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United States v. Alvarez-Machain: Extradition and the Right to Abduct

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CASE NOTE

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He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee.[1]

Stirring international relations, a divided Supreme Court recently held that a United States-sponsored abduction of a Mexican national from Mexico did not violate an extradition treaty between the two nations.[2] Although admitting its decision "may be in violation of general international law principles," the majority reasoned that an extradition treaty not explicitly forbidding the kidnapping of a citizen from his nation is not violated by such a kidnapping.[3] The three dissenting justices labeled the majority's opinion "monstrous" and forbode that, "courts throughout the civilized world . . . will be deeply disturbed."[4] As predicted by the dissenters, the international community expressed its outrage.[5] The vehement objections to the

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[1] 12 FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 97 (Dr. Oscar Levy, ed., Helen Zimmern trans., 1909).

[2] United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992).

[3] *Id.*

[4] *Id.* at 2206 (Stevens, J., dissenting). Justice Stevens was joined by Justices Blackmun and O'Connor.

[5] Mexico: *"Right to Abduct" Sours Mexico-US Relations*, 1992 LATIN AMERICAN NEWSLS., LTD., July 16, 1992, at 8; *Mexico is Upset*, THE HOUSTON CHRON., July 28, 1992, at 12 ("The U.S. Supreme Court decision was a blow to the pride of a nation which has a long memory of high-handedness by its Northern neighbor."); Canada: John Hay, *Even Stupidest U.S. Judge Should Know Kidnapping's a Crime*, CANADA'S WORLD, July 15, 1992, at A11 ("Canada with others should be persuading the U.S. government to renounce publicly and completely the doctrine that it is legally free to commit kidnapping in other countries."); The Caribbean: *"Right to Abduct" Rejected by Angry Caricom Leaders*, 1992 LATIN AMERICAN NEWSLS. LTD., July 23, 1992, at 8 ("As a world leader, the U.S. ought to take a better course than that of a world bully."); Argentina: *Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.*, NOTI-SUR-SOUTH AMERICAN AND CARRIBEAN POL. AFFS., June 30, 1992, at *4 (President described "the 'erroneous' decision as a 'horror.' "); Bolivia: *Id.* at *4-5 (Quoting the Justice Minister: "the U.S., with the title of owner of the world, is declaring that there are no borders, sovereign states or legal organizations in the world."); Brazil: *Id.* at *5 (Discussing the Foreign Minister's condemnation of the decision "as contrary to the Organization of American States (OAS) charter"); Chile: *Id.* (Noting that the government "simply does not accept (the US Supreme Court decision)."); Colombia: *Id.* (The Justice Minister told reporters that "the decision is antithetical to 'years of struggle for consolidation' of several precepts of international law"); Cuba: *Id.* ("The U.S. has no right at all — nor has anyone outside its frontiers granted it the right — to impose its gun law, its law of the Wild West, its law of the jungle, its lynch

Court's decision by the international community may signal that the decision and its philosophical underpinnings represent the harbinger of a new era of border raids, bounty hunters, and vigilante justice.

This Note explores the implications of the Supreme Court's decision in the context of international abductions of defendants subsequently brought to trial in the United States.[6] In Part I, the factual background of this case and the court's holding are described. Parts II and III provide the background law necessary for a clear understanding of the Court's analysis and its application of the law, which is described in Part IV. Finally, in Part V, the Court's decision is analyzed and critiqued. The Note concludes that the case severely damages the integrity and legal value of treaties to which the United States is a party. Foreign states also must question whether a promised "new world order" will require them to sacrifice their sovereignty in furtherance of a particular domestic agenda.

I. Factual Background

On April 2, 1990, Dr. Humberto Alvarez-Machain, a resident and citizen of Mexico, was kidnapped at gunpoint from his office by thugs paid by the United States Drug Enforcement Agency ("DEA").[7] Dr. Alvarez-Machain allegedly was involved in the 1985 torture/murder of DEA agent Enrique Camarena.[8] Specifically, "the DEA believes that [Dr. Alvarez-Machain] . . . participated in the murder by prolonging agent Camarena's life so that others could further torture and interrogate him."[9] Dr. Alvarez-Machain was indicted by

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laws, on other countries."); Peru: *Id.* at *6 (quoting a Justice Court president: the decision "constitutes an 'attack on the sovereignty of foreign countries.' "); Uruguay: *Id.* ("The Senate voted unanimously . . . to condemn the . . . decision."); Venezuela: *Id.* (Considering a revision of its extradition treaty with the United States); United States: Ruth Wedgwood, *A Dangerous Precedent*, THE NAT'L L.J., July 23, 1992, at 15 ("The court's opinion met widespread public outcry. American citizens may see more plainly than the Supreme Court or the Department of Justice that the structure of international law protects our own security."); Elka Worner, *ACLU Demands World Court Ruling on Kidnapped Mexican Doctor*, UPI, July 28, 1992, *available in* LEXIS, Nexis Library, Int'l File ("A dozen Spanish-speaking countries demanded that the U.N. General Assembly act on an international resolution seeking a World Court ruling in the case.").

[6] For an in-depth examination of questions surrounding jurisdiction of state courts over defendants obtained by forcible abduction from other states, see Austin W. Scott, Jr., *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953).

[7] United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd sub. nom*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992). Dr. Alvarez-Machain was abducted at 7:45 pm after treating one of his patients. *Id.* at 603. He is a medical doctor with a specialty in obstetrics and gynecology. *Id.* at 602.

[8] Camarena was kidnapped on February 7, 1985 outside an American consulate building in Mexico. His mutilated body was found a month later approximately sixty miles away from the place of his abduction. *Caro-Quintero*, 745 F. Supp. at 601-02.

[9] *Alvarez-Machain*, 112 S. Ct. at 2190.

a grand jury and awaits trial on these allegations.

Before resorting to forcible abduction, the DEA participated in informal negotiations with representatives of the Mexican government. After a series of discussions, the negotiations failed.[10] Instead of proceeding with a formal extradition request, the DEA offered to pay for information leading to the arrest of the individuals involved in the Camarena slaying.[11] This offer for information eventually evolved into a $50,000 bounty, plus expenses, for the delivery of Dr. Alvarez-Machain to the DEA in the United States.[12] The DEA agent who made the offer confirmed that "the abduction and the final terms of the abduction had been approved by the DEA in Washington, D.C., and [the agent] believed that the United States Attorney General's Office had also been consulted."[13] In early April of 1990, the planned abduction succeeded and Dr. Alvarez-Machain was delivered to the DEA in El Paso, Texas.

