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## The Wild, Wild Western Hemisphere: Due Process and Treaty Limitations on the Power of United States Courts to Try Foreign Nationals Abducted Abroad by Government Agents

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THE WILD, WILD WESTERN HEMISPHERE: DUE PROCESS AND  
TREATY LIMITATIONS ON THE POWER OF UNITED  
STATES COURTS TO TRY FOREIGN  
NATIONALS ABDUCTED ABROAD BY  
GOVERNMENT AGENTS

The United States government is committed to fighting a "War on Drugs,"<sup>1</sup> a war that includes prosecuting foreigners for acts committed abroad which violate United States drug laws.<sup>2</sup> Extradition is the tradi-

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1. On September 6, 1989, President George Bush delivered a televised speech in which he proposed a national drug control strategy that emphasizes prosecution of drug sellers and users. *See* Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. Times, Sept. 6, 1989, at A1, col. 6. *See also* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987) (detailing Reagan Administration efforts to stem the flow of drugs into the United States).

2. Recently, the United States has increased efforts to prosecute foreign nationals for conduct committed outside the territorial United States. *See* *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1068-69 (Brennan, J., dissenting), *reh'g denied*, 110 S. Ct. 1839 (1990). Such prosecutions are authorized by federal controlled substances statutes. *See, e.g.*, 46 U.S.C. App. § 1903(h) (1982 & Supp. 1986) (section proscribing the manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels "is intended to reach acts . . . committed outside the territorial jurisdiction of the United States"); 21 U.S.C. § 959(c) (same provision in section concerning possession, manufacture, or distribution of a controlled substance for the purpose of unlawful importation). *See also* *Chua Han Mow v. United States*, 730 F.2d 1308, 1311-12 (9th Cir. 1984) (same principle applies to prosecution for conspiracy to violate federal narcotics law), *cert. denied*, 470 U.S. 1031 (1985).

Foreigners are also subject to United States antitrust and securities laws such as those governing transactions involving stock registered and listed on a national securities exchange if the alleged conduct is "detrimental to the interests of American investors." *Verdugo-Urquidez*, 110 S. Ct. at 1069 n.3 (Brennan, J., dissenting) (quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968), *rev'd on rehearing on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied sub nom.*, *Manley v. Schoenbaum*, 395 U.S. 906 (1969)). In addition, the United States imposes on foreigners a host of federal criminal statutes aimed at international terrorism. *Verdugo-Urquidez*, 110 S. Ct. at 1069. *See, e.g.*, 18 U.S.C. § 32(b) (prohibiting violence aboard civil aircraft registered in another country); 18 U.S.C. § 115 (prohibiting threats against a federal official's family members); 18 U.S.C. § 1203 (prohibiting abductions if any party involved is a United States national or the defendant is found within the United States or the kidnapper attempts to compel United States government action); 18 U.S.C. § 2331 (prohibiting terrorist acts committed abroad against United States nationals); 49 U.S.C. § 1472(n) (prohibiting aircraft piracy outside United States air space, if the offender is found in the United States).

Under international law, a state has subject matter jurisdiction to enforce a rule of law if it has jurisdiction to prescribe the conduct in question. *United States v. Keller*, 451 F. Supp. 631, 634 (D. P.R. 1978).

The law of nations permits the exercise of criminal jurisdiction by a nation under five general principles: *territorial*, wherein jurisdiction is based on the place where the offense is committed; *national*, wherein jurisdiction is based on the nationality or national character

tional means of achieving the international rendition of criminal defendants.<sup>3</sup> However, extraditing an individual from a foreign country to stand trial in an American court creates difficult legal<sup>4</sup> and practical<sup>5</sup> problems.

On October 14, 1989, the *New York Times* disclosed a secret Justice Department report advising the Federal Bureau of Investigation that it legally may seize fugitives in foreign countries without resort to extradition treaties and without the consent of foreign governments.<sup>6</sup> The dis-

of the offender; *protective*, wherein jurisdiction is based on whether the national interest is injured; *universal*, which amounts to physical custody of the offender; and *passive personal* wherein jurisdiction is based on the nationality or national character of the victim.

*Id.* at 635. United States courts have developed an additional category, known as the "objective territorial principle," in which the courts exercise jurisdiction over individuals who commit acts outside the United States if the acts are intended to or do produce detrimental effects within the United States. *Id.* See also Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U.L.Q. 1205, 1209-10 (1986) (these principles support a finding of subject-matter jurisdiction in almost every case).

3. "Extradition is a formal method of international rendition, typically based upon a treaty by which persons charged with, or convicted of crimes against the laws of a State and found in a foreign State are returned by the latter to the former for trial or punishment." Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, n.1 (1980) (citations omitted).

A fugitive may also be delivered from one state to another through the discretion of the former under the principle of comity. *Id.*

4. Even though the United States has entered into extradition treaties with most nations, see *infra* note 56, problems still arise. Such treaties may specify the crimes for which extradition is allowed, require that the act for which extradition is sought be a criminal violation in both countries, or deny any obligation to surrender a state's own nationals or to extradite persons accused of "political offenses." D. OTT, *PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD* 144 (1987). Moreover, under the doctrine of "specialty," United States courts must try the defendant only for those crimes for which the person was extradited. *United States v. Rauscher*, 119 U.S. 407, 424 (1886).

5. Consider the situation in Colombia. In 1989, Colombian drug traffickers began a series of bloody attacks intended to force the government to cease extraditing drug traffickers to the United States. *Colombian Cartels Tied to Bombing*, N.Y. Times, Dec. 8, 1989, at A10, col.1. On August 18, 1989, just two days after President Virgilio Barco Vargas declared war on the drug lords, presidential candidate Luis Carlos Galan Sarmiento was assassinated. Fricker, *A Judiciary Under Fire*, A.B.A. J., Feb. 1990, at 54. Since then, there have been over 200 bombings in Bogota alone, resulting in 29 deaths and 238 other injuries. On November 27, 1989, more than 100 people died when a jet was bombed. *Id.* Only nine days later, a truckload of dynamite was detonated in front of secret police headquarters, killing 52 and wounding 1,000 more. *Id.* Seventeen judges have been assassinated. Others, including Justice Minister Monica de Greiff, have resigned following threats to their families. *Id.*

6. Wines, *U.S. Cites Right to Seize Fugitives Abroad*, N.Y. Times, Oct. 14, 1989, § 1, at 6, col. 4. Since issuance of the Justice Department report, at least two defendants have been brought to trial in the United States by means of a covert forcible abduction from their homelands. See *United States v. Caro-Quintero*, No. CR 87-422-ER (C.D. Cal. Aug. 10, 1990) (LEXIS, Genfed Library Dist File) (Mexican doctor kidnapped by agents of U.S. government from office in Guadalajara and delivered to DEA agents for trial in California); *Malta-Ballesteros ex rel. Stolar v. Henman*, 697 F.

closure is encouraging to those who advocate a more aggressive role for the United States in combating international drug trafficking.<sup>7</sup> It causes concern, however, among some who question whether, in attempting to stem the flow of illegal drugs into the United States,<sup>8</sup> the government should ignore constraints imposed by international law.<sup>9</sup>

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Supp. 1040, 1041-42 (S.D. Ill. 1988) (Honduran resident abducted with the aid of Honduran military), *aff'd*, 896 F.2d 255 (7th Cir. 1990). The *Caro-Quintero* and *Matta-Ballesteros* decisions are discussed *infra* at notes 60, 69, 85, 103 and 34 respectively.

On December 20, 1989, American troops invaded Panama for the purpose of toppling the government of General Manuel Antonio Noriega. Gordon, *U.S. Troops Move in Panama in Effort to Seize Noriega; Gunfire is Heard in Capital; Alternative Government Sworn—Recognized by Washington*, N.Y. Times, Dec. 20, 1989, at A1, col.6. In January 1990, Noriega turned himself over to United States military forces, who in turn delivered him to DEA agents to face trial in Miami on narcotics smuggling charges. Fricker, *Dealing With the Maximum Leader*, A.B.A. J., April 1990, at 54. In its pretrial motions, the United States government argued that President Bush's action of swearing in Guillermo Endara's government moments before launching the Panamanian invasion deprives Noriega of head of state immunity. *Id.* at 56. If the federal court in Miami agrees, the issue of the court's power to try Noriega as just another accused drug trafficker, despite his forcible abduction from Panama, will be directly before the court. *See infra* note 110.

