

1991

Extraordinary Rendition: A One-Way Ticket to the U.S.... Or Is It?

Jacqueline A. Weisman

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Jacqueline A. Weisman, *Extraordinary Rendition: A One-Way Ticket to the U.S.... Or Is It?*, 41 Cath. U. L. Rev. 149 (1992).

Available at: <https://scholarship.law.edu/lawreview/vol41/iss1/9>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

COMMENT

EXTRAORDINARY RENDITION: A ONE-WAY TICKET TO THE U.S. . . . OR IS IT?

A treaty is an agreement or contract between two or more sovereigns or nations,¹ signed and ratified by the states' lawmaking authorities.² In the United States, the President has the power "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."³ The United States Constitution declares that a treaty is the law of the land,⁴ and a treaty is regarded by the courts as equivalent to a statute.⁵ If a treaty and a statute are inconsistent, the last in time will prevail.⁶ Treaties are also a source of international law and bind the signatory parties to carry out their obligations.⁷

Extradition is a formal process through which a person is surrendered by one state to another by virtue of a treaty.⁸ The person surrendered is usually a fugitive from justice wanted for prosecution or sentencing in the requesting country for a crime committed there. States are anxious to form extradition treaties because without them there is no general duty to surrender a fugitive.⁹ Extradition treaties, however, may not always offer a solution. Most

1. The terms "country," "nation," and "state" are used interchangeably. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 521, 1505, 2228 (Philip B. Gove ed. 1981).

2. BLACK'S LAW DICTIONARY 1502 (6th ed. 1990).

3. U.S. CONST. art. II, § 2, cl. 2.

4. U.S. CONST. art. VI, cl. 2.

5. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds by* *United States v. Percheman*, 32 U.S. 51 (1833); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 63 (1990).

6. HENKIN, *supra* note 5, at 64; *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 233 (1990) (quoting *The Cherokee Tobacco*, 78 U.S. (11 Wall) 616, 620-21 (1871)); *see, e.g.*, *Head Money Cases*, 112 U.S. 580, 597-99 (1884).

7. HENKIN, *supra* note 5, at 62. Treaties are either self-executing or non self-executing. A self-executing treaty requires no legislation to make it operative. It has the force and effect of legislation. A non self-executing treaty can only be enforced pursuant to implementing legislation. *Whitney*, 124 U.S. at 194.

8. 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968).

9. *Id.*; 4 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 11 (1942).

As of January 1, 1990 the countries with which the United States has an extradition treaty are Albania, Antigua, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Bo-

contain a provision that allows the contracting states to refuse to extradite their own nationals.¹⁰ In such a case, if a foreigner commits a crime in the United States and then flees to his homeland, he may not be available for prosecution in the United States. As a result of hindrances on law enforcement, nations sometimes resort to abducting¹¹ fugitives from foreign states and returning them to prosecuting states as an alternate form of rendition. Because international narcotic trafficking and terrorist activities are expanding,¹² the incentive for governments to participate in this alternate form of rendition is rapidly increasing. The abduction of fugitives raises a variety of due process and sovereignty issues which remain unsettled by courts today.¹³

Although the use of an alternate method is sometimes necessary, it remains unclear whether abduction is a legal method for bringing a criminal to justice. One issue is whether the participation by United States officials or their agents, in the abduction of a fugitive from justice, violates that fugitive's right to due process of law. Most courts have held that the use of an alternate method of rendition does not, in itself, violate a defendant's due process rights.¹⁴ Still, such a method raises questions regarding United States laws.

livia, Brazil, Bulgaria, Burma, Canada, Chile, Colombia, Congo, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, Estonia, El Salvador, Fiji, Finland, France, Gambia, West Germany, Ghana, Greece, Grenada, Guatemala, Guyana, Haiti, Honduras, Hungary, Iceland, India, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kiribati, Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Malta, Mauritius, Mexico, Monaco, Nauru, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Romania, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, San Marino, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Tuvalu, United Kingdom, Uruguay, Venezuela, Yugoslavia, and Zambia. TREATY AFFAIRS STAFF, U.S. DEP'T OF STATE, TREATIES IN FORCE 1-274 (1990). (At the time of this book's release, East and West Germany had not yet been united into a single Germany).

10. See, e.g., Extradition Treaty, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5059; Extradition Treaty, March 3, 1978, U.S.-Japan, 31 U.S.T. 892; Extradition Treaty, May 25, 1904, U.S.-Pan., 34 Stat. 2851.

11. "Abduct" means to carry (a person) off by force. WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 3 (Philip B. Gove ed. 1981).

12. Martin Feinrider, *Extraterritorial Abductions: A Newly Developing International Standard*, 14 AKRON L. REV. 27 (1980); TERRORIST RESEARCH AND ANALYTICAL CENTER, U.S. DEP'T OF JUSTICE, TERRORISM IN THE UNITED STATES 9 (1990).

13. See *infra* text accompanying notes 24-42, 74-75.

14. See, e.g., *Frisbie v. Collins*, 342 U.S. 519, 522 *reh'g denied*, 343 U.S. 937 (1952); *Ker v. Illinois*, 119 U.S. 436, 440 (1886); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); *United States v. Fielding*, 645 F.2d 719, 723 (9th Cir. 1981); *United States v. Marzano*, 537 F.2d 257, 271 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038

A more complex issue is whether these actions violate international law or the foreign nation's sovereignty. Many courts have held that if a foreign government aids in or acquiesces to the action, abduction does not violate the nation's sovereignty.¹⁵ When a government unilaterally abducts a fugitive abroad and the foreign government objects, however, a violation of international law and of the foreign nation's sovereignty has occurred.¹⁶ Courts and scholars are divided in opinion on what should be the result of these violations. Some argue that such a violation automatically requires a court to divest itself of jurisdiction and release the defendant.¹⁷ Others contend that case law has firmly established the principle that the manner in which a defendant is brought to court is for the most part irrelevant, and thus any objection to jurisdiction is without merit.¹⁸ They further argue that any objection to the action by the foreign government should be dealt with by the executive and legislative branches of the United States Government, rather than by the judicial branch,¹⁹ because the United States Constitution delegates the foreign affairs power to the President and the Congress.²⁰

This Comment argues that, based on precedent, when United States officials kidnap a fugitive from a foreign country and bring him to the United States for prosecution, a court's jurisdiction to hear the case is not affected if the foreign sovereign objects to the action. First, this Comment surveys case law establishing that the abduction of a fugitive by law enforcement officials does not violate his right to due process of law under the United States Constitution. It next examines whether bypassing an extradition treaty and using alternate forms of rendition violates that extradition treaty. Further, this

(1977); *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Cotten*, 471 F.2d 744, 748 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *Hobson v. Crouse*, 332 F.2d 561, 561 (10th Cir. 1964); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605-06 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

15. See M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: U.S. LAW AND PRACTICE* ch. V, § 2-9 (1983). Territorial sovereignty is the authority a state exercises over its own territory. N.A. MARYAN GREEN, *INTERNATIONAL LAW* 191 (3d ed. 1987). Every state has the right to exercise jurisdiction within its borders and make decisions regarding internal and external affairs without interference by other states. ALAN JAMES, *SOVEREIGN STATEHOOD* 200 (1986).

16. See, e.g., BASSIOUNI, *supra* note 15, ch. V, §§ 2-7 to 2-8; 2 JOHN B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 362 (1906) (quoting Letter from Monroe, Secretary of State, to Anthony St. John Baker (Dec. 6, 1815)).

17. *Caro-Quintero*, 745 F. Supp. 599; BASSIOUNI, *supra* note 15, ch. V, §§ 5-31 to 5-34.

18. *Ker*, 119 U.S. at 444; *United States v. Winter*, 509 F.2d 975, 985-86 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975).

19. See *Mahon v. Justice*, 127 U.S. 700, 705 (1888); WHITEMAN, *supra* note 8, at 1113-14.

20. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. II, § 2, cl. 2.

Comment addresses the issues raised as a result of a unilateral government abduction of a defendant from a foreign sovereign's territory. It examines recent cases which diverge from prior case law by holding that extradition treaties were violated because the foreign governments objected to the abduction of fugitives from their territory and that the remedy for these violations was to release the defendants. This Comment concludes that based on prior court decisions, a court has jurisdiction to try a defendant who was abducted from a foreign country by law enforcement officials. If the foreign government objects and requests the return of the defendant, then that raises separate and distinct issues involving diplomatic relations which are areas properly addressed by the executive and legislative branches of the government, not by the judicial branch.

