of crimes post-extradition is a luxury that can easily be taken away by the home country.[116] Ultimately the court found that there was nothing improper about the district judge including additional comments regarding the subsequently obtained materials at the defendant's sentencing hearing.[117] In reaching their conclusion, the majority opinion rejected numerous assertions made by the court in *United States ex rel. Saroop*[118] by stating that their discussion was purely dictum.[119] The court further claimed that the *Saroop* decision was essentially irrelevant in this case because the cases cited to in the former decision mainly "involved foreign government *consent* to limit the international specialty obligation, or did not involve the principle of specialty at all."[120] Thus giving rise to the circuit split in question.

III. DISCUSSION

In 1997, the Third Circuit in *United States ex rel. Saroop* stated that a criminal defendant lacked the requisite standing to "invoke[e] the treaty or the Rule of Specialty."[121] The court noted that while a defendant may assert that a treaty is invalid, he may not assert that there has been a violation of a valid, existing treaty, absent backing by the signatory nation.[122] This line of reasoning rested on the premise that "extradition agreements run between sovereigns, not individuals," therefore when a country consents to the extradition of a defendant, the defendant lacks standing to challenge because his rights are derivative.[123] More recently, the Sixth Circuit in *Fontana* disagreed, finding that a defendant does possess proper power to evoke the specialty provision. Section (A)

114. *Id. at* 467.

115. *Id.* at 469 (quoting United States v. Puentes, 50 F.3d 1567, 1572 (11th Cir. 1995)).

116. *Id*.

117. *Id*. at 473.

118. The court specifically rejected the court's statement that had the habeas petitioner brought a specialty claim, she would lack standing.

119. *Fontana*, 689 F.3d at 470.

120. *Id*.

121. *United States ex rel. Saroop*, 109 F.3d at 168.

122. *Id*. at 167.

123. *Id*. at 168.

discusses why it is inappropriate for only signatory nations to have the power to challenge a treaty's validity, while section (B) advocates for the ability of individuals to challenge a treaty generally. Section (C) discusses the specialty provision specifically and concludes that a defendant should possess proper standing to evoke the rule of specialty to challenge sentencing. Lastly, section (D) discusses why the crimes that a defendant committed prior to his extradition, that were not the basis of his extradition, should be disregarded in all aspects of the judicial proceedings regarding the crimes that were listed in his extradition request.

A. Allowing Only Signatory Nations to Challenge Treaty Validity is Inappropriate

It is incorrect and unjust to state or to apply the law under the assumption that only signatory nations may challenge a violation of a treaty. The long accepted general rule is that treaties do not convey individual rights.[124] However, while treaties do not convey these rights, they "may create judicially enforceable rights for individuals."[125] The main issue with allowing only signatory nations to challenge actual or potential treaty violations is that there may not be an incentive for them to do so. In fact, there may be an incentive for them *not* to do so.[126] States often have broader interests than those of individuals and therefore lack the more specialized and specific needs that individuals possess. In a situation where a country is facing political pressure to convict a criminal, the signatory nation may agree to extradite under even the most obnoxious requests. For example, if a person is a criminal in their home country and the home country is having difficulty prosecuting, they may choose to extradite to be relieved of their duty and in an attempt to please the public. This situation is illustrated by the extradition of El Chapo. Mexico, embarrassed after El Chapo tunneled himself out of what was considered to be the most secure prison in Mexico, decided it was better to hand him over to the United States, rather than risk his escape again, and also to avoid further straining relations with the United States.[127]

Other potential issues also arise when only signatory nations have standing to challenge treaty violations. The signatory nation may be incentivized to not challenge a violation if they feel pressure from their

124. Siegal, *supra* note 80, at 781, fn. 90.

125. *Id*. at 781.

126. An example of when a country may have an incentive not to do so is in cases involving extradition of a criminal defendant.

127. Ahmned, *supra* note 1.

citizens or other countries. The nation may choose to comply with the request to avoid jeopardizing certain markets or relationships. This may result from a general fear that challenging requests or agreements may lead to adverse effects on the signatory nation in many internal and external aspects, including trade and governance.

