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NOTE

United States v. Alvarez-Machain and the Status of International Law in American Courts

I. INTRODUCTION

A. Preface

Early in 1985, the American war on drugs suffered a casualty. Enrique Camarena-Salazar, an agent for the Drug Enforcement Administration involved in an undercover investigation of Mexican narcotics smugglers, disappeared outside of the American consulate in Guadalajara, Jalisco, Mexico, on February 7.¹ A month later two mutilated bodies, one of them identified as that of Agent Camarena, were recovered from a grave on a ranch about sixty miles outside of Guadalajara.²

Now, over seven years after the tragic death of Agent Camarena, the consequences of that heinous act continue to have an impact on the American legal system. Two cases have come before the Supreme Court to date as a result of this brutal crime, and the results of the Court's deliberations have redefined the constitutional landscape. In addressing the results of the Drug Enforcement Administration's (hereinafter DEA) quest to bring Enrique Camarena's murderers to justice, the Supreme Court, under Chief Justice Rehnquist, has greatly circumscribed the constitutional limitations upon American extraterritorial law enforcement.

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1. *United States v. Caro-Quintero*, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990). Mr. Camarena, thirty-seven years old, born in Mexico, was a naturalized American citizen who had worked for the Drug Enforcement Administration since 1974. Richard L. Berke, 2 *Ex-Mexican Aides Charged in Slaying of U.S. Drug Agent*, N.Y. Times, Feb. 1, 1990, at A1, B9.

2. Agent Camarena's body was found alongside that of Alfredo Zavala-Avelar, a Mexican pilot who had assisted Camarena in locating marijuana plantations. The Justice Department has not specified who is accused in Mr. Zavala's slaying. Berke, *supra* note 1, at A1, B9. The bodies were first buried in La Primavera Park, a Mexican national park near Guadalajara, and later moved to the field where they were found. *United States v. Zuno-Arce*, 958 F.2d 380 (9th Cir. 1992) (Table, text in Westlaw, No. 91-50351). See also William Branigin, *Mexican Suspect Denies 1985 Death of DEA Agent*, Wash. Post, Feb. 10, 1990, at A14, A16.

In the first of these two cases, *United States v. Verdugo-Urquidez*,³ the Supreme Court held that the Fourth Amendment had no cognizance of, and therefore no applicability to, the search of a foreign national's home outside of United States' jurisdictional boundaries. Thus, evidence obtained through the DEA-sponsored search of a *hacienda* in Mexico was admissible against defendant Rene Verdugo-Urquidez, even though the same evidence would have been subject to exclusion if it had been procured through a like search conducted within the territorial United States. The ramifications of *Verdugo-Urquidez* are major, especially given the increasing activity of American law enforcement agencies abroad.⁴ However, the second case spawned by the Camarena tragedy, *United States v. Alvarez-Machain*,⁵ with which this note deals, has even wider-ranging implications.

In *Alvarez-Machain* the Supreme Court examined the competency of an American court to exercise personal jurisdiction over the defendant, Dr. Alvarez, who had been kidnapped from Mexico by American (DEA) operatives.⁶ This abduction was arguably contrary to the purposes behind an extant extradition treaty between the United States and Mexico.⁷ Additionally, and perhaps more significantly, this action constituted a clear affront to and violation of Mexican sovereignty, a breach of customary international law⁸ for which the proper remedy was the repatriation of Dr. Alvarez to Mexico.⁹

3. 494 U.S. 259, 110 S. Ct. 1056 (1990).

4. See generally *Kidnapping Subjects Abroad: Hearing Before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 102d Cong., 2d Sess. V, 30-33 (June 22, 1992) [hereinafter *Kidnapping Subjects Abroad*]; Christopher L. Blakesley, *Terrorism, Drugs, International Law, and the Protection of Human Liberty* (1992); M. Cherif Bassiouni, *Legal Responses to International Terrorism: U.S. Procedural Aspects* (1988).

5. 112 S. Ct. 2188 (1992).

6. The resolution of this case has proven to be rather anticlimatic. Over four-and-a-half years after his kidnapping, and after the Supreme Court's vindication of the government's authority to bring him to trial, on December 14, 1992, a federal judge in Los Angeles ruled that the government lacked sufficient evidence to try Dr. Alvarez. *Was Evidence Withheld in Doctor's Trial?*, *Atlanta Constitution*, Dec. 17, 1992, at A12.

7. Extradition Treaty with Appendix, May 4, 1978, U.S.-Mex. entered into force Jan. 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as 1207 U.N.T.S. 189 on Dec. 9, 1980 [hereinafter *Extradition Treaty*]. See also Brief of the United Mexican States as *Amicus Curiae* in Support of Affirmance at 3 n.1, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762).

8. International law is composed of conventional international law, such as treaties, and customary international law, or the usages and practices of nations that over time and through the labor of scholars become legal principles. See generally Mark E. Villiger, *Customary International Law and Treaties* (1985); Anthony D'Amato, *International Law: Process and Prospect* (1987).

9. Under international law, "a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including

Despite these contentions, the Court ruled that Dr. Alvarez, regardless of the way in which his custody had been obtained, could be tried by American courts. After finding that the abduction did not fall within the purview of the extradition treaty, the Court concluded that, absent an applicable treaty limitation, the prerogative for the undertaking fell solely within the constitutional domain of the Executive. By finding that a *post hoc* consideration of Executive discretion constituted a non-justiciable "political question" under the facts of this case, the Court in effect declared that no limitations existed to render nugatory seizures like that of Dr. Alvarez.¹⁰

In reaching this decision, the Court ignored or rejected a number of legal principles thought by many to preclude or limit the reach of the United States in its actions abroad. Particularly, by effectively vindicating the conduct of the Executive branch in this case, the Supreme Court announced that neither the Due Process Clause of the Fifth Amendment nor international treaties, outside of a very narrow, literal construction, limit the power of the Executive in the extraterritorial enforcement of criminal justice. Even more significantly, the Court refused to recognize fundamental, normative principles of customary international law, either directly or through the medium of the extradition treaty.

The *Alvarez-Machain* decision is of great concern to the American constitutional and international legal communities. Simply put, it stands for the proposition that customary international law in and of itself is not a binding or limiting force upon the extraterritorial expression of American sovereignty. This admittedly broad statement of the Court's position is a logical consequence of the reasoning underlying Chief Justice Rehnquist's opinion. This has been recognized in the subsequent treatment of this case.¹¹

in appropriate circumstances restitution or compensation for loss or injury." Restatement (Third) of Foreign Relations Law of the United States (1987). Also, *see generally* Charter of the Organization of American States, Apr. 30, 1948, art. 17, 2 U.S.T. 2394, 2399, T.I.A.S. No. 2361, as amended by the Protocol of Feb. 27, 1967, art. V, 21 U.S.T. 607, 662, T.I.A.S. No. 6847, as well as the United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (United States and Mexico signatories to both instruments).

10. The Court did in fact address the merits of the case, construing the treaty's applicability. If the treaty's scope had been interpreted broadly enough to apply to the facts of this case, the case would have been decided very differently. This case is notable, however, for the result obtained in the *absence* of the treaty's applicability. Into the legal vacuum behind the treaty the Court read in a Constitutional allocation of power to the President; in so doing, it refused to acknowledge any limiting dictate of customary international law or Constitutional Due Process.

11. On remand, the Ninth Circuit addressed the issues raised by Dr. Alvarez's supplemental briefs as follows:

The principal such issue is whether customary international law alone, absent reliance on a formal treaty, may justify the district court's order that Alvarez-

In addition, the storm of protest which this decision has occasioned is ample evidence of the potentially broad and de-stabilizing sweep of *Alvarez-Machain*. Our global neighbors have reacted to this decision with disbelief and outrage.¹² The Mexican government, stung by the decision, has reacted to it by suspending all ongoing drug enforcement initiatives between the two governments.¹³ This development is partic-

Machain be repatriated to Mexico. We have carefully reviewed the Supreme Court's opinion and conclude that it precludes us from favorably considering Alvarez-Machain's position on this issue.

The Ninth Circuit then reversed the order dismissing prosecution and remanded the case for reinstatement of prosecution. *United States v. Alvarez-Machain*, 971 F.2d 310, 311 (1992).

12. Canada, still incensed over the September, 1981, kidnapping from Toronto of Sydney Jaffe by two Florida bounty-hunters, filed an *amicus* brief in *Alvarez-Machain*. See *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987) (Jaffe was later released in 1983 after the Department of State interceded on his behalf). Canada began its brief by stating that "[t]he issues presented in this case could have a profound effect on Canada-USA extradition relations." Brief of the Government of Canada as *Amicus Curiae* at 2, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762). In a statement issued directly after the Court's opinion was released, Canada's External Affairs Ministry spokesman, Denys Laliberte, was quoted as saying "any attempt by a foreign official to abduct someone from Canadian territory is a criminal act." Nancy E. Roman, *Supreme Court OK's Kidnap of Fugitives in Foreign Nations; Mexico Rips Ruling in Camarena Case*, Wash. Times, June 16, 1992, at A1.

Other nations have joined in the clamor of protest. The Swiss Justice Ministry spokesman, Juerg Kistler, reportedly said "[I]magine where it would lead if every country would do that. You would have anarchy." Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Ruling; Foreign Governments Condemn U.S. Abduction Decision*, Wash. Post, June 17, 1992, at A2. The Presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay submitted a declaration to the Permanent Council of the Organization of American States (OAS) on July 15, 1992, requesting that the Inter-American Juridical Committee of the OAS issue an opinion on the "international juridical authority" of *Alvarez-Machain*. On the same day, the government of Columbia stated that it "energetically rejects the judgement issued by the United States Supreme Court." The Minister of Security and Justice of Jamaica and the President of Spain have similarly publicly criticized the decision. Also, the European media have uniformly condemned the decision. Finally, in a recent decision by the Chilean Supreme Court, two justices voted to deny the extradition of two individuals to the United States in reaction to the *Alvarez-Machain* decision. *The Alvarez-Machain Decision: Hearing Before the House Judiciary Subcomm. on Civil and Constitutional Rights*, 102nd Cong., 2d Sess. (Aug. 3, 1992) (statement of Alan J. Kreczko, Deputy Legal Advisor, Department of State).

13. The initial Mexican response to the decision was to suspend the activities of all American drug agents in Mexico and all Mexican agents operating in the United States. Ruth Marcus, *Kidnapping Outside U.S. is Upheld; Supreme Court Rules Government Can Seize Foreigners for Trial*, Wash. Post, June 16, 1992, at A1. In addition, the Mexican Attorney General stated that he would reject future American assistance in an ongoing eradication effort which had helped reduce from eighty-five percent to thirty percent the portion of Mexican-produced heroin consumed in the United States. Mexico had seized a record 159 metric tons of cocaine in the last three years. Marjorie Miller, *Friendly Fire in Front Lines of Drug War*, Los Angeles Times, Aug. 1, 1992, at A3.

ularly unfortunate, considering the extent to which the administration of Mexican President Carlos Salinas de Gortari has cooperated with the United States' government in combatting the flow of illegal drugs across the border.¹⁴ United States government officials, chastened by the negative reaction of the international community, have tried to downplay the impact of this decision on American foreign policy.¹⁵ Despite this, in the aftermath of *Alvarez-Machain*, the United States is largely perceived as an international scofflaw.¹⁶

14. In November of 1990, then Attorney-General Dick Thornburgh stated that since President Salinas had taken office, the Mexican government had seized eighty-five tons of cocaine and prosecuted some 22,000 persons on drug offenses. *White House Briefing*, Fed. News Serv., Nov. 27, 1990. This increased cooperation was a significant asset to American efforts to combat the drug problem, as about seventy percent of the cocaine sold in the United States enters through Mexico. Michael Isikoff, *Mexican Police to Operate in U.S.; Anti-Drug Pact With DEA Requires Reciprocity in Investigations*, Wash. Post, June 30, 1990, at A25.

Although negotiations continue to repair the schism between the two countries occasioned by this ruling, Mexico has stated that it will challenge the United States on this issue before the International Court of Justice. Tim Golden, *Bush Gives Mexico Limited Pledge on Abductions*, N.Y. Times, July 2, 1992, at A5.

15. The first statement released by the Bush Administration was the following statement by William P. Barr:

We are gratified by the Supreme Court's favorable decision in the Alvarez-Machain case. The court's ruling vindicates the position we have taken from the outset in this case. The decision represents an important victory in our ongoing efforts against terrorism and narcotraffickers who operate against the United States from overseas. We are anxious to proceed with the trial of this individual for his role in the torture and murder of DEA agent Camarena.

Our general policy remains cooperation where possible with foreign governments on law enforcement matters. In that regard, we are pleased to note that the mutual cooperation between the governments of Mexico and the United States in fighting the scourge of illegal drugs has been excellent in recent years, and we believe it will continue to improve.

U.S. Department of Justice, Public Affairs, *Statement by the Attorney General on Alvarez-Machain Ruling*, U.S. Newswire, June 15, 1992.

This statement stood for several hours as the official U.S. response to the decision. However, a statement by Press Secretary Marlin Fitzwater issued later in the day insisted that "[t]he United States strongly believes in fostering respect for international rules of law, including in particular the principle of respect for territorial integrity and sovereign equality of states." *Statement by Press Secretary Fitzwater on the Supreme Court Decision on the Alvarez-Machain Case*, 28 Weekly Comp. Pres. Doc. 1063 (June 15, 1992). Senior White House officials were said to be infuriated by Attorney General Barr's "inflammatory statement." White House Chief of Staff Samuel K. Skinner met with Barr shortly thereafter in order to discuss the statement. According to one Administration official, "Barr just blew by them all and issued his own statement." Marjorie Miller & Douglas Jehl, *U.S., Mexico Ease Tensions on Court Ruling*, Los Angeles Times, June 17, 1992, at A1, A10.

16. In his testimony before a House subcommittee, Andreas F. Lowenfield, Professor of International Law at New York University and former Special Assistant to the Legal

The foreign policy implications of this case are particularly alarming at a time when pundits and politicians alike herald the emergence of a "new world order" premised upon notions of international cooperation and mutual respect between co-equal sovereigns. The Court's failure to condemn such a blatant violation of another sovereign's territorial integrity seems, from a policy perspective, at best remiss, if not downright ill-conceived.

Furthermore, the direction of recent developments in the international law enforcement arena has been towards increased cooperation in the prosecution of extraterritorial law enforcement.¹⁷ At the core of this approach are notions of mutual assent and a collective recognition of the proper reach and scope of sovereign power. The approach to extraterritorial law enforcement endorsed by the Court in this opinion puts the United States out-of-sync with current trends in international law enforcement. The Court, by way of tacit approval, has opened the way for an expansion of regressive and ultimately counter-productive international law enforcement practices.

Given these developments, it is important to understand what motivated the Supreme Court to rule as it did. The note to follow seeks to answer that question by asking whether it was possible for the Court, respecting the integrity and dictate of the United States Constitution, to have provided Dr. Alvarez with the remedy he sought and customary international law demanded, namely his release and repatriation to Mexico. The answer to that question is that the current interpretation of the Constitution would not have allowed for such a result.

This note reaches that conclusion by examining Dr. Alvarez's claims under the text of the Constitution, under the extradition treaty with

Advisor, United States Department of State, had this to say:

As I told members of your staff, I spent most of last week in Europe. Wherever I went, I heard only two questions. One, what is Ross Perot like and two, how can your Supreme Court justify state-sponsored kidnapping? I could do no better than answer I don't know to both questions.

Kidnapping Subjects Abroad, *supra* note 4.

17. See, e.g., Mary Jo Grotenroth, *INTERPOL's Role in International Law Enforcement*; Ekkehart Muller-Rappard, *The European Response to International Terrorism*; John Norton-Moore, *The Need for an International Convention*, all in *Legal Responses to International Terrorism: U.S. Procedural Aspects* (M. Cherif Bassiouni ed., 1988); *International Criminal Law, v. 2 Procedure* (M. Cherif Bassiouni ed., 1986); M. Cherif Bassiouni and Christopher Blakesley, *The Need for an International Criminal Court in the New World Order*, 25 *Vand. J. Transnat'l Law* 151 (1992); Bruno Ristau and Michael Abbell, *International Cooperation* (5 vol. set, 1990); Joel Cavicchia, *The Prospects For an International Criminal Court in the 1990's*, 10 *Dick. J. Int'l L.* 223 (1992); Michael P. Scharf, *The Jury is Still Out on the Need For an International Criminal Court*, 1991 *Duke J. Comp. & Int'l L.* 135 (1991); Duncan Campbell, *Police Forge Closer Links With Russia and the East*, *Guardian* (UK), Oct. 26, 1992.

Mexico, and under relevant precepts of customary international law. Each claim will be analyzed in terms of the violence done to the theoretical framework of the American constitutional system by a recognition of the claim's validity and efficacy in the pre-*Alvarez-Machain* world. A structural view of the Constitution will underlie this analysis, emphasizing the principle of an enumerated separation of powers between the three coordinate branches of the United States government as a mechanism commanding judicial restraint. Before the full impact of *Alvarez-Machain* can be properly assessed, however, the factual and legal background upon which it rests must be fully understood.

B. The Facts

Upon learning of Enrique Camarena's death, the DEA immediately launched "Operation Leyenda," a special investigation into the Camarena abduction and murder.¹⁸ The investigation into Agent Camarena's death continued for several years, yielding nearly fifty arrests and several convictions, both in the United States and in Mexico.¹⁹ Despite this success, certain key suspects, all of them residents of Mexico, continued to elude the long arm of American justice.²⁰

One of these suspects was Dr. Humberto Alvarez-Machain, a doctor of medicine with a specialty in obstetrics and gynecology, who had a

18. Operation Leyenda is a nine-member unit based in Los Angeles in charge of the Camarena investigation. At the time of the Alvarez-Machain abduction, it was headed by DEA Agent Hector Berellez, a close friend of Agent Camarena. Michael Isikoff, *Extradition of DEA Agent, Informant Sought; Mexico's Request Surprises, Concerns U.S. Officials*, Wash. Post, July 21, 1990, at A4.

19. The Mexican government officially closed the investigation into Agent Camarena's death, after twenty-eight convictions, in December of 1989. Michael Hedges, *Camarena Trial Begins; Mexico Reopens Its Probe*, Wash. Times, May 16, 1990, at A5.

20. Despite the apparent assistance of the Mexican government, many officials in the DEA were frustrated by what they felt was a cover-up by high level officials of the Mexican government. Subsequent to Alvarez-Machain's abduction, one American drug agent was quoted as saying "on the border, the corruption problem is as bad as ever. Corruption is bad on both sides, but there it's a symptom of low pay and a perception that cocaine is an American problem, that they aren't hurting their country by doing it." Michael Hedges, *Mexico Bends to U.S. Concerns in Drug Probes*, Wash. Times, May 22, 1990, at A3. This perception was reinforced by the large numbers of Mexican police officials prosecuted in conjunction with the Camarena murder. See *2 Convictions Reversed in Camarena Murder Case*, Los Angeles Times, July 9, 1992, at B2.

The Mexican government has since re-opened the investigation, creating a new department, the General Coordination for Special Affairs, within the Mexican Attorney General's Office to handle this and other "special" investigations. The new division is seen by some United States officials as a means to blunt criticism that the government of President Carlos Salinas de Gortari is doing nothing to resolve the matter, and also as a move to deny the United States any pretext to sponsor further abductions of Mexican citizens. William Branigin, *Mexico Takes New Step in DEA Agent's Murder*, Wash. Post, May 16, 1990, at A13.

practice based in Guadalajara. The DEA alleged that Dr. Alvarez had used his medical skills to prolong Agent Camarena's life so that he might be further tortured and interrogated by his captors.²¹ Because of the terrible nature of Dr. Alvarez's supposed participation in the Camarena murder, he was placed high on the DEA's "wanted" list.

In December of 1989, the DEA undertook negotiations with Mexican Federal Judicial Police commandante Jorge Castillo del Rey over the possibility of securing Dr. Alvarez. These talks fell through when the DEA refused to supply the Mexican police official \$50,000 in advance to cover the expense of transporting Dr. Alvarez to the United States.²² Although commandante del Rey attempted to restart talks in January of 1990, the DEA declined, citing the tension between the Mexican and American governments generated by the airing of an NBC mini-series based upon the Camarena murder and ensuing investigation.²³

In the meantime, however, DEA informant Antonio Garate-Bustamante, an admitted former advisor to Mexican drug lord Ernesto Fonseca-Carrillo, and DEA Special Agent Hector Berellez, chief of "Operation Leyenda," had been conducting their own intelligence-gathering operations south of the border.²⁴ Special Agent Berellez had told Garate to relay to his "contacts" in Mexico that the DEA would pay for information leading to the arrest and capture of individuals responsible for the death of Special Agent Camarena.