I. DUE PROCESS?

A. *The Ker-Frisbie Doctrine: A License to Kidnap*

More than a century ago, the United States Supreme Court ruled in *Ker v. Illinois*²¹ that a defendant's right to due process²² is not violated if he is brought before a court by an irregular method, such as abduction.²³ In *Ker*, a defendant charged with larceny and embezzlement in Illinois fled to Peru. According to the terms of a treaty between the United States and Peru, formal extradition proceedings were instituted to return Ker to the United States.²⁴ Upon direction to retrieve Ker, an American agent was given a warrant to present to the Peruvian authorities.²⁵ Instead of presenting the papers to the foreign authorities, the agent kidnapped Ker and brought him back to the United States.²⁶ Ker was tried and convicted for larceny, and the conviction was affirmed by the Illinois Supreme Court.²⁷ On appeal to the United States Supreme Court, Ker claimed that the abduction in Peru and his subsequent delivery back to the United States authorities violated "due process of law."²⁸ The Court rejected this argument, stating that the

21. 119 U.S. 436 (1886).

22. The Court assumed reference to the fourteenth amendment to the United States Constitution, which provides in part that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

23. *Ker*, 119 U.S. at 440.

24. *Id.* at 438.

25. *Id.*

26. *Id.* At that time Peru was engaged in the War of the Pacific and the capital was under occupation by Chilean forces. The agent, therefore, could not present his papers to the Peruvian authorities. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 462 n.85 (1990).

27. *Ker*, 119 U.S. at 439.

28. *Id.*

guarantee to due process of law is satisfied when the defendant is indicted by the grand jury and has a fair trial in which he is not deprived of the rights to which he is lawfully entitled.²⁹ The Court further noted that a defendant should not be permitted to avoid answering for a crime because of “mere irregularities” in the manner in which he was apprehended.³⁰ Because no positive provision of the Constitution or United States laws was violated in returning Ker to the Court’s jurisdiction, he could not claim that he had been deprived of due process of law.³¹ Thus, the Court affirmed Ker’s conviction.³²

Sixty years later, the Supreme Court reaffirmed this principle in *Frisbie v. Collins*.³³ In *Frisbie*, Michigan police officers kidnapped the petitioner in Chicago and brought him back to Michigan, where he was tried and convicted for murder.³⁴ He claimed that under the circumstances, his trial and conviction violated his right to due process under the Fourteenth Amendment to the Constitution and the Federal Kidnapping Act.³⁵ The United States Court of Appeals for the Sixth Circuit held that given the enactment of the Federal Kidnapping Act, a court could no longer try and convict a defendant brought before it by force in violation of a federal criminal statute.³⁶ The Supreme Court disagreed.³⁷

The Court first addressed the defendant’s due process challenge.³⁸ Refining the *Ker* holding, the Court stated that due process of law is satisfied when a defendant is apprised of the charges against him and is tried in accordance with constitutional procedural safeguards. It found that the Con-

29. *Id.* at 440.

30. *Id.*

31. *Id.*

32. *Id.* at 445.

33. 342 U.S. 519 (1952).

34. *Id.* at 520.

35. *Id.* The Federal Kidnapping Act, 47 Stat. 326, as amended, 18 U.S.C. § 1201 (1988) states in relevant parts:

- (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . when:
- (1) the person is willfully transported in interstate or foreign commerce;
 - (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;
 - (3) any such act against the person is done within the special aircraft jurisdiction of the United States . . . ; or
 - (4) the person is a foreign official, an internationally protected person, or an official guest . . . , shall be punished by imprisonment for any term of years or for life.

36. *Collins v. Frisbie*, 189 F.2d 464, 467-68 (6th Cir. 1951), *rev'd*, 342 U.S. 519 (1952).

37. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952).

38. *Id.*

stitution does not require a court to allow a convicted person to avoid his sentence because he was brought to trial against his will.³⁹ The Court next declared that the Federal Kidnapping Act prescribes sanctions, none of which include barring a state from prosecuting a defendant brought to it in violation of the Act. Therefore, even assuming the Michigan officers violated the Act, the court's jurisdiction over the defendant was not affected.⁴⁰ The rule that a court's jurisdiction is not affected by the manner in which a defendant is brought to justice was sustained in subsequent cases,⁴¹ and has become known as the *Ker-Frisbie* doctrine.⁴²

B. *The Attempt to Narrow Ker-Frisbie*

1. *United States v. Toscanino: The Second Circuit Offers Protection*

In 1974, the United States Court of Appeals for the Second Circuit attempted to restrict the broad jurisdictional basis established in *Ker* and *Frisbie*. In *United States v. Toscanino*,⁴³ Toscanino, an Italian citizen, claimed he had been lured from his home in Montevideo, Uruguay, by a telephone call placed by or at the direction of a member of the Montevideon police, acting as a United States agent.⁴⁴ He further contended that he was knocked unconscious, driven to Brazil, and turned over to the authorities in that country.⁴⁵ After seventeen days of alleged torture,⁴⁶ he was brought to the

39. *Id.*

40. *Id.* at 522-23.

41. *See, e.g.,* *United States v. Crews*, 445 U.S. 463, 474 (1980); *Stone v. Powell*, 428 U.S. 465, 485 (1976); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir. 1988); *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *United States v. Darby*, 744 F.2d 1508, 1530 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *United States v. Valot*, 625 F.2d 308, 309 (9th Cir. 1980); *Weddell v. Meierhenry*, 636 F.2d 211, 214-15 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1981); *United States v. Lara*, 539 F.2d 495, 495 (5th Cir. 1976); *United States v. Marzano*, 537 F.2d 257, 271 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975); *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir.), *cert. denied*, 423 U.S. 946 (1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 64-65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Winter*, 509 F.2d 975, 985-86 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974); *United States v. Cotten*, 471 F.2d 744, 748 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *United States ex rel. Calhoun v. Twomey*, 454 F.2d 326, 328 (7th Cir. 1971); *Ex Parte Lopez*, 6 F. Supp. 342, 344 (S.D. Tex. 1934).

42. The defendants in both *Ker* and *Frisbie* were United States citizens. *See also Winter*, 509 F.2d at 989 (holding that *Ker-Frisbie* applies to non-resident aliens as well as to United States citizens).

43. 500 F.2d 267 (2d Cir. 1974).

44. *Id.* at 269.

45. *Id.* at 269-70.

46. Toscanino alleged that: he was denied sleep and nourishment for days at a time; alcohol was flushed into his eyes; fluids were forced up his anal passage; and electrodes were at-

United States and arrested on a narcotics charge.⁴⁷ The United States government neither affirmed nor denied the allegations, but instead claimed they were immaterial to the court's power to proceed.⁴⁸ Toscanino filed a motion to have the court vacate the verdict, dismiss the indictment, and order his return to Uruguay.⁴⁹ Toscanino contended that because he was abducted by United States agents, the court unlawfully acquired jurisdiction over him.⁵⁰ Relying on the *Ker-Frisbie* doctrine, the district court denied Toscanino's motion without a hearing,⁵¹ and he was subsequently convicted.⁵²

On appeal, the United States Court of Appeals for the Second Circuit remanded the case to the district court to determine whether Toscanino's allegation could be substantiated, and if so, to divest itself of jurisdiction over him.⁵³ The court based its conclusion on the theory that since the time of the *Frisbie* decision, the Supreme Court had expanded the interpretation of "due process."⁵⁴ This "new" due process, according to the Second Circuit, not only guaranteed the accused a fair procedure at trial, but also the freedom from "unreasonable invasion of [his] constitutional rights,"⁵⁵ specifically those guaranteed by the Fourth Amendment.⁵⁶ The court concluded that when a defendant is kidnapped, forcibly brought within a court's jurisdiction, and treated as Toscanino had alleged, due process required a court

tached to his earlobes, toes, and genitals, and jolts of electricity were shot throughout his body. *Id.* at 270.

47. *Id.* at 268, 270.

48. *Id.* at 270.

49. *Id.* at 271.

50. *Id.* at 268.