7. *See* 135 CONG. REC. S12,673 (daily ed. Oct. 5, 1989) (statement of Sen. Specter) (the arrest of Panama's General Manuel Antonio Noriega by American officials during the unsuccessful coup attempt would have been entirely proper under international law); 132 CONG. REC. 18,832 (1986) (statement of Rep. Stump) (no constitutional rights are violated when a terrorist is seized and brought to the United States for trial); Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1453-54 (1988) (former Attorney General Edwin Meese believed the President could authorize the kidnapping of foreigners abroad to stand trial in the United States).

8. *See* Lewis, *U.S. Officials Clash at Hearing on Power to Seize Fugitives*, N.Y. Times, Nov. 9, 1989, at A10, col. 3 (noting objections of House Democrat Don Edwards of California, who stated that "[k]idnapping a suspect would make the U.S. into an international outlaw"). The concern, of course, is that if the United States government starts kidnapping foreign nationals to face trial for alleged violations of American law, the governments of other nations will kidnap American citizens from within the territorial United States to face trial abroad for alleged violations of their laws. *Verdugo-Urquidez*, 110 S. Ct. at 1071 (1990) (Brennan, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)). *See also* Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 36 (1973).

Such concerns cannot be taken lightly. On November 1, 1989, the Iranian Parliament approved a law giving that country the power to arrest Americans anywhere and put them on trial in Iran. The law reportedly was passed in response to the Justice Department's authorization of the FBI to arrest suspected terrorists abroad. *See supra* note 6. One Iranian newspaper suggested that the first target should be the former commander of the United States missile cruiser Vincennes, which mistakenly shot down an Iranian airliner in 1988. *Iran OKs Law Allowing American Arrests Abroad*, Los Angeles Times, Nov. 1, 1989, at P1, col. 4.

9. Under international law, a state which abducts a person from another state's territory violates the second state's sovereignty. The violation usually may be redressed by returning the abductee. *United States v. Toscanino*, 500 F.2d 267, 278 (2d Cir. 1974) (citations omitted). *See also* I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 72 (1971) ("Abduction is clearly an illegal act by the municipal law of the place where it occurs and by international law.").

This Note examines the power of a United States court to try an alleged criminal forcibly abducted<sup>10</sup> from foreign soil by United States government agents without the consent of the defendant's home government.<sup>11</sup> Part I discusses the historical basis for such jurisdiction. Part II examines the due process limitations on a court's power to try a foreign national seized abroad. Part III outlines the impact of a valid extradition treaty on the United States government's power to try a defendant seized in violation of that treaty. Part IV concludes, contrary to the weight of authority, that even though the due process clause imposes only minimal constraints on a court's power to try a foreign national abducted abroad, an extradition treaty deprives United States courts of jurisdiction to try a criminal defendant seized in violation of the treaty.

### I. THE HISTORICAL BASIS: *KER V. ILLINOIS*

In *Ker v. Illinois*, decided in 1886, the United States Supreme Court laid the groundwork for the current debate.<sup>12</sup> Wanted in Illinois on charges of larceny and embezzlement, Frederick M. Ker, a United States citizen, fled to Peru.<sup>13</sup> Pursuant to an extradition treaty between the United States and Peru, the governor of Illinois sent an agent to Peru to request Ker's extradition to the United States to face trial for larceny.<sup>14</sup>

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10. According to Professor Shearer, an "abduction" is "the removal of a person from the jurisdiction of one State to another by force, the threat of force or by fraud." I. SHEARER, *supra* note 9, at 72. Typically, the foreign authorities or private individuals that abduct the suspected criminal do not follow any formal proceedings. *Id.*

11. It is a settled principle of international law that when the person sought is found in a third country, the requesting state may extradite the foreign national from the third country without the consent of the fugitive's own government. *Id.* at 130 (citations omitted). Any differences in the applicability of Part III to such a situation as opposed to the situation in which the accused is found within his own country is beyond the scope of this Note.

12. 119 U.S. 436 (1886).

13. *Id.* at 437-38.

14. *Id.* at 438. The governor requested the warrant for extradition from the Secretary of State of the United States. *Id.* The President complied with this request and issued the warrant pursuant to the treaty between the United States and Peru. *Id.* The Illinois Court ultimately tried and convicted Ker of larceny. *Id.* at 437.

Under the principle of "specialty," a state requesting extradition may not, without permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition other than the crimes specified in the extradition warrant. *See supra* note 3. Thus, if Peru had extradited Ker to Illinois on a larceny charge and Illinois had tried and convicted Ker of embezzlement as well as larceny, Ker could have challenged the embezzlement prosecution for lack of personal jurisdiction. *See Ker*, 119 U.S. at 443; *infra* notes 61-67 and accompanying text. *But cf.* United States v. Kaufman, 858 F.2d 994, 1006-09 (5th Cir. 1988) (defendants, extradited from Mexico to Louisiana to face drug charges, were transferred to Texas, where trial on similar charges was held not to offend

Political chaos in Peru, however, compelled the agent to forego the formal extradition process.<sup>15</sup> Instead, he forcibly arrested Ker and brought him back to the United States.<sup>16</sup> Upon Ker's return, an Illinois court convicted him of larceny.<sup>17</sup> Illinois' highest court affirmed the conviction and Ker appealed to the United States Supreme Court.<sup>18</sup>

Ker argued to the Supreme Court that his arrest and conviction in disregard of the extradition treaty violated the due process clause of the fourteenth amendment.<sup>19</sup> The Court rejected his argument, reasoning that the Constitution does not require government authorization for every arrest.<sup>20</sup> The Court held that "mere irregularities" in taking a defendant into custody do not violate the due process clause as long as the defendant is indicted properly and receives a fair trial.<sup>21</sup>

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principle of specialty); *Fioconi v. Attorney General* 462 F.2d 475 (2d Cir.) (defendants, extradited from Italy to face drug charges in Massachusetts, indicted in New York on similar charges), *cert. denied*, 409 U.S. 1059 (1972).

15. At the time, Chilean forces occupied Lima, Peru's capitol, making it impossible for the agent to execute the extradition request. *See Fairman, Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953).

16. The agent requested and received assistance from the military governor appointed by Chile. *Id.*

17. *Ker*, 119 U.S. at 437.

18. *Id.* at 439.

19. *Id.* at 439-40.

20. *Id.* at 440.

21. *Id.* The Court stated that "for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all." *Id.*

The Court gave an example of such an irregularity 66 years later in *Frisbie v. Collins*, 342 U.S. 519 (1952). In that case, Collins, indicted in Michigan for murder, fled to Chicago, Illinois. Michigan police officers went to Chicago and "forcibly seized, handcuffed, blackjacked and took him to Michigan," where he was convicted of murder and sentenced to life imprisonment. *Id.* at 520. The defendant brought a federal habeas corpus suit claiming the conviction should be a nullity because under the circumstances his trial violated the due process clause and the Federal Kidnapping Act. *Id.* at 519-20. The Supreme Court affirmed the conviction, stating that it had never departed from the rule announced in *Ker* and its "sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards." *Id.* at 522.

Arguably, the Court departed from this rule just weeks earlier in *Rochin v. California*, 342 U.S. 165, 166, 174 (1952), when it reversed the conviction of a defendant because the police forcibly induced him to vomit morphine tablets, which the police then used as evidence at the defendant's trial for possession of morphine. In holding that the state violated the defendant's due process rights, Justice Frankfurter noted that "the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.* at 172. *See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 599-601 (1968) (arguing that the view concerning forcible removal and personal jurisdiction is inconsistent with the rules regard-

Ker also argued that an extradition treaty between the United States and Peru protected him from removal in violation of the terms of the treaty.<sup>22</sup> The Court rejected this argument, holding that an extradition treaty merely limits the extent to which a government voluntarily may grant a fugitive asylum. The Court explained that parties to such a treaty agree that upon proper demand and proceedings the government of the asylum must deliver the fugitive to the requesting country.<sup>23</sup> The Court reasoned that, because the agent did not act nor profess to act under the treaty,<sup>24</sup> Ker did not establish the denial of a right conferred

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ing illegal searches and the policy of discouraging official lawlessness); *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 126-27 (1952) (“[I]t is arguable that there should be no constitutional difference between a trial using reliable evidence brutally obtained and a proceeding against a defendant brutally obtained.”) (citations omitted).