The Mexican government immediately reacted by sending a diplomatic note to the State Department which requested a detailed accounting of possible U.S. involvement in Dr. Alvarez-Machain's abduction.[14] The note stated that "if it is proven that these actions were performed with the illegal participation of U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered."[15] In a second diplomatic note, Mexico demanded Dr. Alvarez-Machain's return and stated that his kidnapping was accomplished with the knowledge that U.S. government agents violated the United States-Mexico Extradition Treaty.[16] In a third diplomatic note, Mexico requested the extradition of the DEA agent who offered the reward for Dr. Alvarez-Machain's abduction.[17]

Based upon Mexico's protest over his abduction, Dr. Alvarez-Machain challenged the jurisdiction of U.S. courts to try him for his alleged role in the Camarena slaying. Specifically, he alleged that the Extradition Treaty was violated because Mexico had protested his abduction. Violation of the Extradition Treaty was an affront to a U.S. court's jurisdiction over Dr. Alvarez-Machain. The district court agreed and held that the only suitable remedy was to return him to

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[10] *Caro-Quintero*, 745 F. Supp. at 602.

[11] *Id.* at 603. An individual DEA agent made the offer but testified that "he received authorization to make this offer not only from his superiors in the Los Angeles division, but also from officials in Washington, D.C., including . . . [the] Deputy Director of the DEA." *Id.*

[12] *Id.*

[13] *Id.* at 603.

[14] *Id.* at 604.

[15] *Id.*

[16] Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty].

[17] *Caro-Quintero*, 745 F. Supp. at 604. The irony of Mexico seeking extradition through proper channels of a U.S. agent responsible for flouting the formal extradition process by plotting an abduction is obvious.

Mexico, in accordance with the "long standing principle of international law that abductions by one state of persons located within the territorial sovereignty of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped."[18] The Ninth Circuit Court of Appeals summarily affirmed.[19] The Court of Appeals based its affirmance on its recent opinion in *United States v. Verdugo-Urquidez*.[20] In *Verdugo-Urquidez*, the Ninth Circuit held that "extradition treaties proscribe government-sponsored kidnappings."[21]

On appeal, the Supreme Court reversed,[22] holding that the Extradition Treaty was not violated because it was never invoked. Because nothing in the Extradition Treaty specifically forbade forcible abductions, the Court reasoned that the Extradition Treaty was not violated by such an abduction.[23] Therefore, the kidnapping was not even an extradition action. Finding that a treaty was not involved, the Court held that forcible abduction was not a defense to a court's jurisdiction over the defendant.[24] The Court based this holding on a rigidly literal interpretation of the Extradition Treaty and nineteenth century Supreme Court precedent. An appalled trio of dissenters called the decision "monstrous" and predicted international condemnation.[25]

II. The *Ker/Frisbie* Doctrine: Abduction and Jurisdiction

In *Ker v. Illinois*,[26] the Supreme Court noted that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such a court." The defendant Ker, an American citizen, fled from the United States to Peru after being convicted for larceny in Illinois.[27] The United States issued a warrant for Ker and sent a messenger to Peru to receive Ker from the Peruvian authorities, in accordance with an extradition treaty in force between the United States and Peru.[28] When he arrived in Peru, instead of presenting the papers to the Peruvian government or making any request of

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[18] *Id.* at 614 (quoting United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974).

[19] United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (*per curiam*), *rev'd*, 112 S. Ct. 2188 (1992).

[20] 939 F.2d 1341 (9th Cir. 1991).

[21] *Id.* at 1351. Similar to Dr. Alvarez-Machain, Verdugo-Urquidez also was a suspect in the Camarena murder and was kidnapped from Mexico at the behest of the U.S. DEA. Mexico also protested this abduction and sought the return of the defendant.

[22] *Alvarez-Machain*, 112 S. Ct. at 2197.

[23] *Id.* at 2194.

[24] *Id.* at 2197.

[25] *Id.* at 2206 (Stevens, J., dissenting).

[26] 119 U.S. 436, 444 (1886).

[27] *Id.* at 437.

[28] *Id.* at 438.

them,[29] the messenger "forcibly and with violence" arrested Ker.[30] Peru did not protest Ker's abduction. The Court held that the manner in which the defendant Ker was brought to the jurisdiction did not violate due process and the indictments would not be dismissed solely because of the forcible abduction.[31] Before reaching its holding, the Court also noted that "the facts show that it was a clear case of kidnapping within the domains of Peru, without any pretence [sic] of authority under the treaty or from the government of the United States."[32] Nevertheless, Peru's sovereignty was only marginally infringed because its ability to protect its nationals was not implicated, nor was its ability to protect a treaty right.

Sixty-six years later, the Court in *Frisbie v. Collins* reaffirmed *Ker* by stating:

> This Court has never departed from the rule announced in *Ker v. Illinois*, 119 U.S. 436, 444, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[33]

Collins alleged that while he was living in Chicago, he was "forcibly seized, handcuffed, [and] blackjacked" by Michigan police officers and taken to Michigan for trial.[34] Collins sought his release from a Michigan prison,[35] claiming that his trial and conviction violated federal law and the Due Process Clause of the Fourteenth Amendment and therefore was invalid.[36] Applying the *Ker* decision, the Court denied Collins any relief from his conviction.[37] Again, *Collins* did not implicate national sovereignty or a state's ability to assert rights conferred by a bilateral treaty.

The holdings of these cases developed into the *Ker/Frisbie* doctrine.[38] Under this doctrine, "due process [i]s limited to the guaran-

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[29] It has been suggested that the messenger could not gain access to the Peruvian authorities because Chilean forces occupied the city. Andrew M. Wolfenson, Comment, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 723 n.96 (1990).

[30] *Ker*, 119 U.S. at 438.

[31] *Id.* at 440.

[32] *Id.* at 443.

[33] 342 U.S. 519, 522 (1952).

[34] *Id.* at 520.

[35] Collins was serving a life sentence for murder. *Id.*

[36] *Id.*

[37] *Id.* at 523.