On January 31, 1990, a grand jury in the Central District of California returned its sixth superseding indictment in the Camarena case, and Dr. Alvarez was among those indicted.²⁵ In March of 1990, after

21. The evidence against Doctor Machain was always somewhat sketchy. The Attorney General of Mexico, Enrique Alvarez del Castillo, had acknowledged that Dr. Alvarez laundered money for Rafael Caro-Quintero, who was convicted in Mexico last year of Agent Camarena's murder. Larry Rohter, *Mexico Arrests 6 in Abduction Case*, N.Y. Times, Apr. 29, 1990, § 1, at 9. According to an affidavit filed over three years ago in federal court, Dr. Alvarez told investigators that he had seen Agent Camarena at the house where he was tortured, but that another doctor, Juan Mejia Monge, was attending to Camarena. Dr. Alvarez reported that Camarena "was in a bad state." Investigators insisted, however, that they had extensive physical and testimonial evidence that Dr. Alvarez personally assisted in the torture by administering revitalizing drugs to Camarena. Jim Newton, *A Cry of Innocence*, Los Angeles Times, June 26, 1992, at B1. The government's evidence was apparently not extensive enough. See *supra* note 6.

22. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990).

23. *Drug Wars: The Camarena Story*, (NBC Television broadcast, Jan. 7-9, 1990).

24. The Mexican Attorney General's Office confirmed that Bustamante is a former Mexican police officer. William Branigin, *Mexico to Seek Extradition of Alleged Kidnap Leader; Ex-Policeman Living in Los Angeles Named*, Wash. Post, Apr. 29, 1990, at A21.

25. The indictment was the sixth to update the charges in the case, making a total of seven indictments since the investigation began. This indictment, the first to name Dr. Alvarez, was possessed of a sense of urgency, as the five-year statute of limitations for those not charged in the case was due to expire on February 7, 1990. Berke, *supra* note 1, at A1, B9.

talks with the Mexican police had broken down, Garate informed Special Agent Berellez that his associates in Mexico believed they could successfully apprehend Dr. Alvarez and deliver him to custody in the United States.²⁶ Special Agent Berellez instructed Garate to tell his associates that the DEA would pay them \$50,000 plus expenses if Dr. Alvarez were delivered to the DEA on American soil.²⁷

The opinion of the United States district court, before which the case was initially brought, sets forth the subsequent events:

On April 2, 1990, at about 7:45 p.m., Dr. Machain was in his office in Guadalajara, having just finished treating a patient. Five or six armed men burst into his office. One showed Dr. Machain a badge which appeared to be the badge of the [Mexican] federal police. Another man placed a gun to Dr. Machain's head and told him to cooperate or he would be shot.

Dr. Machain was taken to a house in Guadalajara. One of the men hit him in the stomach as he exited the car at their request. In the house, he was forced to lay on the floor face down for two to three hours. Dr. Machain testified that he was shocked six or seven times through the soles of his shoes with an "electric shock apparatus." He says that he was injected twice with a substance that made him feel "light-headed and dizzy."

Dr. Machain was then transported by car to Leon where they were joined by a "fair-skinned" man. They all boarded a twin engine airplane. Dr. Machain asked the fair-skinned man

26. The group of renegade Mexican police officers involved in the abduction of Dr. Alvarez was reportedly known as "The Wild Geese." Michael Isikoff, *Arrest of Mexican Doctor Strains DEA's Reputation; Tactics in Camarena Case are Questioned*, Wash. Post, May 2, 1990, at A1, A14.

27. Berellez would later testify that he had received authorization to make this offer from, among others, Pete Gruden, Deputy Director of the DEA in Washington, D.C. In addition, Berellez believed that the Attorney General's office had also been consulted. Robert Reinhold, *Witness Says U.S. Offered Reward to Get a Suspect*, N.Y. Times, May 26, 1990, at A1. There is some evidence, however, that this may have been a rogue operation planned and executed from within the DEA. Mexican officials reported as much, stating United States officials informed them that the operation was conducted out of the Los Angeles DEA office, without any authorization from Washington. Ronald J. Ostrow & Marjorie Miller, *Mexico Threatens to Halt U.S. Anti Drug Cooperation Over Abduction of Suspect*, Los Angeles Times, Apr. 19, 1990, at A6. Berellez's testimony caused several senior DEA officials to be reassigned as part of a "managerial shakeup" at the agency. Robert Pear, *Justice Department Scrambles to Explain Abduction Plot*, N.Y. Times, May 27, 1990, § 1, at 24. In addition, a process was established whereby future affairs of this sort would be referred through the National Security Council directly to the President, he being "the one person most able to balance foreign policy objectives in general with law enforcement needs in specific." *White House Briefing*, Fed. News Serv., June 23, 1992.

to identify himself and to indicate where they were going. The man said that he was "with the DEA" and they were going to El Paso. Agent Berellez testified that no DEA agents participated in the actual kidnapping.

When they arrived in El Paso on April 3, agent Berellez, Mr. Garate, and others were waiting for them on the runway. Only Dr. Machain exited the plane. As he exited, one of the men in the plane reportedly said, "We are Mexican police, here is your fugitive."²⁸

The DEA then placed Dr. Alvarez under arrest.

On April 18, 1990, the Mexican government presented a diplomatic note to the Department of State seeking a clarification of the United States' involvement in Dr. Alvarez's abduction.²⁹ The note stated that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered."³⁰

On May 16, 1990, in a second diplomatic note, the Embassy of Mexico officially condemned the United States' participation in the abduction, and demanded that Dr. Alvarez be immediately repatriated. The note further informed the Department of State that criminal proceedings had been initiated in Mexico against the kidnapers of Dr. Alvarez and that their extradition would be sought.³¹ Finally, on July

28. *United States v. Caro-Quintero*, 745 F. Supp. 599, 602-03 (C.D. Cal. 1990).

29. It may be that the United States was, at that point, uncertain of its own role in the kidnapping. For some time after the abduction there was "extraordinary confusion . . . among American law enforcement agencies on how Dr. Alvarez was brought to the United States." Philip Shenon, *Mexico Says Suspect's Seizure Imperils Aid to U.S. on Drugs*, N.Y. Times, Apr. 20, 1990, at A1. A subsequent internal investigation by the DEA resulted in an initial denial of any responsibility for the kidnapping. Frank Shults, the DEA's chief spokesman in Washington, stated that DEA investigators had found "no violation of Federal law, no violation of sovereignty, no improper behavior by the DEA, and nothing that even smells bad." Philip Shenon, *U.S. Drug Agency Denies Role in Mexican Capture*, N.Y. Times, Apr. 22, 1990, at A1. This led to assertions early in May of 1990 by the Attorney General of the United States that "high-ranking Mexican police officers" had in fact initiated the abduction. Michael Isikoff, *Mexican Police Initiated Abduction of Doctor, Thornburgh Says*, Wash. Post, May 3, 1990, at A9. See also *Justice Department Briefing*, Fed. News Serv., May 4, 1990. Finally, on May 24, 1990, President Bush declared "we did not grab that doctor." *Bush Denies Agents Abducted Mexican*, Wash. Times, May 25, 1990, at A2.

30. Brief of the United Mexican States as *Amicus Curiae* in Support of Affirmance at 3, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762) [hereinafter Brief of the United Mexican States].

31. *Id.* The note stated that the procedure followed by the kidnapers was in violation of Articles fourteen and sixteen of the Political Constitution of the United Mexican States, which establish the rights of due process and equal protection. After noting that proceedings had been initiated to charge those involved in the crime under the laws of Mexico, the

19, 1990, the State Department received a third diplomatic note, requesting the provisional arrest and extradition of Garate and Special Agent Berellez for prosecution in Mexico for crimes relating to the abduction of Dr. Alvarez.³²

C. *The Lower Courts*

Dr. Alvarez was brought to trial before the United States' District Court for the Central District of California in August of 1990.³³ After entertaining briefs on the case, the court found that the circumstances surrounding the abduction of Dr. Alvarez evidenced a violation of the extradition treaty, in force since 1980, between the United States and Mexico.³⁴ Looking to the Restatement (Third) of the Foreign Relations Law of the United States and federal jurisprudence to discern a remedy,

Mexican government requested that the State Department intervene and secure the immediate repatriation of Dr. Alvarez. *Id.* App. B., at 5a.

Immediately after Dr. Alvarez's kidnapping the Mexican government arrested four Mexican policemen and two other persons believed to be involved in the kidnapping of Dr. Alvarez. Larry Rohter, *Mexico Detains 4 Officers in Abduction of Doctor Accused in U.S.*, N.Y. Times, Apr. 27, 1990, at A8. Of these, at least three have been sentenced, according to the state-owned Mexican news agency Notimex. *3 Mexicans Sentenced in U.S.-Paid Kidnapping*, Wash. Times, July 5, 1992, at A12.

32. Brief of the United Mexican States, *supra* note 30, at 4.

33. Specifically, Dr. Alvarez was charged with violations of 18 U.S.C. § 371, § 1959 (1988) (conspiracy to commit violent acts in furtherance of racketeering activity), 18 U.S.C. § 1959(a)(2) (1988) (commission of violent acts in furtherance of racketeering activity), 18 U.S.C. § 1201(c) (1988) (conspiracy to kidnap a federal agent), 18 U.S.C. § 1201(a)(5) (kidnap of a federal agent), and 18 U.S.C. § 3 (1988) (misprision of felony). *United States v. Caro-Quintero*, 745 F. Supp. 599, 601 n.1 (C.D. Cal. 1990); *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2190 n.1 (1992).

34. Dr. Alvarez's standing to raise the treaty was rendered a moot issue by the protest of the Mexican government. As a preliminary matter, the treaty was construed as intending to confer the right to raise a treaty violation upon Mexican nationals in general, and Dr. Alvarez in particular. *Caro-Quintero*, 745 F. Supp. at 607-08; *see also* *Edey v. Robertson*, 112 U.S. 580, 598-99, 5 S. Ct. 247, 254 (1884). Even assuming this construction, however, in the absence of an official protest Dr. Alvarez would have lacked standing in several circuits to raise the issue of the treaty's violation. *Compare* *United States v. Cuevas*, 847 F.2d 1417, 1426 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012, 109 S. Ct. 1122 (1989), *United States v. Thirion*, 813 F.2d 146, 151, n.5 (8th Cir. 1987), and *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir. 1988), *cert. denied*, 492 U.S. 921, 109 S. Ct. 3249 (1989) (holding that a person to be extradited may raise whatever objections the extraditing country is entitled to raise) *with* *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884, 94 S. Ct. 204 (1973), *United States v. Kaufman*, 874 F.2d 242, 243 (5th Cir. 1989) (*per curiam*), *Demjanjuk v. Petrovsky*, 776 F.2d 571, 584 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S. Ct. 1198 (1986), and *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990) (holding that only a nation, as a party to a treaty, may complain of a breach of that treaty). *See also* *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir. 1988); *Leighnor v. Turner*, 884 F.2d 385, 388 (8th Cir. 1989).

the court concluded the proper remedy was the immediate return of Dr. Alvarez to Mexico.³⁵

The United States appealed. The Ninth Circuit Court of Appeals affirmed the dismissal of the indictment,³⁶ relying on its prior pronouncements in *United States v. Verdugo-Urquidez*.³⁷ That case also involved a Mexican national kidnapped for assisting in the torture/murder of Agent Camarena,³⁸ and the court had observed that although the extradition treaty in question did not expressly forbid such abductions, the "purpose" of the treaty was undermined by such action.³⁹ The Ninth

35. *Caro-Quintero*, 745 F. Supp. at 614. Restatement (Third) of Foreign Relations Law of the United States § 901 (1987) states in pertinent part "the reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Id.*

36. *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (*per curiam*).

37. 939 F.2d 1341 (9th Cir. 1991). Indicted for the Camarena murder, Verdugo was tried and convicted of that crime and related narcotics trafficking activities. No. CR-87-422-ER (C.D. Cal. 1988). The District Court had granted Urquidez's motion to suppress evidence gained from a search of his *hacienda* in Mexico. The government appealed this decision, and after a divided 9th Circuit Court of Appeals affirmed the trial court, 856 F.2d 1214 (1988), the Supreme Court reversed. 494 U.S. 259, 110 S. Ct. 1056 (1990). The Ninth Circuit complied with the Supreme Court's ruling on remand. 902 F.2d 773 (9th Cir. 1990).

Even without the suppressed evidence, however, the government had been able in the meantime to obtain a conviction. Verdugo appealed, and his conviction was reversed by the Ninth Circuit on the grounds that his "abduction" from Mexico violated the extradition treaty between the two nations. 939 F.2d 1341 (9th Cir. 1991). The government applied for writs to the Supreme Court, and the Supreme Court, on the heels of *Alvarez-Machain*, granted a writ of certiorari, vacated the judgment of the Ninth Circuit, and remanded the case for proceedings consistent with its ruling in *Alvarez-Machain*. 112 S. Ct. 2986 (1992).

38. The circumstances of Verdugo-Urquidez's delivery to the United States were quite similar to those of Dr. Alvarez:

He was arrested in San Felipe, Mexico, on January 24, 1986, by Mexican authorities. Verdugo was blindfolded, handcuffed, placed in the back seat of a car and driven to the border at Calexico, where he was handed through the fence to waiting U.S. marshals who had a warrant for his arrest.

The Mexican police officials involved were reportedly paid \$32,000 for their role in the transaction. *Conviction in 1985 Killing Imperiled; Kidnapping of Foreign Suspect Ruled Violation of Extradition Pact*, Wash. Post, July 23, 1991, at A10.

39. The Ninth Circuit adopted the "uncontroversial proposition that in construing treaties we must look to their purposes and implicit assumptions as well as their express proscriptions and prescriptions." *Verdugo-Urquidez*, 939 F.2d at 1354, citations omitted. The court was very clear about the scope of that "purpose:"

To summarize (our) conclusion, we hold that extradition treaties provide a comprehensive means of regulating the methods by which one nation may remove an individual from another nation for the purpose of subjecting him to criminal prosecution, and that unless the nation from which an individual has been forcibly abducted consents to that action in advance, or subsequently by its silence or otherwise waives its right to object, a government authorized or sponsored abduction constitutes a breach of the treaty. To hold to the contrary would seriously

Circuit believed the same remedy applied in *Verdugo-Urquidez*, repatriation of the kidnapped Mexican national, to be appropriate in Dr. Alvarez's case as well.⁴⁰

D. *Rehnquist, Ker, and Rauscher*

The Supreme Court reversed the Ninth Circuit and held that American courts could rightfully try Dr. Alvarez, regardless of the means by which personal jurisdiction had been obtained. In doing so, the Court resorted to the so-called *Ker-Frisbie* doctrine, a nineteenth-century jurisprudential creation.⁴¹ The *Ker-Frisbie* doctrine maintains that a person forcibly abducted from one state can legitimately be subjected to personal jurisdiction by a court of the state to which he is transported. Prior to *Alvarez-Machain*, however, this doctrine had not been used to justify the violation of a foreign nation's sovereignty.⁴²

In expanding the scope of the *Ker-Frisbie* line, the Court rejected the applicability of *United States v. Rauscher*⁴³ to Dr. Alvarez's case. *Rauscher*, also a child of the nineteenth century,⁴⁴ had been interpreted

undermine the utility and vitality not only of our extradition treaty with Mexico but of all of our extradition treaties.

Id. at 1355. The extradition treaty was examined generically, as an international agreement regulated by conventional and customary international law, and not in the distinctive context of its own genesis. This is an important and marked contrast to the approach adopted by the majority in *Alvarez-Machain* which emphasized the intent of the Executive as manifested in the diplomatic and historical antecedents to the treaty's formation.

40. The Ninth Circuit based this decision upon Mexico's request that Dr. Alvarez be returned and the applicable international law precepts set out in the famous case of Attorney General v. Eichmann, 36 Int'l L. Rep. 18, 70-71 (Dist. Ct. Israel, 1961), *aff'd*, 36 Int'l L. Rep. 277 (Sup. Ct. Israel, 1962). See also *Annuaire Française de Droit International*, VI, 609-11 (1960) (reviewing how antecedent settlement of dispute between Argentina and Israel over the Eichmann kidnapping removed international legal obstacles to Eichmann trial). Although the legal justification for this decision was slight, the policy reasons behind the ruling were obvious:

The fact that our decision today may ultimately result in the release to Mexico of a convicted felon should not obscure the larger meaning of this case. Although the principle of *pacta sunt servanda* (agreements must be obeyed) has not always been scrupulously followed in the affairs of this and other nations, if we are to see the emergence of a "new world order" in which the use of force is to be subject to the rule of law, we must begin by holding our own government to its fundamental legal commitments.

Verdugo-Urquidez, 939 F.2d at 1362.

41. *Ker v. Illinois*, 119 U.S. 436, 443, 7 S. Ct. 225, 229 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S. Ct. 509, 511 (1952).

42. Brief of the United Mexican States, *supra* note 30, at 8-9.

43. 119 U.S. 407, 7 S. Ct. 234 (1886).

44. *Rauscher*, decided first, and then *Ker* were decided on the same day, December 6, 1886. *Ker*, 119 U.S. 436, 7 S. Ct. 225.

to stand for the proposition that treaty construction should be informed by a broad view of the purposes which engendered the treaty.⁴⁵ Chief Justice Rehnquist treated *Rauscher* narrowly based on his view that federal courts may not rely upon customary international law in treaty interpretation.

The tension between these competing doctrines is the dynamic which underlies the *Alvarez-Machain* decision. If the implications of the Supreme Court's holding are to be properly understood, a brief examination of the *Ker-Frisbie* and *Rauscher* doctrines is a necessary evil.

1. *Rauscher*—The Treaty Won't Let Us Try Him

United States v. Rauscher was an 1886 case which involved the Webster-Ashburton Treaty of 1842, an extradition treaty between the United States and England.⁴⁶ Rauscher, a criminal defendant, had been extradited from England under the treaty to stand trial for the crime of murder on the high seas.⁴⁷ Once within the United States, however, he instead was indicted and tried for the cruel and unusual punishment of the supposed murder victim.⁴⁸ The issue was whether Rauscher could be tried for a crime other than the one for which he had been extradited.

Justice Miller delivered the opinion of the Court that he could not. The Court observed that the treaty granted to Rauscher, by virtue of its operation, certain rights, among them a right to be tried only within the parameters established by the treaty.

That right . . . is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or

45. See *Verdugo-Urquidez*, *supra* notes 39-40. *Rauscher* arguably never stood for this sort of broad interpretative sweep, but only for the proposition that implied terms may be derived from treaties. See *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 57 S. Ct. 100 (1936). Nothing in *Alvarez-Machain* has served to change that perspective. The Webster-Ashburton treaty, August 9, 1843, violated in *Rauscher* was interpreted in light of the specific purpose for which it had been negotiated, to facilitate the exchange of fugitives between the United States and Great Britain, and *not* against the background of some grander, overriding aspiration of international harmony and accord.

46. 8 Stat. 572 (1842). The preamble to the treaty set forth its avowed goals:

A TREATY

To settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases.

47. *Rauscher*, 119 U.S. at 409, 7 S. Ct. at 235, citing to Revised Statutes of the United States, § 5339.

48. *Id.*, citing to Revised Statutes of the United States, § 5347.

after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.⁴⁹

In recognizing that this principle, known in international legal parlance as the doctrine of specialty,⁵⁰ was applicable to *Rauscher*, the Court read an implied term into the treaty; no express treaty clause indicated the existence of such a provision.⁵¹

The Court found it necessary to construe the treaty this way in order to preserve the treaty's integrity, in light of the objectives which had motivated the treaty's negotiation. In rejecting the alternative notion posited by the United States—that the treaty was merely a conduit for transferring prisoners from one jurisdiction to another—the Court focused upon the greater purpose or “object” of the treaty:

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.⁵²

Thus, in *Rauscher* the purposes inspiring the treaty's formation also served to gauge its sweep.

Significantly, the *Rauscher* Court did not view the treaty's purpose as a reciprocal obligation imposed upon the United States by force of

49. *Id.* at 424, 7 S. Ct. at 243.

50. For more about the doctrine of specialty, see Restatement (Third) of Foreign Relations Law of the United States § 477 (1987), and, generally, M. Cherif Bassiouni, *International Extradition* (1983).

51. Chief Justice Waite was in dissent and of the opinion that the lack of an express endorsement of the doctrine of specialty in the treaty precluded its application. *Rauscher*, 119 U.S. at 434, 7 S. Ct. at 248 (Waite, C.J., dissenting). Interestingly enough, Chief Justice Waite based his dissent upon the somewhat inchoate “political question” rationale espoused in *The Richmond*, 12 U.S. (9 Cranch) 102 (1815), one of the cases relied upon by the current Chief Justice in *Alvarez-Machain*.

52. *Rauscher*, 119 U.S. at 421-22, 7 S. Ct. at 242.

international law.⁵³ Rather, the theory undergirding the holding of *Rauscher* was that the United States, as a signatory to the extradition treaty⁵⁴ with England, had voluntarily surrendered a measure of its sovereign authority. The Court merely determined the extent of that surrender.