51. *Id.* at 271.

52. *Id.* at 268.

53. *Id.* at 275, 281.

54. *Id.* at 272. The court based this theory on two Supreme Court cases, *Rochin v. California*, 342 U.S. 165 (1952), and *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Rochin*, a case actually decided before *Frisbie*, the Supreme Court set aside a conviction which rested on evidence obtained through police misconduct. The extent of the misconduct "shocked the conscience" of the Court. *Rochin*, 342 U.S. at 172-73. In *Mapp*, the Supreme Court expanded the scope of the exclusionary rule to apply to state court proceedings, as well as federal court proceedings. The exclusionary rule, first articulated in *Weeks v. United States*, 232 U.S. 383 (1914), provides that evidence obtained by officers through an illegal search or seizure cannot be admitted in a criminal trial of the person from whom it was seized. Its purpose is to deter police misconduct by excluding the "fruit" gained from an illegal act. *Toscanino*, 500 F.2d at 267, 272-73.

55. *Toscanino*, 500 F.2d at 275.

56. The Fourth Amendment to the Constitution provides in part that "people [have the right] to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

to divest itself of jurisdiction over the person.⁵⁷ Subsequent judicial opinions would narrow the *Toscanino* holding.⁵⁸

2. *The Second Circuit Retreats From Toscanino: United States ex rel. Lujan v. Gengler*

Only months after the Second Circuit declined to rehear *Toscanino en banc*,⁵⁹ it substantially narrowed that decision in *United States ex rel. Lujan v. Gengler*.⁶⁰ In *Lujan*, the defendant was abducted in a foreign country and brought to the United States to face prosecution for a narcotics violation.⁶¹ Lujan attacked the court's jurisdiction over his person based upon the manner in which he was apprehended.⁶² The district court dismissed Lujan's petition without a hearing.⁶³

On appeal, the Second Circuit acknowledged that the Supreme Court had never disavowed the *Ker-Frisbie* doctrine and stressed that it in no way intended to eviscerate that doctrine in *Toscanino*.⁶⁴ The court noted that an irregularity in the manner of rendition did not, by itself, require a court to divest itself of jurisdiction.⁶⁵ In fact, the court stated that absent a set of facts analogous to those alleged in *Toscanino*, the "expanded scope of due process" does not require nullification of an indictment where the defendant was brought before the court by illegal means.⁶⁶ The court concluded that the conduct of which Lujan complained⁶⁷ did not "shock the conscience,"

57. *Toscanino*, 500 F.2d at 275. It is interesting to note that on remand, the district court held that United States officials had not participated in the alleged forcible abduction and torture of the defendant. The court found it unnecessary to divest itself of jurisdiction over *Toscanino*. *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

58. See, e.g., *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.) cert. denied, 421 U.S. 1001 (1975); *United States v. Lira*, 515 F.2d 68 (2d Cir.), cert. denied, 423 U.S. 847 (1975). For a discussion of *Toscanino*, see Note, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law*, *United States v. Toscanino, United States ex rel. Lujan v. Gengler*, 47 U. COLO. L. REV. 489 (1976); Peter J. Corcoran, Note, *Apprehension Abroad of Alien Criminal Defendant In Violation of Fourth Amendment Ousts Trial Court of Jurisdiction To Hear Charges-Second Circuit Restricts Ker-Frisbie Rule*, 43 FORDHAM L. REVIEW 634 (1975).

59. *Toscanino*, 500 F.2d at 267.

60. 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975).

61. *Id.* at 63.

62. *Id.*

63. *Id.* at 64.

64. *Id.* at 65.

65. *Id.*

66. *Id.* at 66.

67. Lujan alleged he had been hired to fly a man, who later turned out to be a paid agent of the United States, from Argentina to Bolivia. When Lujan landed, he was taken into custody by the Bolivian police, who were also paid agents of the United States, and was trans-

and therefore the exclusionary rule did not apply. The court upheld its jurisdiction over Lujan.⁶⁸

To date, no court has found any government conduct so egregious as to require a court to divest itself of jurisdiction.⁶⁹ In fact, various courts have rejected the reasoning articulated in *Toscanino*.⁷⁰ Many courts have also reaffirmed the *Ker-Frisbie* doctrine, holding that a defendant's right to due process is not violated if he is brought into the jurisdiction by irregular means.⁷¹

II. EXTRADITION TREATIES AND OFFICIALLY SANCTIONED ABDUCTIONS: CAN THEY BE RECONCILED?

The manner in which an accused is brought to the prosecuting jurisdiction may be, for the most part, irrelevant in determining compliance with due process requirements, but it may be relevant to other issues. For instance, the United States has entered into bilateral extradition treaties with many countries around the world.⁷² Through these treaties the contracting states have a legal right to demand and a duty to surrender persons found within

ported by them to the United States. Lujan was arrested once he was inside United States territory. *Id.* at 63.

68. *Id.* at 66. The Second Circuit reinforced its retreat from *Toscanino* in *United States v. Lira*, 515 F.2d 68 (2d Cir. 1975). In *Lira*, the court noted that unless a defendant's presence is secured through the use of "cruel and inhuman conduct," a court need not automatically divest itself of jurisdiction when the defendant has been abducted by United States representatives. *Id.* at 70.

69. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

70. See *United States v. Crews*, 445 U.S. 463, 474 (1980) (holding that "[the defendant] is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct"); *Matta-Ballesteros*, 896 F.2d at 261 (noting that the Fifth and Eleventh Circuits have rejected *Toscanino* and that "*Toscanino* is of ambiguous constitutional origins. On its face, [it] purports to rely on the due process clause . . . [y]et the Second Circuit relied for support on *Mapp v. Ohio*, a fourth amendment exclusionary rule case." (citation omitted)); *United States v. Marzano*, 537 F.2d 257, 272 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (noting that the Fifth, Ninth and Tenth Circuits have rejected *Toscanino*); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974) (discounting the *Toscanino* exception); *United States v. Cotten*, 471 F.2d 744, 748 (9th Cir.) (holding that *Mapp* does not preclude trial of the accused if he was kidnapped), *cert. denied*, 411 U.S. 936 (1973); *Hobson v. Crouse*, 332 F.2d 561, 561-62 (10th Cir. 1964) (holding that *Mapp* does not impel or even encourage the court to overrule *Frisbie*).

71. *United States v. Crews*, 445 U.S. 463 (1979); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); *United States v. Toro*, 840 F.2d 1221 (5th Cir. 1988); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605-06 (C.D. Cal. 1990), *aff'd sub nom.* *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

72. See *supra* note 9 and accompanying text.

their territory wanted for prosecution of crimes committed in the other contracting state.⁷³ Extradition treaties generally provide the procedures and circumstances under which an accused is to be transferred to the requesting country. When the procedures in an extradition treaty are bypassed and a fugitive is returned to the prosecuting country by irregular means of rendition, a controversy arises as to whether that action is a violation of either the treaty or the foreign nation's sovereignty.⁷⁴ The answer may depend upon the specific terms of the treaty and whether the foreign state aids in, or acquiesces to, the action.⁷⁵ A more difficult issue to resolve, however, is whether a court must divest itself of jurisdiction over the defendant if the treaty has been violated. The prevailing view is that limiting a court's jurisdiction based on an extradition treaty first requires a review of the treaty in question.

A. Extradition Treaty Limits on Alternate Forms of Rendition

Some scholars suggest that an extradition treaty limits the manner in which a fugitive may be returned to the prosecuting state.⁷⁶ This belief, however, is derived from the misinterpretation of a Supreme Court case, *Ford v. United States*.⁷⁷ *Ford* does not support the view that every United States extradition treaty limits the method of rendition of a person to the procedures prescribed in the treaty.

Ford involved a treaty between the United States and Great Britain.⁷⁸ The treaty empowered the United States to board and search British vessels found outside the territorial waters of the United States, its territories or possessions, but within a specified limit.⁷⁹ The treaty provided that if reasonable cause existed to believe the crew of the vessel was violating United States prohibition laws, the United States authorities could seize the vessel and take it to port.⁸⁰

73. WHITEMAN, *supra* note 8, at 727-28; HACKWORTH, *supra* note 9, at 33.

74. See *supra* note 15 and accompanying text.

75. See *infra* notes 89-92, 101-11 and accompanying text.

76. See, Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative [sic] Study*, 32 IND. L.J. 427, 428-29 (1957).

77. 273 U.S. 593 (1927).