22. *Ker*, 119 U.S. at 441. The Court did not address the third argument made by Ker that the forcible abduction of an alleged criminal from another country violates customary international law and thus precludes trial in a state court following such a seizure. Justice Miller held that the issue did not present a federal question and thus the Court did not have appellate jurisdiction to review the Illinois court’s decision. *Id.* at 444. The Court noted in dictum that “[t]here are authorities of the highest respectability which hold 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 court.” *Id.*

This dictum has become the leading precedent for the principle that a government’s violation of customary international law in bringing a defendant to trial presents no bar to his or her prosecution in federal court. See Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 446, 452 (1987) (collecting cases). But cf. *United States v. Lira*, 515 F.2d 68, 72-73 n.4 (2d Cir.) (Oakes, J., concurring) (finding untenable Justice Miller’s “distinction between treaty obligations and unwritten obligations of customary international law”), *cert. denied*, 423 U.S. 847 (1975).

Any possibility that a violation of customary international law could serve as the basis for denying a court jurisdiction to hear a case seems foreclosed by the Court’s decision in *United States v. Crews*, 445 U.S. 463 (1980). In *Crews*, a majority of the Court rejected the defendant’s request to overturn his conviction because his in-court identification was the product of an illegal arrest. *Id.* at 474. Justice Brennan, citing *Ker*, reiterated that “[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution,” and held that the defendant himself was not a suppressible “fruit” such that the illegality of his arrest could deprive the Government of the opportunity to prove his guilt. *Id.* at 474. Justice Brennan noted that:

[o]ur numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

*Id.* at 474 n.20, (citing *United States v. Blue*, 384 U.S. 251, 255 (1966)).

23. *Ker*, 119 U.S. at 442. Justice Miller ruled that no language creating such a “right of asylum” existed in the treaty and that “the absurdity of such a proposition would at once prevent the making of a treaty of that kind.” *Id.*

24. Justice Miller characterized the agent’s action as “a clear case of kidnapping within the

upon him by the treaty.<sup>25</sup>

Today, *Ker* is generally cited for the proposition that the means by which a person is brought physically within a State's control is irrelevant to the State's power to try him.<sup>26</sup> Despite criticism,<sup>27</sup> the Supreme Court has continually reaffirmed *Ker*.<sup>28</sup> Because *Ker* involved a United States citizen abducted without official authorization, the case leaves open jurisdictional questions arising when the United States government kidnaps a foreigner from his home country.

## II. THE DUE PROCESS CHALLENGE: *UNITED STATES V. TOSCANINO*

In *United States v. Toscanino*,<sup>29</sup> the Court of Appeals for the Second Circuit held that due process protects foreign nationals kidnapped abroad and brought to the United States to face trial.<sup>30</sup> The defendant, an Italian citizen, alleged that agents of the United States government seized him from his home in Uruguay and interrogated and tortured him for three weeks before transporting him to the United States.<sup>31</sup> He al-

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dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." *Id.* at 443.

25. *Id.* The Court noted, however, that *Ker* was not totally without a remedy. Justice Miller stated that Peru could seek extradition of the agent who abducted *Ker* on charges of kidnapping. Moreover, he noted that *Ker* could have an action against the agent for trespass and false imprisonment. *Id.* at 444. See *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983) (bail bondsman who forcibly abducted criminal defendant in Canada and returned the defendant to Florida for trial later extradited to Canada to face kidnapping charges); *McBride v. Soos*, 594 F.2d 610, 612 n.3 (7th Cir. 1979) (recognizing split of authority on issue whether failure to comply with interstate extradition procedures is actionable under 42 U.S.C. § 1983 and holding that such a cause of action does exist because it involves violation of federal rights created by federal extradition statute). *But cf.* *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975) (leaving open question but doubting existence of such a cause of action because *Ker* seems to hold that the Constitution, laws, and treaties of the United States do not afford defendant any protection in such a transaction).

26. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir. 1990); *United States v. Winter*, 509 F.2d 975, 985-86 (5th Cir.), *cert. denied sub nom. Parks v. United States*, 423 U.S. 825 (1975).

27. See Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934); Kester, *supra* note 7; Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bere Detentus? Sidney Jaffe: A Case in Point*, 28 CRIM. L.Q. 341 (1986); Pitler, *supra* note 21; *The Supreme Court, 1951 Term, supra* note 21.

28. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984) (alien summoned to deposition hearing following allegedly unlawful arrest); *United States v. Crews*, 445 U.S. 463 (1980); *Stone v. Powell*, 428 U.S. 465, 485 (1976) (*dicta*); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (refusing to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction"); *Frisbie v. Collins*, 342 U.S. 519 (1952).

29. 500 F.2d 267 (2d Cir. 1974).

30. *Id.* at 275, 281.

31. *Id.* at 269-71.



leged that the agents beat him, kept him awake for prolonged periods, injected fluids into his eyes and nose, and administered electric shocks to his ears, toes, and genitals.<sup>32</sup> The Second Circuit held that when the government obtains custody of a criminal defendant by a “deliberate, unnecessary and unreasonable” violation of the accused’s constitutional rights, due process requires the court to divest itself of jurisdiction.<sup>33</sup>

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32. *Id.* at 270.

33. *Id.* at 275. A threshold inquiry is whether assertion of the fifth amendment is a valid defense for foreign nationals arrested abroad. In *Toscanino*, the court assumed without discussion that fifth amendment protections extend to non-resident aliens seized abroad. Yet, in the same opinion, the Second Circuit felt constrained to discuss separately whether such a defendant could invoke fourth amendment protections to exclude certain evidence seized as the result of a wiretap on his foreign residence. *Id.* at 280.

The Supreme Court recently addressed the applicability of the Bill of Rights to non-resident aliens subject to criminal investigations abroad. In *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1059, *reh’g denied*, 110 S. Ct. 1839 (1990), the Supreme Court held that the fourth amendment did not require the exclusion of evidence seized during a warrantless search of a foreign national’s Mexican home after he had been arrested and was awaiting trial in the United States. A plurality of the Court held that the fourth amendment does not apply to searches and seizures by United States agents of property owned by non-resident aliens when such searches and seizures occur in a foreign country. *Id.* at 1066 (opinion of Rehnquist, C.J.). Four Justices, however, would extend fourth amendment protections to non-resident aliens on the facts of this case. *See id.* at 1068 (Stevens, J., concurring) (arguing that fourth amendment protections should extend to the defendant because he was held for trial within the territorial United States); *id.* at 1077-78 (Blackmun, J., dissenting) (same, but would remand for determination of whether agents had probable cause to search the residence); *id.* at 1068-77 (Brennan, J., dissenting) (arguing that by placing a foreign national among those governed by federal criminal laws and investigating him for violations of those laws the government has made him a part of our community for purposes of the fourth amendment).

The swing vote on the issue of the extraterritorial application of the fourth amendment belonged to Justice Kennedy. Though joining the plurality’s conclusion, he refused to go as far as Chief Justice Rehnquist, holding only that the fourth amendment was not violated on the facts of the case. *Id.* at 1068. Justice Kennedy rejected outright Chief Justice Rehnquist’s reliance on the text of the Constitution, finding no merit to the argument that the Framers’ use of “the people” in the first, second, fourth, ninth, and tenth amendments was intended to limit their scope to a certain group of people while the fifth and sixth amendments, in which the term “persons” is used, were intended to broadly regulate governmental power in criminal cases. *Id.* at 1060-61, 1067. More important, however, is Justice Kennedy’s narrower interpretation of key precedent relied upon by the plurality. Justice Kennedy read the Court’s decisions in *Reid v. Covert*, 354 U.S. 1 (1957), *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *Dorr v. United States*, 195 U.S. 138 (1904), *Hawaii v. Mankichi*, 190 U.S. 197 (1903) and *Downes v. Bidwell*, 182 U.S. 244 (1901) for the proposition that certain constitutional provisions do not necessarily apply under all circumstances in every foreign place, but may be restricted when adherence to a specific guarantee is “impracticable and anomalous.” *Id.* at 1067-68. He concluded, largely because of the absence of local judges or magistrates to issue warrants, that “the Fourth Amendment warrant requirement should not apply in Mexico as it does in this country.” *Id.* at 1068.