Furthermore, it is not proper to only allow signatory nations to challenge treaty violations when treaties themselves can be internally ambiguous. In this sense, it appears suspicious to allow only signatory nations to challenge a treaty that was supposed to have been carefully reviewed and signed, especially when the treaty has an impact on a country's citizenry. A treaty violation claim will likely not arise until an individual is adversely impacted by the treaty's implementation. An individual will not have standing or a purpose to attack the treaty as a whole until they have been adversely impacted, at which point challenging the overall validity becomes less important than the issue at hand the individual actually wishes to challenge. It is clearly inconsistent to state that individuals may only challenge the overall validity of the treaty. If an individual can challenge a treaty as a whole, it does not follow logically that the individual cannot challenge a piece of that whole. By opening the door for the validity of a treaty to be challenged, the door must be held open to all other inquiries stemming from the treaty.

In numerous cases the Supreme Court seems to be operating under the presumption that an individual possesses the requisite standing to assert a treaty violation.[128] The decision to find that a defendant possesses appropriate standing is intertwined with the Court's finding that they lack jurisdiction in cases in which a defendant appears before them to claim that a treaty has been violated.[129] While the Supreme Court appears to be leaning towards a defendant having proper standing, case law shows that lower courts are not following suit. It is evidently necessary that the Supreme Court clarify what standard should apply in treaty violation cases.

Many scholars also argue that persons should have the right to challenge a treaty. The case of *Sosa v. Alvarez-Machain*[130] is frequently discussed by scholars when it comes to individuals claiming violations of a treaty.[131] In *Sosa*, the defendant was looking to challenge the basis

128. Siegal, *supra* note 80, at 786. *See also* United States v. Rauscher, 119 U.S. 424, 431 (1886); Johnson v. Browne, 205 U.S. 309 (1907); Cosgrove v. Winney, 174 U.S. 64 (1899); Cook v. United States, 288 U.S. 102 (1933).

129. Siegal, *supra* note 80, at 786-89.

130. *Sosa*, 542 U.S. at 692. In *Sosa*, a Mexican national was kidnapped by DEA agents and brought to the United States to stand trial for the murder of a DEA agent. This case did not involve the specialty provision.

131. *See generally* Siegal, *supra* note 80.

of his extradition but, under existing case law and treaty jurisprudence, he was unable to do so on his own. Fortunately for him, he was able to attract the attention of the Mexican government. With the Mexican governments backing, the United States was essentially forced to dismiss the indictment against Alvarez- Machin. The bizarre set of facts in this case is the reason that many scholars use it to argue that an individual should be able to challenge a treaty violation. Such facts indicate that, in some circumstances, it appears to be a crucial international human rights violation to not allow a defendant to challenge the treaty and thus his basis for extradition.

In summation, individuals should be found to possess the standing necessary to challenge a violation of a treaty. Allowing this to occur should not be absolute and it should be necessary for a claimant to show a tie to damage, whether that be physical or monetary, which will be discussed in more depth below. Furthermore, it is not appropriate to only allow signatory nations to bring actual or potential treaty violation claims. A bright-line rule works ineffectively in this type of setting because signatory nations may not always have an individual's best interests in mind, especially when potential secondary effects of non-compliance are taken into consideration.

B. Individuals Should Possess Standing to Challenge the Violation of a Treaty

A definitive answer that citizens do not possess the power to challenge the validity of a treaty is inappropriate. Generally speaking, a defendant, or anyone else who is adversely impacted by a treaty, should possess the requisite standing to challenge a violation. An individual should be able to step into the shoes of the signatory nation to challenge overall validity and specific violations, and the signatory nation should never be given the opportunity to waive the individual's rights and preclude their objections.

However, to challenge a treaty, it should be a prerequisite that the treaty has a negative implication, whether direct or indirect, physical or monetary, on a particular individual, such that the reasonable person would find it necessary for that individual to possess the appropriate standing to challenge. In such a situation, a defendant will be directly impacted by the treaty and have standing to challenge its validity. The same may be true if a similar rationale is employed to an individual's family members. Under the latter principle, an applicable example would be the family members of an incapacitated defendant. The family members would be able to step into his shoes to argue that a violation of a treaty has taken place on his behalf.