[38] United States v. Toscanino, 500 F.2d 267, 272 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

tee of a constitutionally fair trial, regardless of the method by which jurisdiction [i]s obtained over the defendant."[39] Until the Second Circuit's decision in *United States v. Toscanino*,[40] the *Ker/Frisbie* doctrine remained essentially unchanged and unchallenged.[41]

The Second Circuit's holding in *Toscanino* became recognized as an exception to the broad reach of the *Ker/Frisbie* doctrine.[42] Toscanino, a citizen of Italy, was charged in New York with conspiracy to import narcotics.[43] After a jury found Toscanino guilty, he appealed by challenging the jurisdiction of the district court.[44] Toscanino alleged that his presence before the court was illegally obtained because he was kidnapped from his home in Uruguay and brought to New York only after being detained for almost three weeks of interrogation and torture.[45] The treaty between Uruguay and the United States was not invoked by the United States, nor did Uruguay protest the abduction.[46] The court held that when a defendant alleges and shows acts of torture so outrageous as to shock the conscience, a court would be forced to divest itself of jurisdiction.[47] The court based its ruling by examining the Supreme Court's more recent decisions broadening the concept of due process to include protecting the accused before trial.[48] Based on this expansion of due process,

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[39] *Id.*

[40] 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

[41] *But see* United States v. Edmons, 432 F.2d 577, 583 (2d Cir. 1970) ("Whether the Court would now adhere to them must be regarded as questionable."); Virgin Islands v. Ortiz, 427 F.2d 1043, 1045 (3d Cir. 1970) ("We recognize that the validity of the *Frisbie* doctrine has been seriously questioned because it condones illegal police conduct.").

[42] *See* Wolfenson, *supra* note 29, at 722-26.

[43] United States v. Toscanino, 500 F.2d 267, 268 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974), *motion to dismiss denied on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

[44] *Id.* at 269.

[45] *Id.* Toscanino alleged that he was knocked unconscious by a blow to the head, thrown into the back of a car after being lured to a deserted area in the City of Montevideo and driven to the Uruguayan/Brazilian border. Toscanino also alleged that at the border, a group of Brazilians, under U.S. control, took custody of him and over the next three weeks denied him sleep and nourishment except intravenously carefully calculated to be the exact amount needed to keep him alive. Additionally, he allegedly was forced to walk up and down a hallway for several hours at a time and if he stopped, he was kicked and beaten. When he did not respond to a question, Toscanino claimed his fingers were pinched with pliers and alcohol was flushed into his eyes and nose as were other fluids forced up his anal cavity. United States agents also allegedly attached electrodes to his earlobes, toes and genitals and sent jolts of electricity cursing through his body. *Id.* at 269-70.

[46] *Id.* at 276.

[47] *Id.* at 274-75. The "shocks the conscience" standard was first applied in Rochin v. California, 342 U.S. 165, 172-73 (1952). In *Rochin*, the state police officers frustrated the defendant's attempt to swallow two morphine capsules by taking the defendant to a hospital where a doctor induced vomiting.

[48] *Toscanino*, 500 F.2d at 272. *See* United States v. Russell, 411 U.S. 423, 430-31 (1973) (entrapment defense); Mapp v. Ohio, 367 U.S. 643 (1961) (evidence from illegal search and seizure); Miranda v. Arizona, 384 U.S. 436 (1966) (evidence absent warning of rights); Wong Sun v. United States, 371 U.S. 471 (1963) (fruits of unlawful arrest); Silverman v. United States, 365 U.S. 505 (1961) (use of electronic listening devices). *See*

the Second Circuit reasoned that the *Ker/Frisbie* view of due process must yield where such heinous acts were alleged.[49] The court also based its holding on the fact that the *Ker*[50] and *Frisbie*[51] cases could be removed from the matter at issue: "If distinctions are necessary, *Ker* and *Frisbie* are clearly distinguishable . . . . Neither case, unlike that here, involved the abduction of a defendant in violation of international treaties of the United States."[52] The court further stated, "*Ker* does not apply where a defendant has been brought into the district court's jurisdiction by forcible abduction in violation of a treaty."[53] Thus, although the Supreme Court did not rule on the *Toscanino* case, a clear distinction was made when treaty rights were threatened by vigilante justice. Both due process principles and recognized international law limit an unrestrained application of *Ker/Frisbie* kidnapping jurisdiction.

III. The Extradition Process

Extradition is the "surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which being competent to try and punish him, demands the surrender."[54] Extradition is not a requirement of customary law and many nations, including the United States, do not extradite except as bound to do so by a treaty.[55] Usually if an extradition treaty is in effect between the requesting countries, a person will be extradited only by the requesting country acting in accordance with the conditions set forth

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generally Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971).

This reasoning may be precarious today after the Supreme Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), in which the Court held that non-resident aliens are not protected by the Fourth Amendment prohibition on unreasonable searches and seizures when carried out by U.S. agents on foreign soil.

[49] *Toscanino*, 500 F.2d at 275. The court noted:

> Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield. Accordingly we view due process as now requiring a court to divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.

Id. The court also stated, "we think a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into a territory of the United States by the methods alleged here." *Id.* at 276.

[50] 119 U.S. 436.

[51] 342 U.S. 519.

[52] *Toscanino*, 500 F.2d at 277.

[53] *Id.* at 278.

[54] BLACK'S LAW DICTIONARY 526 (5th ed. 1979).

[55] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 475 cmt. a (1987).

by the relevant extradition treaty.[56] Extradition chiefly occurs through diplomatic channels and such treaties generally detail a formalized process for making a request and require specific accompanying information.[57] The United States-Mexico Extradition Treaty at issue is no exception.

A. The United States/Mexico Extradition Treaty

If the United States sought extradition of Dr. Alvarez-Machain in accordance with the U.S.-Mexico Extradition treaty, the United States would have been required to accompany its request with specific documents containing a description of the offense, the facts of the case, the elements of the offense, the punishment for the offense, and other information.[58] Once Mexico made its decision whether or not to extradite Dr. Alvarez-Machain, the Mexican government would have promptly related its decision to the United States.[59] If Mexico decided not to extradite, it also would have had to state its reasons for the refusal.[60] Generally, if the procedures in the Extradition Treaty are followed, the requested country must extradite the individual requested.[61] Because Dr. Alvarez-Machain is a Mexican national, however, Mexico would have additional discretion under the Extradition Treaty to decide whether to extradite him. "Neither contracting party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it is deemed proper to do so."[62]

Acting outside the Extradition Treaty usurped Mexico's discretionary decision of whether to extradite Dr. Alvarez-Machain. On some occasions, nations allow extradition outside of their extradition treaties. The critical similarity to formal extradition, though, is that the violated nation *consents* to action outside its extradition treaty.