The implication of Justice Kennedy’s opinion is that he is willing to extend fourth amendment protections to nonresident aliens when it is not impracticable and anomalous to do so. In this instance, Verdugo-Urquidez’ Mexican home was searched only after agents of the Drug Enforcement

Subsequent cases severely limit *Toscanino's* protection of a foreign national seized by the government to face criminal charges in the United States. Three circuits expressly reject *Toscanino*, reasoning that the fifth amendment places no restrictions on the government's power to seize suspected criminals abroad.<sup>34</sup> Those courts recognizing the *Toscanino* exception to the *Ker* doctrine require the fulfillment of two conditions before they will divest themselves of jurisdiction over a defendant obtained in such a manner. First, the circumstances surrounding the de-

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Agency (DEA) obtained an arrest warrant, arrested him and, while holding him in the United States for trial, received authorization to conduct the search from high-ranking Mexican officials. *Id.* at 1059. It is possible, however, that Justice Kennedy would apply the fourth amendment to exclude evidence on other facts. For example, if American authorities, without any prior presentation of evidence to a neutral magistrate and without consulting the foreign authorities, broke into a non-resident alien's home in the middle of the night, arrested him, and searched his home for evidence linking him to alleged criminal activity, Justice Kennedy might hold that the fourth amendment does not apply at all and might admit the evidence at the defendant's trial. It is equally likely, however, that under these circumstances the search violates even the relaxed requirements of the fourth amendment's reasonableness test as applied to nonresident aliens and Justice Kennedy might vote to exclude the evidence.

With regard to the subject matter of this Note, *Verdugo-Urquidez* indicates that the dictates of the fifth amendment always apply to protect a foreign national investigated, arrested, and subjected to criminal trial in the courts of the United States. Chief Justice Rehnquist implicitly recognized this rule when discussing the language of the fourth and fifth amendments. *Id.* at 1060-61. Justice Kennedy recognized it explicitly, stating that "[a]ll . . . agree" that the defendant was protected by the due process clause. *Id.* at 1068. *But cf. infra* note 34 and accompanying text.

34. To date, the Fifth, Seventh, and Eleventh Circuits have expressly rejected *Toscanino*. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 263 (7th Cir. 1990); *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *United States v. Winter*, 509 F.2d 975, 986-88 (5th Cir.), *cert. denied sub nom. Parks v. United States*, 423 U.S. 825 (1975).

In *Matta-Ballesteros*, the Seventh Circuit relied on the Supreme Court's decision in *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989), to conclude that in § 1983 actions for use of excessive force during arrest, a fourth amendment rather than a fifth amendment analysis applies. *Matta-Ballesteros*, 896 F.2d at 261-62. Because the Seventh Circuit found that the values served by fourth amendment exclusionary principles, deterrence of police lawlessness and maintenance of the integrity of the judicial system, were outweighed by the governmental interest in convicting criminals, the court declined to adopt *Toscanino* as the law of the circuit. *Id.* at 261-63.

The Seventh Circuit's rationale is tenuous at best. While such a "balancing" of policies may be appropriate in § 1983 actions, the court did not contend that *Graham* overruled *United States v. Russell*, 411 U.S. 423 (1973). Concurring in the *Matta-Ballesteros* decision, Judge Will quoted from the *Russell* opinion, which states that there may be cases " 'in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction.' " *Matta-Ballesteros*, 896 F.2d at 264 (Will, J., concurring) (citing *Russell*, 411 U.S. at 431-32 (Rehnquist, J.)). The Supreme Court's recent decision in *Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), makes it clear that the applicability of the fifth amendment does not depend on policy considerations; its protections always apply to protect criminal defendants from official overreaching.

fendant's abduction must shock the conscience of the court.<sup>35</sup> Second, agents of the United States government must participate in the shocking conduct.<sup>36</sup>

Just months after its decision in *Toscanino*, the Second Circuit severely limited the scope of its holding, stating that absent conduct similar to that which occurred in *Toscanino*,<sup>37</sup> mere irregularities in the circumstances of a defendant's arrival in the jurisdiction will not vitiate the proceedings of a criminal court.<sup>38</sup> Following the Second Circuit's lead, other courts require facts similar to those in *Toscanino* before granting relief.<sup>39</sup>

If the accused succeeds in proving shocking conduct, he must also show that representatives of the United States government participated, or at least acquiesced, in the conduct.<sup>40</sup> Indirect participation by United States officials in torture administered by foreign authorities will not suffice.<sup>41</sup> Nor will initiating efforts that culminate in the arrest and torture

35. *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040, 1046 (S.D. Ill. 1988), *aff'd sub nom. Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990).

36. *Id.*

37. For a summary of the torture inflicted in *Toscanino*, see *supra* notes 31-32 and accompanying text.

38. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). In *Gengler*, the defendant alleged that the DEA paid a pilot to lure him to Bolivia, where he was arrested by Bolivian police acting "as paid agents of the United States." *Id.* at 63. The agents then flew him to New York where federal officers sought his prosecution on drug trafficking charges. *Id.* at 63. The court noted that the arrest was illegal because the United States did not request extradition, but concluded that not every instance of official illegality is such that the fifth amendment requires nullification of the indictment. *Id.* at 66.

39. The following cases found conduct insufficient to justify relief under the *Toscanino* exception: *United States v. Cordero*, 668 F.2d 32, 37 (1st Cir. 1981) (Panamanian officers cooperating with American agent insulted, pushed, and slapped one defendant, and held both defendants in a jail where they were forced "to sleep on the floor and . . . 'huddle up in a corner' to avoid the splashing of urine coming from prisoners in other cells"); *United States v. Matta-Ballesteros*, 700 F. Supp. 528, 529 (N.D. Fla. 1988) (defendant "seized . . . at his home [and] forcibly subdued, possibly by means of a stun gun"); *United States v. Orman*, 417 F. Supp. 1126, 1131 (D. Colo. 1976) (illegally tapping telephone in Turkey).

40. *United States v. Lira*, 515 F.2d 68, 69 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). In *Lira*, Chilean police officers allegedly arrested and took the defendant to a police station in Santiago. There, he was beaten, blindfolded, strapped nude to a box spring and tortured with electric shocks. *Id.* at 69. The court found that evidence that the defendant heard English spoken during this torture, that he later saw American special agents at the prosecutor's office, that he was told that his picture was "for the Americans," and that he had been arrested at the request of the DEA did not establish sufficient involvement by United States officials to allow relief under *Toscanino*. *Id.* at 70-71.

41. See *United States v. DeGollado*, 696 F. Supp. 1136, 1140 (S.D. Tex. 1988); *Lira*, 515 F.2d at 71; *supra* note 40.

of a defendant by foreign police, as long as United States government agents are not present during the actual infliction of the torture.<sup>42</sup>

Because courts interpret *Toscanino* so narrowly,<sup>43</sup> the decision imposes only minimal restraints on the power of United States courts to try defendants abducted abroad. To date, no court applying the *Toscanino* analysis has dismissed an indictment.<sup>44</sup>

### III. EXTRADITION TREATIES AS A LIMITATION OF *KER V. ILLINOIS*

Although due process requirements rarely limit a United States court's power to try foreign nationals kidnapped by the United States government, such defendants may have another avenue of relief. Under some circumstances, an extradition treaty between the United States and a foreign nation will require a court to discharge a defendant seized in violation of the treaty.

In *Ker v. Illinois*,<sup>45</sup> the Supreme Court rejected the defendant's claim that the extradition treaty between the United States and Peru precluded his prosecution.<sup>46</sup> The Court emphasized that the agent who kidnapped Ker acted in a purely private capacity and not as a United States government agent.<sup>47</sup> When the abduction is accomplished by an agent of the United States government, however, the analysis is quite different.

#### A. Government-Authorized Treaty Violations

*Cook v. United States*<sup>48</sup> involved a treaty between the United States and Great Britain prohibiting the United States Coast Guard from boarding British ships beyond a fixed distance from the American

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42. *United States v. Fielding*, 645 F.2d 719, 723-24 (9th Cir. 1981); *United States v. Lara*, 539 F.2d 495 (5th Cir. 1976).

In *DeGollado*, American officials cooperated in the defendant's arrest in Mexico and watched while his interrogators sprayed seltzer water up his nose. The court held that because the American agents left when they saw the interrogation begin to turn "rough" and were not present when the interrogators subsequently tortured the defendant with an electrical prod, no due process violation occurred. *DeGollado*, 696 F. Supp. at 1139-40.

43. See *supra* notes 37-42.

44. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir. 1990). Indeed, on remand after the *Toscanino* decision, the district court denied the motion to dismiss, ruling that there was no claim of participation by American agents in the defendant's abduction and torture. See *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).

45. 119 U.S. 436 (1886).