While some individuals should be allowed to challenge treaty violations, it is not reasonable to say that *anyone* may challenge a violation. Without some sort of personal connection or tie to the actual treaty violation,[132] it is simply not plausible to allow just anyone to challenge any actual or potential treaty violation. To allow this would allow for an overflow of violation claims burdening the legal system. In allowing individuals who are directly, or at least more closely, impacted to bring treaty violation claims, we may still see attorney's seeking out client's in attempt to find that violation. However, the system would likely not be opened to the floodgates by individuals who have not felt an impact by the alleged violation.

A potential issue in allowing individuals to bring treaty violation claims, especially when they themselves are directly impacted, is that they may see the use of this measure as a way to slow down certain processes, which is more relevant in a criminal context. While there is potential for this vehicle to become a stalling tactic, this factor alone should not place an overall ban on an individual's right to challenge.

Cost could be a further barrier in attempt to bar these claims. Allowing all claims to proceed would certainly be a costly matter, one that can be addressed by implementing a vetting process. This may include taking a look into the merits of the case when it is filed or within a specified time thereafter to determine whether the facts and argument warrant the claim to proceed. An alternative avenue to this may be establishing clear guidelines that must be satisfied to even proceed to the route discussed in the preceding sentence. While two theories are mentioned above, it may prove difficult in practice to impose clear guidelines. A case-by-case analysis is likely more appropriate due to the broad-range and naturally subjective nature of the claims that would be submitted to the court.

C. A Defendant Should Be Able to Invoke Rules of Specialty

A criminal defendant should possess the power to invoke the rules of specialty if a provision exists in the relevant extradition treaty. While opening the door for many defendants to invoke these rules may be time consuming and potentially costly, those are insufficient reasons to place a blanket ban on their use. If the rules of specialty may be used as a stalling tactic in some situations, it is not evident that all extradited criminal defendants will challenge intending to achieve this result. Allowing a defendant to invoke specialty will result in a greater sense of

132. Perhaps a personal connection or tie that may suffice in this instance could be anything from incarceration to financial hardship or extreme emotional distress. This standard could also be applied to close family members of a defendant.

equity. Furthermore, simply allowing the rule to be invoked does not require the court to grant or approve all requests under these provisions.

Under current jurisprudence, and contrary to numerous pieces of case law, a defendant must have standing before he can make a claim that his rights have been violated under an extradition treaty.[133] It should, although it does not currently, logically flow that a defendant must be able to challenge the treaty, in whole or in part, to validly make a claim that his rights have been violated. Although extradition treaties are essentially contracts between nations, these contracts should not be viewed to displace the basic human rights that individuals are afforded. By not allowing a defendant to challenge a violation of a treaty that adversely affects him, those basic rights are put at risk.

The freedom to contract is, and has been, a respected part of law in the United States. It is important to note that the rule of specialty is a contractual provision. The United States has effectively contracted with other nations, to govern the relationship between them. Since the citizens of the signatory nations have the potential to be adversely impacted by the provisions entered into, they should be given the right to challenge those provisions when they believe that they are being held as a result of something contrary to the treaty's written terms. By disallowing a defendant to challenge his extradition under the existence of a specialty provision, the government should not only be subject to potential human rights violations, but they also open the door to breach of contract issues. In absence of a complaint from the signatory nation, the affected person should acquire the rights that the signatory nation possesses to challenge the claim. If his rights are per se derivative, he should possess the ability to invoke the rule of specialty. To avoid greater injustice, a signatory nation should not possess the power to waive all claims involving violations. That opportunity should simply flow to the affected person.

D. An Extradited Defendant's Other Crimes Should be Excluded from Sentencing

It is contrary to public policy and international law to suggest that a foreign defendant should be tried for crimes in which he was not extradited for. This is consistent with the original stated purpose of the specialty provision: to maintain trust between nations who agree to extradite individuals. Under a similar rationale, the other crimes, for which a defendant was not extradited, should not have a presence in any

133. While case law suggests that a defendant may challenge the validity of the treaty as a whole, it also suggests that a defendant may not challenge individual pieces to that treaty.

step of a defendant's judicial proceedings.