Since extradition treaties are "in the nature of contracts between nations," the signatory nations are free to waive the treaty's terms.[63] "Just as private parties may waive a term in a contract that is in the contract for his benefit, so a signatory to an extradition treaty may waive the requirement that the other signatory follow the procedures set forth in the treaty."[64] For any waiver to be effective, it must have been given voluntarily.[65] The waiver may come before or after the

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56 *Id.*
57 *See, e.g.*, The Extradition Treaty, *supra* note 16, art. 10, 31 U.S.T. at 5066-68.
58 The Extradition Treaty, *supra* note 16, art. 10, 31 U.S.T. at 5066.
59 *Id.* art. 14, 31 U.S.T. at 5069.
60 *Id.* art. 14, § 2, 31 U.S.T. at 5069.
61 *Id.* art. 1, 31 U.S.T. at 5061.
62 *Id.* art. 9, § 1, 31 U.S.T. at 5065.
63 *Verdugo-Urquidez*, 939 F.2d at 1352.
64 *Id.*
65 *Id.*

act of removal.[66] In either situation where the signatory nations operate outside an extradition treaty, the principal act violates the treaty, but the other nation's consent or failure to object to the act, waives any objection to the violation or ratifies the unlawful act.[67]

B. The Doctrine of Specialty

On the same day that the *Ker* decision was handed down, the Supreme Court decided *United States v. Rauscher*.[68] In *Rauscher*, the Court held that under the extradition treaty between the United States and Great Britain, a defendant could be tried only for the crimes for which he was extradited.[69] Rauscher was charged with murder on board an American ship on the high seas.[70] After the defendant was located in England, the United States immediately requested extradition for the crime of murder, and England surrendered him to be tried for this charge.[71] Once in the United States, Rauscher was indicted on a different charge.[72] After recognizing that "a treaty is the law of the land,"[73] the Court held that "the fair

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[66] *Id.* ("[A] nation may consent to the removal of an individual from its territory outside the formal extradition process *after the fact*, by failing to protest a kidnapping.").

Cases demonstrating prior consent to the removal or expulsion are: United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) ("Thailand initiated, aided and acquiesced in Valot's removal to the United States"); U.S. v. Lovato, 520 F.2d 1270, 1272 (9th Cir. 1975) ("routine expulsions by Mexican officers of an undesirable alien"), *cert. denied*, 425 U.S. 985 (1975); Stevenson v. United States, 381 F.2d 142, 143-44 (9th Cir. 1967) (Mexican police delivered defendant to Arizona sheriff); United States v. Kaufman, 858 F.2d 994, 998 (5th Cir. 1988) (placed on plane to U.S. by Mexican authorities), *reh'g denied*; 874 F.2d 242 (1989); U.S. v. Evans, 667 F. Supp. 974, 978-79 (S.D.N.Y. 1987) (involving deportation from Bermuda).

Cases demonstrating consent or acquiescence after the removal are: Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) ("Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest."), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988) (no objection from Panama); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) ("neither Guatemala nor Belize protested appellant's detention and removal to the United States"); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (no protest by Bahamian government); Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) (no allegation of a Canadian protest was made); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) (neither Argentina nor Bolivia objected), *cert. denied*, 421 U.S. 1001 (1975); United States v. Yunis, 681 F. Supp. 909, 916 (D.D.C. 1988) (no protest made by Lebanon or Cyprus), *rev'd*, 859 F.2d 953 (D.C. Cir. 1988).

[67] *Verdugo-Urquidez*, 939 F.2d at 1353. *See also* United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir.) ("The [extradition] treaty binds the two countries to surrender fugitives to one another under certain circumstances. It does not purport to limit the discretion of the two sovereigns to surrender fugitives for reasons of comity, prudence, or even as a whim."), *cert. denied*, 479 U.S. 1009 (1986).

[68] 119 U.S. 407 (1886). Justice Miller authored both the *Ker* and the *Rauscher* decisions.

[69] *Rauscher*, 119 U.S. at 423. ("[T]he fair purpose of the treaty is . . . that the person shall be delivered up to be tried for that offence and for no other.")

[70] *Id.* at 409.

[71] *Id.* at 409-10.

[72] *Id.* at 409.

[73] *Id.* at 418.

purpose of the treaty is . . . that the person shall be delivered up to be tried for that offence and no other."[74] This principle is known as the Doctrine of Specialty.

Specialty is based upon international comity.[75] "Because the surrender of the defendant requires the cooperation of the surrendering state, preservation of the institution of extradition requires that the petitioning state live up to whatever promises it made in order to obtain extradition."[76] Specialty demands that the requesting country satisfy its obligations as a predicate to the surrendering nation's decision to deliver custody of the defendant. Because of this concern, "protection exists . . . to the extent that the surrendering country wishes."[77] Thus, a country may consent to extradition for one offense and, after the defendant is removed and charged with a second offense, it may consent to the defendant being tried for the second offense.[78] The ability of the surrendering country to consent to a defendant being tried for crimes other than those for which he was extradited is an important exception to the doctrine of specialty.[79] The person extradited may raise any objections to the extradition that the surrendering nation may raise.[80] Once the surrendering nation consents to trial for the additional offense, however, the person extradited has no standing to raise an objection to trial for the second offense on the basis that it violates the doctrine of specialty.[81] Thus, the defendant's rights are purely derivative.

The *Rauscher* decision flows from basic principles of treaty interpretation. As the Court implicitly recognized, "treaties are to be construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[82] Another facet of treaty interpretation is a court's "responsibility to give the specific words of the treaty a meaning consistent with the shared *expectations* of the contracting parties."[83] These tenets of interpretation are necessary to preserve sovereignty.

In 1927, the Supreme Court addressed related issues involving

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[74] *Id.* at 423.

[75] *Najohn*, 785 F.2d at 1422.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943); *accord* Air France v. Saks, 470 U.S. 392, 396 (1985) (adopting reasoning of Court in *Chocktaw*). Four of the current justices took part in the *Saks* decision; among them was Chief Justice Rehnquist who wrote for the majority in *Alvarez-Machain*.