In *Rauscher*, the authority of the American courts to exercise personal jurisdiction over Rauscher was not restricted by the treaty in a prohibitive sense, but rather had been waived by the United States in order to receive the benefits that the treaty conferred upon them.⁵⁵ The Court, aware of this subtle distinction, restricted its review to the unique circumstances and negotiations which had culminated in the signing of the Webster-Ashburton Treaty; it did not consider any normative guidelines governing the interpretation of international compacts generally or extradition treaties specifically. Thus, it was proper to examine the context in which this *particular* treaty operated, as well as the intent behind it, to determine the extent of the obligation entered into by the United States.⁵⁶

53.

[I]t may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Id. at 412, 7 S. Ct. at 236.

54. The extradition treaty involved in *Rauscher* was *self-executing*, which means it did not require any implementing legislation to incorporate it into American domestic law. This is in contrast to an *executory* treaty, which requires affirmative legislative sanction by Congress before judicial notice may be taken of it. *Foster v. Neilson*, 27 U.S. 253, 2 Pet. 253, 314 (1829). See also the *Head Money Cases*, 112 U.S. 580, 5 S. Ct. 247 (1884); *Chew Heong v. United States*, 112 U.S. 536, 5 S. Ct. 255 (1884); Thomas M. Franck & Michael J. Glennon, *Foreign Relations and National Security Law, Cases, Materials, and Simulations* 274-96 (1987); and the Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987). Extradition treaties are viewed as intrinsically self-executing. 1 M. Cherif Bassiouni, *International Extradition: United States Law & Practice* 71-74 (2d ed. 1987) [hereinafter Bassiouni—International Extradition].

55. This is analogous to the contract, where a party, in order to receive benefits, binds himself with a promise to act, or, as in this case, not to act. Treaties have been referred to in the jurisprudence as "contract(s) between nations." *Foster*, 27 U.S., at 314. For a critical view of this approach to treaties, see generally Evangelos Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties* (1990).

56. In outlining the treaty's parameters, the Court sought guidance from the diplomatic missives which had passed between the American Executive and the government of Great Britain in the course of the Webster-Ashburton Treaty negotiations. The question presented was whether the doctrine of specialty was enforceable as a law of the land, or a policy consideration more appropriately left to the discretion and judgment of the political branches.

In other words, the Court did not recognize that international legal norms could operate through the back door of treaty construction to delimit the United States' sovereign reach. It merely recognized that the United States was capable of limiting its own sovereignty, and had done so in this case. In return for the new procedures and mechanisms available to the United States under the treaty, it had impliedly ceded the power to try extradited criminals, like Rauscher, in violation of the doctrine of specialty. The rationale is basic—increased capability for both nations through mutual cooperation and reciprocal exchange.⁵⁷

2. *Ker-Frisbie—Go Get 'Em, Boys*

*Ker v. Illinois*⁵⁸ involved the abduction from Peru of a fugitive, Frederick M. Ker, wanted in the State of Illinois for the crime of larceny. Governor Hamilton of Illinois sought and obtained from the President of the United States a warrant, directed to Henry G. Julian, requesting the extradition of the defendant from the authorities of Peru. Mr. Julian departed immediately after receiving the warrant and traveled to Lima in order to discharge his duties.

The Executive Department of the United States and the government of Great Britain had engaged in diplomatic negotiations on just the question presented by the *Rauscher* case, *i.e.*, the application of the doctrine of specialty to this case. Although that particular correspondence was inconclusive, two Congressional statutes and a statute of Great Britain passed subsequent to the treaty's coming into force favored the adoption of the doctrine of specialty into the treaty. See *Rauscher*, 119 U.S. at 415-16, 7 S. Ct. at 238-39 (citing *Foreign Relations of the United States, 1876-1877*, at 204-307, 14 Albany L.J. 85, 15 Albany L.J. 224, 16 Albany L.J. 361, and 10 Am.L.Rev. 617 (1875)). It is this zone of ambiguity, where Judicial review meets Executive prerogative, which is the suffusive dynamic, and the constitutional lynchpin, of *Alvarez-Machain*. The *Rauscher* Court found that the decision had in fact already been made by the Executive; the Court's role was merely to derive the dispositive intent of the Executive from the evidence before it.

In addition, Justice Miller noted that several federal statutes imposed the doctrine of specialty upon extradition treaties to which the United States was a party. *Rauscher*, 119 U.S. at 415, 7 S. Ct. at 238 (citing Revised Statutes of the United States, §§ 5270, 5272, and 5275). The importance of these federal statutes will be addressed later in this note.

57. Among these "new procedures and mechanisms" made available to the Executive was the power to extradite its own nationals in the absence of any limiting language. *Charlton v. Kelly*, 229 U.S. 447, 468, 33 S. Ct. 945, 952 (1913). However, the Supreme Court has held that the United States nationals may not be extradited by the American government unless the treaty under which they are extradited contains a positive grant of authority to surrender United States citizens. *Valentine v. United States ex. rel. Neidecker*, 299 U.S. 5, 7-12, 57 S. Ct. 100, 101-04 (1936). See also *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Collins v. Miller*, 252 U.S. 364, 369-70 (1920); *Grin v. Shine*, 187 U.S. 181, 192 (1902); and *Hooker v. Klein*, 573 F.2d 1360, 1364 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978).

58. 119 U.S. 436, 7 S. Ct. 225 (1886).

Upon his arrival in Lima, however, Mr. Julian, for reasons unknown, chose not to present the extradition papers to the Peruvian government.⁵⁹ Instead, Mr. Julian seized Ker and put him on a boat which ultimately transported him to California. From there, Ker was extradited to Illinois, where ultimately he was tried and convicted. The United States Supreme Court took up the case on a writ of error, in order to address Ker's contention that his forcible abduction had violated the Due Process Clause of the Fourteenth Amendment and the extradition treaty with Peru.

Justice Miller, coincidentally the author of *Rauscher*, set out the opinion of the Court and rejected Ker's argument that the extradition treaty with Peru, by virtue of its existence, had "clothed" him with certain rights. The Court admitted that if Ker had been delivered to the United States under cover of the extradition treaty, the treaty might have imposed certain restrictions upon the United States' exercise of jurisdiction over him. However, since Ker had been kidnapped by a private actor, as opposed to being extradited by the government of Peru, he came before the Court "clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty."⁶⁰ Justice Miller's conclusion summed up Ker's failing: "We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, he has failed to establish the existence of any such right."⁶¹

In 1952, the Court decided *Frisbie v. Collins*,⁶² a *habeas corpus* proceeding in which Collins, who had been convicted of murder, sought release on the grounds that his kidnap from Illinois to stand trial in Michigan constituted a violation of the Fourteenth Amendment. Justice Black, in rejecting Collins' petition, stated that "[t]his Court has never departed from the rule announced in *Ker v. Illinois* . . . that the power of a court to try a person for crime is not impaired by the fact that he [has] been brought within the court's jurisdiction by reason of a 'forcible abduction.'"⁶³ To support this ruling, the Court cited several

59. It has been suggested that the reason Mr. Julian failed to present the extradition papers to the Peruvian government was that, at the time in question, Lima was occupied by revolutionaries, and there existed no proper governmental authority accessible to Mr. Julian. John G. Kester, *Some Myths of United States Extradition Law*, 76 Geo. L.J. 1441, 1451 (1988).

60. *Ker*, 119 U.S. at 443, 7 S. Ct. at 229.

61. *Id.*

62. 342 U.S. 519, 72 S. Ct. 509 (1952).

63. *Id.* at 522, 72 S. Ct. at 511.

favorable post-*Ker* cases.⁶⁴ The doctrine that arose out of these cases has come to be known as the *Ker-Frisbie* doctrine. This doctrine maintains that "when a criminal is brought or is in fact within the jurisdiction and custody of a State, charged with a crime against its laws, the State may, *so far as the Constitution and laws of the United States are concerned*, proceed against him for that crime, and need not inquire as to the particular methods employed to bring him into the State."⁶⁵

There are several problems with holding this doctrine applicable to the facts in *Alvarez-Machain*. With the exception of *Ker*, all the other cases applying the doctrine involved the abduction and transportation of fugitives from one state to another. This involves an infringement of state sovereignty, a federalism matter of strictly national import.⁶⁶ Cases of international kidnapping, like that of Dr. Alvarez, infringe upon national sovereignty, a situation more readily dealt with by international legal precepts. The following passage from *Mahon v. Justice*,⁶⁷ an 1887 Supreme Court case applying the *Ker* rule, is instructive:

If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties abducted, and of parties committing the offence, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures they might deem necessary as redress for the past and security for the future. But the States of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the Federal Constitution. They cannot declare war or authorize reprisals on other States. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by citizens of other States.⁶⁸

64. *Id.* at 522 n.7, 72 S. Ct. at 1511 n.7 (citing *Ker*, 119 U.S. 436, 7 S. Ct. 225 (1886)); *Ex Parte Johnson*, 167 U.S. 120, 17 S. Ct. 735 (1896); *Lascelles v. Georgia*, 148 U.S. 537, 13 S. Ct. 687 (1892); *Mahon v. Justice*, 127 U.S. 700, 8 S. Ct. 1204 (1887). See also *Cook v. Hart*, 146 U.S. 183, 13 S. Ct. 40 (1892).

65. *Pettibone v. Nichols*, 203 U.S. 192, 208, 27 S. Ct. 111, 116 (1906).

66. See generally U.S. Const. art. I, § 10, cl. 1; *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1860).

67. 127 U.S. 700, 8 S. Ct. 1204 (1888).

68. *Id.* at 704-05, 8 S. Ct. at 1207. The application of the *Ker-Frisbie* doctrine to American law enforcement activities abroad may be as much a comment on the vitality of state sovereignty as it is an expansion of a nineteenth century jurisprudential rule. Contrast *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1347 (9th Cir. 1991) ("the rule announced in *Frisbie* is suited to cases of domestic kidnapping, not international kidnapping").

It would seem that of the entire line of cases espousing the *Ker-Frisbie* doctrine, the only one involving even the possibility of an infringement of absolute national sovereignty is *Ker* itself.

3. *Rehnquist—A Bird in the Hand . . .*

Dr. Alvarez submitted two bases for distinguishing *Ker*, both of which the court of appeals found to be dispositive. First, in *Ker* the kidnapping had been perpetrated by a private party, while the kidnapping of Dr. Alvarez, although carried out for the most part by Mexican nationals, was an act instigated by, supervised by, and to some measure participated in by the United States government.⁶⁹ This contention was sufficient to at least raise the specter of an extradition treaty or due process violation where none had been found in *Ker*.

The second and far more significant basis for distinguishing *Ker* from Dr. Alvarez's situation involved a fundamental point of international and treaty law. In *Alvarez-Machain*, there was a recognizable violation of another nation's sovereignty "clearly prohibited in international law."⁷⁰ In *Ker*, the Peruvian government had not protested the actions of the American agent within its jurisdiction; Mexico, on the other hand, lodged an official objection, stating its outrage over Dr. Alvarez's abduction. Under customary international law, a formal protest from an offended nation is necessary in order to establish a violation of that nation's sovereignty.⁷¹ Although not urging the Court's direct

69. Only the trial court addressed the issue of whether the abductors of Dr. Alvarez were "agents" of the United States, such that their actions were attributable to the United States. *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990). The trial court focused upon the fact that the DEA had paid, and continues to pay, the kidnapers. *Id.* at 609 (citing *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 985, 96 S. Ct. 392 (1975) (defendant must show that challenged activities were performed by "persons who can be characterized as paid agents of the United States")). See also Brief of United Mexican States, *supra* note 30, at 5 (as of May 1991, the DEA had made partial reward payments of \$20,000 to the Mexican individuals who abducted Dr. Alvarez, and had further resettled seven of the abductors and their families in the United States). The trial court looked to international legal scholarship for a test for state action:

[T]he type of connection which must be established between the individual (acting privately) and the state (in order to impute that individual's act to the state) is not very clear. . . . There is, however, no ambiguity in cases where the state, through its agents, incited, encouraged or induced private individuals to undertake such actions with a view to benefit from its outcome.

Bassiouni—International Extradition, *supra* note 54, at 216.

70. Brief of Respondent (Dr. Alvarez), at 11, *quoted* in *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2195 (1992).

71. See Brief *Amicus Curiae* of the Lawyers' Committee for Human Rights in Support of Affirmance, at 22-23, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No.

application of customary international law, Dr. Alvarez argued that this distinction from *Ker* should control the Court's assessment, under the *Rauscher* interpretative scheme, of the infringement of the extradition treaty.

Chief Justice Rehnquist, in reversing the court of appeals, found these submissions unsubstantial. Analyzing the treaty as a self-executing instrument,⁷² he viewed the posture assumed by Mexico as largely irrelevant: "The extradition treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation."⁷³ He considered the case merely one of treaty interpretation, the sole question being whether the extradition treaty with Mexico had been violated by the United States' kidnapping of Dr. Alvarez.⁷⁴ Pursuing a strict scheme of treaty construction and application, he concluded it had not.

In order to ascertain the treaty's scope, the Chief Justice reviewed only the terms of the extradition treaty, the history of the negotiations, and the pre-existing Mexican-American diplomatic relationship, rejecting Dr. Alvarez's appeal that the treaty be interpreted against the backdrop of customary international law.⁷⁵ As the Chief Justice saw it, the "Re-

91-762). See also *United States v. Toro*, 840 F.2d 1221, 1235 (5th Cir. 1988); *United States v. Maynard*, 888 F.2d 918, 926-27 (1st Cir. 1989) (Puerto Rico); *United States v. Mena*, 863 F.2d 1522, 1530 (11th Cir.), *cert denied*, 493 U.S. 834, 110 S. Ct. 109 (1989); *Thomas v. Brewer*, 923 F.2d 1361 (9th Cir. 1991). The establishment of an offense against international law should not be confused with the related but separate issue of a defendant's standing to raise the violation in a municipal court. See *supra* note 34.

72. See *supra* note 54.

73. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2195 (1992).

74. *Id.* at 2193.

75. A treaty is a bilateral obligation between two sovereign states, and all rights flowing from it are derived from a respective nation-state's position in the compact. However, in this case Rehnquist approached the treaty in a unilateral, almost partisan manner, reviewing only the extent to which the United States had ceded its authority to act, not the rights or expectations of the other party. He observed that

[i]n *Rauscher*, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

Alvarez-Machain, 112 S. Ct. at 2195.

An opposite view, broached by Justice Scalia in a concurring opinion several years prior to *Alvarez-Machain*, is that

[t]he question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer that question accurately, it can reasonably be said, whatever extra-textual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history)

spondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not 'exercise its police power in another state.'"⁷⁶

The Chief Justice conceded that the purpose of the treaty with Mexico was to further co-operative efforts between the two nations in combatting crime.⁷⁷ He further admitted that the treaty established a mechanism by which the two nations could more effectively pursue their respective domestic law enforcement activities. However, he felt that nothing in the treaty language or history indicated that extradition had been designated as the *exclusive* means by which the United States could obtain fugitives from Mexico. The doctrine of specialty may have been a necessary corollary of the express terms of the Webster-Ashburton Treaty in *Rauscher*, but the Chief Justice found that no such limitation on the power of the United States could be logically inferred from the language of *this* treaty: "The Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."⁷⁸

In so ruling, the Court undermined the integrity of all extant American extradition treaties, placing in jeopardy the continued vitality of a number of international agreements.⁷⁹ Given this dramatic impact, could this ruling have been avoided in some way? Did any of the several exceptions to the United States' conduct raised by Dr. Alvarez on appeal offer the Court an alternative to deciding as it did? Or, considering the developed jurisprudence of the Court, was *Alvarez-Machain* inevitable?

rather than a unilateral understanding.

United States v. Stuart, 489 U.S. 353, 374, 109 S. Ct. 1183, 1195 (1989) (Scalia, J., Concurring). Despite this stated perspective, Justice Scalia cast his vote with the majority in *Alvarez-Machain*.

76. *Alvarez-Machain* 112 S. Ct. at 2196 (citing Brief for Respondent, at 16).

77. The preface to the treaty reads in pertinent part:

The Government of the United States of America and the Government of the United Mexican States; Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition"

Extradition Treaty, *supra* note 7, at 31 U.S.T., 5061 and U.N.T.S. at 190.

78. *Alvarez-Machain*, 112 S.Ct. at 2193.

79. The U.S.-Mexican Binational Commission has stated that it will review the extradition treaty between the two countries, possibly with the purpose of amending it to prevent a future recurrence of the *Alvarez-Machain* debacle. *An Understanding With Mexico*, Wash. Post, July 5, 1992, at C6. This approach, if generally adopted, could prove a burden to American foreign policy practitioners, as the United States is currently a signatory to 102 such treaties. Herman Schwartz, *The Supreme Court's Insult to Law-abiding Countries*, Los Angeles Times, June 21, 1992, at M1, M8.

II. DR. ALVAREZ'S CLAIMS UNDER THE FOURTH AND FIFTH AMENDMENTS

A. *The Fourth Amendment*

If Dr. Alvarez had been able to demonstrate that the Bill of Rights provided some restraint upon the Executive, the question of the role of customary international law might never have been reached. At first glance, the Fourth Amendment would seem to be the constitutional provision most applicable to Dr. Alvarez's situation. It reads, in pertinent part:

The right of the people to be secure in their persons . . . against unreasonable searches *and seizures*, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized.⁸⁰

Given the extremely well-developed Fourth Amendment jurisprudence of the Court, Dr. Alvarez would seem to have a tenable claim that the United States government's conduct in procuring his person had constituted an unreasonable seizure.⁸¹

This argument would have failed Dr. Alvarez, however, for two reasons. The first is that the *Ker-Frisbie* doctrine limits the reach of the exclusionary rule, asserting that the withholding of judicial process, and the corollary release of the accused from custody, is too great a price for society to pay in order to deter future constitutional violations.⁸²

80. U.S. Const. amend. IV.

81. There did exist a valid warrant for Dr. Alvarez's arrest, stemming from his grand jury indictment. See *supra* note 25. Furthermore, at least one Justice has expressed the opinion that Fourth Amendment evaluations should rest purely upon the basis of the reasonableness of the search or seizure, without benefit of the presumption of invalidity formerly accorded warrantless searches. *California v. Acevedo*, 111 S. Ct. 1982 (1991) (Scalia, J., concurring). Dr. Alvarez could very well have argued that the circumstances of the arrest, i.e. the extra-territorial abduction, the use of Mexican mercenaries to secure his court appearance, the violence and recklessness of these agents' conduct, etc., had rendered his arrest "unreasonable." After all, the "reasonableness" of an arrest lies not only in the presence of probable cause, or proper grounds for the detention of the suspect, "but also how (the arrest) is carried out." *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 1699 (1985). See also *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989) (holding that the use of excessive force in the making of an arrest may render that arrest an unreasonable seizure within the cognizance of the Fourth Amendment).

82. The exclusionary rule is premised upon the rationale of deterring police misconduct. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976). However, "even the most egregiously unconstitutional arrest of the defendant does not bar retaining jurisdiction over the person so that he can be tried on a properly founded charge." Jerome H. Israel & Wayne R. LaFave, *Criminal Procedure in a Nutshell: Constitutional Limitations* 265 (1988), discussing *Frisbie v. Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952).

Even had Dr. Machain been able to raise a claim under the Fourth Amendment, *Ker-Frisbie* would have limited the available remedy to suppression of any *evidence* obtained as a result of the constitutional violation. Thus, the exclusionary rule would have been unable to reach Dr. Alvarez's *person* and engineer his release.

The second reason why Dr. Alvarez would have failed had he pursued a Fourth Amendment claim is the Supreme Court's recent pronouncement in *United States v. Verdugo-Urquidez*⁸³ that the protections of the Fourth Amendment do not extend beyond the territorial jurisdiction of the United States, at least insofar as non-citizens are concerned.⁸⁴ This holding decisively preempted any successful assertion by Dr. Alvarez of a Fourth Amendment violation.⁸⁵ Not surprisingly, therefore, such a

83. 494 U.S. 259, 110 S. Ct. 1056 (1990).

84. Verdugo had argued that *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222 (1957), established the extra-territorial applicability of the Bill of Rights. In *Reid*, the Supreme Court ruled that Sixth Amendment protections extended to an American civilian criminal defendant being tried in England in an American military court. Verdugo had also relied upon the Court's ruling in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479 (1984), holding that certain illegal aliens present in the United States have Fourth Amendment rights.

Chief Justice Rehnquist, who authored the opinion in *Verdugo-Urquidez*, disagreed, noting that the concurring justices in *Reid* had "resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions." *Verdugo-Urquidez*, 494 U.S. at 270, 110 S. Ct. at 1603. The Chief Justice went on to observe that in the *Insular Cases*, the Court had held many constitutional constraints not operative outside of the territorial jurisdiction of the United States, even in territories where the United States possessed some degree of sovereign power. *Id.* at 268, 110 S. Ct. at 1062, citing *Balzac v. Porto Rico*, 258 U.S. 298, 42 S. Ct. 343 (1922) ("Sixth Amendment right to jury trial inapplicable in Puerto Rico"); *Ocampo v. United States*, 234 U.S. 91, 34 S. Ct. 712 (1914) ("Fifth Amendment Grand Jury provision inapplicable in Philippines"); *Dorr v. United States*, 195 U.S. 138, 24 S. Ct. 808 (1904) ("Trial by Jury provision inapplicable in Philippines"); *Hawaii v. Mankichi*, 190 U.S. 197, 23 S. Ct. 787 (1903) (Fifth Amendment Grand Jury and Trial by Jury provisions inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244, 21 S. Ct. 770 (1901) (revenue clauses of Constitution inapplicable to Puerto Rico). Chief Justice Rehnquist concluded that "the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory." *Verdugo-Urquidez*, 494 U.S. at 266, 110 S. Ct. at 1061.