78. *Id.* at 600.

79. *Id.* at 607-08. The treaty specified that a vessel could only be seized if it was within one hour's travel time from the coast of the United States, its territories or possessions. Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, U.S.-Gr. Brit., art. II, 43 Stat. 1761, 1762.

80. *Ford*, 273 U.S. at 608.

In *Ford*, the United States Coast Guard stopped a British steamer and discovered sacks of liquor aboard.⁸¹ The crew was arrested and the steamer was towed into port.⁸² The defendants claimed that the vessel was not seized in accordance with the treaty.⁸³ The government contended that the issue was irrelevant to the proceedings because, under *Ker*, the Court had jurisdiction over the defendants even if the seizure was illegal.⁸⁴

The Court refused to apply *Ker*, because in *Ker* neither the United States Constitution, a federal law, nor a treaty was violated; therefore, the validity of the trial after seizure of defendant *Ker* "was not a matter of federal cognizance."⁸⁵ In contrast, the *Ford* Court noted, the treaty involved set specific limitations upon the power of the United States to seize British vessels.⁸⁶ The Court concluded that, unlike *Ker*, the use of any alternate procedures in *Ford* would directly violate a provision of the treaty.⁸⁷ The conviction in *Ford* was ultimately sustained on other grounds.⁸⁸

81. The National Prohibition Act prohibited the importation of liquor. *Id.* at 618.

82. *Id.* at 603. The members of the crew were charged with conspiracy to violate the prohibition laws by importing liquor. *Id.* at 601.

83. The defendants also claimed that the issue should have been submitted to a jury. *Id.* at 605. The issue had been decided by the district court. *United States v. Ford*, 3 F.2d 643, 648 (S.D. Cal. 1925).

84. *Ford*, 273 U.S. at 605.

85. *Id.* at 605-06.

86. *Id.* at 608; *see supra* note 79 and accompanying text.

87. *Id.* at 606.

88. The Court stated that the question of whether the vessel was seized within the limits prescribed by the treaty did not affect the defendants' guilt or innocence, but only affected the question of jurisdiction. *Id.* Since a plea to jurisdiction must be filed before a plea of not guilty, and that had not been done, the effect was to waive the jurisdictional issue. *Id.*

The defendants also contended that the treaty expressly provided for the boarding, seizure and disposition of the vessel, but did not expressly provide for the prosecution of persons on board. Because of this omission, they argued, the treaty precluded their prosecution. *Id.* at 607. The defendants based this claim on the maxim of statutory interpretation *expressio unius est exclusio alterius*. *Id.* at 611. The maxim means "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990). The Court rejected this argument and interpreted the treaty as providing an implicit grant of jurisdiction over the offenders found on the vessels. *Ford*, 273 U.S. at 610; *see also* John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 458 (1987). The defendants would be immune from prosecution only if the treaty affirmatively granted them such a right. *Ford*, 273 U.S. at 611.

The same treaty involved in *Ford* was involved in *Cook v. United States*, 288 U.S. 102 (1933). In *Cook*, a British vessel carrying liquor in violation of United States laws was seized by United States officials and brought into port. *Id.* at 107-08. The vessel was seized outside the territorial limits prescribed by the treaty. *Id.* The Court held the United States lacked the power to seize the ship and dismissed the charges. *Id.* at 121-22.

Ford should not be interpreted as holding that every United States extradition treaty acts to limit the jurisdiction of the courts.⁸⁹ The violation discussed in *Ford* was of a "positive provision" of the treaty.⁹⁰ The treaty contained a provision specifically limiting the manner and the place in which United States officials could board British ships.⁹¹ Most extradition treaties do not contain such specific limits on the manner of rendition.⁹² Therefore, suggestions that extradition treaties limit a court's jurisdiction must occur only after reviewing the specific treaty.

B. *Extraordinary Rendition*

A court's jurisdiction also may not be affected if the prosecuting and asylum governments decide not to formally extradite a defendant, but rather to effectuate his return by alternate means.⁹³ This is sometimes necessary where the offense committed is not provided for in the extradition treaty. In such a case, formal extradition is not possible.⁹⁴ Even if an extradition treaty exists and covers the crime in question, because it is for the benefit of

89. *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *See Rogers*, *supra* note 88, at 460. *Cook* also should not be viewed as holding that every United States extradition treaty acts to limit the courts' jurisdiction. Note, *A Federal Court Lacks Jurisdiction Over a Criminal Defendant Brought Into the District by forcible Abduction; The Fourth Amendment Protects an Alien Residing Abroad Against Unreasonable Searches and Seizures Conducted by American Agents*, 88 HARV. L. REV. 813, 820-21 (1975).

90. *United States v. Winter*, 509 F.2d 975, 989 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975). The provision of the treaty involved states: "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." *Ford*, 273 U.S. at 608.

91. *Ford*, 273 U.S. at 607-08.

92. *See, e.g.*, Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

93. *See, e.g.*, *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (holding that a treaty does not limit the ability of the contractive states to surrender fugitives by comity), *cert. denied*, 479 U.S. 1009 (1986); *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981) (holding that the extradition treaties in question do not mandate that the countries involved follow the enumerated procedures, and that states may return defendants outside the formal extradition procedures); *Ex Parte Foss*, 36 P. 669, 670 (Cal. 1894) (holding that a sovereign has the right to surrender fugitives for crimes other than those specified in the extradition treaty). *But see Collier v. Vaccaro*, 51 F.2d 17, 19 (4th Cir. 1931) (holding that a defendant can be sent to another state only in accordance with the treaty provisions governing extradition).

94. *See, e.g.*, *Foss*, 36 P. at 670. Such treaties are called the "numerative (list) approach." Extradition is only possible if the alleged offense is enumerated in the treaty. *See, e.g.*, Extradition Treaty, June 7, 1934, U.S.-Iraq, 49 Stat. 3380. The other type of extradition treaty is the "eliminative (no list) approach." Under this type of treaty, extradition is possible for all offenses punishable in both contracting states by some minimum amount of time. *See, e.g.*, Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227.

the contracting nations, they may agree to avoid the formal proceedings and engage instead in alternate forms of rendition.⁹⁵

1. Comity: Just Between Friends

Comity is the principle under which a government may voluntarily surrender a fugitive from justice to the country from which he has fled.⁹⁶ It is a "willingness to grant a privilege, not as a matter of right, but out of deference and good will."⁹⁷ Such voluntary actions do not violate the fugitive's due process rights,⁹⁸ and there is no right to be free from prosecution if returned to the prosecuting country by means other than formal extradition.⁹⁹ It is neither a violation of United States domestic law nor a violation of the foreign state's sovereignty if that state aids in, or acquiesces to, the action.¹⁰⁰ A number of cases have reinforced this proposition.

In *United States v. Cordero*,¹⁰¹ the defendants were arrested by Panamanian officials in that country. They were flown to Venezuela and then to Puerto Rico, where they were tried and convicted for narcotics offenses.¹⁰² The procedures used to return the defendants to Puerto Rico were not in accord with those enumerated in the extradition treaties between the United States and Panama and between the United States and Venezuela.¹⁰³ The defendants, relying on that fact, claimed their arrest and subsequent return to the United States violated both extradition treaties.¹⁰⁴ The United States Court of Appeals for the First Circuit disagreed, stating that neither treaty provided that the procedures enumerated therein were the sole means by which an accused could be transferred from one state to another.¹⁰⁵ The

95. Alternate forms of rendition are possible because an extradition treaty is for the benefit of the contracting states and they may, if they wish, waive their rights under the treaty. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *United States v. Cordero*, 668 F.2d 32, 32 (1st Cir. 1981).

96. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); see also *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933).

97. BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

98. See *supra* notes 21-42 and accompanying text.

99. *Chandler v. United States*, 171 F.2d 921, 935-36 (1st Cir. 1948).

100. See *supra* note 15.

101. 668 F.2d 32 (1st Cir. 1981).

102. *Id.* at 35-36.

103. *Id.* at 37.

104. *Id.* The defendants also relied on the *Toscanino* exception to the *Ker-Frisbie* doctrine. The court found no circumstances analogous to those alleged in *Toscanino* and refused to apply the exception. *Id.* at 36-37.