[83] *Saks*, 470 U.S. at 399 (emphasis added).

criminal convictions and treaties in *Ford v. United States*.[84] Great Britain protested the seizure of one of its vessels by the United States while the vessel was beyond the United States' territorial waters in violation of a treaty between the two nations.[85] The Court seemingly limited *Ker* to cases in which no treaty is involved. The Court stated:

> [T]he *Ker* case does not apply here. It related to a trial in a state court, and this Court found that the illegal seizure of the defendant therein violated neither the Federal Constitution, nor a federal law, nor a treaty of the United States, and so that the validity of their trial after the alleged seizure was not a matter of federal cognizance. Here a treaty of the United States is directly involved, and the question is quite different.[86]

The Court's language indicating this limitation, however, may be regarded as dicta, because the Court held the defendants waived any claim to protest jurisdiction by entering a plea of not guilty before challenging the trial court's jurisdiction over them.[87] Still, the *Rauscher* dicta is consistent with treaty interpretation and the objective of preserving sovereign expectations through international law.

C. General Tenets of International Law

In addition to their Extradition Treaty, the United States and Mexico are signatories of international agreements recognizing the territorial sovereignty of their sister nations. For example, both nations are original parties to the United Nations Charter. The U.N. Charter was developed in part "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[88] Article Two of the U.N. Charter provides that the United Nations and its members must "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state."[89] Although customary international law regarding the use of force may be questioned, specific treaties cement the general tenet between signatory nations.

Mexico and the United States also are parties to the Charter of the Organization of American States ("OAS Charter") which provides as its purpose to "achieve an order of peace and justice, . . . and to defend [the American States'] sovereignty, their territorial integrity and their independence."[90] Governing principles under the

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[84] 273 U.S. 593, 605 (1927).
[85] *Id.* at 596.
[86] *Id.* at 605-06.
[87] *Id.* at 606.
[88] U.N. CHARTER art. 2.
[89] *Id.*
[90] Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 2417, 119 U.N.T.S. 3, 50, *amended by* Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 847, T.I.A.S. No. 6487.

OAS Charter include the recognition that "[i]nternational order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law."[91] These tenets of international law provide insight into the mutual expectations of the United States and Mexico when signing the Extradition Treaty and aid in its interpretation.

IV. The Supreme Court Opinions

A. Chief Justice Rehnquist for the Majority

In opening the majority opinion, Chief Justice Rehnquist stated the issue before the Court as: "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts."[92] In answer, Justice Rehnquist responded that "he does not, and that he may be tried in federal district court for violations of the criminal law of the United States."[93]

In outlining the applicable background law, the Court recognized *Rauscher* as illustrative of proceedings in which the Court has occasion to entertain the alleged violation of an extradition treaty. The Court quickly dismissed the relevance of *Rauscher*, however, by observing that "[u]nlike the case before us today, the defendant in *Rauscher* had been brought to the United States by way of an extradition treaty; there was no issue of forcible abduction."[94] The Court proceeded to address *Ker* and prefaced its discussion by stating that in *Ker* "we addressed the issue of a defendant brought before the court by way of a forcible abduction"[95]; thus making the relevance of the *Ker* opinion appear obvious.

Turning its focus to the case at hand, the majority commented that "[t]he only differences between *Ker* and the present case are that *Ker* was decided on the premise that there was no governmental involvement in the abduction; and Peru, from which Ker was abducted, did not object to his prosecution."[96] The respondent, Dr. Alvarez-Machain, and the Court of Appeals found these distinctions to be crucial and, as in *Rauscher*, reasoned that Dr. Alvarez-Machain's prosecution would be an affront to the Extradition Treaty. In contrast, the Government contended that "*Rauscher* stands as an 'exception' to the rule in *Ker* only when an extradition treaty is invoked, and the

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91 *Id.* art. 5(b).
92 United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992).
93 *Id.*
94 *Id.* at 2191-92.
95 *Id.* at 2192.
96 *Id.* at 2193.

terms of the treaty provide that its breach will limit the jurisdiction of a court."[97] Before discussing the merits of each position, the Court commented that "[i]f we conclude that the Treaty does not prohibit the respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how respondent came before it."[98]

After reviewing the Extradition Treaty, the Court remarked that nothing in the Extradition Treaty obliged the United States or Mexico to refrain from forcible abduction as a method of obtaining a suspect from a foreign nation.[99] Abduction was never expressly forbidden, nor were the repercussions of such conduct described in the Extradition Treaty.[100] The Court focused specifically on Article Nine of the Extradition Treaty which embodies the terms of extradition and held that "Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution."[101] "Extradition treaties exist so as to impose mutual obligations to surrender individuals in *certain defined sets of circumstances*, following established procedures."[102] Thus, Chief Justice Rehnquist narrowly limited Article Nine to situations explicitly covered by its language and seemingly ignored the Treaty's overriding purpose to create orderly transfers of individuals between the two signatory nations.

Finding nothing dispositive in the Extradition Treaty itself, the Court referred to the "history of negotiation and practice under the Treaty."[103] The Court took notice of the Mexican Government's awareness of the *Ker* doctrine and the fact that the Extradition Treaty did not attempt expressly to diminish the effect of *Ker*.[104] Accordingly, the Court held that "the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of it terms."[105] Seemingly, sovereign ex-

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97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 2194. The Court apparently based this opinion on the idea that "[i]n the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution." *Id.* Under the Court's resolution of this case, of course, whether or not a party participated in an extradition treaty, it would be free to abduct the suspects of their choice at will, regardless of the suspect's foreign domicile unless there was an extradition treaty in place which forbade such conduct.

102 *Id.* (emphasis added). The Court further stated that the Extradition Treaty "thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, following established procedures." *Id.*

103 *Id.*

104 *Id.* The Court also remarked that language which would give the respondent the relief sought had been drafted by scholars as early as 1935, but, again, nothing was incorporated into the Extradition Treaty. *Id.* at 2194-95.

105 *Id.* at 2195.

pectations would not be respected unless the Treaty expressly included them to limit United States common law.