85. It should be noted that the search of Verdugo's residence was authorized by Florentino Ventura, the then-Director General of the Mexican Federal Judicial Police (MFJP). *United States v. Verdugo-Urquidez*, Case No. 86-0107-JLI-Crim. (S.D. Cal., 1987), reprinted in Brief for Respondent in Opposition to Petition for Writ of Certiorari, at 55, 56. It may well be that in place of the Fourth Amendment, non-citizens subject to American police activities abroad should rely upon the legal principles governing that locality for protection. Such an approach would certainly help moderate the *Verdugo* decision, filling the resultant void in a way which would demonstrate respect for and deference to the laws of another sovereign in accordance with principles of comity.

claim was not made at any stage of the proceedings. Instead, Dr. Alvarez preferred to put his faith in the Due Process Clause of the Fifth Amendment.

B. *The Fifth Amendment: The Toscanino Exception*

In an evidentiary hearing before the district court, Dr. Alvarez alleged that he had been tortured in the course of his abduction from Mexico.⁸⁶ He submitted that the district court lacked personal jurisdiction over him because his abduction had "denie[d] him due process of law as guaranteed by the [F]ifth [A]mendment."⁸⁷ Although Dr. Alvarez's Due Process claim was rejected by the district court and not successfully resuscitated on appeal,⁸⁸ it is necessary to examine the reach and viability of this potential limitation upon American extra-territorial law enforcement.

Cases involving the extra-territorial kidnapping of fugitives from the United States are typically analyzed under the Due Process Clause of

86. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990). See also *supra* text at note 28. Perhaps one reason why Dr. Alvarez's allegations of mistreatment failed to move the district court was that his testimony, given in an evidentiary hearing on May 25, 1990, was deemed by the district judge to be "not worthy of belief":

Dr. Machain, a medical doctor trained in trauma care, testified that shortly after his arrival in the United States he developed chest pains. Yet when he sought relief from various examining medical personnel, he failed to relate to them that he had been repeatedly shocked with an electrical apparatus the day before these pains developed. Surely Dr. Machain would have relayed this information to his treating physicians had he actually been repeatedly shocked. Under these circumstances, Dr. Machain's recent allegations of abuse are simply not credible.

Id. at 605-06.

The United States had also filed several affidavits to counter Dr. Alvarez's motion to dismiss the charges, including a statement "that Alvarez-Machain, upon arrival in the United States, warmly embraced the Mexican undercover agent who engineered his capture and made no charges of mistreatment until a month after his arrival." Jay Mathews, *Mexican Doctor Not Injured During Capture*, *U.S. States*, Wash. Post, May 19, 1990, at A2. Federal prosecutors believe that Dr. Alvarez's claims were influenced by a co-defendant, Ramon Matta-Ballesteros, who has also alleged he was tortured while being transported to the United States. Matta's assertions of governmental misconduct were first heard in his own motion for dismissal of all charges against him. Philip Shenon, *N.Y. Times*, Apr. 21, 1990, at Sec. 1, P. 3.

87. *Caro-Quintero*, 745 F. Supp. at 604.

88. The district court found that "Dr. Machain's allegations of mistreatment, even if taken as true, [did] not constitute acts of such barbarism as to warrant dismissal of the indictment under the case law." *Id.* at 605. On appeal, the Ninth Circuit disposed of the case on the extradition treaty grounds, not reaching the Due Process question. *United States v. Alvarez-Machain*, 946 F.2d 1466 (1991). The Supreme Court, reversing both lower courts, validated the wide sweep of the *Ker-Frisbie* doctrine and rejected any limiting force in the Fifth Amendment. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

the Fifth Amendment.⁸⁹ The federal circuits have consistently, albeit tacitly, conceded that the constraining reach of Fifth Amendment Due Process extends beyond the territorial United States to wherever the federal government is active.⁹⁰ This approach seeks to apply what has come to be known as the *Toscanino* exception to the *Ker-Frisbie* rule, an exception first articulated in the genesis case of *United States v. Toscanino*.⁹¹

89. The propriety of this approach, as opposed to a Fourth Amendment analysis, has been questioned by some courts. For example, in *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990), a case related to the Camarena murder which involved the forced abduction and transportation of an alien from a foreign country to the United States, the Seventh Circuit noted that "[c]laims such as Matta's involving constitutional violations during arrest . . . are properly analyzed under the [F]ourth [A]mendment rather than the [F]ifth [A]mendment." Even the Supreme Court has recognized that in the arrest context, the Fourth Amendment is the proper analytical framework: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [claims of governmental misconduct]." *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989).

However, it has also been observed that a Fourth Amendment violation "is 'fully accomplished' at the time of an unreasonable governmental intrusion." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264, 110 S. Ct. 1056, 1060 (1990); *United States v. Calandra*, 414 U.S. 338, 354, 94 S. Ct. 613, 623 (1974); *United States v. Leon*, 468 U.S. 897, 906, 104 S. Ct. 3405, 3411 (1984). It is therefore not the Fourth Amendment, but the Due Process Clause which governs the pre-trial detention stage once the initial arrest and determination of probable cause have been made. *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987). Since Dr. Alvarez's allegations fix the time that his abuse occurred to sometime after his initial seizure, the Due Process Clause would seem to be the applicable constitutional provision. This reasoning is certainly supported by the ubiquitous nature of substantive Due Process. See *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952), *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149 (1937). Whatever the arguments against its validity, the existence of this particular species of Due Process analysis has been tacitly confirmed, in the negative, by the Court. See *Medina v. California*, 112 S. Ct. 2572, 2587 (1992) (citing *Alvarez-Machain* for the proposition that "official misconduct in the form of forcible kidnapping of defendant for trial does not violate defendant's due process rights at trial).

90. Although admittedly widespread among the circuits, this procedure is difficult to reconcile with *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936 (1950). There, the Court held that enemy aliens, arrested in China and subsequently imprisoned after World War II, were not protected by the Fifth Amendment or other constitutional provisions. The Court referred to the legal milieu of the Founding Fathers:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784, 70 S. Ct. at 947 (citations omitted).

91. 500 F.2d 267 (2d Cir. 1974).

1. *The Toscanino Decision—The Reach of Due Process*

Francisco Toscanino was an Italian citizen who was convicted in the Eastern District of New York for participating in a conspiracy to import narcotics into the United States.⁹² On appeal, he alleged that his presence within the district court's territorial jurisdiction had been achieved through illegal means. He claimed that he had been kidnapped from his home in Montevideo, Uruguay, detained and physically tortured⁹³ for three weeks in Brazil, and then brought into the Eastern District of New York for arraignment and trial. Toscanino further alleged that the United States Attorney prosecuting his case had received regular reports on the progress of his inquisition and, furthermore, that a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs had actually participated in the interrogation.⁹⁴

The Second Circuit reversed the conviction. In doing so, it relied upon the expanded interpretation of Fifth Amendment Due Process,⁹⁵ and the corollary implementation of an exclusionary rule to ameliorate Due Process violations, established by the Supreme Court in *Rochin v. California*⁹⁶ and companion jurisprudence.⁹⁷ In *Rochin*, the police activity

92. In violation of 21 U.S.C. §§ 173 and 174.

93. Toscanino alleged that he received nourishment at a base subsistence level and, in addition, that he:

was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

Toscanino, 500 F.2d at 270, quoting from Appellant's Brief.

94. *Id.*

95. The line of Due Process cases discussed in this paper, dealing with egregious police misconduct, should be distinguished from a line of cases which concerns itself with police activities inherently likely to produce untrustworthy evidence. These two lines do tend to overlap, and the difference between them is basically one of focus: the former scrutinizes the specific activities of the police agency involved, while the latter directs its inquiries to the reliability of the evidence produced by the police process.

96. 342 U.S. 165, 72 S. Ct. 205 (1952). In *Rochin*, the police had introduced an emetic solution into the defendant's stomach, against his will, in order to induce vomiting and recover morphine capsules which the defendant had swallowed. The Court reversed the conviction, barring the state's use of the capsules in evidence. *Contrast* *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957) (withdrawal of blood sample from unconscious driver did not offend Due Process); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966) (unconsented to withdrawal of blood sample from suspected drunk driver did not offend Due Process).

97. See also *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 1637 (1973); *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407 (1963); *Silverman v. United States*, 365 U.S. 505, 81 S. Ct. 679 (1961). In addition, the Second Circuit cited *Mapp v. Ohio*, 367 U.S.

in question had been found by the Court to be so outrageous as to "shock the conscience" of a civilized society.⁹⁸ The Court ruled that in order to deter police from engaging in such gross misconduct, an exclusionary rule prohibiting the use of all evidence gained through such intolerable activity was required.⁹⁹

In *Toscanino*, the Second Circuit saw this conceptualization of Due Process as an evolution in judicial thought, a "constitutional revolution"¹⁰⁰ which could serve to vary the strict decree of the *Ker-Frisbie* doctrine:

Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.¹⁰¹

Thus, the court felt that the circumstances behind the abduction of *Toscanino* should be inquired into, and if *Toscanino's* allegations were proven, an appropriate judicial remedy could be administered.

The Second Circuit moved a step beyond *Rochin*, however, when it addressed the nature of the exclusionary rule applicable in the *Toscanino* case: "[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."¹⁰² The

643, 81 S. Ct. 1684 (1961), mandating the application of an exclusionary rule in the Fourteenth Amendment Due Process context.

98. *Rochin*, 342 U.S. at 172, 72 S. Ct. at 209.

99. See *Colorado v. Connelly*, 479 U.S. 157, 166, 107 S. Ct. 515, 521 (1986) ("The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution"). However, "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'" *Rochin*, 342 U.S. at 173, 72 S. Ct. at 210. Generally, the Due Process Clause "come[s] into play only when the Government activity in question violate[d] some protected right of the defendant." *United States v. Payner*, 447 U.S. 727, 737 n.9, 100 S. Ct. 2439, 2447 n.9 (1980).

100. *United States v. Toscanino*, 500 F.2d 267, 272 (2d Cir. 1974), citing Erwin Griswold, *The Due Process Revolution and Confrontation*, 119 U. Pa. L. Rev. 711 (1971).

101. *Id.* at 275.

102. *Id.* In *Rochin*, the Court had applied the exclusionary rule only to the morphine capsules disgorged by the defendant. The Court subsequently recognized the possibility of a farther-reaching exclusionary rule: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205 (1952), the instant case is distinctly not of that breed." *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643 (1973). A case "of that breed" has not yet come before an American court.

granting of such a wide sweep to the exclusionary rule was a departure from then existing jurisprudence,¹⁰³ and of course constituted a direct threat to the *Ker-Frisbie* doctrine's continued viability.¹⁰⁴

The Second Circuit in *Toscanino*, after observing that the *Ker-Frisbie* line of cases dealt strictly with appeals from state courts, went on to note that even if no Due Process violation was present, a second source of authority was available: "In this case we may rely simply upon our supervisory power over the administration of criminal justice in the district courts within our jurisdiction."¹⁰⁵ The Second Circuit regarded the case before it as one fit for the use of supervisory power, a use designed to prevent the district court from becoming an accomplice "in willful disobedience of law."¹⁰⁶ The court concluded by recounting the scope of the supervisory power: "the supervisory power is not limited to the admission or exclusion of evidence, but may be exercised in any manner necessary to remedy abuses of a district court's process."¹⁰⁷

The sweeping remedy that *Toscanino* mandates, and, to a lesser extent, the invocation of the supervisory power for support in enforcing that remedy, are the truly salient aspects of the Second Circuit's ruling. They are also, as will be detailed in the next two sections, the reasons why the *Toscanino* exception to the *Ker-Frisbie* rule has been completely rejected by all but two of the federal circuits.

103. See *supra* note 97.

104. In reaching its conclusion, the *Toscanino* court relied upon "the well-recognized power of federal courts in the civil context to decline to exercise jurisdiction over a defendant whose presence has been secured by force or fraud." *Toscanino*, 500 F.2d at 275, citing *Ex Parte Johnson*, 167 U.S. 120, 126, 17 S. Ct. 735, 737 (1896) and *Fitzgerald Constr. Co. v. Fitzgerald*, 137 U.S. 98, 11 S. Ct. 36 (1890). Apparently, however, the opinion in *Ex Parte Johnson* was not read in its entirety; after recounting the general policy of courts in civil cases relied upon in *Toscanino*, the *Johnson* Court went on to distinguish the criminal context:

The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

Johnson, 167 U.S. at 126, 17 S. Ct. at 737.

105. *Toscanino*, 500 F.2d at 276.

106. *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 345, 63 S. Ct. 608, 615 (1943)).

107. *Id.*, citing *Rea v. United States*, 350 U.S. 214, 76 S. Ct. 292 (1955). To see whether the supervisory power applied, the Second Circuit looked again to the field of civil procedure for guidance, citing *Commercial Mut. Acc. Co. v. Davis*, 213 U.S. 245, 29 S. Ct. 445 (1909) and *Fitzgerald*, 137 U.S. 98, 11 S. Ct. 36. The court's far reach to produce an (arguably) legal basis for its decision demonstrates the activist, and frankly contrived, nature of the *Toscanino* decision.

2. *The Due Process Argument; It May Look Good on Paper. . . .*

The problem with *Toscanino* is that although courts will use it to analyze extraterritorial abductions for Due Process violations, they will not follow it beyond the *Rochin* threshold. If *Toscanino* held that egregious government misconduct may erase the "mere fiction, that the defendant is in the custody of the marshall,"¹⁰⁸ which has been the unassailable foundation of personal jurisdiction in criminal proceedings since the earliest days of the Common Law,¹⁰⁹ it could be called a holding seeking a case.

No court citing *Toscanino* has ever dismissed an indictment.¹¹⁰ In *Toscanino* itself, the Second Circuit remanded the case to the district court, which denied the defendant's motion to dismiss the indictment after finding that no agent of the United States had participated in *Toscanino's* ordeal.¹¹¹ Even in the two circuits which still purport to apply the *Toscanino* exception, the Second and the Ninth, its potential reach has been rigidly circumscribed,¹¹² and the remedy of divestiture of jurisdiction has never been used.

108. *United States v. Worrall*, 2 U.S. 384, 390 (1798).

109. "As a general rule the criminal law applies to all persons whatever who are within certain local limits . . . whatever may be their native country." Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, v. 2, 2-3 (1883).

110. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990). The validity of the *Toscanino* argument, or one similar, has been rejected by the First, Fifth, Sixth, Seventh, Tenth, Eleventh, and District of Columbia circuits. *See, e.g.*, *United States v. Lussier*, 929 F.2d 25 (1st Cir. 1991); *United States v. Zabaneh*, 837 F.2d 1249 (5th Cir. 1988); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S. Ct. 61 (1979); *United States v. Winter*, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825, 96 S. Ct. 39 (1975); *United States v. Herrera*, 504 F.2d 859 (5th Cir. 1974); *United States v. Pelaez*, 930 F.2d 520 (6th Cir. 1991); *United States v. Mitchell*, 957 F.2d 465 (7th Cir. 1992); *Hobson v. Crouse*, 332 F.2d 561 (10th Cir. 1964); *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986), *cert. denied* 480 U.S. 919, 107 S. Ct. 1377 (1987); *United States v. Darby*, 744 F.2d 1508 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100, 105 S. Ct. 2322 (1985); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

111. *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975). This led to the formulation of a two-pronged test for determining whether the *Toscanino* exception is warranted: "The first is that there must be government participation, and the second is that the government agents' conduct must rise to a level that shocks the conscience of the Court." *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040, 1046 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

112. The Second Circuit in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S. Ct. 2400 (1975), backed off somewhat from its strident language in *Toscanino*:

[I]n recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by use

Particularly damning to the vitality of *Toscanino* has been a string of Supreme Court decisions, delivered in the wake of the Second Circuit's opinion, affirming the continued existence of the *Ker-Frisbie* doctrine and the concomitant limitation of the exclusionary rule to suppression of evidence only.¹¹³ It is true, however, that these decisions have discussed largely the exclusionary rule's reach in the "illegal arrest" domain of the Fourth Amendment and not the "pre-trial detention" milieu which marks the realm of Due Process.¹¹⁴ Nor have these cases addressed incidents of excessive violence or outrageous conduct comparable to those alleged in *Toscanino*.¹¹⁵

of torture, brutality, and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court [W]e are forced to recognize that, absent a set of incidents like that in *Toscanino*, not every violation by prosecution or police is so egregious that *Rochin* and its progeny requires nullification of the indictment.

Gengler, 510 F.2d at 65-66. See also *United States v. Reed*, 639 F.2d 896, 902 (2d Cir. 1981) (suggesting the the *Toscanino* facts are the minimum required showing to invoke the exception).

The Ninth Circuit has stated that to qualify for the *Toscanino* exception, a defendant must provide "a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States." *United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), cert. denied, 423 U.S. 985, 96 S. Ct. 392 (1975). See also *United States v. Valot*, 625 F.2d 308 (9th Cir. 1980); *United States v. Fielding*, 645 F.2d 719, 723 (9th Cir. 1981). But see *United States v. Cotten*, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936, 93 S. Ct. 1913 (1973).

In addition, it has been observed that "[t]he remedy . . . for violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 (7th Cir), cert. denied, 111 S. Ct. 209 (1990), citing *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979).

113. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 3483 (1984); *United States v. Crews*, 445 U.S. 463, 479, 100 S. Ct. 1244, 1254 (1980); *Payton v. New York*, 445 U.S. 573, 592 n.34, 100 S. Ct. 1371, 1383 n.34 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 865 (1975). See also *United States v. Scios*, 590 F.2d 956, 961-62 n.13 (D.C. Cir. 1978).

114. See *supra* note 89. The circuits rejecting the *Toscanino* exception, see *supra* note 110, raised the *Ker-Frisbie* doctrine to bar the exclusionary rule's reach. And the Supreme Court has commented upon the efficacy of the doctrine in limiting the exclusion of evidence in the Fourteenth Amendment Due Process context:

[The *Ker-Frisbie* precedents] rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

Frisbie v. Collins, 342 U.S. 519, 522, 72 S. Ct. 509, 512 (1952).

115. Many lower courts have suggested that the cases applying *Ker-Frisbie* could be distinguished by a sufficiently egregious fact pattern: "As *Toscanino* establishes, there is

These differences are not dispositive. First of all, though the policies which impel the exclusionary rule's application in the Fourth and Fifth Amendment contexts are quite different, none justifies a variance in the bedrock limitation the *Ker-Frisbie* doctrine imposes on the reach of exclusion,¹¹⁶ as those circuits rejecting *Toscanino* have generally recognized. Second, the Supreme Court has persistently restricted application of the exclusionary rule since *Toscanino* was decided in 1975, confining it almost exclusively to the suppression of unconstitutionally obtained evidence in the context of a trial on the merits, and even then excepting its use for impeachment purposes.¹¹⁷ Finally, although Chief Justice Rehnquist himself has stated that, in theory, there could be a fact pattern suggesting government misconduct sufficiently egregious to warrant the trial court's divestiture of jurisdiction,¹¹⁸ to date no such case has ever been argued in any court of the United States.

Given these factors, it seems difficult to imagine a case where a *Toscanino* exclusionary remedy could be employed to sanction a constitutional violation.¹¹⁹ There remains, however, the argument made in *Toscanino* that a federal court, in exercising its supervisory power, could compel a lower federal court to release a defendant upon a proper showing of governmental misconduct. If the judicial supervisory power

a difference between conduct which is merely illegal and conduct so egregious it shocks the conscience." *United States v. Noriega*, 746 F. Supp. 1506, 1531 (S.D. Fla. 1990). See also *United States v. Felix*, 113 S. Ct. 13 (1992).

116. "[T]he remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by the exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *United States v. Blue*, 384 U.S. 251, 255, 86 S. Ct. 1416, 1419 (1966). See also *supra* note 112.

117. See *Lopez-Mendoza*, 468 U.S. 1032, 104 S. Ct. 3479 (declining to extend exclusionary rule to civil deportation hearing); *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021 (1976) (declining to extend exclusionary rule to civil tax proceeding); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976) (declining to extend exclusionary rule to *habeas corpus* review); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971) (declining to extend exclusionary rule to impeachment evidence gained in *Miranda* violation).

118. "[T]he Court in *United States v. Russell* . . . suggested in dictum that while certain law enforcement practices may not violate the Constitution or federal law, they may be 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" Brief of Appellee in Opposition to Petition for Writ of Certiorari, at 49, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056 (1990). See also *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973).