105. *Id.* at 37. The court further noted that the treaties did not prohibit a nation from deporting an accused. *Id.* The court also recognized that the contracting government, not the

First Circuit refused to hold that extradition treaties forbid independent states from returning an accused by alternate means.¹⁰⁶

The United States Court of Appeals for the Ninth Circuit articulated a similar view in *United States v. Valot*.¹⁰⁷ In *Valot*, the defendant was arrested and incarcerated in Thailand on a marijuana charge.¹⁰⁸ On the day he was released from incarceration, Thai officials detained the defendant until they were able to turn him over to United States officials in Thailand, who then returned him to the United States.¹⁰⁹ Valot argued his "abduction" violated the extradition treaty between Thailand and the United States.¹¹⁰ The court dismissed this claim and stated that there was nothing to stop Thai authorities from deporting the defendant.¹¹¹

2. True Abduction

When government officials abduct a fugitive from a foreign state without the express consent of the foreign government, that government will either acquiesce or object to the action.¹¹² If the government acquiesces to the action, the court's inquiry into the method of rendition ends, barring any due process concerns.¹¹³ Absent protest from the foreign government, the abducted individual does not have standing to claim that either a state's sovereignty or an extradition treaty was violated.¹¹⁴ This is because it is within

defendant, has the right under international law to complain about an alleged treaty violation. *Id.* at 38.

106. The court acknowledged that under such restrictions, extradition treaties would hinder, rather than help, states return fugitives. *Id.* at 38.

107. 625 F.2d 308 (9th Cir. 1980).

108. *Id.* at 309.

109. *Id.*

110. *Id.* at 310.

111. *Id.* The court also noted that the defendant did not have standing under international law to raise the issue of a possible treaty violation. *Id.*

112. For cases in which a government has acquiesced to the alleged abduction of an accused from its territory, see *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989); *United States v. Rosenthal*, 793 F.2d 1214, 1231 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Insull*, 8 F. Supp. 310, 313 (N.D. Ill. 1934); *United States v. Unverzagt*, 299 F. 1015, 1017 (W.D. Wash. 1924), *aff'd sub nom. Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925). For cases in which a government has protested the alleged abduction, see *Mahon v. Justice*, 127 U.S. 700, 704 (1888); *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992); *Ex Parte Lopez*, 6 F. Supp. 342, 344 (S.D. Tex. 1934).

113. See *supra* note 71.

114. *Matta-Ballesteros*, 896 F.2d at 259; *Kaufman*, 874 F.2d at 243; *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988); *United States v. Cordero*, 668 F.2d 32, 37 (1st

the state's province to determine whether such violations have occurred and whether the alleged violations require redress.¹¹⁵

If the offended government does protest the abduction, either in terms of a violation of its sovereignty or of the existence of a bypassed extradition treaty, it will usually do so by means of a diplomatic note sent to the abducting government.¹¹⁶ From that point, courts have disagreed as to whether a court must divest itself of jurisdiction over the person and as to who should properly address the foreign government's concerns.¹¹⁷

a. Jurisdiction of Courts Over Defendants Seized in Violation of United States or International Law

Many courts have held that, due process issues aside, an illegal arrest, in itself, will not bar prosecution.¹¹⁸ In *Autry v. Wiley*,¹¹⁹ the defendant, a United States Naval Reserve member, was court martialed and convicted of deserting his ship while docked in Canada.¹²⁰ The defendant appealed to the United States Court of Appeals for the First Circuit, claiming that the circumstances under which he was brought from Canada to the United States

Cir. 1981); *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981); *Lujan*, 510 F.2d at 67; *Caro-Quintero*, 745 F. Supp. at 607; *Garcia-Mora*, *supra* note 76, at 436.

Some courts have held that once the offended government formally protests, the abducted individual has derivative standing to raise the issue and invoke rights under the treaty. *Verdugo-Urquidez*, 939 F.2d at 1355-57; *Caro-Quintero*, 745 F. Supp. at 608.

115. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Zabaneh*, 837 F.2d at 1261; *Lujan*, 510 F.2d at 67.

116. *See, e.g., Verdugo-Urquidez*, 939 F.2d at 1343; *Caro-Quintero*, 745 F. Supp. at 608.

117. For cases in which courts have referred the matter to the political branches of the government, see *Mahon v. Justice*, 127 U.S. 700 (1888); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934); *Ex Parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom. Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925). For cases in which courts have declared the matter within judicial cognizance, see *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

A threshold issue is whether the abduction was perpetrated by officials of the prosecuting state or its paid agents, or by individuals acting of their own accord. If the abductors were bona fide volunteers, then a state cannot be accused of violating another state's sovereignty. BASSIOUNI, *supra* note 15, at ch. V, § 2-7; Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 269 (1952); Michael H. Cardozo, *When Extradition Fails, Is Abduction The Solution?*, 55 AM. J. INT'L L. 127, 132 (1961). If the abductors were agents of the prosecuting government, however, that government is held responsible. A government agent is an individual who is vested with the government's authority. His acts are considered those of the state. CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 44-45 (1928).

118. *See cases cited infra* note 138.

119. 440 F.2d 799 (1st Cir. 1971).

120. *Id.* at 800.

violated a treaty and that jurisdiction therefore could not be asserted over him.¹²¹ He based this assertion on *United States v. Rauscher*,¹²² which established that a defendant who is extradited for one crime may not be tried for a different crime once inside the prosecuting state.¹²³ The defendant also relied on *Cook v. United States*,¹²⁴ which established that if the terms of a treaty set specific territorial limits, a defendant seized outside those limits may not be prosecuted.¹²⁵

The *Autry* court relied on *Ker* as establishing the general rule that the manner in which an accused is brought before a court is immaterial. The court further stated that *Rauscher* and *Cook* provide very limited exceptions to the general rule and that neither applied in the case at bar.¹²⁶

This interpretation of jurisdictional limitations was reaffirmed in *United States v. Noriega*.¹²⁷ In *Noriega*, a federal grand jury indicted Noriega¹²⁸ for "participating in an international conspiracy to import cocaine and materials used in producing cocaine into and out of the United States."¹²⁹ Relations between the United States and Panama deteriorated to the point that in December of 1989, Noriega declared the existence of a state of war between the two countries.¹³⁰ Subsequently, Panamanian troops shot and killed an American soldier, wounded another American soldier, and assaulted a Navy couple.¹³¹ United States President Bush responded by sending United States troops into Panama City.¹³² The troops were to seize Noriega and return him to the United States to face prosecution.¹³³ Two weeks later, Noriega surrendered to the United States.¹³⁴

121. *Id.*

122. 119 U.S. 407 (1886).

123. *Id.* at 430.

124. 288 U.S. 102 (1933).

125. *Id.* at 121.

126. 440 F.2d at 801-02.

127. 746 F. Supp. 1506 (S.D. Fla. 1990).

128. General Manuel Antonio Noriega was the leader of the Panamanian armed forces. *Id.* at 1509-10. Also indicted was Lt. Col. Luis Del Cid. *Id.*

129. *Id.* at 1510.

130. *Id.* at 1511.

131. *Id.*

132. *Id.*

133. *Id.* The troops were also sent in to "safeguard American lives, restore democracy, [and] preserve the Panama Canal treaties." *Id.* Before the action, Guillermo Endara was sworn in as president of Panama. Endara had won the presidential election held in Panama months earlier, but Noriega disregarded the election results. *Id.*

134. *Id.* at 1511. Noriega surrendered after taking sanctuary in the Papal Nunciature in Panama City. *Id.*

Noriega claimed that the invasion of Panama violated international treaties.¹³⁵ Although the court dismissed this claim on other grounds,¹³⁶ it noted that based on *Ker-Frisbie*, violations of international law, such as treaties, do not require a court to divest itself of jurisdiction over a defendant. The court recognized that its jurisdiction would only be affected if the treaties at issue included terms which expressly limited that jurisdiction.¹³⁷ A number of cases have expressed the same line of reasoning.¹³⁸

b. Diplomacy: The Executive's Exclusive Sphere

Although a court retains jurisdiction over a defendant brought before it in violation of a United States or international law, the issue of how to address the offended government's protest remains. Governments communicate with each other through diplomatic channels. Therefore, an official protest from the offended government will be presented through such channels.¹³⁹ In the United States, diplomatic issues are handled by the executive branch; specifically, communication passes through the Department of State.¹⁴⁰ From this point, courts have differed as to whether the matter should be resolved by the judiciary¹⁴¹ or the political branches of the government.¹⁴²

135. Specifically, Noriega claimed the United Nations Charter, article 2, paragraph 4, and the Organization of American States Charter, article 17, were violated. *Noriega*, 746 F. Supp. at 1532. For a discussion of claims under these charters see *infra* note 185.