Dr. Alvarez-Machain urged that the Extradition Treaty should be interpreted in light of general principles of international law which clearly forbid international abductions.[106] The Court found these tenets of general international law to be irrelevant because "none of it relates to the practice of nations in relation to extradition treaties," but rather to international law more generally.[107] Explaining its rejection of Dr. Alvarez-Machain's arguments, the Court reasoned:

> Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not "exercise its police power in the territory of another state." There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations.[108]

The Court also criticized the Court of Appeals for falling prey to this position and rationalized that "[i]n a broad sense, most international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations. This, however, does not mean that the violation of any principle of international law constitutes a violation of this particular treaty."[109]

Failing to find that the Extradition Treaty prohibited forcible abductions, the Court held that it was not violated and that *Ker* was applicable.[110] Thus, the Court reasoned that under *Ker*, Dr. Alvarez-Machain's abduction posed no jurisdictional problems to the federal courts.[111] The decision to repatriate Dr. Alvarez-Machain, as a matter outside the Extradition Treaty, ultimately was deferred to the Executive Branch.[112]

B. Justice Stevens for the Dissent

In a scorching dissent, Justice Stevens, joined by Justices Blackmun and O'Connor, distinguished *Ker* from the case at hand and found that Dr. Alvarez-Machain's abduction violated the spirit and purpose of the Extradition Treaty. Justice Stevens described the case as "unique" when compared with *Ker*, as the situation at issue did not involve "an ordinary abduction by a private kidnapper, or

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106 *Id.*
107 *Id.*
108 *Id.* at 2196.
109 *Id.*
110 *Id.* at 2197.
111 *Id.*
112 *Id.* at 2196.

bounty hunter."[113] Instead of focusing his attention on *Ker*, Justice Stevens relied upon *Rauscher*, the Extradition Treaty itself, and applicable principles of international law. Taking a broad view of the Extradition's Treaty's purpose and giving attention to its specific provisions, the dissenters found that the majority's position reduced the Extradition Treaty "into little more than verbiage."[114]

The dissent acknowledged that there was "no express promise by either party to refrain from forcible abductions in the territory of the other Nation."[115] Illustrating the illogic of the Court's position, however, the dissenters posed an example of what Justice Rehnquist's holding would permit:

> If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty. That, however, is a highly improbable interpretation of a consensual agreement, which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.[116]

Immediately, the majority's demand that Mexico anticipate all possible factual variations within Article Nine's scope was deplored in light of the other accepted principles of international law.

Justice Stevens found support for his interpretation of the Extradition Treaty in the applicable tenets of international law. He noticed a critical flaw in the majority's opinion in that "[i]t fails to differentiate between the conduct of private citizens which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law, and . . . also constitutes a breach of our treaty obligations."[117] The dissent concluded that the "Court's admittedly 'shocking' disdain for customary and conventional international law principles . . . is thus entirely unsupported by case law and commentary."[118]

V. Analysis

Simplistically speaking, the majority and dissenting opinions in *United States v. Alvarez-Machain* can be distinguished by which of two cases, *Ker* or *Rauscher*, the authors believed better paralleled Dr. Alvarez-Machain's case. *Ker*, which involved a forcible abduction of a suspect from a foreign nation brought to trial in the United States, earned the majority's focus and led the Court to expand the *Ker* doctrine to encompass situations in which the United States sponsors an

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[113] *Id.* at 2197 (Stevens, J., dissenting).
[114] *Id.* at 2198 (Stevens, J., dissenting).
[115] *Id.* (Stevens, J., dissenting).
[116] *Id.* at 2199 (Stevens, J., dissenting) (footnote omitted).
[117] *Id.* at 2203 (Stevens, J., dissenting) (footnote omitted).
[118] *Id.* at 2205 (Stevens, J., dissenting).

abduction. The dissent, on the other hand, viewed *Rauscher*, involving the interpretation of an extradition treaty and the implication of terms not express in the treaty, as the fundamental starting point. While the majority's opinion follows somewhat from *Ker*, the majority relies upon an unexplained leap of faith from *Ker* to find jurisdiction. The majority fails to explain why an abduction by a private individual is dispositive in a case involving an abduction in which the United States was a sponsor. The Court never acknowledges that abductions *by the U.S. Government*, and not by private bounty hunters, may present different issues.

The United States made pledges to respect and preserve the sovereignty of other nations, Mexico among them. Sponsoring an abduction of a nation's citizen from his homeland certainly is a breach of these promises, especially when Mexico objects to the kidnapping on sovereignty grounds. A private bounty hunter is not obliged to respect the sovereignty of another nation; the abductor in *Ker* was such a private individual. By ignoring this critical difference, the Court leaps to the conclusion that if the Extradition Treaty was not violated, *Ker* applies and the abduction is not an impediment to a U.S. court's jurisdiction over Dr. Alvarez-Machain. Measuring the breadth of this assumption depends upon the credibility of the majority's reading of Article Nine to waive sovereignty concerns in situations not expressly covered by the Treaty.

In interpreting the Extradition Treaty, the majority approached the issue convinced that if the Extradition Treaty did not prohibit abductions expressly or implicitly, then such an abduction does not violate the Extradition Treaty. In contrast, the dissent began with the approach that absent some evidence that the nations desired to reserve abduction as an option, the Extradition Treaty would be violated by such an abduction. As Justice Cardozo explained "the one construction invigorates the [A]ct; the other saps its life. A choice between them is not hard."[119]

The Court's decision to severely limit the Extradition Treaty is rife with generalizations and unexplained conclusions. Although the Court stated that "[t]reaties are construed more liberally than private agreements,"[120] the majority reads the Extradition Treaty with a literalism which strains the purpose of the Extradition Treaty specifically and the purposes of extradition generally. Chief Justice Rehnquist ignores the details contained in the Extradition Treaty which cover evidentiary, documentary, and procedural requirements, and extradition policy with regard to capital punishment, among other provisions.[121] The majority's version of treaty interpretation is

[119] Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J. dissenting).
[120] Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943).
[121] Extradition Treaty, *supra* note 16.