119. Such a case is not an impossibility, however. Torture may be heinous to a civilized society, but that does not preclude its use. At times desperation, or even something less, might drive police officers "to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." *McNabb v. United States*, 318 U.S. 332, 344, 63 S. Ct. 608, 614 (1943).

could be used to this end, it would free the courts from the enervating deference to Executive excess which *Alvarez-Machain* decrees. To determine if such a ruling would be efficacious and proper, a brief examination of the supervisory power is in order.

3. *The Supervisory Power—Not in My Court You Don't!*

The supervisory power of the federal courts arises out of the power of the higher courts to regulate and prescribe the procedures to be followed in the courts below. Thus, the courts of appeals may exercise supervisory power over district courts within their respective circuits, and the Supreme Court may exercise supervisory power over the entire federal system.¹²⁰ In exercising their supervisory power, however, federal courts must be wary, lest they impermissibly inhibit the just exercise of power by the Executive or Congress,¹²¹ and thereby violate the constitutional separation of powers between the three branches of the federal government.¹²²

A good example of the Supreme Court's exercise of its supervisory power may be found in *McNabb v. United States*.¹²³ There, a "clan" of moonshiners was arrested in connection with the murder of a revenue agent in the foothills of Tennessee.¹²⁴ The federal agents conducting the investigation detained and interrogated the McNabbs, delaying the defendants' initial appearance before a federal magistrate for several days. Several confessions were procured from the McNabbs and ultimately led to the convictions of three members of the McNabb family. The McNabbs appealed, the Sixth Circuit affirmed the convictions,¹²⁵ and the Supreme Court reversed. The Court ordered that the confessions be suppressed, finding "[t]he circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty

120. Also, a district court may, within certain parameters, exercise supervisory power over a grand jury, e.g. by the dismissal of an indictment. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S. Ct. 2369 (1988).

121. See generally Sara Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Col. L. Rev. 1433 (1984).

122. "Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts." *United States v. Payner*, 447 U.S. 727, 737, 100 S. Ct. 2439, 2447 (1980) (Burger, C.J., concurring).

123. 318 U.S. 332, 63 S. Ct. 608 (1943).

124. *Id.* at 333-38, 63 S. Ct. at 609-12.

125. *McNabb v. United States*, 123 F.2d 848 (6th Cir. 1942).

enjoined by Congress upon federal law officers."¹²⁶ In reaching this decision, the Court found it unnecessary to consider the Due Process claims urged by the defendants:

[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.¹²⁷

This proclamation of the scope and purpose of the supervisory power accords with the approach enunciated by the Second Circuit in *Toscanino*. The question which this approach raises, when addressed to the facts of Dr. Alvarez's plight, is the same one presented in the context of the Due Process exclusionary rule: may the supervisory power properly provide for the release of the *person of the defendant*, as opposed to mere exclusion of evidence, from the scrutiny of judicial process?¹²⁸ The answer, based upon principles expounded in *McNabb* and subsequent clarifying jurisprudence, is a resounding no.

The Supreme Court has observed that there are three separate objectives which justify the exclusion of evidence under the supervisory power: the implementation of a remedy for a substantial violation of

126. *McNabb*, 318 U.S. at 344, 63 S. Ct. at 615. The Court cited a number of statutes, none of which proscribed the particular actions of the federal officers in this case. The Court saw these statutes not as specific proscriptions, but rather, as indicators of a broader legal regime within which the Executive had to operate in order to legitimately pursue law enforcement objectives. This jurisprudential rule, termed the *McNabb-Mallory* rule (see the companion case of *Mallory v. United States*, 354 U.S. 449, 77 S. Ct. 1356 (1957)), was overruled by Title II of the Omnibus Crime Control and Safe Streets Act of 1968. See 18 U.S.C. § 3501(c) (1968) (confession offered against a federal criminal defendant is not to be excluded solely because of delay in presenting defendant before a magistrate).

127. *McNabb*, 318 U.S. at 340, 63 S. Ct. at 613.

128.

Regardless of the abstract doctrine *Ker* and *Frisbie* are said to stand for, . . . in the interest "of establishing and maintaining civilized standards of procedure and evidence," we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power . . .

Brief of the Association of the Bar of the City of New York as *Amicus Curiae* in support of Respondent at 8, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762), quoting *United States v. Lira*, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring), cert. denied, 423 U.S. 847, 96 S. Ct. 87 (1975).

recognized rights,¹²⁹ the preservation of judicial integrity by ensuring that a conviction rests upon appropriate considerations properly before the jury,¹³⁰ and, perhaps most importantly, the deterrence of illegal conduct.¹³¹ The Court has also noted that these purposes are often coterminous with those underlying the exclusionary rule's application in the context of constitutional violations.¹³² The only difference between exclusion of *evidence* pursuant to supervisory power, Fourth Amendment violation, or Due Process violation, are the values sought to be protected in each instance.

Although the values protected in each context are different, the societal costs against which these values are balanced to determine whether judicial exclusion applies are the same.¹³³ The societal costs of the judicial divestiture of jurisdiction over a criminal defendant have rendered that remedy too drastic a measure for the courts to implement when addressing constitutional violations. When the *Ker-Frisbie* doctrine is considered in the context of the federal courts' supervisory power, the special concerns which animate that power do not rise to such a level as to invalidate the doctrine.

129. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55, 108 S. Ct. 2369, 2373 (1988) (holding that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)).

130. See *Mesarosh v. United States*, 352 U.S. 1, 14, 77 S. Ct. 1, 8 (1956); *Elkins v. United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 1447 (1960). See also *Olmstead v. United States*, 277 U.S. 438, 471-85, 48 S. Ct. 564, 570-75 (1928) (Brandeis, J., dissenting).

131. *United States v. Hastings*, 461 U.S. 499, 505, 103 S. Ct. 1974, 1978 (1983).

132.

Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury. After all, it is the defendant, and not the constable, who stands trial.

The same societal interests are at stake when a criminal defendant invokes the supervisory power to suppress evidence

United States v. Payner, 447 U.S. 727, 734, 100 S. Ct. 2439, 2445 (1980).

133. This was unequivocally stated by Justice Powell, writing for the majority, in *Payner*. *Id.*, 100 S. Ct. 2439. There, the defendant argued that the Court should exclude evidence under its supervisory power in order to deter future constitutional transgressions by the Executive. The Court rejected this contention, finding appeal to supervisory power alone insufficient to warrant a change of policy:

The values assigned to the competing interests do not change because a court has elected to analyze the question under supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

Id. at 736, 100 S. Ct. at 2446-47. In *Payner*, the values seeking to be vindicated were those protected by the Fourth Amendment, and the Fourth Amendment equation had already been litigated and determined. The defendant's attempt to reopen the discussion by presenting the argument under the aegis of the supervisory power was therefore unavailing.

In fact, the Court has grown somewhat wary of the imprudent use of supervisory power since *McNabb* was decided, narrowing the limits within which supervisory power may be effectively exercised. In particular, the reversal of convictions¹³⁴ and the dismissal of indictments¹³⁵ have been largely rejected as proper subjects for the exercise of supervisory power. One Justice has even suggested that the employment of supervisory power to discipline prosecutors is inappropriate.¹³⁶ These developments suggest that the current Court would not countenance a transgression of the *Ker-Frisbie* rule through the exercise of supervisory power.

Another, and far more stringent, reason why the Court's supervisory power could not have been invoked to secure Dr. Alvarez's freedom is that the Court in *McNabb*, in excluding the confessions, specifically relied upon its traditional role in regulating what *evidence* is to be admitted into the federal courts.¹³⁷ In effect, the Court found the confessions to be inadmissible evidence, as if they had constituted inadmissible hearsay.¹³⁸ Although the effect of this approach is indistinguishable

134. "To the extent that the values protected by supervisory authority are at issue here, these powers may not be exercised in a vacuum. Rather, reversals of convictions under the court's supervisory power must be approached 'with some caution,' and with a view toward balancing the interests involved." *Hastings*, 461 U.S. at 506-07, 103 S. Ct. at 1979 (citations omitted). This is not to say that if the reversal of a conviction is warranted, and indeed necessary to the proper ethical functioning of our system of law and values, it will not be sustained. For example, reversal would be justified if an error in a previous proceeding had deprived the defendant of a fair determination of his guilt or innocence. When the error complained of had no deleterious effect upon the trial's outcome, however, the balance of interests tips the other way. This is even truer when the proposed remedy is one of divestiture of jurisdiction over the person of the defendant. For a good discussion on the societal costs involved in reversals, see *United States v. Mechanik*, 475 U.S. 66, 72-73, 106 S. Ct. 938, 943 (1986).

135. *United States v. Williams*, 112 S. Ct. 1735 (1992).

136. Except, of course, as concerns their courtroom performance, and their obligations as members of the bar. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 264, 108 S. Ct. 2369, 2378 (1988) (Scalia, J., concurring); see also *Frazier v. Heebe*, 482 U.S. 641, 651-52, 107 S. Ct. 2607, 2614 (1987) (Rehnquist, C.J., dissenting).

137.

In the exercise of its supervisory authority over the administration of criminal justice in the federal courts this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance. Quite apart from the Constitution, therefore, we are constrained to hold that the *evidence* elicited from the petitioners in the circumstances disclosed here must be excluded.

McNabb v. United States, 318 U.S. 332, 341, 63 S. Ct. 608, 613 (1943) (citations omitted) (emphasis added).

138. Just as common law jurists weighed the policies to determine which hearsay was

from an exclusionary rule applied to sanction constitutional violations, the fundamental differences between the two are of crucial importance.¹³⁹

In the American constitutional system, it is the Executive which is charged with the prosecution of criminal offenses, in effect "executing" the penal code enacted by Congress.¹⁴⁰ Every time an exclusionary rule operates to remove evidence from the trial landscape, the constitutionally mandated prerogative of the prosecutor is somewhat infringed. This is an acceptable procedure where only evidence is involved, given that the regulation of evidence is part and parcel of the Judiciary's traditional role. When this analysis is extended to the exclusion of the defendant's person, however, the twilight zone between permissible and impermissible interference with the Executive has been entered.

It is in this setting that the difference between exclusion authorized by supervisory power and exclusion to deter constitutional violations is clearly revealed. The Fourth and Fifth Amendments are binding on the *entire* federal government, and limit the reach of all three branches. The supervisory power, on the other hand, is a device for the Judiciary's self-governance and not a constitutional limitation on Executive power. Therefore, a federal court's divestiture of personal jurisdiction over a criminal defendant made pursuant to the supervisory power *alone* would arguably constitute an impermissible, and therefore unconstitutional, encroachment of Judicial power upon the Executive's constitutional duty to prosecute that criminal.¹⁴¹ "Even a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions."¹⁴²

sufficiently reliable to constitute an exception to inadmissibility, so did the *McNabb* court weigh the importance of the confessions against the costs to society if the federal officers' behavior went unattended to. The values and policies balanced against each other were different, but the process was essentially the same. *Ker-Frisbie* stands for the proposition that when the cost side is the divestiture of jurisdiction over the defendant, the scales tip against exclusion.

139. This distinction is an arguable premise, given that the "constitutionally-mandated" exclusionary rules developed out of the Court's authority to determine evidentiary standards for the federal courts. See *Weeks v. United States*, 232 U.S. 383, 397-98, 34 S. Ct. 341, 346 (1913).

140. See *Leeke v. Timmerman*, 454 U.S. 83, 102 S. Ct. 69 (1981), and *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S. Ct. 2168 (1976).

141. The Court has recognized that the supervisory power cannot be exercised so as to intrude into the discretionary zone constitutionally allocated to the Executive. *United States v. Caceres*, 440 U.S. 741, 99 S. Ct. 1465 (1979), discussed in *United States v. Cooper*, 35 M.J. 417 (CMA 1992). In addition, see *United States v. Williams*, 112 S. Ct. 1735 (1992). Furthermore, the possibility of intrusion into the sphere of the other branch of the federal government—Congress—should not be ignored; Congress has passed criminal statutes, authorized prosecutors to enforce these statutes, and granted jurisdiction and prescribed rules for courts to hear these prosecutions. Such a unilateral divestiture of jurisdiction certainly acts to undermine the manifest intent of Congress.

142. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S. Ct. 466, 471 (1985).

4. Conclusion

Neither the Fourth Amendment, the Fifth Amendment, nor the federal courts' supervisory power was able to effect Dr. Alvarez's freedom from judicial process. The *Ker-Frisbie* doctrine ensured that Dr. Alvarez, indicted and languishing in federal custody, could not be exempted from the machinery of the American criminal justice system. Although the Constitution would offer him its protections while he was in custody, it would not serve to facilitate his repatriation back to Mexico.

It is essential at this juncture that the *Ker-Frisbie* doctrine be understood for what it is: a bedrock limitation upon the application of the exclusionary rule. *Ker-Frisbie* is the product of the weighing of some of the basic values of a free society against the need to protect the individual members of that society. This balancing of interests concludes that if a court is competent to exercise personal jurisdiction over a criminal defendant, any irregularities in the way in which the accused was brought before it will not deter it from doing so. Violations of the defendant's rights may be sanctioned in other ways, such as through the exclusion of evidence, but the exclusion of a defendant's person is simply too great a price for society to pay.

The salient question presented in *Alvarez-Machain* was thus not whether the limiting effect of *Ker-Frisbie* was operative, but rather the much more fundamental question of whether the court was competent to try Dr. Alvarez in the first place. As has been explained above, once a court has established jurisdiction over a defendant, *Ker-Frisbie* prevents the court from unilaterally divesting itself of that jurisdiction. The remedy sought by Dr. Alvarez, his release and repatriation to Mexico, could only have been granted if the court was unable to legitimately exercise jurisdiction over him in the first place.¹⁴³ Thus, the question became: had the United States ceded its authority to exercise personal jurisdiction over Dr. Alvarez when it became party to the extradition treaty with Mexico?

III. DR. ALVAREZ'S CLAIMS UNDER THE EXTRADITION TREATY

Dr. Alvarez filed a pre-trial motion to contest the district court's exercise of personal jurisdiction over him.¹⁴⁴ He contended the extradition

143.

There can be no valid prosecution and conviction for crime unless the court in which the prosecution is instituted and carried on is legally created and constituted, at least de facto, and has jurisdiction of the offense charged, of the person of the defendant, and jurisdiction to render the particular judgement rendered.

16 C.J. Criminal Law § 163 (1918).

144. *United States v. Caro-Quintero*, 745 F. Supp 599, 601 (C.D. Cal. 1990). The

treaty between the United States and Mexico, which the official protests of Mexico had given him standing to assert,¹⁴⁵ had effectively deprived the Executive of any authority to arrest him, and the courts of any jurisdiction to try him. In doing so, he harkened back to a prohibition-era case, *Cook v. United States*,¹⁴⁶ which set forth the legal landscape upon which *Alvarez-Machain* would be fought.

A. *Cook v. United States—The Role of the Treaty in American Law*

The issue in *Cook* was whether a Congressional statute¹⁴⁷ authorizing Coast Guard officers to stop and search vessels within twelve miles of the American coastline had been modified by a subsequent treaty¹⁴⁸ between the United States and Great Britain. Defendant Cook's vessel, the *Mazel Tov*, had been seized by the Coast Guard eleven and one-half miles off the coast of Rhode Island and brought into port, ostensibly for transporting liquor on the high seas. Cook objected to the Coast Guard's action, claiming that the United States had waived its right to make the seizure when it became party to the treaty.

Specifically, Cook relied upon Article II(3) of the Treaty, which stated that "[t]he rights (of search and seizure) 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."¹⁴⁹ As the *Mazel Tov* had a maximum speed of ten miles per hour, Cook claimed that the Coast Guard had exceeded the Treaty limits in making the seizure. The government countered, asserting that "the Treaty settled the validity of the seizure only for those cases where it was made within the limits described

district court overruled Dr. Alvarez's exceptions to subject matter jurisdiction, according the statutes under which Dr. Alvarez was charged extraterritorial reach. For more on the issue of subject matter jurisdiction, see Christopher Blakesley & Peter Lagodny, *Finding Harmony Amidst Disagreement Over Extradition, Jurisdiction, The Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 *Vand. J. Int'l L.* 1 (1991); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991) ("We think it clear that Congress intended to apply statutes proscribing the kidnapping and murder of DEA agents extraterritorially"); *United States v. Benitez*, 741 F.2d 1312, 1317 (11th Cir. 1984) ("assault and attempted murder of DEA agents is exactly the type of crime that Congress must have intended to apply extraterritorially"); *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046, 109 S. Ct. 1178 (1989) ("the killing of [Congressman Leo Ryan] is 'directly injurious to the government,' and capable of perpetration without regard to particular locality").

145. See *supra* notes 30-34.

146. 288 U.S. 102, 53 S. Ct. 305 (1933).

147. § 581 of the Tariff Act of 1930, 46 Stat. 590, 747 (1930). *Cook*, 288 U.S. at 107, 53 S. Ct. at 306.

148. Treaty between the United States and Great Britain, 43 Stat. 1761 (1924).

149. *Cook*, 288 U.S. at 111, 53 S. Ct. at 308.

in the treaty; and that since this seizure was made beyond one hour's sailing distance from the coast the Treaty did not apply."¹⁵⁰ The argument in *Cook* therefore centered around whether the Treaty addressed seizures outside of the "one-hour limit." If it did, Cook was vindicated, and the government had ceded any authority to seize his vessel and adjudicate its disposition; if it did not, the Treaty presented no obstacle to the Coast Guard's actions.

The Court analyzed the treaty, looking to its language and history to discern if the two nations had intended to so limit the Treaty's scope. The Court found that the United States' enforcement of Prohibition laws on the high seas had caused some friction between the two nations and that the mutual dissatisfaction engendered by this discord had been the primary impetus for the Treaty's negotiation. Because both the United States and Great Britain had exhibited a strong desire to settle their differences, the Court divined that the parties had resolved "to deal completely with the subject of search and seizure, beyond [territorial waters], of British vessels suspected of smuggling liquors."¹⁵¹

This finding led to the conclusion that searches and seizures involving British ships on the high seas were governed by the provisions of the Treaty. Justice Brandeis, writing for the majority, set out the crux of the Court's decision:

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. The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.¹⁵²

This same rationale was the focus of both the majority and dissenting opinions in *Alvarez-Machain*. Both Chief Justice Rehnquist, writing for the majority, and Justice Stevens, who authored the dissent, recognized

150. *Id.* at 112, 53 S. Ct. at 308.

151. *Id.*, 53 S. Ct. at 308.

152. *Id.* at 121-22, 53 S. Ct. at 312, *quoted in* United States v. Alvarez-Machain, 112 S. Ct. 2188, 2204 (1992) (Stevens, J., dissenting).

that the principles set out in *Cook* would control the disposition of the case.

Furthermore, they both recognized that the extradition treaty in *Alvarez-Machain*, like the treaty in *Cook*, could function essentially like a Congressional statute, capable of amending any prior legislation if such was its intention and breadth.¹⁵³ If the treaty had the sweep Dr. Alvarez alleged it had, it would be the equivalent of a federal statute forbidding the extraterritorial arrest of Mexicans in Mexico, thereby depriving the American courts of jurisdiction to hear cases in which the defendant was a kidnapped Mexican citizen.¹⁵⁴ Thus, the position of the government and the defendant in *Alvarez-Machain* mirrored the relationship between Cook and the Coast Guard in *Cook*. If Dr. Alvarez's kidnapping was contemplated and proscribed by the extradition treaty with Mexico, the government lacked authority to seize and try him; if it was not, then his lot was the same as any other federal criminal defendant.

B. *The Construction of the Treaty in Alvarez-Machain*

As suggested above, the overt conflict in *Alvarez-Machain* concerned the extradition treaty's construction. Chief Justice Rehnquist adopted a somewhat rigid textual analysis informed by a review of both the his-

153. The principle is known as *lex posterior derogat priori*, and essentially means that a later statute will, where the two overlap, amend, modify, or abrogate a prior statute. Long a rule of statutory construction, a treaty is susceptible to the same treatment:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.

Whitney v. Robertson, 124 U.S. 190, 194, 8 S. Ct. 456, 458 (1888). The Fifth Circuit in *United States v. Postal*, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832, 100 S. Ct. 61 (1979), stated that, "[w]e read *Cook* and *Ford* to stand for the proposition that self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction over property and individuals that would otherwise be subject to that jurisdiction." See also *Postal*, 589 F.2d at 875 n.19, distinguishing *Cook* from the *Ker-Frisbie* doctrine. Note that only *self-executing* treaties would have this status; *executory* treaties are not cognizable by the courts, representing merely potential obligations upon the international legal plane waiting to be transcribed into Congressional legislation discernible by the courts. See *supra* note 54.