136. The court determined that Noriega did not have standing to assert the violations. It based this conclusion on the fact that offended nations, not individuals, have standing to assert a violation of international treaties. *Id.* at 1533. Noriega was not considered by the court to be the leader of the nation of Panama. The court noted that the United States has never recognized the Noriega regime as Panama's government and that the present government did not object. *Id.* at 1534.

137. *Id.* at 1533.

138. See, e.g., *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *United States v. F/V Taiyo Maru*, Number 28, SOI 600, 395 F. Supp. 413, 418-19 (D. Me. 1975). *But see* *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1354-55 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599, 606-14 (C.D. Cal. 1990), *aff'd sub nom.* *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

139. HACKWORTH, *supra* note 9, at 604 (quoting Letter from Secretary Bacon to Norwegian Minister Gude (Dec. 11, 1908)).

140. *Id.* There are a few instances in which communication may not need to go through the State Department. See *id.* at 606.

141. See, e.g., *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom.* *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

142. See, e.g., *Mahon v. Justice*, 127 U.S. 700 (1888); *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *United States v. Sobell*, 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.) *cert. denied*, 355 U.S. 873 (1957); *United States v. Insull*, 8 F. Supp. 310 (N.D. Ill. 1934); *Ex Parte Lopez*, 6 F. Supp. 342 (S.D. Tex. 1934); *United States v. Unverzagt*, 299 F.

Traditionally, the President has been considered responsible for conducting the United States' foreign affairs¹⁴³ and for conducting general negotiations with foreign governments.¹⁴⁴ The President negotiates treaties¹⁴⁵ and represents the United States to foreign nations.¹⁴⁶ In part, this is due to the fact that the executive may be privy to relevant information to which the judiciary is not.¹⁴⁷ "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁴⁸ As a result, executive decisions which must be made in dealing with foreign governments are of a political, rather than judicial, nature.¹⁴⁹ Many courts have conformed their decisions to these principles.¹⁵⁰

In *Mahon v. Justice*,¹⁵¹ the defendant was wanted in Kentucky for murder. He was forcibly abducted from West Virginia, where he had fled.¹⁵² The Governor of West Virginia demanded the release and return of Mahon, but the Governor of Kentucky refused.¹⁵³ The Governor of West Virginia petitioned the Court for the defendant's release.¹⁵⁴

The Court held that the jurisdiction of a court over a defendant is not affected by the manner in which the defendant is returned.¹⁵⁵ One of the cases the Court relied upon to reach its conclusion not only ruled that jurisdiction was unaffected by such action, but also that if the foreign country

1015 (W.D. Wash. 1924), *aff'd sub nom.* Unverzagt v. Benn, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925).

143. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-21 (1936).

144. HACKWORTH, *supra* note 9, at 650 (quoting SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 108 (2d ed. 1916)).

145. Although the President makes treaties by and with the consent of two-thirds of the Senators present, U.S. CONST. art. II, § 2, cl. 2, he alone negotiates. *Curtiss-Wright*, 299 U.S. at 319.

146. *Id.* at 319-20.

147. *Id.* at 320; *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

148. *Curtiss-Wright*, 299 U.S. at 319 (quoting address by Marshall, U.S. House of Representatives 6th Congress (Feb. 15, 1816)).

The importance of the United States speaking with a unitary voice was also recognized by the Senate Committee on Foreign Relations in its report to the Senate in 1816. Part of the report provided that "[t]he President is the constitutional representative of the United States with regard to foreign nations . . . [He is the] most competent to determine when, how, and upon what subjects negotiation may be urged The nature of transactions with foreign nations, moreover, requires . . . unity of design" *Curtiss-Wright*, 299 U.S. at 319 (quoting United States Senate Reports, Committee on Foreign Relations, vol. 8, at 24 (Feb. 15, 1816)).

149. *Waterman*, 333 U.S. at 111.

150. *See infra* notes 151-85 and accompanying text.

151. 127 U.S. 700 (1888).

152. *Id.* at 700-01.

153. *Id.* at 703.

154. *Id.* at 700.

155. *Id.* at 708, 715.

from which the defendant was abducted complains, the matter should be referred to the political branches, because the court is not empowered under the Constitution to enter into political relations.¹⁵⁶ Mahon's conviction was affirmed.¹⁵⁷ The following year, the Supreme Court held in *The Chinese Exclusion Case*¹⁵⁸ that it is not within the power of the judiciary to pass upon the legitimacy of a decision by the government to disregard a treaty with a foreign sovereign.¹⁵⁹

Of the many cases decided in accord with the above stated opinions,¹⁶⁰ four are particularly noteworthy. The first is *United States v. Unverzagt*,¹⁶¹ in which the defendant was abducted from British Columbia and brought to the United States.¹⁶² The defendant argued that he could not be removed from British Columbia without that government's consent and that he should be released because he was unlawfully brought before the court. The Federal District Court for the Western District of Washington found that there was no question as to the validity of the indictment, or as to whether the defendant was the person named in the indictment, and denied the defendant's writ for discharge.¹⁶³ It noted that if either Canada or British Co-

156. *Id.* at 711-12. The Court relied on *State v. Brewster*, 7 Vt. 118 (1835).

157. *Mahon*, 127 U.S. at 715. *But see Garcia-Mora*, *supra* note 76, at 438 (explaining that the abduction of a fugitive is a matter for judicial inquiry and should not be transferred to the domain of politics).

158. 130 U.S. 581 (1889).

159. *Id.* at 602.

160. A few examples of such cases are as follows:

In 1905, Antonio Martinez was kidnapped from Mexico and returned to the United States to stand trial in California. At the Mexican Government's request, the United States extradited Martinez's kidnapper to Mexico for prosecution. The Mexican Government also requested the return of Martinez on the grounds that he was brought to the United States by unlawful means. The request was sent to the U.S. State Department, and it, not the court, decided the issue. Martinez was not returned to Mexico. 2 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 321 (1941).

Adelard Lafond was charged in Canada with larceny. He was allegedly kidnapped from Illinois and returned to Canada for prosecution. The American Consul requested the Attorney General of Canada to return Lafond to the United States. The judiciary was not involved in this decision. HACKWORTH, *supra* note 9, at 224.

In 1849, a Spaniard from Cuba was kidnapped from the United States by the direction of either the Spanish or Cuban Government. The American Consul was ordered to investigate the matter, and if it was discovered that either foreign government had been involved, the matter would be sent to Congress, not the court, to decide on a remedy. 4 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW 329 (1906).

161. 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom.* *Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925).

162. 299 F. at 1016.

163. *Id.*

lumbia wished to protest, which they did not, the issue would be political and should be handled through appropriate channels.¹⁶⁴

The Federal District Court for the Northern District of Illinois reasoned similarly in *United States v. Insull*.¹⁶⁵ The defendant was aboard a Greek vessel in the Bosphorus.¹⁶⁶ He was seized by Turkish police and delivered to an American vessel anchored in a Turkish port¹⁶⁷ which transported him to the United States.¹⁶⁸ The defendant argued that the court did not have jurisdiction over his person, because he was abducted in violation of United States law and in violation of treaties between the United States and the Hellenic Republic and between the United States and Turkey.¹⁶⁹ The court dismissed that contention by citing *Ker* and its progeny.¹⁷⁰ It added that the country from which the defendant was seized had not, at the time of prosecution, objected to the action. If it did object, however, the question would be political and it should be addressed through diplomatic channels—channels over which the court had no power to examine.¹⁷¹

In *Ex Parte Lopez*,¹⁷² the defendant was seized in Mexico and brought to the United States to face prosecution for violation of narcotics laws.¹⁷³ The Mexican government claimed that the abduction violated its sovereignty and requested that Lopez be released and returned to Mexico.¹⁷⁴ The Federal District Court for the Southern District of Texas acknowledged the objection was a very serious matter, but noted that it was one which should be handled by the executive, not the judicial branch of the government.¹⁷⁵ The court therefore continued with the proceedings against the defendant.¹⁷⁶

164. *Id.* at 1016-17.