based on a notion that throughout the negotiations and drafting of the Extradition Treaty both nations consciously preserved the option to scrap the extradition scheme by abducting criminal defendants. While this reading seriously restricts the Treaty's significance, its only support is the majority's speculative view that the parties' failure to mention abduction specifically waived the application of any international law, customary or contractual, to it. Furthermore, the Court so decides despite its pronunciation that "it is *our responsibility* to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[122] The majority's position is untenable.[123] "No government—[and] certainly no Mexican government—would have agreed to an extradition treaty if it was understood that the United States government considered any right of extradition subject to an overriding privilege of abduction. Any American [P]resident who conceded the right of a foreign state to abduct American citizens would be subject to impeachment."[124] If, however, the Court is correct, then the nations of Germany, Japan, the United Kingdom, and Canada must have so understood, because their extradition treaties with the United States do not expressly forbid kidnapping.[125]

To further support its interpretation, the Court relies upon Mexico's "awareness" of the *Ker* decision and a 1935 article detailing how a treaty provision might be drafted to avoid the *Ker* result.[126] The Court, however, neglects to take notice of international developments since 1935, which include both nations' recognition of the U.N. and OAS Charters. In these documents, both nations pledged to refrain from acts of aggression and to respect the sovereignty of the other nation. The Court discounted Dr. Alvarez-Machain's argument that these documents demonstrate the nations' intent to preclude unilateral, forcible abductions, reasoning that "[t]here are many actions which could be taken by a nation that would violate" the international principle that one nation may not exercise its police

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[122] Air France v. Saks, 470 U.S. 392, 399 (1985)(emphasis added). Current Justices White, Blackmun, and Chief Justice Rehnquist joined in Justice O'Connor's opinion.

[123] "[E]ven by Justice Antonin Scalia's new 'show me where it says we can't' school of textual interpretation, the majority's opinion is hard to square. After all, the United States-Mexico treaty makes kidnapping itself a crime for which extradition must be granted unless the kidnapper is prosecuted domestically." Charles L. Hobson, *The Treaty Was Not Violated*, THE NATIONAL L. J., July 6, 1992, at 15.

[124] Sen. Daniel Patrick Moynihan, *Supreme Court's Kidnapping Ruling is Manifestly Wrong*, ROLL CALL, July 27, 1992, *available in* LEXIS, Nexis Library, Int'l File.

[125] Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition, June 20, 1978, U.S.-F.R.G., 32 U.S.T. 1485; Treaty on Extradition Between the United States of America and Japan, Mar. 3, 1978, U.S.-Japan, 31 U.S.T. 892; Extradition Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, June 8, 1972, U.S.-U.K., 28 U.S.T. 227; Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983.

[126] Harvard Research in International Law, 29 AM. J. INT'L L. 442 (Supp. 1935).

power in the territory of another nation, "including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations."[127] Here, the Court attempts to weaken the effect of these agreements by generalizing and clouding the issue. Dr. Alvarez-Machain was not asserting that an invasion of the United States by Mexico violates the Extradition Treaty. Instead, Dr. Alvarez-Machain urged that his abduction accomplished under the color of U.S. authority violated the Extradition Treaty; a treaty which covers the exact nature of the action at issue. Furthermore, Mexico's objection to the kidnapping clearly implicates the Treaty's respect for the signatories' mutual sovereignty and does not involve disputes far removed from the letter and spirit of the Treaty. Even if a forcible, non-consensual abduction does not violate the letter of the Extradition Treaty, it certainly contradicts the spirit of the Treaty.

Following the majority's approach to treaty interpretation, treaties would have to become detailed to the point of rigid formality and over-inclusion. Treaties would be required to cover every situation or scenario, for if a situation were not so described, the parties could be deemed to have acquiesced to the act regardless of their mutual expectations. Following the dissent's approach, treaties could be flexibile in wording, because some basic assumptions as to the parties' intentions would not have to be explicitly expressed. Instead, a treaty read in light of international principles could reduce the need to enumerate the parties' response to each possible scenario. The dissent's interpretive method is the only plausible approach to preserving the value of treaties generally and the sovereign expectations of Mexico specifically.

The Court's decision marks a significant regress from respecting the sovereignty of nations and promoting good will. International relations suffer from the kidnapping of citizens within another nation's borders.[128] International trade also suffers because the safety of normal transportation routes becomes questionable.[129] Such actions also deprive individuals the security of knowing that "they may rely on the established framework of state sovereignty and state boundaries in carrying on their personal and political activities."[130] The potential repercussions of such conduct are ominous.[131] The district court and the Ninth Circuit Court of Appeals recognized this potential and sought to counteract it.[132] In a related companion

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[127] United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195 (1992).

[128] *See* Thomas H. Sponsler, *International Kidnapping*, 5 INT'L LAW. 27 (1971).

[129] *Id.* at 27.

[130] *Id.*

[131] *See* Olmstead v. United States, 277 U.S. 438, 484-85 (1928) (Brandeis, J., dissenting).

[132] *Verdugo-Urquidez*, 939 F.2d at 1362.

case, the Court of Appeals recognized:

> Although the principle of *pacta sunt servanda* (agreements must be obeyed) has not always been scrupulously followed in the affairs of this and other nations, if we are to see the emergence of a "new world order" in which the use of force is to be subject to the rule of law, we must begin by holding our own government to its fundamental legal commitments.[133]

Respecting international legal obligations, including sovereignty, is essential to promoting multinational relations, regardless of temporary blows to one nation's domestic agenda.

The potential negative result of rejecting jurisdiction is repatriation of a doctor who allegedly kept Agent Camarena alive so he could be further tortured.[134] While following the proper extradition procedures may have resulted in the Mexican government surrendering Dr. Alvarez-Machain for trial in the United States, this result was unlikely considering Mexico's traditional reluctance to extradite its citizens for trial.[135] As the story behind this case indicates, corruption in the refuge nation's government may be widespread; the investigation surrounding the death of Agent Camarena implicated, among others, several former Mexican police officers,[136] the Mexican police commander initially handling the investigation,[137] Mexico's then attorney general,[138] and the brother-in-law of a former Mexican President.[139] Recognition of such corruption in foreign governments has prompted one commentator to write, "[t]he U.S. Constitution menaces justice and the rule of law when applied in foreign lands whose political cultures and legal mores are alien to those

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133 *Id.*

134 *Id.*

135 *See* Kim Murphy, *Extradition from Mexico: It's Tricky Going; Nation Historically Reluctant to Turn Over Citizens for Prosecution Despite Treaty*, L.A. TIMES (Home Ed.), Apr. 20, 1989, at 3 ("Though the treaty technically allows for the extradition of Mexican nationals from Mexico, U.S. officials could not recall such an instance."). Mexico reserved the discretion over whether it would extradite its own citizens in the Extradition Treaty. Extradition Treaty, *supra* note 16, art. 9, 31 U.S.T. at 5065. Dr. Machain's abduction denied Mexico the opportunity to exercise this discretion.