154. The most crucial aspect here is the jurisdictional effect on the courts. If no jurisdiction exists prior to the defendant's being brought before the court, the criminal prosecution cannot proceed, and the *Ker-Frisbie* doctrine is inapposite. See *Postal*, 589 F.2d at 875-76 n.19 ("The treaty involved in *Ford* and *Cook* . . . was construed by the Court as a self-imposed limitation on the jurisdiction of the United States and hence on that of its courts").

torical relationship between Mexico and the United States¹⁵⁵ and the specific circumstances surrounding the treaty's negotiations. Justice Stevens, on the other hand, chose to pursue a wider ambit of consideration, viewing the greater purpose of the statute, enlightened by norms of customary international law, as the proper mode of construction. Insofar as the resolution of these different approaches was determinative of the outcome in *Alvariz-Machain*, it would be instructive to examine the Court's jurisprudence on treaty construction.

1. Norms of Treaty Interpretation in the Supreme Court

In the American constitutional scheme, a treaty is more than simply a "contract between nations";¹⁵⁶ it is a source of law equivalent in force to a federal statute.¹⁵⁷ Thus, a statute may be amended by a subsequent treaty,¹⁵⁸ and vice versa,¹⁵⁹ given express language or incontrovertible implication that such is the intent of the later act.¹⁶⁰ A treaty, of course, can never authorize an unconstitutional exercise of power.¹⁶¹

155. See *Alvarez-Machain*, 112 S. Ct. at 2194 n.11, where the Chief Justice discussed the "Martinez incident" which involved the 1905 abduction of a Mexican national and his conduct to the United States for trial. The Mexican *charge d'affaires* wrote the Secretary of State, protesting the American action and claiming the kidnapping violated the then-current extradition treaty between the two nations. The Secretary of State responded that the issue raised by the Martinez incident had been settled in *Ker*, and that "the remedy open to the Mexican government, namely a request to the United States for extradition of Martinez' abductor had been granted by the United States."

This anecdote was offered to illustrate two things: the historical tendency of American law enforcement officers to act without regard to diplomacy or tact when arresting Mexican fugitives who had retreated across the border and the fact that Mexico had notice of the *Ker* doctrine at the turn-of-the-century. Given that both parties shared this knowledge during the negotiations leading to the current extradition treaty, a failure to address the issue in the express terms of the treaty indicated a mutual decision to not use *this* treaty to forbid the practice.

156. *The Chinese Exclusion Case*, 130 U.S. 581, 600, 9 S. Ct. 623, 628 (1889); see *supra* note 55.

157. *Clark v. Allen*, 331 U.S. 503, 509-10, 67 S. Ct. 1431, 1435-36 (1947); *Moser v. United States*, 341 U.S. 41, 45, 71 S. Ct. 553, 555 (1951). This proposition, along with the distinction between self-executing and executory treaties, was expounded eloquently by Chief Justice Marshall in *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829). See also *supra*, note 54.

158. See, e.g., *Cook v. United States*, 288 U.S. 102, 118-19, 53 S. Ct. 305, 311 (1933); *United States v. Lee Yen Tai*, 185 U.S. 213, 22 S. Ct. 629 (1902).

159. See, e.g., *Clark v. Allen*, 331 U.S. 503, 509-10, 67 S. Ct. 1431, 1435-36 (1947); *Moser v. United States*, 341 U.S. 41, 45, 71 S. Ct. 553, 555 (1951).

160. See *Johnson v. Browne*, 205 U.S. 309, 321, 27 S. Ct. 539, 542 (1907).

161. *Reid v. Covert*, 354 U.S. 1, 17, 77 S. Ct. 1222, 1231 (1957). However, a treaty can confer authority on Congress, through the workings of the "necessary and proper" clause, to reach beyond its enumerated powers in executing the treaty. See *Missouri v. Holland*, 252 U.S. 416, 433-35, 40 S. Ct. 382 (1920) (treaty altered federalism equation, allowing Congress to legislate upon wild animals, traditionally owned by states); *Biddle v. United States*, 156 F. 759, 761 (9th Cir. 1907) (treaty allowed Congress to confer jurisdiction on courts in China).

The difference between treaties and statutes is reflected in the way the Court has traditionally approached treaty interpretation. The judiciary must have some latitude in construing statutes in order to fulfill its constitutional role as a check upon the legislative discretion of Congress,¹⁶² but the same is not true for treaties. When Article II treaties¹⁶³ are concluded, the Executive possesses the constitutional prerogative, checked by the "advice and consent" of the Senate.¹⁶⁴ Thus, the role of the Court in treaty construction is not of the same constitutional dimension as its role in statutory construction; deference to the designs of the political branches has consequently typified the Court's approach to treaties.¹⁶⁵

Accordingly, "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its sig-

162. "[T]he courts of justice are to be considered as the bulwarks of a limited constitution, against legislative encroachments" The Federalist No. 78, at 400 (Alexander Hamilton).

163. U.S. Const., art. II, § 2, cl. 2, provides the constitutional basis for treaties. This note will not explore the fascinating realm of "Executive agreements," or agreements between the American Executive and foreign nations which have not been subject to Senate confirmation. See *Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972 (1981); *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758 (1937); *United States v. Pink*, 315 U.S. 203, 62 S. Ct. 552 (1942); and Congressional Research Service, Library of Congress, Senate Comm. on Foreign Relations, 98th Cong., 2d Sess., *Treaties and other International Agreements: The Role of the United States Senate* (Comm. Print 1984).

164. Traditionally, it was the sovereign who entered into treaties with other nations, the treaty being essentially an agreement "between sovereigns." In the American context, the Founding Fathers added the check of Congressional approval in order to restrain the potential for Executive excess in this area. The Federalist Nos. 66, 69, and 75 (Alexander Hamilton).

165. Several courts have taken Chief Justice Rehnquist's statement that "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2193 (1992) (citations omitted), to stand for the broader proposition that "[c]ourts construe Treaties just as they do statutes." *Cannon v. United States Department of Justice*, 973 F.2d 1190, 1192 (5th Cir. 1992). This seems, on its face, an erroneous statement of the law. Although the preliminary inquiries, i.e., addressing the express language of the statute or treaty, may be identical, the extent to which the Court may "go behind" that language differs greatly, depending upon whether it is a statute or treaty being examined. See *In re Garcia*, 802 F. Supp. 773 (E.D.N.Y. 1992) (following interpretative methodology set out in *Alvarez-Machain*).

In his dissent in *Alvarez-Machain*, Justice Stevens cited *Cannon v. University of Chicago*, 441 U.S. 677, 699, 99 S. Ct. 1946, 1958 (1979), for the proposition that the "legal context" in which the treaty was negotiated should bear heavily upon its construction. *Alvarez-Machain*, 112 S. Ct. at 2199-2200. *Cannon* involved the alleged violations of a number of federal statutes, not treaties, and was concerned with the question of whether those statutes had granted a cause of action to the plaintiffs. The precedent appears to be inapposite to the facts of *Alvarez-Machain*.

natories.”¹⁶⁶ To uncover this intent, the Court may look beyond the written words of a treaty to the negotiations and diplomatic correspondence which culminated in the treaty’s formation.¹⁶⁷ The political branches’ construction of the treaty is also highly relevant to discerning a treaty’s terms.¹⁶⁸ Finally, for certain common types of treaties, there may evolve certain generic rules of construction which conform to the purposes and goals typically underlying such treaties.¹⁶⁹ Extradition treaties are just such a specialized “sub-class” of treaties.

2. Extradition Treaties and Specialty

The function of extradition treaties is to create an exception to the right of sovereign nations to refuse the extradition demands of other nations.¹⁷⁰ In the American legal system, an extradition treaty also bestows upon the Executive the authority, pursuant to the treaty’s grant of power, to seize certain individuals and deprive them of their liberty.¹⁷¹

166. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 2377 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S. Ct. 1054, 1057 (1963)). See also *The Santissima Trinidad*, 20 U.S. (7 Wheat) 283, 347 (1822), and *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 668 (Fed. Cir. 1992) (“if the statutory provisions at issue here are inconsistent with GATT, it is a matter for Congress and not this court to decide and remedy”). However, the interpretative maxim of *expressio unius est exclusio alterius* (the expression of one thing signifies the exclusion of all others) is not operative in this context. *Ford v. United States*, 273 U.S. 593, 611, 47 S. Ct. 531, 537 (1926).

167. *Factor v. Laubheimer*, 290 U.S. 276, 295, 54 S. Ct. 191, 196 (1933); *Perkins v. ELG*, 307 U.S. 325, 337-38, 59 S. Ct. 884, 891 (1939) (implied treaty term cannot divest person of rights of citizenship).

For a good example of the use of diplomatic history in treaty interpretation, see *Kolovrat v. Oregon*, 366 U.S. 187, 81 S. Ct. 922 (1961). See also *United States v. Postal*, 589 F.2d 862, 880-81 (5th Cir.), cert. denied, 444 U.S. 832, 100 S. Ct. 61 (1979).

168. *Factor*, 290 U.S. at 295, 54 S. Ct. at 196. Courts may also examine the practice of the political branches in enforcing the treaty terms since the treaty has been in force. *Transworld Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 1786-87 (1984). Although the political branches’ (typically, the State Department’s) view of a treaty at the time of suit may be influential, it cannot be determinative; the proper target of judicial inquiry is the intent of the Executive and Congress at the time the treaty was concluded.

169. *Transworld*, 466 U.S. at 258 n.31, 104 S. Ct. at 1786 n.31; *Maximov*, 373 U.S. at 55 n.3, 83 S. Ct. at 1058 n.3.

170. *Jaffe v. Smith*, 825 F.2d 304, 306 (11th Cir. 1987) (citing *United States v. Rauscher*, 119 U.S. 407, 411-12, 7 S. Ct. 234, 236 (1886)).

171. See *Factor*, 290 U.S. at 287, 54 S. Ct. at 193. In *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9, 57 S. Ct. 100, 102 (1936), the Court posited that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that dis-

Rauscher and *Alvarez-Machain* arose out of and are distinguishable in this context.

The prosecution in *Rauscher* was limited by the doctrine of specialty. Specialty is far more than simply a tenet of international law, or a jurisprudential decree; it is a component part of the extradition process. More than just a protection of individual rights, it is a limitation upon the Executive's discretion in the extradition process. Thus, when an individual enters that process, he becomes, in the words of *Ker*, "clothed" with the rights granted him under the extradition procedure.¹⁷²

The source of these protections is the obligation owed by the United States as party to an extradition treaty, a cession of power like that in *Cook*. Given this background, it is quite natural that a liberal mode of interpretation is applied to extradition treaties *once* the extradition process has been initiated, to reflect the concern that the extraditee receive what the treaty guarantees him.¹⁷³

cretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender.

It must be found that statute or treaty confers the power.

See also 4 Michael Abbell & Bruno A. Ristau, *International Judicial Assistance, Criminal Extradition* (1990); Restatement (Third) of the Foreign Relations Law of the United States, § 475 (1987). Contrast *United States v. Mitchell*, 957 F.2d 465, 467 (7th Cir. 1992) (Honduran President able to authorize extradition in absence of treaty).

172. See *supra* text at note 60.

173.

Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Factor, 290 U.S. at 293-94, 54 S. Ct. at 195-96. See also *Perkins v. ELG*, 307 U.S. 325, 59 S. Ct. 884 (1939). The "considerations" and "good faith" of which the Court speaks are derived from international law, and not the Constitution. See Christos L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, ix (1976); see generally, Villiger, *supra* note 8. As both *Factor* and *Perkins* involved treaties directly impacting individual rights (respectively, extradition and naturalization), it could be argued that these cases stand for the notion that the Bill of Rights exerts a counter-pressure to any deference owed to the political branches when the Judiciary's role as the protector of individual liberties is invoked. Such a reading would not be out of step with the traditional understanding of the Judiciary's function. See *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 305 (1829). The judicial scrutiny becomes heightened in areas where individual rights are concerned, but *only when the mechanisms of the treaty impacting individual liberties are operative!* See *supra* text at note 60. This rule of construction informs only the extent of protections under a treaty, NOT the initial question of whether a particular case falls within the purview of the treaty which was the issue in *Alvarez-Machain*.

In *Alvarez-Machain*, Justice Stevens saw *Rauscher's* adoption of the doctrine of specialty as standing for a universal principle of treaty construction, namely resort to principles of customary international law as the background law against which treaties must be interpreted, and not as a statement about the purposes underlying the extradition treaty as *sui generis*. He characterized the *Rauscher* decision in particular, and the application of the doctrine of specialty in extradition treaties in general, as follows:

Thus, the Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.¹⁷⁴

This reasoning fails to deal with the uniqueness of the extradition context; it does not address why specialty is an operative component of extradition treaties. To compel a government to extradite even non-citizens for trial, there must be some mechanism for limiting the predatory discretion of the rival sovereign. Specialty guarantees this mechanism and facilitates cooperation by creating a middle ground of certain select offenses of sufficient gravity to warrant a fugitive's seizure and extradition.¹⁷⁵ This makes possible the limited agreement which an extradition treaty represents.

Justice Stevens also observed that the aegis of specialty had been granted to *Rauscher* "despite the absence of any express language in the Treaty" bestowing this protection. This is only partially true; there may not have been any "express language" establishing the doctrine of specialty "in the Treaty," but there was some very material "express language." A Congressional statute mandating the application of specialty (which persists in pertinent part to the present day) was recognized at the time of *Rauscher*.¹⁷⁶ Strictly speaking, it was, therefore, unne-

174. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2201 (1992).

175.

An extradition treaty represents an attempt by nation-states, through diplomatic and legal means, to cooperate in rendering fugitive criminals to one another. Of course, when nations cooperate in criminal matters, they give up some of their sovereignty. The extradition process is designed to accomplish this goal without seeming to diminish either party's sovereignty or to bypass or demean either's institutions, processes, or basic theories of criminal justice, including the traditional rights of the accused fugitive.

Blakesley, *supra* note 4 at 172.

176. *Supra* note 56. The current incarnation of this statute may be found in 18 U.S.C. § 3192 (1988), which the Historical and Revision Notes indicates is derived directly from old Revised Statutes of the United States. *See also* *Johnson v. Browne*, 205 U.S. 309,

essary for the *Rauscher* Court to opine about the relationship between specialty and extradition, as the application of specialty had already been legislatively determined and declared in positive law to be one of those rights with which an extraditee was "clothed."

The precedential force of *Rauscher* in the *Alvarez-Machain* milieu is to some degree a deceptive one. It cannot be refuted that individuals involved in the extradition process are entitled to special protections, one of which is the Court's tendency to construe extradition treaties liberally. However, the true source of this proclivity is not supplementary protections derived from the intangible implications of an extradition treaty, but rather the traditional posture of the courts when individuals are subject to colorable deprivations of liberty. In these matters, the courts' authority emanates not from the treaty, but rather from the requirements of due process¹⁷⁷ and, where the doctrine of specialty is involved, a statute of Congress.

More importantly, nothing in *Rauscher* addressed the applicability of an extradition treaty to events occurring outside of extradition proceedings, and the trials resulting therefrom. The relevant precedent here was *Cook*, not *Rauscher*. *Cook* stands for the proposition that a treaty will trump pre-existing legislation which interferes with the objectives sought by the treaty, be that legislation administrative or jurisdictional in nature. Thus, in *Cook* a treaty which was negotiated in order to resolve disputes arising out of maritime seizures pursuant to the enforcement of prohibition was found to contravene a pre-existing statute which authorized maritime seizures pursuant to the enforcement of prohibition. Properly distinguished, therefore, *Rauscher* addresses the in-

320-21, 27 S. Ct. 539, 542-43 (1907), referring to these statutes in upholding *Rauscher's* continued vitality in 1906.

177. The Court, as the self-proclaimed protector of individual liberties, assumes a different guise when the equation ceases to be sovereign to sovereign, and becomes sovereign to individual. The logic mandating deference to the Executive prerogative is no longer present, and a new dynamic emerges:

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803). The extradition process, involving as it does pre-trial detention, is a proper context for heightened judicial scrutiny, and the extradition treaty, as the source of the Executive's power to initiate and conduct the process, is a fitting subject for that scrutiny. See *infra* note 179. See also *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979); *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095 (1987).

ternal governance of a treaty's workings, while *Cook* deals with the external reach of a treaty mandate.

3. *The Treaty in Alvarez-Machain*

The treaty involved in *Alvarez-Machain* was an extradition treaty, functionally identical to that in *Rauscher*. However, the question in *Alvarez-Machain* was not the extent of the protections provided by the treaty once the extradition process was initiated, but rather the broader question of whether the treaty even addressed Dr. Alvarez's kidnapping from Mexico.¹⁷⁸

Chief Justice Rehnquist found nothing in the terms and history of the treaty addressing cross-border abductions.¹⁷⁹ The power of the United States had been ceded only to the extent necessary to secure the advantages which would accrue to it under the treaty, and those advantages were the same ones to be found in any extradition treaty.¹⁸⁰ Nothing

178. See *St. Paul Surplus Lines v. Davis*, 983 F.2d 1057 (4th Cir. 1993) (when defendant is extradited, doctrine of specialty applies only to specified criminal offenses, not civil claims); *United States v. McGeough*, 1992 WL 390234 (E.D.N.Y. 1992) (extradition treaty did not require American government to forcibly liberate defendant from a German prison).

179. The main issue was the exact meaning of Article 9 of the treaty:

Article 9

Extradition of Nationals

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Extradition Treaty, *supra* note 7.

Dr. Alvarez argued this clause constituted an agreement between the United States and Mexico wherein "[e]ach nation is given the right to insist that charges be brought against a national of the other, in exchange for that nation's right to choose where such proceedings will be instituted." Brief for Respondent, at 10, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762). Dr. Alvarez further urged that if his kidnapping was allowed to stand, this reservation of rights would be rendered meaningless.

This argument was rejected. "Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." *Alvarez-Machain*, 112 S. Ct. at 2194.

180.

Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures. The Treaty thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the treaty is invoked.

Alvarez-Machain, 112 S. Ct. at 2194 (citations omitted).

in the way those rights had been acquired voided the Executive's option to seize Dr. Alvarez in Mexico for Agent Camarena's murder.

Dr. Alvarez complained that by "[v]iewing forcible abduction of Mexican nationals as a viable alternative to extradition proceedings, the government completely undermines the basic purpose of the Treaty by unilaterally altering the terms of its agreement with Mexico."¹⁸¹ However, the extradition treaty with Mexico had not been negotiated in order to halt the forcible abduction of Mexican nationals; it had been negotiated in order to ease the law enforcement burdens of both countries by facilitating the interstate rendition of fugitives. In the majority's opinion, since the foreclosure of the United States' option to seize fugitives extraterritorially did not manifest itself in the treaty record, the United States had never surrendered its freedom to act in such a fashion. The matter was therefore not susceptible to further legal scrutiny; it was adjudged best left to the diplomats.

C. *The Political Question Problem, and What It Suggests*

In the absence of a binding treaty term, the Chief Justice "re-manded" the case for consideration by the Executive. In the absence of applicable positive law and in recognition of the Executive's strong influence in foreign affairs,¹⁸² Justice Rehnquist felt the matter was best left to Executive discretion.¹⁸³ He resorted to the political question doctrine—the traditional response of the Court when faced with matters implicating the United States' foreign affairs and national security concerns.

To reach this end, the Court rejected the view espoused by the court of appeals in *Verdugo-Urquidez*,¹⁸⁴ the decision relied on by Justice Stevens in his dissent, that "international law principles are relevant to the background assumptions that inform the making of extradition trea-

181. Brief for Respondent, at 11, *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (No. 91-762).

182. The Executive's strong powers over foreign affairs derive from his authority as commander-in-chief, his authority as lawmaker in the treaty process, and from the inherent powers accruing to him as the successor to the English sovereign. U.S. Const., art. II, § 2, cl. 2; *United State v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S. Ct. 216 (1936).

183.

Respondent and his *amici* may be correct that respondent's abduction was "shocking" and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch.

Alvarez-Machain, 112 S. Ct. at 2196 (citations omitted) (footnotes omitted).

184. *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991).

ties.”¹⁸⁵ Under this view, the extradition treaty with Mexico had been contracted on the field of customary international law, and those principles of international law which had not expressly been derogated from were to be implied as treaty terms.

This approach is analogous to the bilateral contract. The essence of the contract is a mutual agreement reached by two individuals, but behind this agreement are rules of public policy which inform the initial agreement, and in some instances delimit it. These rules are usually manifested in contracts through implied terms; some are suppletive and may be derogated from, while others constitute strict limitations upon the limits of contractual, and legal, freedom.

The Ninth Circuit and the dissent in *Alvarez-Machain* approached the extradition treaty with Mexico in this way, assuming customary international law comprised the background against which this treaty must be interpreted. Justice Stevens observed in his dissent, “[i]t is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party’s territory.”¹⁸⁶

This passage starkly illustrates the difference between the approaches taken by Chief Justice Rehnquist and Justice Stevens. The Chief Justice believed a formal renunciation of power by the United States was required in order to remove from it the option of Dr. Alvarez’s forcible abduction. The only limitations upon the Executive’s discretion relevant to the Chief Justice were those demanded by the Constitution, and customary international law obviously did not fit into the constitutional calculus. Justice Stevens, on the other hand, believed that only a secret reservation of power could justify the United States’ action, the underlying assumption being that the United States was *empowered* by the treaty to make the abduction. This logic only follows if it is presumed that the United States was in some way limited, prior to the treaty, from acting in such a way; Justice Stevens found this limitation in the normative influence of customary international law.¹⁸⁷

185. *Id.* at 1352.