165. 8 F. Supp. 310 (N.D. Ill. 1934).

166. The Bosphorus is an eighteen mile straight between Greece and Turkey, which connects the Black Sea with the Mediterranean Sea. 4 ENCYCLOPEDIA AMERICANA 291 (Int'l. ed. 1965).

167. *Insull*, 8 F. Supp. at 311.

168. *Id.*

169. *Id.*

170. *Id.* at 312-13 (citing *Ker v. Illinois*, 119 U.S. 436 (1886); *United States v. Unverzagt*, 299 F. 1015 (W.D. Wash. 1924), *aff'd sub nom. Unverzagt v. Benn*, 5 F.2d 492 (9th Cir.), *cert. denied*, 269 U.S. 566 (1925)).

171. *Id.* at 313.

172. 6 F. Supp. 342 (S.D. Tex. 1934).

173. *Id.* at 343.

174. *Id.*

175. *Id.* at 344.

176. *Id.*

Finally, in *United States v. Sobell*,¹⁷⁷ the defendant was involved in espionage against the United States.¹⁷⁸ He fled to Mexico where he was forcibly abducted and returned to the United States by Mexican Security Police who were acting as paid agents of the United States.¹⁷⁹ He was subsequently convicted of giving United States defense information to the Soviet Union and five years later petitioned the United States District Court for the Southern District of New York to set aside the verdict and the judgment.¹⁸⁰ The defendant claimed that his abduction violated the extradition treaty between the United States and Mexico and, therefore, that the federal district court had lacked jurisdiction to proceed against him.¹⁸¹

The court discussed the specific obligations owed by one sovereign to another upon entering into an extradition treaty.¹⁸² The surrendering state is obligated to extradite fugitives for the agreed upon offenses.¹⁸³ The demanding state is obligated to try the fugitive only for the specific crime charged.¹⁸⁴ If the demanding state bypasses the formalities of the extradition treaty and recovers a fugitive by alternate means which violate the other state's sovereignty, "that creates a question for the political branches of the government, but does not raise any [questions] concerning judicial jurisdiction."¹⁸⁵ The court denied the defendant's motion.

177. 142 F. Supp. 515 (S.D.N.Y. 1956), *aff'd*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957).

178. *Id.* at 517.

179. *Id.* at 519.

180. *Id.* at 517-19. Sobell's conviction was affirmed by the United States Court of Appeals for the Second Circuit. *Id.* at 519. The Soviet Union was a multinational state organized as a federation of fifteen union republics. It was formed in 1922 following the Bolshevik revolution of 1917. 27 ENCYCLOPEDIA AMERICANA 379, 380 (Int'l. ed. 1965). On December 8, 1991, the leaders of three of the republics, Russia, Ukraine and Byelorussia, formally announced the dissolution of the Soviet Union. Michael Dobbs, *Slavic Republics Declare Soviet Union Liquidated*, WASH. POST, Dec. 9, 1991, at A1. On December 21, 1991, the leaders of eleven former Soviet republics announced that the Soviet Union was replaced by a new Commonwealth of Independent States. James Rupert, *Yeltsin to Control Most Nuclear Arms; 11 Former Soviet Republics Declare Formation of Commonwealth*, WASH. POST, Dec. 22, 1991, at A1.

181. *Id.*

182. *Id.* at 524.

183. *Id.*

184. *Id.*

185. *Id.* at 524-25.

A defendant may further attempt to challenge a court's jurisdiction based on the alleged violation of an international obligation. The United Nations Charter is an international agreement, and therefore it is not self-executing. As a result, it does not confer judicially enforceable rights upon individuals. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). Some defendants who have been returned to a country by means other than extradition refer to article 2, paragraph 4 of the Charter, which limits the use of force by one member state against another, in an attempt to challenge the court's jurisdiction. U.N. CHARTER, article 2, paragraph 4. While this provision imposes obligations on the member nations

C. A Disturbing Departure

The two most recent opinions released in this area of the law were decided by federal courts in California. In *United States v. Caro-Quintero*,¹⁸⁶ the defendant, Dr. Alvarez-Machain, was a Mexican national who was wanted in the United States to face charges in connection with the torture/murder of Drug Enforcement Administration (DEA) Special Agent Enrique Camarena-Salazar.¹⁸⁷ The United States and Mexican Governments reached an agreement whereby Machain would be returned to the United States.¹⁸⁸ Unfortunately, the agreement fell apart,¹⁸⁹ and Machain was sub-

and the United Nations itself, it does not protect an individual's rights. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). Therefore, a defendant's challenge to jurisdiction based on article 2, paragraph 4 of the Charter must fail. *Id.* If a sovereign state claims that a violation of article 2, paragraph 4 has occurred, however, in certain situations the state accused of the violation may want to argue that article 51 of the Charter supports its action. See U.N. CHARTER, art. 51. This article gives states the right to take steps to protect its territory and citizens if "an armed attack occurs." *Id.* There are some states that allow terrorist groups to use their territory to train and plan terrorist attacks on other countries. These actions could constitute an armed attack and, based on Article 51, would allow the prosecuting state to use force in "self-defense." *Id.* The force used would be abducting the fugitive and bringing him to justice. D. Cameron Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 22 (1988).

Another international obligation relied upon by defendants to attack a court's jurisdiction is contained in article 17 of the Charter of the Organization of American States. *Organization of American States*, April 30, 1948, 2 U.S.T. 2394, *amended by* the Protocol of Buenos Aires, February 27, 1967, art. 17, 21 U.S.T. 607. This article discusses the inviolability of a state. However, the Charter is not self-executing, and thus does not confer any enforceable rights on individuals. *Tel-Oren*, 726 F.2d at 809.

One multilateral treaty that does confer rights on individuals is the International Covenant on Civil and Political Rights. *International Covenant on Civil and Political Rights*, December 19, 1966, art. 9, 999 U.N.T.S. 171. Article 9, which affirms the rights of individuals to liberty and security of person, best supports the argument that abduction violates internationally protected human rights. Findlay, *supra*, at 36. This article is intended to guard against police abuse. *Id.* Article 9 may not actually help a defendant's case, however, because it has been interpreted to require only "that a state have valid grounds to deprive an individual of his or her liberty and an adequate procedure for detention and trial." *Id.*

Even in recent times, cases still arise in which a defendant, abducted from one state and brought to another for prosecution, attacks a court's jurisdiction based on the manner of his rendition. *Id.* at 38-39.

186. 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom.* *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *cert. granted*, 112 S. Ct. 857 (1992).

187. *Id.* at 601.

188. *Id.* at 602.

189. The DEA refused to advance Mexican officials \$50,000 to cover transportation expenses, and thus Machain was not delivered. *Id.* at 602. Subsequent negotiations also fell apart due to increased tension between the Mexican Government and the United States Government, which resulted from the airing of an NBC mini-series based on the Camarena murder and investigation. *Id.* at 602-03.

sequently abducted from Mexico by United States agents and returned to the United States.¹⁹⁰

The following month, the Embassy of Mexico sent several diplomatic notes to the United States Department of State alleging United States participation in Machain's abduction and stating that the action violated the extradition treaty between the two countries.¹⁹¹ The Mexican government demanded Machain's return to Mexico and requested the extradition of the DEA agent and DEA informant who arranged the abduction for prosecution.¹⁹² To date, the United States has not complied with this demand.

The United States District Court for the Central District of California followed the *Ker-Frisbie* doctrine¹⁹³ and denied Machain's motion to dismiss on due process grounds.¹⁹⁴ However, the court held that the United States action, combined with Mexico's protest, violated the extradition treaty, and that as a result Machain should be returned to Mexico.¹⁹⁵ In reaching its decision, the court misinterpreted *Ford v. United States*¹⁹⁶ and *Cook v. United States*¹⁹⁷ as establishing that the *Ker-Frisbie* doctrine does not apply when "a treaty of the United States is directly involved."¹⁹⁸ As stated in prior case law, the *Ker* doctrine did not apply in *Ford* and *Cook* because no positive provision of the treaty had been violated in *Ker*. *Ford* and *Cook* only apply when a positive provision of a treaty that limits jurisdiction is violated.¹⁹⁹ There is no provision in the extradition treaty between the United States and Mexico which specifies that a fugitive may be returned to the prosecuting country only in accordance with the procedures enumerated in the treaty.²⁰⁰ Therefore, in *Caro-Quintero*, no positive provision of the extradition treaty was violated. The court should have based its analysis on *Ker*, not *Ford* and *Cook*.