46. See *supra* notes 22-25 and accompanying text.

47. See *supra* note 24 and accompanying text.

48. 288 U.S. 102 (1933).

coast.<sup>49</sup> The Coast Guard seized a British ship outside the prescribed distance and returned the crew to the United States to face liquor smuggling charges.<sup>50</sup> The Supreme Court affirmed the federal district court's decision to dismiss the case for lack of personal jurisdiction.<sup>51</sup>

The Court rejected the government's attempt to invoke *Ker*,<sup>52</sup> distinguishing a seizure unauthorized by the United States government from a seizure by the government.<sup>53</sup> The Court explained that the treaty fixed the conditions under which the United States could seize a vessel and subject its crew to an adjudication under American law.<sup>54</sup> The Court concluded that allowing a criminal prosecution following a seizure by the government in contravention of its promise not to undertake such a seizure would render the treaty meaningless.<sup>55</sup>

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49. The treaty allowed the United States Coast Guard to board private British vessels outside the territorial boundaries of the United States to enforce the prohibition laws provided such boardings did not take place at a distance from the American coast greater than the distance the ship could travel in one hour. *Cook*, 288 U.S. at 112.

50. *Cook*, 288 U.S. at 107-08, 110.

51. *Id.* at 108-09, 122. The Court paved the way for *Cook* six years earlier with its decision in *Ford v. United States*, 273 U.S. 593 (1927). *Ford*, the captain of a British ship seized by the Coast Guard outside the maximum distance allowed by the treaty for such seizures, was tried and convicted in federal district court for violating the prohibition laws. *Ford*, 273 U.S. at 600. On appeal, *Ford* argued that the treaty violation deprived the court of jurisdiction. In response, the government relied on *Ker* for the proposition that an illegal seizure would not impair the court's power to try *Ford*. *Id.* at 605. The Court rejected this argument and noted that *Ker* does not apply when "a treaty of the United States is directly involved." *Id.* However, the Court affirmed the conviction because the defendant did not challenge jurisdiction in a timely manner. *Id.* at 605-06, 625.

In two subsequent cases involving violations of a similar treaty between the United States and Panama, the defendants' timely challenges to jurisdiction succeeded. *United States v. Schouweiler*, 19 F.2d 387 (S.D. Cal. 1927); *United States v. Ferris*, 19 F.2d 925 (N.D. Cal. 1927).

52. The Court relied primarily on *Dodge v. United States*, 272 U.S. 530, 532 (1926), for the proposition that when "the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial." *Cook*, 288 U.S. at 121 (citing *Dodge*, 272 U.S. at 532).

53. The court stated:

The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority.

*Cook*, 288 U.S. at 121.

54. *Id.* See also *Ford*, 273 U.S. at 606 (when a treaty of the United States is directly involved, the question is "quite different" from that raised in *Ker*).

55. *Cook*, 288 U.S. at 121-22 ("To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.").

### B. Abduction as a Violation of an Extradition Treaty

The caveat to *Ker* established in *Cook* raises a second issue: whether seizure by the United States government of a foreign national from a country with whom the United States has a treaty of extradition violates that treaty.<sup>56</sup> Dictum in *Ker* suggests no such "right of asylum" exists<sup>57</sup> and some courts of appeals are reluctant to so hold.<sup>58</sup> Some commentators<sup>59</sup> and at least one circuit court,<sup>60</sup> however, would find a violation of an extradition treaty when the United States seizes a foreigner abroad

56. The United States has entered into bilateral treaties of extradition with over ninety countries. 18 U.S.C. § 3181 (1988) (listing countries). This list includes virtually all of the major drug producing, processing, and distributing countries. See Extradition Treaty, Jan. 25, 1980, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656; Treaty of Extradition, Dec. 17, 1964, United States-Brazil, 15 U.S.T. 2093, T.I.A.S. No. 5691; Extradition Treaty, Nov. 12, 1873, United States-Ecuador, 18 Stat. 199, T.S. No. 79; Additional Extradition Treaty, June 18, 1926, United States-Cuba, 44 Stat. 2392, T.S. No. 737; Treaty of Extradition, April 14, 1923, United States-Venezuela, 43 Stat. 1698, T.S. No. 675; Treaty of Extradition, July 10, 1911, United States-El Salvador, 37 Stat. 1516, T.S. No. 560; Treaty for the Extradition of Criminals, July 14, 1907, United States-Nicaragua, 35 Stat. 1869, T.S. No. 462; Treaty Providing for the Mutual Extradition of Fugitives from Justice, March 2, 1905, United States-Cuba, 33 Stat. 2265, T.S. No. 440; Treaty Providing for the Extradition of Criminals, Feb. 22, 1901, United States-Peru, 31 Stat. 1921, T.S. No. 288; Extradition Treaty, Nov. 12, 1873, United States-Ecuador, 18 Stat. 199, T.S. No. 79.

On September 14, 1979, the United States government signed an extradition treaty with Colombia, which replaced the treaties of 1888 and 1940. I EXTRADITION LAWS AND TREATIES, at 140.1 n.1 (I. KAVASS & A. SPRUDZS COMP. 1989). However, in December, 1986 and June, 1987, the Supreme Court of Colombia declared the 1979 treaty unconstitutional. The State Department continues to recognize the 1979 treaty, even though Colombian authorities indicate that they consider the 1888 and 1940 conventions the effective treaties. *Id.* In response to these decisions, President Barco of Colombia issued an emergency order allowing the summary extradition of any Colombian indicted by the United States. Fricker, *supra* note 5, at 58. DEA agents or Colombian police can "extradite" these individuals without prior notice. *Id.* Such proceedings are not performed under the auspices of any extradition treaty between the United States and Columbia. I EXTRADITION LAWS AND TREATIES, *supra*, at 140.1, n.1.

The United States is also a party to the Pan American Extradition Convention signed at Montevideo on December 26, 1933 and entered into force for the United States on January 25, 1935. Pan American Extradition Convention, Jan. 25, 1935, 49 Stat. 3111. Other signatories to the treaty include Argentina, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama.

57. See *supra* notes 22-25.

58. *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (no treaty violation when Thai authorities "initiated, aided, and acquiesced" in defendant's delivery to DEA agents); *United States v. Sobell*, 244 F.2d 520, 525 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957) (no treaty violation despite allegations that U.S. agents initiated, planned, and participated in seizure of defendant in Mexico).

59. See *Rogers*, *supra* note 22, at 460 (Supreme Court has held that entry into an extradition treaty infers an intention to relinquish the right recognized in *Ker*); *Lewis*, *supra* note 27, at 359-63 (allowing abductions in violation of an extradition treaty erodes the importance of treaties as "the Supreme law of the land").

60. *Jaffe v. Smith*, 825 F.2d 304, 307 (11th Cir. 1987) (the law is not concerned with the man-

without the consent of the government involved and without resort to traditional extradition procedures.

Supreme Court precedent supports the conclusion that an abduction without the consent of the foreign government violates an extradition treaty. In *United States v. Rauscher*,<sup>61</sup> the United States extradited Rauscher from Great Britain for the murder of one of the crew of an American ship.<sup>62</sup> A federal district court convicted Rauscher of assault and the infliction of cruel and unusual punishment.<sup>63</sup> On appeal to the Supreme Court, Rauscher argued that his extradition for the murder charge precluded the district court from trying him on any other charge.<sup>64</sup> The Court agreed, reasoning that it would be useless for nations to establish detailed procedural safeguards<sup>65</sup> as prerequisites to the international rendition of a criminal defendant if the country seeking to prosecute may ignore these procedures and yet retain power to try the case.<sup>66</sup>

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ner in which a criminal defendant finds her or his way into court unless the government removed the defendant from the asylum in violation of a treaty).

On August 10, 1990, a federal judge in California ruled that the United States government violated its extradition treaty with Mexico when it kidnapped a Mexican doctor for trial. *United States v. Caro-Quintero*, No. CR 87-422-ER (C.D. Cal. Aug. 10, 1990) (LEXIS, Genfed Library, Dist file). The judge ordered Dr. Humberto Alvarez Machain discharged and directed the government to repatriate him to Mexico. *Id.* Machain was accused of participating in the torture and murder of DEA agent Enrique Camerena at a ranch outside Guadalajara in 1985. DEA operatives captured the doctor at his office and took him out of Mexico on April 2, 1990.

The court rejected the government's argument that no treaty violation occurred because no DEA agents were directly involved in Alvarez's kidnapping. *Id.* The judge cited testimony indicating that the DEA paid at least \$20,000 in rewards for Alvarez's abduction and provided the abductors and their families \$6,000 to defray living expenses. In addition, high level DEA officials approved the plan and the United States Attorney General's office was aware of the plan. The judge stated that "[t]he United States is responsible for the actions of its paid agents." *Id.*

61. 119 U.S. 407 (1886). *Rauscher* was decided the same day as *Ker v. Illinois*, 119 U.S. 436 (1886). Justice Miller wrote the majority opinion in both.