186. *Alvarez-Machain*, 112 S. Ct. at 2201 (Stevens, J., dissenting).

187. Justice Stevens subscribed to the Ninth Circuit’s view in *Verdugo-Urquidez* that the signatories to the treaty were *required* to utilize the extradition procedure in order to secure fugitives from each other; this requirement only makes sense if it is understood that customary international law has obviated any alternative means of securing custody of these fugitives. *Verdugo-Urquidez*, 939 F.2d at 1349. The treaty, as a conventional agreement, therefore constituted a derogation from this suppletive norm imposed by customary international law.

Justice Stevens, ruminating upon the prospective reach of the treaty, had this to say, “If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available

The problem with Justice Stevens' approach is that in many ways it departs from the traditional posture of the Court in matters, such as Dr. Alvarez's predicament, involving the wide-ranging power of the Executive over foreign affairs.¹⁸⁸ In matters more suited to the application of international, as opposed to domestic, legal principles, the Court has traditionally deferred to the Executive prerogative.¹⁸⁹

For example, a maxim of statutory construction states that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains."¹⁹⁰ The same principle of construction would be presumed to apply, *a fortiori*, to the construction of treaties. Such, however, is not the case because of the role of the Executive in the treaty-making process. International law regulates the interrelationship of sovereigns,¹⁹¹ while the courts determine the private rights of the individual parties before them. Thus, in the treaty context, international legal principles are the concern of the Executive, to be adopted or dispensed with as the Executive chooses, and the Court is left with what remains after Executive prerogative has been exercised.¹⁹²

because they, too, were not explicitly prohibited by the treaty." *Alvarez-Machain*, 112 S. Ct. at 2199 (Stevens, J., dissenting). Justice Stevens' assessment is correct, to a point. The actions complained of would not be prohibited by the treaty but by the protections inscribed in the Fifth and Eighth Amendments of the Constitution. Whether the Rehnquist Court would allow these protections extraterritorial effect is another question altogether. *See supra* note 90.

188. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20, 57 S. Ct. 216, 220-21 (1936), where the avowed supremacy of the Executive over foreign affairs reached its rhetorical zenith.

189. *See Moser v. United States*, 341 U.S. 41, 42, 44-45, 71 S. Ct. 553, 555 (1951) (United States citizenship); *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358, 75 S. Ct. 423, 425 (1955) (sovereign immunity of the Republic of China); *United States v. The Three Friends*, 166 U.S. 1, 73, 17 S. Ct. 495, 505 (1897) (courts bound by the actions of the political branches); *Ex Parte Republic of Peru*, 318 U.S. 578, 63 S. Ct. 793 (1943) (statutorily modified by Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 et seq. (1988)) (sovereign immunity); *Jones v. United States*, 137 U.S. 202, 212, 11 S. Ct. 80, 83 (1890) (recognition and sovereignty over territory).

190. *The Charming Betsy*, 5 U.S. (2 Cranch) 64, 118 (1804). *See also McCulloch v. Sociedad Nacional*, 372 U.S. 10, 21, 83 S. Ct. 671, 677-78 (1963); *Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S. Ct. 1510, 1516 (1982).

191. Thus, a treaty stipulation is "but a formal recognition of the pre-existing sanction in the law of nations." *United States v. Moreno*, 68 U.S. 400, 404 (1863). This "formal recognition," however, is the mechanism which takes the treaty from the realm of international law into the realm of domestic law, where it may be construed and applied by courts.

192. The policy of statutory construction respecting international law may also be a product of the constitutional separation of powers, a measure employed to restrain the Congress from unintentionally interfering with the diplomatic responsibilities of the Executive. *See Weinberger v. Rossi*, 456 U.S. 25, 32-33, 102 S. Ct. 1510, 1516 (1982). The general jurisprudential policy of due respect for the actions taken by foreign sovereigns

As a result, the Court in *Alvarez-Machain* used the political question doctrine to remove the case from its scrutiny since it involved a potential transgression into the Executive domain.¹⁹³ Rather than risk an intrusion into a sphere of influence allocated to another branch of the federal government, the Court simply turns the troublesome issue back at the threshold, finding it "nonjusticiable."¹⁹⁴

and the principles of comity between nations may be justified upon similar grounds. See *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 103 S. Ct. 2591 (1983); *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S. Ct. 139, 143 (1895).

193. The Court generally resorts to the political question doctrine when it encounters a textual commitment to a coordinate branch, or lacks any judicially discoverable and manageable standards for resolving the issue before it. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962). This doctrine, like the Article III "case and controversy" justiciability requirements, is ultimately a product of the constitutional separation of powers. See Edward H. Levi, *Some Aspects of Separation of Powers*, 76 Col. L. Rev. 371 (1976). The Court has adopted a range of criteria for determining whether the exercise of its power would, in any certain instance, threaten the constitutional equation. The political question is one of these emendations. See Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597 (1976); Linda Champlin and Alan Schwartz, *Political Question Doctrine and Allocation of Foreign Affairs Power*, 13 Hofstra L. Rev. 215 (1985); Martin H. Redish, *Judicial Review and the Political Question*, 79 Nw. L. Rev. 1031 (1985). It is a judicially created prophylactic measure devised to preserve the integrity of the constitutional separation of powers.

Historically, the separation of powers has been viewed as a rigidly compartmentalized division of duties and responsibilities between the three co-ordinate branches with parameters specified in the technical blueprint of the Constitution. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951, 103 S. Ct. 2764, 2784 (1983); *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S. Ct. 3181, 3185 (1986). More recent cases, however, appear to downplay the formal disposition of powers set out in the Constitution in favor of an updated version of the "checks-and-balances" rationale. This approach views the rivalry between the branches in terms of functional equivalency, and not the traditional textual allocation of powers, compensating for the historical evolution of federal, and especially Executive, power, and the distortions that this evolution has created in the balance of power among the branches. See *Morrison v. Olson*, 487 U.S. 654, 108 S. Ct. 2597 (1988); *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989).

194.

[T]he political question doctrine has embraced two radically different ideas. In one formulation, the doctrine is a finding by the court that the question before it has been constitutionally allocated exclusively to one or both of the other branches. In this sense, the court does not assert nonjusticiability but, employing the appropriate level of judicial review, implicitly reaches the merits and decides that the government has acted constitutionally. In contrast, under the other formulation, the doctrine is a finding by the court that the question before it, while normally within the scope of its review, will nevertheless not be adjudicated due to a lack of obtainable evidence, manageable standards or out of prudence.

Thomas M. Franck & Michael J. Glennon, *Foreign Relations Law and National Security Law: Cases, Materials, Simulations* 723 (1987). It was the first of these two formulations that the Court applied in *Alvarez-Machain*, and which, conjuring the Judiciary's "long tradition of scrutinizing the legality of governmental conduct during the course of a criminal prosecution," the Ninth Circuit in *Verdugo-Urquidez* was able to circumvent. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1358 (9th Cir. 1991).

A significant demonstration of the Court's use of the political question doctrine in a case involving violations of international law can be found in *Banco Nacional de Cuba v. Sabbatino*.¹⁹⁵ There, an arm of the Cuban government sued Sabbatino to collect proceeds earned from a shipment of raw sugar from Cuba. Sabbatino maintained that Banco Nacional's claim was void because Banco Nacional's predecessor-in-interest had acquired title to the sugar through an expropriation procedure in violation of international law. Banco Nacional invoked the "act of state" doctrine as a defense to Sabbatino's charge.¹⁹⁶

Justice Harlan, writing for the Court, concluded that the origins of the "act of state" doctrine lay not in customary international law, but in the constitutional separation of powers.¹⁹⁷ Weighing the constitutionally mandated "act of state" doctrine against the violation of customary international law, he found the former to be controlling, and held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . *even if the complaint alleges that the taking violates customary international law.*"¹⁹⁸

Justice Harlan's comment on the role of international law in the American legal order isolates the fundamental source of disagreement in *Alvarez-Machain*:

The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. Although it is,

195. 376 U.S. 398, 84 S. Ct. 923 (1964).

196.

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgement of the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Sabbatino, 376 U.S. at 416, 84 S. Ct. at 934 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S. Ct. 83, 84 (1897)). See also Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 Col. L. Rev. 1907 (1992).

197. *Sabbatino*, 376 U.S. at 423-24, 84 S. Ct. at 938. The operative principle is that a judicial investigation into the internal operation of a foreign nation could hamper the Executive's diplomatic transactions. Contrast *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980). See also Burley, *supra* note 196; Bill Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467 (1986).

198. *Sabbatino*, 376 U.S. at 428, 84 S. Ct. at 940 (emphasis added).

of course, true that United States courts apply international law as a part of our own *in appropriate circumstances*, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.¹⁹⁹

This goes to the heart of the question presented in *Alvarez-Machain*. What are the "appropriate circumstances" in which the courts should not resort to polical question, separation of powers, and "act of state" doctrines but apply customary international law in American courts?

IV. THE QUESTION OF CUSTOMARY INTERNATIONAL LAW

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.²⁰⁰

Given this premise, it is necessary to look to the powers the Constitution confers upon the federal government to uncover where in the document the authority to execute or derogate from customary international law dwells. The arguments offered to this point suggest that the Executive's prerogative, a source of power largely inferred from the structure of the Constitution and the duties of the Executive,²⁰¹ was intended as the constitutional repository of international law. In addition, Congress' role as lawmaker—especially its constitutional grant of power to "define and punish . . . Offenses against the Law of Nations"—argues for the possibility of a legislative modification of this allocation.²⁰²

The jurisprudence reveals, however, that the Supreme Court has in the past purported to apply substantive principles of customary international law as rules of decision.²⁰³ The sources of law cognizable to

199. *Id.* at 422-23, 84 S. Ct. at 937 (emphasis added) (citations omitted). Justice Harlan cited three cases for the proposition that international law may be applied in American courts. *Id.* at 423, 84 S. Ct. at 937. Two of these, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., Concurring) and *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815), involved conventional international law, i.e., treaties. The third, *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900), will be addressed *infra*.

200. *Reid v. Covert*, 354 U.S. 1, 5-6, 77 S. Ct. 1222, 1225 (1957).

201. *See supra* note 182.

202. U.S. Const., art. I, § 8, cl. 10.

203. *See generally The Paquete Habana*, 175 U.S. at 700, 20 S. Ct. at 299, and cases cited *infra* at notes 218 and 259. This proposition is highly controversial. *Contrast* *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law"); *United States v. James-Robinson*, 515 F. Supp. 1340, 1342-43 (1981) (citation omitted) ("International law . . . applies even in the absence of a specific treaty, and must be ascertained and applied by the Court when necessary").

the Judiciary must be examined in order to find the substructure justifying the direct application of customary international law by the Court.²⁰⁴ Only two of these sources merit attention: Congressional statutes and the Constitution itself.²⁰⁵

A. *Congressional Statutes as a Basis for International Law*

Precepts of customary international law have been imported into the domestic legal sphere by way of statute since the first years of the Republic.²⁰⁶ Simple prudence and considerations of comity have dictated that Congress draw upon the developed and sophisticated body of customary international law when legislating upon foreign matters. Generally, Congress has done so in two ways: through statutes respecting certain specific areas concurrently addressed by customary international law, and through statutes allowing specified judicial recourse to the substantive principles of customary international law.

An example of the former is the Foreign Sovereign Immunities Act.²⁰⁷ The courts traditionally have deferred to the Executive in the declaration or revocation of sovereign immunity.²⁰⁸ This statute provides a legislative exception to an Executive certification of foreign sovereign immunity, granting the courts personal and subject matter jurisdiction over those foreign sovereigns covered by the statute.²⁰⁹ Thus, by encasing the act

204. The importance of isolating the constitutional basis, if any, of the application of customary international law by the Supreme Court is suggested by the following passage: "a violation of international law that is not also a violation of the Constitution would not call for the exclusionary rule to be applied to suppress any evidence obtained as a result of the violation." *United States v. Williams*, 617 F.2d 1063, 1090 (5th Cir. 1980).

205. Three other sources of law are available to judicial scrutiny: the supervisory power (detailed *supra* in text at notes 120-143), rulemaking (*see Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989)), and treaties. The first is strictly speaking not so much a source of law as a manifestation of judicial power, similar to that comprising the Executive's prerogative. The second, as a delegated power of Congress, should be considered subsumed into the statutory analysis. The third has already been dealt with.

206. *See* Section 9 of the Judiciary Act of 1789, 1 Stat. 76-77 (1789), reading in pertinent part:

[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

This act continues in force today. *See* 28 U.S.C. § 1350 (1973).

207. 28 U.S.C. §§ 1602 et seq. (Supp. 1992). *See also supra* note 189.

208. *See Ex Parte Republic of Peru*, 318 U.S. 578, 63 S. Ct. 793 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S. Ct. 530 (1945).

209. *See Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 109 S. Ct. 683 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962 (1983); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). An interesting question presented by the Foreign Sovereign Immunities Act is the extent to

in positive legislation, Congress has allowed the Judiciary to address matters formerly beyond its competence to review.

This statute does not, however, allow a reviewing court free access to the rules of international custom, but merely authorizes a limited inquiry into a specific matter under conditions pre-determined by Congress. The subject matter of the statute may be that of customary international law, but the law applied is the law of Congress, not the law of nations.

A somewhat different result obtains when a statute mandates judicial recourse to customary international law. The quintessential example of such a statute is the Alien Tort Statute,²¹⁰ which grants federal district courts jurisdiction over a tort claim filed by an alien, provided the alien claims the tort injuring him was committed in violation of the "law of nations" or a treaty of the United States.²¹¹ In doing so, the statute "places an awesome duty on federal district courts to derive from an amorphous entity—*i.e.*, the 'law of nations'—standards of liability applicable in concrete situations."²¹² Even if the courts meet this duty, and the sources of international law²¹³ can be demonstrated to provide a sound basis for tort liability, this statute does not allow the wholesale importation of customary international law into the trial process. Resort to the "law of nations" is necessary only for the purpose of establishing the district court's jurisdiction over the offense; once jurisdiction is established, the role of customary international law is done. What substantive law will govern the trial on the merits is a choice of law question, and customary international law is not one of the choices.²¹⁴

which Congress, pursuant to its Article I mandate, may legislatively remove determinations touching upon the administration of international law from the hands of the Executive and place them into the hands of the lower federal courts.

210. 28 U.S.C. § 1350 (1973); *see supra* note 206.

211. *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003, 105 S. Ct. 1354 (1985). For more on the growing number of foreign human-rights cases appearing in American courts, see Edward Felsenthal, *Foreign Human-Rights Disputes Increasingly Land in U.S. Courts*, Wall St. J., Oct. 16, 1992, at B10.

212. *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

213. "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising (sic) and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). In addition, international agreements, like the United Nations Charter, and "general principles of law common to the major legal systems of the world" also serve as sources of customary international law. Restatement (Third) of the Foreign Relations Law of the United States, § 102 (1987).

214. *Filartiga*, 630 F.2d at 876. *See, however*, the case's disposition on remand, *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). *See also* Casto, *supra* note 197.

No federal statute has ever provided for the wholesale importation of customary international law into American law.²¹⁵ Furthermore, it seems unlikely that such an action would pass constitutional muster, serving as it does to subject the Executive to widespread judicial scrutiny on its traditional bulwark of foreign affairs. Thus, the only logical wellspring for the application of customary international law is the fountainhead of all American law, the Constitution itself.

B. The Constitutional Basis of Customary International Law

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction²¹⁶

Nowhere in the text of the Constitution is customary international law expressly named as among those “Laws of the United States” to which the Judicial Power extends.²¹⁷ Yet the Supreme Court has applied customary international law in a number of cases,²¹⁸ overcoming in those instances the political question obstacle. For the Court to have overcome the restrictions imposed by the separation of powers, the Judicial Power must extend to a source of law embodying principles of customary international law.²¹⁹ The express terms of the Constitution do not reveal

215. However, Congressional statutes have often dictated results contrary to canons of customary international law, despite the rule of construction referred to *supra* at the text for note 190. See *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931, 93 S. Ct. 1897 (1973) (Byrd Amendment resumed trade with Rhodesia despite U.N. trade boycott); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (aid to Nicaraguan rebels after adverse decision in International Court of Justice); *United States v. Maynard*, 888 F.2d 918 (1st Cir. 1989) (Maritime Drug Law Enforcement Act prevented defendants from raising objections under “international law”).

216. U.S. Const. art. III, § 2, cl. 1.

217. The Constitution allocates the primary concern with observation of customary international law to the political branches, *e.g.*, the authority of the President as the “Commander in Chief of the Army and Navy of the United States,” and the power of Congress to “define and punish . . . Offences against the Law of Nations.” Art. II, § 2, cl. 1, and Art. I, § 8, cl. 10, respectively. See *supra* note 182.

218. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 299 (1900); *United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820); *The Antelope*, 23 U.S. (10 Wheat) 66 (1825); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).

219. A constitutional source of judicial power would obviate the need for any separation of powers analysis. A “textual commitment” of customary international law to the Judiciary negates the possibility of judicial encroachment into a realm of discretionary authority allocated to the Executive branch. See, however, *supra* note 197. Note, however, that this

where that source of law is, so an implied grant of constitutional power must be considered. In other words, the question of customary international law's constitutional dimension is inextricably bound up in the question of a substantive federal common law.

1. *Is There A Substantive²²⁰ Federal Common Law?*

When the constitution was adopted, it was not the design of the framer thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected.²²¹

Article III extends the judicial Power to "all Cases, in Law and Equity, arising under the Constitution." In the early years of this nation's history, the question of the exact meaning of this phrase was a subject of contention. Did this grant of power to all cases in law and equity mean the Judiciary, in the absence of a positive enactment from Congress, could resort to the traditional body of English Common Law, long administered in the states, for rules of decision?²²² Or was this grant of power modified by the "arising under" language so as to

conception of the judicial power contemplates only the ability to apply a judicial remedy. The jurisdiction of the court, set by Congress, is assumed. See *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

220. What is meant by the "federal common law," as discussed below, is that particular historical body of principles and doctrines evolved in the Common Law courts of England and, arguably, incorporated to some degree as substantive law by the Founding Fathers. This note does not purport to explore the use of a federal common law to fill the interstices of federal statutory law, nor does it seek to revisit the controversies surrounding *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938), and its myriad progeny. See Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231 (1985). What is germane to this discussion is federal common law as substantive principles of law, not federal common law as law-making. For more on the application of *Erie* in this vein, see Daniel Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 Iowa L. Rev. 165 (1988).

221. *Murray v. Chicago & N.W. Ry. Co.*, 62 F. 24, 31 (C.C.N.D. Iowa, 1894), *aff'd*, 92 F. 868 (C.C.A. Iowa, 1899), quoted in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 231, 37 S. Ct. 524, 535 (1918) (Pitney, J., dissenting).

222. "[T]here are rights and duties that exist notwithstanding the lack of action by a legislative body with respect to the area in question." Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003, 1007 (1985).

preserve to Congress the power to formulate substantive federal law?²²³ The answer to this question is crucial, for among the many duties bound into the corpus of the Common Law was the charge to observe and apply the customs and practices of the law of nations.²²⁴

The serious implications of this potential grant of power became apparent when the First Congress passed the Judiciary Act of 1789. Section 9 of that Act granted federal district courts exclusive jurisdiction over all crimes "cognizable under the authority of the United States."²²⁵ Questions arose early on as to what substantive law would govern in proceedings conducted under color of this statute. Could a criminal defendant be indicted in a federal court for a common law crime, even if that crime were not forbidden by any Act of Congress? Should the Judiciary choose to resort to the decisions of the common law in the absence of positive guidance from Congress, two principles which lay at the core of the federal Constitution would be threatened: the all-encompassing separation of powers doctrine, and the principle of federalism.²²⁶

Both of these objections to the advent of a federal common law were principled on the vision of a legislating Judiciary, a constitutional

223. This note deals with the question of substantive law, and not jurisdiction. Article III is admittedly primarily a jurisdictional statement, but as the subsequent pages will indicate the question of the scope of the Judicial Power involves consideration of the sources of law upon which the Courts may draw in fashioning rules of decision in their exercise of Article III jurisdiction.

224. In 1736, Lord Talbot, a renowned English jurist, declared "that the law of nations in its full extent was part of the Law of England." Benjamin M. Ziegler, *The International Law of John Marshall* 4 (1939), quoting *Barbuit's Case*, Talbot 281 (1736). This charge to respect the "law of nations" was in turn passed on to the states of the Union with their adoption of the English common law. Jay, *supra* note 222, at 1059-60, quoting Z. Swift, *A Digest of the Law of Evidence*, at viii (1810). Thus, in 1784, in the court of Oyer and Terminer, etc., in Philadelphia, the following charge was made: "The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers." *Respublica v. De Longchamps*, 1 U.S. 110, 116 (O&T Pa. 1784). See also *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948) (state court interpretation of customary international law binding upon federal courts when case removed on grounds of diversity).