Only crimes a defendant is extradited for, and actually convicted of, should be presented. While special agreements do exist between countries to provide a roadmap with the specifics of extradition and other matters of foreign policy, any defendant that is brought to the United States should be treated as if he is a United States citizen being tried in the United States. The policies and procedures should not vary, unless specifically authorized or stated in a contract by the countries and acknowledged by the defendant.[134] Just as a presentence report is often prepared by probation officers for daily handlings in the court system, a presentence report should also be prepared for a defendant who is extradited to the United States.[135] The presentence report may contain crimes only in which the defendant was convicted of in other jurisdictions, and may not contain crimes in which United States authorities believe that the defendant committed, but was not convicted of, prior to said extradition.

While the Sixth Circuit was correct in invoking the rules of specialty, it was incorrect in allowing even the mere discussion of other crimes allegedly-committed by the defendant, regardless of whether or not it affected his sentence. If it was deemed so necessary to include information of his past crimes, he should have been prosecuted for them, or returned to Canada so that a new extradition request could be processed through Canadian authorities. Regardless of whether or not (1) a foreign individual is put on trial or (2) he or she committed obscure crimes, foreign individuals still have basic rights and one of those rights should be the exclusion of any mention of crimes that he or she was not charged with or convicted of. Without this right, there is, at the very least, a remote chance that the defendant will be prejudiced by the inclusion or discussion of these crimes.

The Sixth Circuit's decision to allow discussion of additional crimes was not proper, even though the crimes were deemed to be so related to what the defendant was being sentenced for. This, alone, is not an appropriate justification for allowing such related crimes to be discussed. It is never appropriate for a judge to essentially assume guilt for these uncharged, and thus unproven, crimes—something that occurred when the judge discussed the crimes that the defendant likely committed pre-extradition. The Sixth Circuit allowed the particular discussion of the defendant's crimes to occur because they noted that, regardless of the fact that the additional victims were brought up at

134. If he objects to the change, he must be given an opportunity to be heard.

135. Paul Bergman, *Your Presentence Report and How to Improve It*, NOLO, https://www.nolo.com/legal-encyclopedia/your-presentence-report-how-improve-it.html (last visited Apr. 6, 2018).

sentencing, the defendant was given a lower sentence than the recommended life sentence. Essentially, the court based its justification on the fact that the information's admission allegedly had no impact. An alternative argument is that if the information had no impact, it should not have been allowed in because it wastes the time and resources of all parties involved. If the inclusion has no impact, the information is irrelevant. Allowing it to be spoken is arguably only working to make a mockery of the defendant in a setting (a sentencing in particular) where he is unable to defend himself. Allowing information of alleged, but uncharged, crimes into any stage of the judicial process promotes injustice and is an infringement on basic rights.

IV. CONCLUSION

On February 12, 2019, El Chapo was found guilty by a jury on all ten counts of a superseding indictment.[136] It does not appear that there was an issue with El Chapo effectively being charged with crimes not listed in the extradition request between the United States and Mexico.[137] If the prosecution had attempted to tack on additional crimes, without following the proper protocol, it is unlikely that the Mexican government would have stepped in to claim a violation of the rule of specialty.[138] If this situation had arisen, the defense could have, and should have, argued that the Sixth Circuit's holding in *United States v. Fontana* controls and that El Chapo should only be tried for the crimes upon which his extradition was based.

136. *"El Chapo" verdict: Notorious drug lord convicted in U.S. trial*, CBS NEWS (Feb. 12, 2018), https://www.cbsnews.com/news/el-chapo-guilty-verdict-today-trial-of-notorious-drug-lord-joaquin-guzman/.

137. When El Chapo was brought to the United States, the fourth superseding indictment charged him in seventeen counts. Another superseding indictment was later issued, charging him in ten counts. Ultimately, El Chapo was tried on the ten-count indictment. Press Release, Department of Justice, Detention Memo (Jan. 20, 2017), https://www.justice.gov/opa/press-release/file/929896/download.

138. This assertion is based upon Mexico's previous embarrassment in its dealings with El Chapo.