62. *Id.* at 409.

63. *Id.*

64. *Id.* See *supra* note 3.

65. Under the terms of the treaty, an obligation to deliver up a fugitive arose only after he was formally charged with one of the crimes enumerated in the treaty and a judge or magistrate of the asylum country determined that sufficient evidence existed under the law of the asylum to justify the accused's apprehension and commitment for trial. *Rauscher*, 119 U.S. at 421.

66. Justice Miller stated:

[i]f the proceedings under which the party is arrested . . . are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it.

*Id.*

The *Rauscher* Court's rationale applies to situations in which the government abducts a person from another country without resort to the extradition process. In *Rauscher*, the Court found that the United States violated the treaty by trying the defendant for cruel and unusual punishment even though a British tribunal had already found sufficient evidence to try him for the more serious crime of murder.<sup>67</sup> In the case of an international abduction in which no prior judicial determination of the sufficiency of the evidence is made, nor any other procedural protection afforded the defendant, a court certainly would find an even more egregious violation of the treaty.<sup>68</sup>

### C. *Self-Executing Treaties*

Assuming that the United States government's seizure of an alleged criminal abroad violates an extradition treaty, the majority of courts require an official protest from the nation involved to defeat the court's jurisdiction.<sup>69</sup> These courts reason that because treaties protect the sovereignty of states, only the contracting foreign government, not the defendant, may complain about a violation.<sup>70</sup>

67. *Id.* at 409.

68. *See* *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (citing *Rauscher* and stating that "[i]t seems clear that, if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial").

69. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259-60 (7th Cir. 1990) (involving extradition treaty with Honduras); *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988) (involving extradition treaties with Guatemala and Belize); *United States v. Davis*, 767 F.2d 1025, 1030 (2d Cir. 1985) (involving treaty with Switzerland to aid in gathering Swiss bank records); *United States v. Cordero*, 668 F.2d 32, 37-38 (1st Cir. 1981) (involving extradition treaties with Panama and Venezuela); *United States v. Valot*, 625 F.2d 308, 310 (9th Cir. 1980) (involving extradition treaties with Thailand); *United States v. Yunis*, 681 F. Supp. 909, 916 (D.D.C. 1988) (involving extradition treaties with Lebanon and Cyprus).

On August 10, 1990, a federal judge in California ordered the discharge of a Mexican doctor kidnapped by DEA operatives and taken to the United States to face trial for the killing of an American drug agent. *United States v. Caro-Quintero*, No. CR 87-422-ER (C.D. Cal. Aug. 10, 1990) (LEXIS, Genfed Library, Dist file). The court ruled that the United States government violated its extradition treaty with Mexico in carrying out the abduction. *Id.* *See supra* note 60. In ordering the discharge, the court noted that Mexico sent three diplomatic letters to the United States protesting the kidnapping as a violation of its sovereignty. *Id.* The judge held that when a treaty is violated and the asylum nation protests, the court must return the defendant. *Id.*

70. *See supra* note 69. *See also* *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.) (citations omitted), *cert. denied*, 421 U.S. 1001 (1975). The Second Circuit asserted that "even where a treaty provides certain benefits for nationals of a particular state . . . it is traditionally held that 'any rights arising out of such provisions are, under international law, those of the states and . . . individual rights are only derivative through the states.'" *Gengler*, 510 F.2d at 67 (quoting RE-



*Cook v. United States*, however, does not conform to this logic.<sup>71</sup> In *Cook*, the Supreme Court did not ask whether Great Britain filed an official protest and yet it affirmed dismissal of the case for lack of personal jurisdiction. Thus, it seems clear that an official protest is not always a prerequisite to a jurisdictional plea based on a treaty violation. When it is, the appropriate remedy may be reparations, apologies, or extradition of the kidnappers themselves to the nation whose sovereignty is violated. However, when an official protest is not required, the violation may deprive the court of jurisdiction.<sup>72</sup>

According to the United States Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."<sup>73</sup> The courts regard certain treaties as self-executing, that is, as attaining the force of law upon execution by the executive branch. Other treaties require ratification by Congress before attaining the force of law.<sup>74</sup> If a treaty is neither self-executing nor ratified by Congress, only the executive branch may attempt to enforce it by demanding redress of violations.<sup>75</sup> Courts may enforce self-executing treaties, on the other hand, in the same manner as any other act of Congress.<sup>76</sup>

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STATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 comment e (1965)).

71. 288 U.S. 102 (1933). See *supra* notes 48-55 and accompanying text.

72. Rogers, *supra* note 22, at 454 (citations omitted). See also I. SHEARER, *supra* note 9, at 72. Professor Shearer notes that only two unresolved questions remain in the area of forcible abductions from the jurisdiction of one state to another. One is the effect of a privately-conducted abduction on international responsibility and the other "whether the jurisdiction of the receiving State is vitiated by the irregular means by which its jurisdiction has been obtained." *Id.*

73. U.S. CONST. Art. VI, cl. 2.

74. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). In *Foster*, Chief Justice Marshall explained:

Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

*Foster*, 27 U.S. at 314.

75. In the *Head Money Cases*, 112 U.S. 580, 598 (1884), the Court explained:

[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.

76. *Head Money Cases*, 112 U.S. at 598-99 (when a treaty is self-executing, a court may resort

The issue whether a treaty is self-executing has been described as "one of the most confounding in treaty law."<sup>77</sup> In the *Head Money Cases*,<sup>78</sup> Justice Miller explained that a treaty is more than a contract between nations when its provisions affect the rights of a private citizen.<sup>79</sup> When such treaties are violated, both the injured nation and private parties may assert the treaty as a rule of decision and seek redress for the violation.<sup>80</sup> Therefore, a treaty is self-executing as a matter of domestic law if it creates, as a matter of international law, private rights cognizable in domestic courts.<sup>81</sup>

This approach explains *Cook*. The Court interpreted the 1924 treaty with Great Britain, which delineated the conditions under which the Coast Guard could board British vessels, as also affirmatively prohibiting the prosecution of persons arrested in violation of the treaty.<sup>82</sup> The *Cook* Court applied the treaty as it would any other rule of law. Because this "law" prohibited the prosecution of persons seized in violation of its provisions, the Court dismissed the case.<sup>83</sup>

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"to the treaty for a rule of decision for the case before it as it would to a statute"); *Foster*, 27 U.S. at 314.

77. *United States v. Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

78. 112 U.S. 580 (1884).

79. *Id.* at 598-99. *See also* *United States v. Ferris*, 19 F.2d 925, 926 (N.D. Cal. 1927) (treaties, "in so far as they are self-executing and relate to private rights are to be given effect by the courts to the extent they are capable of judicial enforcement").

80. *See supra* note 76 and accompanying text.

81. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) ("When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action."), *cert. denied*, 470 U.S. 1003 (1985); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and . . . the circumstances surrounding its execution.").

The self-execution question has two aspects. Reisenfield, *The Doctrine of Self-Executing Treaties and United States v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 896-97 (1980). The international aspect focuses on "whether the treaty aims at the immediate creation of rights and duties of private individuals which are enforceable and to be enforced by domestic tribunals." Standard rules of international treaty interpretation are used to analyze this aspect of the question. *Id.* at 896-97. The domestic aspect asks whether and under what circumstances enforceability requires legislative action to accomplish its intent. *Id.* at 897. Professor Reisenfield concludes:

[a] treaty provision which by its terms and purpose is meant to stipulate the immediate . . . creation of rights, privileges, duties, and immunities cognizable in domestic courts and is capable of being applied by the courts without further concretization is self-executing by virtue of the constitutional mandate of Article VI of the U.S. Constitution.

*Id.* at 900-01 (emphasis in original).

82. *Cook*, 288 U.S. at 119 (the treaty is self-executing).

83. In *United States v. Toscanino*, 500 F.2d 267, 277-79 (2d Cir. 1974), the Second Circuit held

#### D. *Extradition Treaties as Self-Executing*

The only remaining issue is whether extradition treaties are self-executing. In *United States v. Rauscher*,<sup>84</sup> the Court did not consider whether Great Britain protested the defendant's prosecution.<sup>85</sup> Instead, the Court interpreted the treaty affirmatively to prohibit the prosecution.<sup>86</sup> The Court enforced the treaty just as it would enforce a statute conferring the same right, and dismissed the case. Therefore, the *Rauscher* court must have viewed the extradition treaty with Peru as self-

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that because the defendant's arrest was effected in violation of the Charter of the United Nations and the Charter of the Organization of American States, the court lacked jurisdiction to prosecute him.