190. *Id.* at 603.

191. *Id.* at 604.

192. *Id.*

193. *Id.* at 604. For a discussion of the *Ker-Frisbie* doctrine, see *supra* notes 21-42 and accompanying text.

194. *Caro-Quintero*, 745 F. Supp. at 605-06.

195. *Id.* at 614. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991). The court based its decision on *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991). *Machain*, 946 F.2d at 1466-67. The United States Supreme Court has granted certiorari to hear the case. *United States v. Alvarez-Machain*, 112 S. Ct. 857 (1992).

196. 273 U.S. 593 (1927); see *supra* notes 76-92 and accompanying text.

197. 288 U.S. 102 (1933); see *supra* note 88.

198. 745 F. Supp. at 606 (quoting *Ford v. United States*, 273 U.S. 593, 606 (1927)).

199. See cases cited *supra* note 138.

200. See Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059. It is interesting to note that the district court did not cite any provision of the treaty in its decision.

The court further reasoned that, because the Mexican Government objected to the abduction, the extradition treaty had been violated. Even if the action violated the extradition treaty, case law has established that a court's jurisdiction is not effected in such a situation unless the treaty provides specific limits. In addition, a diplomatic protest following an abduction should be handled by the executive and legislative branches of the government, not by the judicial branch.²⁰¹

In *United States v. Verdugo-Urquidez*,²⁰² the defendant was also abducted from Mexico by United States officials to face prosecution for the murder of DEA Agent Camarena-Salazar.²⁰³ The Mexican Government demanded his return.²⁰⁴ The defendant filed a motion to dismiss the indictment, alleging that the extradition treaty between the two countries was violated and therefore the court must divest itself of jurisdiction.²⁰⁵ The district court dismissed the defendant's motion based on the *Ker-Frisbie* doctrine.²⁰⁶

On appeal, the United States Court of Appeals for the Ninth Circuit held that the authorized or sponsored abduction of a defendant by the United States from a foreign sovereign's territory, without the consent or acquiescence of that government, violates the extradition treaty between the two countries.²⁰⁷ Further, if the offended government protests, a court hearing the case must divest itself of jurisdiction.²⁰⁸ The court stated that based on *Ford* and *Cook*, a court's jurisdiction is adversely affected if the defendant is brought before the court by illegal means, especially in violation of a treaty.²⁰⁹ The treaty involved in both *Ford* and *Cook*, however, provided explicit limits on when the defendants could be seized. No such limits are provided for in the United States-Mexico extradition treaty.²¹⁰

The Ninth Circuit in *Verdugo-Urquidez*, as did the district court in *Caro-Quintero*, misinterpreted *Ford* and *Cook* and combined the jurisdiction issue with the diplomatic relations issue. Both cases are disturbing in that they

201. See *supra* notes 139-85 and accompanying text.

202. 939 F.2d 1341 (9th Cir. 1991).

203. See *supra* text accompanying note 187.

204. *Verdugo-Urquidez*, 939 F.2d at 1343.

205. *Id.*

206. *Id.*

207. *Id.* at 1342-43.

208. *Id.* at 1343. The court acknowledged that individuals do not have standing under international law to raise treaty violation issues, but found that because Mexico objected, the defendant had derivative standing to raise such an issue. *Id.* at 1355-57.

209. *Id.* at 1346-47. The court remanded the case to the district court to determine whether the United States authorized or sponsored Verdugo-Urquidez's kidnapping. *Id.* at 1343. If the district court so finds, it shall give Verdugo-Urquidez to the Mexican authorities. *Id.* at 1360.

210. See *supra* text accompanying notes 89-91.

significantly diverge from one hundred years of precedent in which courts had refused to limit the method of rendition.

III. THE FUTURE OF OFFICIALLY SANCTIONED ABDUCTION OF FUGITIVES

International terrorist and narcotic activities are rapidly increasing in today's world.²¹¹ This, in addition to the fact that many states will not extradite their own nationals,²¹² frustrates law enforcement officials and courts to the point where alternate forms of rendition become increasingly attractive.

Over one hundred years ago, the Supreme Court recognized that a court maintains jurisdiction over a defendant brought in from overseas by means other than formal extradition, with or without the offended nation's consent.²¹³ Since that time, courts have affirmed and expanded on that decision.²¹⁴ It is now well established that a defendant, whether a United States citizen or an alien, abducted from abroad by the prosecuting state may not claim that his right to due process has been violated based solely upon that one factor.²¹⁵ Consistent with a line of Supreme Court cases,²¹⁶ the defendant's "due process rights" are afforded to him after his arrest in the pretrial and trial stages.

A court also maintains its jurisdiction when a defendant is brought before the court in violation of United States or international law.²¹⁷ When an offended government protests the action through diplomatic channels, the answers are not as clear. What is clear, however, is that the protest does not affect the court's jurisdiction over the defendant. The issue of jurisdiction is distinct from the issue of how to deal with the protesting government. Diplomatic relations are within the sphere of the executive and legislative branches. Only representatives of these branches are familiar with diplomatic strategies and are privy to certain facts necessary to plot these strategies.²¹⁸ A judge is neither equipped nor empowered to make decisions that will inevitably affect the foreign policy of the United States.²¹⁹ These powers are delegated by the Constitution to the executive and the legislature, not to the judiciary.²²⁰

211. See *supra* note 12.

212. See *supra* note 10.

213. See *supra* notes 21-32 and accompanying text.

214. See cases cited *supra* note 71.

215. See cases cited *supra* note 71.

216. See *supra* notes 21-42 and accompanying text.

217. See *supra* notes 118-38 and accompanying text.

218. See *supra* notes 139-50 and accompanying text.

219. See *supra* notes 139-50 and accompanying text.

220. See *supra* notes 143-49 and accompanying text.

When deciding whether to return a defendant who has been abducted abroad by a prosecuting state back to the state from which he was abducted, the Government should consider the ramifications of its decision. In *Caro-Quintero* and *Verdugo-Urquidez*, the Mexican Government is demanding the return of the defendants. If that demand is not satisfied, then the cooperation given to the United States by Mexico in its "war on drugs" could be jeopardized. The United States must also consider what its position would be if the situation was reversed. Would it silently accept the abduction of one of its citizens? It has not in the past.²²¹

There may be some situations in which the United States will not want to extradite an individual. For example, in *Caro-Quintero* the Mexican Government wants the DEA agent who was indirectly involved in Machain's abduction extradited to face charges.²²² If the United States does not honor the request and Mexican officials or their paid agents abduct the agent, return him to Mexico, and try him there, what will the United States do? Based upon the prior actions of the United States, it may not be in a strong position to object to Mexico's action and demand the return of the DEA agent. The United States may not want to set a precedent that it is acceptable to flout international law principles and ignore diplomatic requests from foreign governments. Because of the potential ramifications of such action, any decisions made regarding a diplomatic request should be made by the executive, not by the judiciary.

IV. CONCLUSION

Extradition treaties are executed for the benefit of the contracting states to protect their respective sovereignty. States may, if they wish, avoid the extradition treaty and return fugitives by alternate forms of rendition. Sometimes, however, a state acts unilaterally and abducts a fugitive from another state. If the foreign government acquiesces and does not register a complaint, the fugitive has no recourse. If the foreign country views the action as a violation of its sovereignty, it has the right under international law to register a formal protest. Most courts have held, in such cases, that a court maintains jurisdiction over the fugitive regardless of the violation of any United States or international law. Complaints about the violation of sovereignty or international law are forwarded through the diplomatic channel,

221. See *supra* note 160, the second and third examples.

222. See *supra* notes 191-92 and accompanying text.

and are best handled by the executive and legislative branches of government.

Jacqueline A. Weisman