136 Kim Murphy, *9 Indicted in Murder of Drug Agent in Mexico; Narcotics Lord and Former Police Officials Named in Torture-Killing of DEA's Camarena*, L.A. TIMES (Home Ed.), Jan. 7, 1988, at 1.

137 *Id.* ("Nine men, including . . . the Mexican police commander who headed the original murder investigation, were indicted Wednesday in the torture and death of U.S. drug agent Enrique Camarena and his pilot in 1985.").

138 Henry Weinstein, *Testimony Implicates Atty. Gen. of Mexico: Drugs: DEA Agent Says a Defendant in the Camarena Murder Trial Told Him the Official, While a Governor, 'Was Involved' with Traffickers*, L.A. TIMES (Home Ed.), May 31, 1990, at B1. ("A Drug Enforcement Administration agent testified Wednesday that a defendant in the Enrique Camarena murder trial told him last July that Mexico's attorney general 'was involved' with drug traffickers while he was governor of the Mexican state of Jalisco in the mid-1980s.")

139 Henry Weinstein, *Camarena Indictment Names Business Figure; Narcotics: Ruben Zuno Arce is the 16th Person to be Charged in the Kidnap-Murder of the U.S. Drug Agent. He is a Brother-in-Law of a Former President of Mexico*, L.A. TIMES, Dec. 12, 1989, at A3.

of the USA."[140] The commentator was applauding the "twin pronouncements"[141] of a Supreme Court decision refusing to apply the Fourth Amendment to the search and seizure of a nonresident alien's property on foreign soil[142] and a Justice Department statement giving the FBI authority to arrest persons abroad for offenses against the United States.[143]

In his thirst for vengeance, the commentator fails to recognize the significance that U.S. actions have in the international arena. As Justice Brandeis so poignantly stated:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. *Our Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example.* Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.[144]

The United States must act as an example by promoting democracy, human rights and respect for other nations; adhering to the U.S. Constitution and the treaties which the United States signs is essential to the promotion of peace and democratic ideals. Hiring thugs to kidnap a suspect from his home country, without that country's consent, to stand trial in the United States equates to promoting lawlessness. Such an action also demonstrates that certain governments may act outside the law and without respect for its neighbors. The Supreme Court was a bastion of hope to save the United States from impugning Mexico's sovereignty. The Court had the tools: a valid extradition treaty, negotiated after the development of the U.N. Charter and the OAS Charter; the vocal protests of an outraged Mexican government, which made the abduction non-consensual; and the limitations to *Ker/Frisbie* based on treaty interpretation. To the detriment of United States-Mexico relations, the majority failed to recognize the true nature of the Extradition Treaty and eroded the foundations of extradition generally. Unfortunately, the world soon may feel the reverberations. Through its holding, the Court injures the United States' image as a friend to the international community and weakens the view of the United States as a democratic country in which the court system acts independently from the political machinery when rendering its decisions. The Court also implic-

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[140] Bruce Fein, *USA Must Act to Fight Crime Abroad*, USA TODAY, Mar. 6, 1990, at 8A.

[141] *Id.*

[142] United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990).

[143] Fein, *supra* note 140, at 8A. ("These twin pronouncements are imperative to enlightened and effective law enforcement in a world where official corruption, lassitude or anti-Americanism are the earmarks of several nations.").

[144] *Olmstead*, 277 U.S. at 484-85 (1928) (Brandeis, J., dissenting) (emphasis added).

itly encourages other nations to conduct their own versions of vigilante justice without regard for the borders of sovereign nations.

The fate of the principle established by this decision is unclear. Anti-kidnapping legislation was being discussed by members of Congress in late July.[145] Facing a predicted veto by President Bush, Congress is delaying the progress of legislation until after the November elections.[146]

VI. Conclusion

> *Back in the days of the Wild West, American bounty hunters had no hesitation about crossing an international border, kidnapping a fugitive and bringing him home for trial.*[147]

A majority of the Supreme Court succumbed to the appeal for seeing justice served on the parties who brutally tortured and murdered Agent Camarena; however, the devastation to peace and respect among nations and the integrity of the United States is not worth the shallow reward of retribution. The decision demonstrates that the United States may profit by conduct that would be illegal for any of its citizens. Kidnapping is illegal whether done for a ransom or for a vigilante sense of justice. In order for the United States to retain its citizens' and the world's respect as a leader in human rights and democracy, the government must act within the boundaries of the law and demonstrate its loyalty to the treaties it signs. To promote respect among other nations, the United States must act as an example. "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law."[148]

In addition, the United States cannot hope that other signatory nations will abide by their treaties if the United States is seen as a country that will live by its treaties only when it formally invokes them; otherwise, it feels free to act outside any treaty. By the Court's decision, all possibilities must be provided for in a treaty, or the seemingly improbable action may occur and not be in violation of the treaty. The interests of protecting the sovereignty of nations and of upholding treaty obligations must prevail over rigid formalism and an executive policy of vigilante justice. As Thomas Paine warned over two hundred years ago:

> 'an avidity to punish is always dangerous to liberty' because it leads a Nation to 'stretch, to misinterpret, and to misapply even the best of laws.' To counter this tendency, . . . [we must be mindful that] '[h]e that would make his own liberty secure must guard even his enemy

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[145] Mary Benanti, *Panel Considers Ban on Foreign Kidnapping*, GANNETT NEWS SERVICE, July 29, 1992, *available in* LEXIS, Nexis Library, Curr. File. Rep. Leon Panetta, D-Cal., is leading the fight for this legislation.

[146] *Id.*

[147] *Beyond Wild West Justice*, THE WASH. POST, July 26, 1991, at A22.

[148] *Toscanino*, 500 F.2d at 274.

> from oppression; for if he violates this duty he establishes a precedent that will reach to himself.'[149]

Sadly, Thomas Paine was ignored first by the DEA and then by the majority of the Supreme Court.

CANDACE R. SOMERS

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[149] *Alvarez-Machain*, 112 S. Ct. 2188, 2206 (1992)(Stevens, J., dissenting)(quoting 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed. 1945)).