These treaties generally proscribe the use of force against the territorial integrity of another state. See *Toscanino*, 500 F.2d at 277. Thus, they are more properly examples of the contractual variety of treaty which depends for its enforcement on the will of the political branches of the party nations. *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 100 (9th Cir. 1974) (Trask, J., concurring) ("Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants"), *cert. denied*, 420 U.S. 1003 (1975); *Rogers*, *supra* note 22, at 461 (a jurisdictional "challenge based on a friendship treaty, a border treaty, or a jurisdiction-allocating treaty . . . should not be considered by a United States court"). The Second Circuit seemed to recognize its error in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). There, the court distinguished *Toscanino* as a case in which official government protests preceded the court's action. *Id.* at 67. Unfortunately, subsequent courts have misinterpreted *Gengler* to require an official protest to justify a defendant's standing to assert a treaty violation in all cases, instead of recognizing the crucial distinction between treaties that are and are not self-executing.

84. 119 U.S. 407 (1886). See *supra* note 61-66 and accompanying text.

85. Only an official protest by the government of the asylum nation will sustain a defendant's claim that his country is protesting a prosecution in violation of an extradition treaty. See *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040 (S.D. Ill. 1988), *aff'd sub nom. Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990). The *Matta-Ballesteros* court found no official protest of the defendant's abduction despite an affidavit from members of the Honduran Congress condemning the defendant's abduction and asserting that it provoked public demonstrations resulting in the death of five Honduran citizens, six million dollars in property damage, and a state of national emergency. *Id.* at 1043-44.

In *United States v. Caro-Quintero*, No. CR 87-422-ER, at n.12 (C.D. Cal. Aug. 10, 1990) (LEXIS, Genfed Library, Dist file), Judge Rafeedie stated that in *Rauscher*, the British government protested under the treaty, thereby vesting the defendant with standing to invoke his individual rights. This statement is incorrect. While the British did voice their strong opposition to prosecutions in violation of the treaty, no official protest was made. See *United States v. Kaufman*, 858 F.2d 994, 1009 (5th Cir. 1988) (the United States was aware of Britain's objections as a result of failed negotiations not as a result of a formal British protest). In support of his statement, Judge Rafeedie quotes a portion of a statement made by Chief Justice Taft in his opinion in *Ford v. United States*, 273 U.S. 593, 615 (1926). Quoted in full, Chief Justice Taft's statement that "[t]he case was decided at the end of a prolonged controversy between Great Britain and the United States through their State Departments on the same issue presented in several cases," reveals that no official protest was made in the *Rauscher* case. *Id.* (emphasis added).

86. See *supra* notes 61-66 and accompanying text.

executing.<sup>87</sup>

The structure of many extradition treaties provides further evidence that they are self-executing. When the accused is a citizen of the requesting country, as in *Ker*, the asylum country is obligated to deliver up the fugitive upon proper demand.<sup>88</sup> However, many extradition treaties exempt nationals of the asylum nation from prosecution abroad<sup>89</sup> because of the potential unfairness involved in defending against criminal charges in a foreign land.<sup>90</sup> Because they protect individual rights, these treaties, as applied to a national of the asylum nation, are self-executing.<sup>91</sup> There-

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87. This conclusion is bolstered by the settled view that the executive branch lacks power to seize a fugitive criminal and surrender him to a foreign nation. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) (the Constitution creates no executive right to seize an individual without express authority from a statute or treaty); *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) (extradition rights exist only by treaty).

In *Argento v. Horn*, 241 F.2d 258, 259 (6th Cir.), *cert. denied*, 255 U.S. 818 (1957), the Italian government initiated extradition proceedings against the appellant. After a United States Commissioner found sufficient evidence to sustain the action and ordered appellant's arrest, appellant brought a habeas corpus action challenging the legality of his confinement. *Id.* He argued that because no valid extradition treaty existed between the United States and Italy, there was no legal authority for his surrender to Italy. *Id.* Although it ultimately found that such a treaty was in force, the court noted that "[w]ithout question the appellant is on solid ground in asserting that he cannot be extradited . . . in the absence of a valid treaty so providing." *Id.* at 263, 259. Thus, the court recognized that the existence of an extradition treaty determines whether a defendant may be prosecuted.

88. See *supra* note 23 and accompanying text.

89. The extradition treaties in force between the United States and Chile, Treaty Providing for the Extradition of Fugitives from Justice, June 26, 1902, United States-Chile, art. V, 32 Stat. 1850, T.S. No. 407; El Salvador, Treaty of Extradition, July 10, 1911, United States-El Salvador, art. VIII, 27 Stat. 1516, T.S. No. 560; Panama, Treaty Providing for the Extradition of Criminals, May 8, 1905, United States-Panama, art. V, 34 Stat. 2851, T.S. No. 445; Peru, Treaty Providing for the Extradition of Criminals, Feb. 22, 1901, United States-Peru, art. V, 31 Stat. 1921, T.S. No. 288; and Venezuela, Treaty of Extradition, April 14, 1923, United States-Venezuela, art. VIII, 43 Stat. 1698, T.S. No. 675, still provide that neither country is bound to deliver up its own nationals under the provisions of the treaty. The treaties with Brazil, Treaty of Extradition, Dec. 17, 1964, United States-Brazil, art. VII, 15 U.S.T. 2093, T.I.A.S. No. 5791; Guatemala, Treaty for the Mutual Extradition of Fugitives from Justice, Aug. 15, 1903, United States-Guatemala, art. V, 33 Stat. 2147, T.S. No. 425; and Mexico, 21 Extradition Treaty, Jan. 25, 1980, United States-Mexico, art. 9, 31 U.S.T. 5059, T.I.A.S. No. 9656, provide for the extradition of nationals only at the discretion of the contracting nations.

90. Professor Shearer advances three primary bases for the practice of refusing to surrender nationals for trial and punishment in other countries: 1) a person deserves a trial before his natural judges; 2) a State has a duty to protect its subjects; and 3) a foreign court may not be able to mete out justice to a foreigner as it might to its own national or effectively apply to the foreigner the laws of his home state. I. SHEARER, *supra* note 9, at 118-121. See also S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 210 (1968); D. OTT, *supra* note 3, at 142 (extradition treaties provide the accused with "procedural rights" to protect from victimization by a foreign state).

91. See *supra* note 82 and accompanying text.

fore, when a foreign national invokes a violation of an extradition treaty as a defense to a criminal prosecution, a United States court must enforce the treaty and dismiss the case.<sup>92</sup>

#### IV. A GUIDE TO RESOLVING THE JURISDICTIONAL ISSUES

##### A. *The Due Process Argument*

In *Ker v. Illinois*,<sup>93</sup> the Court suggested that due process requirements are satisfied if a criminal defendant seized abroad receives a fair trial. In *United States v. Toscanino*,<sup>94</sup> however, the Second Circuit recognized that modern notions of due process afford such defendants a modicum of additional protection. Although some courts purport to reject the *Toscanino* holding,<sup>95</sup> it is clear that a court must divest itself of jurisdiction when the means used by the government to bring the defendant to trial “shock the conscience” of the court.<sup>96</sup> Although courts often interpret this standard very narrowly,<sup>97</sup> recognition that a standard exists assures defendants of receiving at least the minimum protection required by due process.

##### B. *The Treaty Argument*

It is a mistake to assume that once the minimum protections imposed by the fifth amendment are satisfied, no further obstacle exists to the prosecution of a foreign national seized abroad. It is incumbent upon a court to inquire whether an applicable extradition treaty bars the prosecution.

Although the Supreme Court held in *Ker* that the extradition treaty

92. Although some criticize such provisions and question the vitality of the rationale behind them, the fact remains that until new extradition treaties are negotiated, these provisions must serve as the basis for determining whether an extradition treaty is self-executing. See I. SHEARER, *supra* note 9, at 121-25 (criticizing the nationality rule).

In 1982, the House Judiciary Committee's Subcommittee on Crime held hearings regarding reform of the extradition laws. The Committee expressed concern that current extradition laws are not sufficient to deal with increased terrorism and drug trafficking on the international level. *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the Committee on the Judiciary, 97th Cong., 2d Sess. 1 (1982)* (statement of Hon. William J. Hughes, Chairman of the Subcommittee).

93. 119 U.S. 436 (1886). See *supra* notes 12-21 and accompanying text.

94. 500 F.2d 267 (2d Cir. 1974). See *supra* notes 29-33 and accompanying text.

95. See *supra* note 34 and accompanying text.

96. See *supra* notes 34-35 and accompanying text.

97. See *supra* notes 37-42 and accompanying text.

with Peru posed no obstacle to the defendant's prosecution,<sup>98</sup> two crucial facts distinguish that case from the issue at hand.<sup>99</sup> First, the defendant in *Ker* was a United States citizen, not a foreign national.<sup>100</sup> Second, the United States government did not authorize Ker's abduction.<sup>101</sup>

If the United States government violates an extradition treaty by seizing a foreigner without resort to the extradition process,<sup>102</sup> most courts require an official protest from the nation involved to defeat the court's jurisdiction.<sup>103</sup> Such a protest, however, is not a prerequisite to a plea to the court's jurisdiction if the treaty is self-executing,<sup>104</sup> that is, if by the treaty the parties intend not only to contract with each other, but to confer rights on private parties cognizable in domestic courts.<sup>105</sup>

In *United States v. Rauscher*,<sup>106</sup> the Court reversed the conviction of a defendant tried in violation of an extradition treaty with Great Britain, though the English made no official protest. In so doing, the Court im-

98. See *supra* notes 22-25 and accompanying text.

99. In *Cook v. United States*, 288 U.S. 102 (1933), the Court established that when the defendant is a foreign national and the United States government authorizes the abduction, a different analysis is required. See *supra* notes 48-55 and accompanying text.

100. See *supra* note 13 and accompanying text.

101. See *supra* note 24.

102. See *supra* notes 56-60 and accompanying text.

103. See *supra* notes 69-70 and accompanying text. See also *United States v. Caro-Quintero*, No. CR 87-422(F)-ER (C.D. Cal. Aug. 10, 1990) (LEXIS, Genfed Library, Dist file). In *Caro-Quintero*, because the Mexican government registered an official protest to the abduction of the defendant by DEA operatives, the court discharged the defendant. *Id.* See *supra* note 69-70 and accompanying text. In dictum, the court suggested that absent such diplomatic protests, the defendant would have no basis for attacking the jurisdiction of the court. *Id.* The court reconciled those cases allowing an individual defendant to invoke a violation of the doctrine of specialty, see *supra* note 3, by characterizing such claims as an implicit protest by the asylum country. *Id.*

The reasoning of the *Caro-Quintero* court's dictum is flawed. An individual defendant's assertion of a violation of the doctrine of specialty as a defense in criminal prosecution is not based on an implicit protest by the sending nation. Instead, it is derived from a self-executing extradition treaty, which creates private rights cognizable in domestic courts. See *United States v. Rauscher*, 119 U.S. 407 (1886) (prosecution invalid when jurisdiction obtained in violation of doctrine of specialty); *supra* notes 81, 85-86 and accompanying text. Thus, when an extradition treaty is self-executing, it is irrelevant whether the sending nation files an official protest.

The extradition treaty in force between the United States and Mexico provides for the extradition of nationals only at the discretion of the contracting nations. Extradition Treaty, Jan. 25, 1980, United States-Mexico, art. 8, 31 U.S.T. 5059, T.I.A.S. No. 9656. Therefore, according to the analysis set out in Part III of this Note, a diplomatic protest by the Mexican government was not a prerequisite to the *Caro-Quintero* defendant's jurisdictional plea. See *supra* notes 46-92 and accompanying text.

104. See *supra* notes 73-81 and accompanying text.

105. See *supra* note 81 and accompanying text.

106. 119 U.S. 407 (1886). See *supra* notes 60-65 and accompanying text.

plied that the treaty not only proscribed certain actions by the party nations, but protected individual rights, the touchstone of a self-executing treaty. By specifically restricting the extent to which a country's own nationals are subject to the extradition process,<sup>107</sup> many extradition treaties to which the United States is a party manifest the same intent and are thus similarly self-executing.<sup>108</sup>

As a result, when the United States government abducts an alleged criminal from a country with which it has entered into an extradition treaty exempting nationals of the asylum nation from the extradition process,<sup>109</sup> a United States court lacks jurisdiction to try the defendant.<sup>110</sup>

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107. Under this analysis it is irrelevant whether the treaty absolutely prohibits the extradition of a party's nationals, or leaves it to the discretion of the party whether to grant requests for extradition of its nationals. In either case the contracting nations agree to confer a specific right on a class of individuals to protect them from the perceived unfairness involved in defending against criminal charges in a foreign country. The Court's reasoning in *Rauscher* is directly applicable. See *supra* note 55 and accompanying text. To allow the prosecution of foreign nationals seized in violation of such provisions would render meaningless the protection the provisions are intended to provide.

108. See *supra* note 90.

109. *Id.*

110. In January 1990, the United States government arrested General Manuel Antonio Noriega in Panama and returned him to the United States to face trial on drug trafficking charges. See *supra* note 7. Under the analysis advanced in Part III, the federal district court in Miami may lack jurisdiction to try Noriega.

First, the United States government clearly authorized Noriega's arrest. See *supra* note 7. Thus, *Ker v. Illinois*, 119 U.S. 435 (1886), is inapplicable. See *supra* notes 12-25 and accompanying text. Instead, the principles established in *Cook v. United States*, 288 U.S. 102 (1933), govern the issue of whether Noriega successfully may challenge the court's jurisdiction based on the United States government's violation of its treaties with Panama. See *supra* notes 48-55 and accompanying text. Second, the United States government undoubtedly violates an extradition treaty when it seizes an alleged criminal abroad without recourse to treaty processes. See *supra* notes 55-67 and accompanying text.

The United States may argue, however, that Panama's legitimate government, headed by Guillermo Endara, consented to the seizure, and therefore, no treaty violation occurred. Such an argument invokes the third step in the analysis: deciding whether the extradition treaty between the United States and Panama creates a private right against prosecution of nationals seized from the asylum state without recourse to the treaty processes. See *supra* notes 85-92 and accompanying text.

Article V of the extradition treaty between the United States and Panama provides that "[n]either of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this treaty." Treaty Providing for the Extradition of Criminals, May 8, 1905, United States-Panama, art. V, 34 Stat. 2851, T.I.A.S. No. 445. Though the United States expressly rejected a similar provision in the Multilateral Convention on Extradition, to which both the United States and Panama are parties, that treaty states that it is not intended to abrogate treaties already in force between the signatory parties. Extradition Convention between the United States of America and other American Republics, Jan. 25, 1935, art. 2 & 21, 49 Stat. 3111. Provisions exempting nationals of the asylum state from extradition derive from concerns about the fairness of facing criminal charges in a foreign country. See *supra* note 88 and accompanying text. Given these concerns, it is arguable that the extradition treaty between the United States and Panama is intended to proscribe

## V. CONCLUSION

When a foreign national is abducted from another country, it is incumbent upon a court to inquire whether violation of an applicable extradition treaty bars prosecution. Merely reciting the shibboleth that treaties are contracts between nations, and that violations are only enforceable by the contracting parties, is not adequate. Some treaties are intended to create individual rights enforceable in domestic courts. Modern courts ignore this issue altogether, and in the process ignore a century of established treaty law.

No one questions the importance of punishing international drug traffickers for the harm they inflict on the world community. In their zeal to bring such people to justice, however, courts should not discard principles once considered fundamental to the legitimacy of governmental assertions of power.

Appeals to the rule of law and established principles of criminal justice administration continue to go unheard in the current hysteria to lock up more and more "drug lords."<sup>111</sup> Though the ends are laudable, the consequences may be severe. It may take the kidnap and trial of an American citizen in a foreign nation to make the point.<sup>112</sup> The courts should adhere to fundamental principles, for the protection of individual liberty from arbitrary governmental power is the foundation of this nation's existence.

*Martin B. Sipple*

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the prosecution of foreign nationals seized in violation of the treaty. *See supra* notes 85-92 and accompanying text. If the treaty is so construed, the federal court in Miami lacks jurisdiction to try General Noriega and is obligated to return him to Panama.

111. *See Wisotsky, supra* note 1, at 925-26 (the "drug exception" to the Bill of Rights threatens to spill over into other areas of the law).

112. For example, an Iranian law authorizes the arrest and trial of Americans without regard to national boundaries. *See supra* note 8 and accompanying text.