225. 1 Stat. 76-77 (1789). This statute was admittedly jurisdictional in nature, but insofar as it extended the jurisdiction of the federal courts to "cognizable" offenses, a determination of the substantive criminal law to be applied was merged into the jurisdictional question. Thus, although the section to follow speaks of a "federal common law criminal jurisdiction," the question asked is to what extent the *substantive* principles of the English common law were incorporated into the constitutional scheme. The criminal, as opposed to the civil, milieu is examined for two reasons. First, the question asked was settled earlier, and more definitively, in the criminal context. Second, it is in the area of criminal law that the power of the sovereign, speaking through Congress, to fashion applicable law through positive enactments is patent.

226. For a full discussion of these arguments, see Jay, *supra* note 220, at 1231.

oxymoron to some. If federal courts were able to unilaterally expand their criminal jurisdiction by taking cognizance of common law crimes, the states would suffer an encroachment upon their residual jurisdiction. The related separation-of-powers argument arose in response to the potential threat to Congress's designated role as the law-giver of the republic, a constitutionally assigned role which federal judges administering a separate body of law would go far to subvert.

Several early decisions sustained the validity of indictment for common law offenses in federal courts, a number involving offenses contrary to the "law of nations."²²⁷ Many were an early response to incidents of piracy upon the high seas,²²⁸ and may have been more a matter of expediency than creed, attributable to the "entire interregnum of law (which) has existed, and must exist in many cases, till congress legislate expressly on matters that have been confided to it."²²⁹ Regardless of

227. See *United States v. Smith*, 27 F.Cas. 1147 (C.C.D. Mass. 1792) (No. 16,323); *Henfield's Case*, 11 F.Cas. 1099 (C.C.D. Pa. 1793) (No. 6360); *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 27 F.Cas. 713 (C.C.D. Pa. 1793) (No. 6360); *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 28 F.Cas. 774 (C.C.D. Pa. 1798) (No. 16,766); *United States v. Meyer*, 26 F.Cas. 1242 (C.C.D. Pa. 1799) (No. 15,761); *Williams' Case*, 29 F.Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708); *Anonymous*, 1 F.Cas. 1032 (C.C.D. Pa. 1804) (No. 475); *United States v. McGill*, 4 U.S. (4 Dall.) 426, 26 F.Cas. 1088 (C.C.D. Pa. 1806) (No. 15,676).

228. In theory, the part of the Article III judicial Power extending to the Admiralty jurisdiction included the traditional criminal jurisdiction of the Admiralty courts of England; this jurisdiction, embracing the "international" crime of piracy as well as other lesser maritime offenses, was at the time of the Constitution quite vital. See *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 106 (1820); *United States v. New Bedford*, 27 F.Cas. 91, 111-17 (C.C.D. Mass. 1847) (No. 15,867). However, unlike the prize and civil admiralty jurisdiction, the admiralty criminal jurisdiction was never distinguished from the common law criminal jurisdiction in the federal courts. There are four reasons for this. The first is the textual commitment to Congress of the duty "To *define* and punish Piracies and Felonies on the high Seas." (See *United States v. Alvarez-Mena*, 765 F.2d 1259, 1265 n.9 (5th Cir. 1985), citing *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110, 103 S. Ct. 738 (1983) ("the constitutional power to proscribe and punish offenses committed on the high seas is reflected in Article I, section 8, clause 10, and in Article III, section 2, of the Constitution"). The second was historical, a popular dislike of the dictatorial, non-jury procedures of the admiralty court. *New Bedford*, 27 F.Cas. at 114. The third reason lay in the indistinct parameters of the admiralty criminal jurisdiction's reach. *New Bedford*, 27 F.Cas. at 112. Finally, Section 9 of the Judiciary Act of 1789 lumped all crimes into one, the important factor being whether they were "cognizable under the authority of the United States," 1 Stat. 76 (1789), but granted the district courts jurisdiction over "all *civil* causes of admiralty and maritime jurisdiction," noticeably omitting any reference to a criminal jurisdiction. 1 Stat. 77 (1789) (emphasis added). For more on law of piracy, see Alfred Rubin, *The Law of Piracy* (1988).

229. *New Bedford*, 27 F.Cas. at 101. The argument here is that the federal courts' early resort to the reservoir of common law crimes was a creature of necessity, not of design.

the questions raised by these early indictments, the Supreme Court settled the issue against the notion of a federal common law in the 1812 case of *United States v. Hudson & Goodwin*.²³⁰

In *Hudson*, the defendants had been indicted for the common law crime of libel, although there did not yet exist a federal statute proscribing the offense. The Court, in a brief opinion authored by Justice Johnson, went directly to the merits of the district court's assertion of jurisdiction over a common law offense.²³¹ The government had urged that a common law criminal jurisdiction was part and parcel of the "implied powers" of the federal courts, powers without which the Judiciary's influence would be vitiated.²³² The Court responded by accepting the basic verity of the argument, but rejecting the idea that its implications extended to a common law criminal jurisdiction.²³³ The Court held that for a federal court to assert criminal jurisdiction over any offense, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."²³⁴

Although *Hudson* was not necessarily expected to be the final word on the existence of a federal common law criminal jurisdiction,²³⁵ it

230. 11 U.S. (7 Cranch) 32 (1812). For an excellent study of this case, the personalities involved, and the saga of the federal common law criminal jurisdiction, see Gary D. Rowe, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 Yale L.J. 919 (1991).

231. *Hudson*, 11 U.S. at 32 ("The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases").

232. *Id.* at 33.

233. "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers." *Id.* at 34.

234. *Id.*

235. Even after *Hudson*, the bar harbored doubt upon the issue, and in certain quarters the result was openly disfavored. The issue was raised again by Justice Story in *United States v. Coolidge*, 25 F.Cas. 619 (C.C.D. Mass. 1813) (No. 14,857), *overruled*, 14 U.S. (1 Wheat) 415 (1816). Justice Story distinguished the case before him from *Hudson* on the grounds that the prosecution of Coolidge was for piracy, and fell within the traditional jurisdiction of the courts of admiralty and not the courts of common law. See *supra* note 228. The District Judge did not concur in the decision, so the case was certified to the Supreme Court for review.

The Supreme Court reversed, but under conditions which did not alleviate the cloud of doubt hanging over the issue:

Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the Attorney-General has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of *United States v. Hudson and Goodwin*,

proved to be the common law crime's last hurrah in the federal courts. Although courts continued to draw upon traditional common law notions of crime as a guide to discerning Congressional intent,²³⁶ the existence of a federal jurisdiction over purely common law offenses was not a serious proposition by the end of the nineteenth century.²³⁷ The flowering of a common law criminal jurisdiction had been thwarted by essentially two considerations: the federal government's peculiar status as a government of enumerated powers, and the federalism²³⁸ and separation-of-powers²³⁹ concerns that status engendered.

Thus, the ancestral courts of the common law provide no seed from which customary international law may spring fully-formed from the constitutional text; they, like the courts of equity,²⁴⁰ were limited by the structural and textual constraints of the Constitution, their ambit to be determined by the enabling hand of Congress. As the judicial power of

or draw it into doubt.

United States v. Coolidge, 14 U.S. 415 (1816).

Despite the shaky support the *Hudson* case enjoyed in the years immediately following it, *stare decisis* eventually took its toll. See *infra* note 237.

236.

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Convention of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary . . . they expressed [their ideas] in terms of the common law, confident that they could be shortly and easily understood.

Ex Parte Grossman, 267 U.S. 87, 108-109, 45 S. Ct. 332, 333 (1925). See also *United States v. Palmer*, 16 U.S. (3 Wheat) 610, 640 (1818); *United States v. Coppersmith*, 4 F. 198, 200 (C.C.W.D. Tenn. 1880); *In re Greene*, 52 F. 104, 111 (C.C.S.D. Oh. 1892).

237. See the Supreme Court decisions in *United States v. Hall*, 98 U.S. (8 Otto) 343, 343-45 (1878); *Tennessee v. Davis*, 100 U.S. 257, 275 (1879); *United States v. Britton*, 108 U.S. 199, 206, 2 S. Ct. 531 (1883); *United States v. Eaton*, 144 U.S. 677, 687, 12 S. Ct. 764, 767 (1892).

238. See *United States v. Hutchinson*, 26 F.Cas. 452, 453 (D.C.E.D. Pa. 1848) (No. 15,432) ("The jurisdiction of offences which are cognizable at common law resides in the state courts alone, even though the general government may be the party immediately aggrieved by the misdeed complained of.") (emphasis added).

239. See *Peters v. United States*, 94 F. 127, 131 (9th Cir. 1899) ("It devolves upon Congress to define what are crimes, to fix the proper punishment, and to confer jurisdiction for their trial"); *United States v. Ramsay*, 27 F.Cas. 694, 695 (C.C.D. Ark. 1847) (No. 16,115) ("The defects in the Criminal Code of the United States, have been severely felt, but it is for Congress, not this court, to interpose and apply the corrective").

240. The First Congress strictly limited the equity jurisdiction of the federal courts, providing "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, Sec. 16, 1 Stat. 82 (1789). The example of equity serves clearly to demonstrate how Congress was assigned the duty of delimiting the jurisdictional parameters of the federal courts (outside, of course, of the original jurisdiction of the Supreme Court;

Article III only extends to cases in law and equity "arising under this Constitution," and no law extends the cognizance of the Judiciary to customary international law, federal common law cannot be the source of the Court's past applications of customary international law.

There were, however, three courts carried from England to the colonies, and the latent jurisdictional scope of this third court was also incorporated into Article III. It is this third court which must be examined now, in order to determine whether within its recesses dwells a positive expression of customary international law upon which the court has drawn in fashioning rules of decision. For if the "law of nations" could be presumed to lie anywhere in the Constitution, it would be in the court of the admirals, arbiter of the ancient law of the sea.

2. *The Admiralty and Maritime*²⁴¹ *Jurisdiction—The Substantive Grant*

In the late eighteenth century, the seas were the entrepot of the civilized world. Highways of commerce and conquest, there was a strong consensus that the seas be ruled by one law so that they might remain open and accessible, unburdened by the parochial demands of any particular municipal law.²⁴²

The condition imposed upon maritime nations for the use of this great nexus of trade was a conformance to the regimen of the "law of nations," for a violation of those laws in the maritime context was of direct concern, not only to the aggrieved nation, but to all nations.²⁴³

see U.S. Const. art. III, § 2, cl. 2). See *Baker v. Biddle*, 2 F.Cas. 439, 446 (C.C.E.D. Pa. 1831). This limitation upon the jurisdiction of the court sitting in equity was subject to no variance by extra-constitutional influences. *Baker*, 2 F.Cas at 444.

241. The Court has suggested that the term "maritime" was appended to admiralty in the constitutional grant in order to include certain commissions, issued by the Crown to the Colonial admiralty courts, which extended those courts beyond the traditional bounds of the admiralty jurisdiction in England. *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 114-15 (1820). Contrast *United States v. New Bedford*, 27 F.Cas. 91, 115 (C.C.D. Mass. 1847) (No. 15,867) ("At the utmost, 'maritime' and 'admiralty' courts are treated as the same, and the expression a pleonasm"). There persisted in the jurisprudence some debate as to whether the system adopted in Article III, section 2, was that of the colonies at the time of the Constitution's adoption, or that of the English courts of admiralty, which question was answered in favor of the former proposition in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 608 (1874). See also *De Lovio v. Boit*, 7 F.Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).

242. See Arthur Nussbaum, *A Concise History of the Law of Nations* 31 (1947).

243. At the time the Constitution was written, there was still a lively debate as to whether the seas should be *mare liberum*, a neutral "free-trade zone," or *mare clausum*, a conceptualization which allowed for the assertion of particular sovereign interests. For a concise treatment of this fascinating subject, see R.P. Anand, *Origin and Development of the Law of the Sea* 72-158 (1983). The formulation favored by the proponents of a *mare liberum* was to ultimately triumph.

These concerns, significantly not only of a political but of an economic nature, were shared by the newborn United States, itself isolated from the continent of its origins by the Atlantic Ocean. This peculiar facet of the admiralty jurisdiction was early recognized by the Court:

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their power upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it, does no act inconsistent with the general equality of nations which exists upon the ocean. . . *Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent.*²⁴⁴

It was this state of affairs which led the Founding Fathers to place the admiralty jurisdiction in its entirety within the cognizance of the federal courts. Two of the great purposes which led to the formation of the Union, the creation of a common marketplace among the states and the common defense of the several states, were directly implicated by the legal regime which would control the seas. The seas were avenues of trade and of war, and it was upon them that the United States would face the predatory monarchs of Europe.²⁴⁵

The Constitution limited the substantive content of the common law and equity jurisdiction of the Judiciary to those legal precepts in the Constitution itself, in treaties, or in the enactments of Congress. In similar fashion, it curtailed the jurisdictional reach of federal courts sitting in common law or equity,²⁴⁶ such that the residuary jurisdiction devolved upon the nation's courts of general jurisdiction, i.e., the state courts. This was not the case with the admiralty jurisdiction, for the mercantile goals of the Constitution would not be served by thirteen separate interpretations of the law of the sea.²⁴⁷

Thus, under Article III, Section 2 of the Constitution, the judicial power of the United States was extended to *all* cases arising in the admiralty jurisdiction.²⁴⁸ This latent grant was more than just a mere

244. *Rose v. Himley*, 8 U.S. (4 Cranch) 268, 287 (1808) (Johnson, J., concurring).

245. See Anand, *supra* note 243, at 115-16; *Churth v. Hubbard*, 6 U.S. (2 Cranch) 232, 234-35 (1804). See also Benjamin M. Ziegler, *The International Law of John Marshall*, 72-74 (1939).

246. A by-product of this limitation was to remove the common law restrictions which had circumscribed the reach of the admiralty courts in England. See, e.g., *De Lovio v. Boit*, 7 F.Cas. 418, 443 (C.C.D. Mass. 1815).

247. Such an approach would be destructive of the "uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

248. See *United States v. Flores*, 289 U.S. 137, 148, 53 S. Ct. 580, 582 (1933).

extension of jurisdiction, however unlike the constitutional extension of the judicial power to cases in law and equity "arising under this Constitution" and the laws that would be passed pursuant to it, the admiralty jurisdiction came into federal law with no such caveat attached. It comprised a substantive grant as well as a jurisdictional one, and once the Judiciary Act of 1789 had extended the district courts' jurisdiction to "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,"²⁴⁹ the Judiciary was able to draw upon the law of the sea in fashioning opinions rendered on admiralty cases.²⁵⁰

As with the common law and equity jurisdiction, the substantive principles applied within the admiralty jurisdiction would ultimately be within the province of Congress.²⁵¹ But in the admiralty jurisdiction, given the commercial and diplomatic impact of the cases arising therein, the United States could not afford an "interregnum" of the law, with the federal code silent on any given matter because Congress had not yet spoken to it. Congress may have been given a blank slate upon which to write in the common law and equity jurisdictions, but on the admiralty side it was seen as vital to perpetuate the known and accepted system governing maritime relations. The maritime trade was a matter of national concern, and the Founding Fathers did not wish its regulation to devolve to the states in the absence of Congressional action.²⁵²

249. Judiciary Act of 1789, Sec. 9, 1 Stat. 79 (1789).

250.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The Lottawanna, 88 U.S. at 574.

251.

[Article III, section 2] has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies, and, by implication, conferring on Congress the power, subject to well recognized limitations not here material, to alter, qualify, or supplement it as experience or changing conditions may require.

Flores, 289 U.S. at 148-49, 53 S. Ct. at 582 (citations omitted). The "well recognized limitations" were adverted to in *Panama R. Co. v. Johnson*, 264 U.S. 375, 386-87, 44 S. Ct. 391, 394 (1924), where the Court suggested in *dicta* that "there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without." This *dicta* has never been further developed.

252. *The Lottawanna*, 88 U.S. at 575.

The full extent of the Founding Father's design was proclaimed by the Supreme Court in the landmark case of *Southern Pacific Co. v. Jensen*:²⁵³

Article III, § 2, of the Constitution, extends the judicial power of the United States "[t]o all cases of admiralty and maritime jurisdiction;" and Article I, § 8, confers upon the Congress power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further . . . , in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.²⁵⁴

And among this general maritime law as set forth in the Constitution was to be found the "law of nations."

The treatment of the law of piracy provides an ample demonstration of this. The Judiciary Act of 1789 had established that the district courts' jurisdiction only extended to *civil* actions arising in the admiralty and maritime jurisdiction, and to those matters criminalized by Congressional act.²⁵⁵ Once piracy was made a crime by Congressional statute, giving federal courts jurisdiction over the offense, the courts considered it proper to look to the law of nations for a definition of the crime.²⁵⁶

253. 244 U.S. 205, 37 S. Ct. 524 (1918).

254. *Id.* at 214-15, 37 S. Ct. at 528. See, however, Justice Holmes' vigorous and well-reasoned dissent, *id.* at 218-22, 37 S. Ct. at 530-32 (Holmes, J., dissenting). Holmes' point that "[t]he common law is not some brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . ." was not lost upon Justice Brandeis, who joined Justice Holmes in dissent. Some twenty years later, Brandeis would resurrect some of these same arguments in writing the Court's opinion in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938); see also *supra* note 220.

255. See *supra* note 228.

256. See *United States v. Smith*, 18 U.S. (5 Wheat) 153, 112 (1820) ("the offense charged in the indictment in this case . . . amounts to the crime of piracy, as defined by the law of nations, so as to be punishable under the act of Congress"). In *United States v. Klinton*, 18 U.S. (5 Wheat) 144, 152 (1820). Chief Justice Marshall resorted to the law of nations in finding that pirates sailing under a foreign flag were still amenable to American justice, since even though under the law of the sea a nation could not properly exercise jurisdiction over acts committed by a foreign person aboard a foreign vessel, pirates were stateless, and subject to the penal laws of all nations. This principle persists today in international law, and piracy is one of the limited offenses for which universal jurisdiction is allowed. See also *United States v. Holmes*, 18 U.S. (5 Wheat) 412 (1820); *United States*

This recourse to the law of nations for instruction, however, could not be used to defeat the plain language and intent of the statute; even when legislating in a domain of the law of nations bequeathed through the Constitution, Congress as legislator had the final say.²⁵⁷

A far better example may be found in the law of prize,²⁵⁸ for it is out of prize cases that practically all of the Court's language applying the "law of nations" has come.²⁵⁹ The reasons for this were broached by Henry Wheaton, reporter for the Supreme Court, in 1815:

These courts of prize are established in every country, according to the municipal constitution of each, and there is in all a superior court of review, consisting of the most considerable persons, to which the parties, who think themselves aggrieved, may appeal; and all these courts, whether supreme or inferior, judge by the same rule, which is the law of nations.²⁶⁰

v. *Pirates*, 18 U.S. (5 Wheat) 184 (1820); *United States v. Flores*, 289 U.S. 137, 53 S. Ct. 580 (1933); Alfred P. Rubin, *Revising the Law of "Piracy"*, 21 Cal. W. Int'l L.J. 129, 133-34 (1991); and Rubin, *supra* note 228.

257. See G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 Am. J. Int'l L. 727 (1989).

258. The law of prize deals with the capture of maritime vessels during a state of war, and is addressed in the Constitution in Article I, Section 8, Clause 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"), and in the general admiralty and maritime jurisdiction of Article III, Section 2. The overtly international aspect of the prize court, as opposed to the regular operation of the admiralty court, can be observed in that "[c]ourts of admiralty do not proceed according to the law of nations, except in cases of prize; or unless suits are brought in admiralty under the law of nations, on the instance side of the court." (citations omitted). *United States v. New Bedford*, 27 F.Cas. 91, 111 (C.C.D. Mass. 1847) (No. 15, 867).

259. Some of the prize cases presenting the grandest rhetoric about the place of the law of nations in American law are *The Amiable Isabella*, 19 U.S. (6 Wheat) 1 (1821); *The Apollon*, 22 U.S. (9 Wheat) 362 (1824); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290 (1900); *The Marianna Flora*, 24 U.S. (11 Wheat) 1 (1826); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Palmer v. United States*, 16 U.S. (3 Wheat) 610 (1818); *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827); *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808); and *Talbot v. Jansen*, 3 U.S. (3 Dallas) 133 (1795).

Those cases outside of the admiralty context which have discussed the role of customary international law in the domestic context have uniformly failed to apply it as a rule of decision. See, e.g., *United States v. Arjona*, 120 U.S. 479, 7 S. Ct. 628 (1887).

260. Henry Wheaton, *A Digest of the Law of Maritime Captures and Prizes*, 266 (1815). Under this rule, the prize court sits as an arbiter of customary international law, and it applies such law to the merits of the cases before it. However, the jurisdiction of such courts, as noted by Wheaton, is set by the municipal authority. Therefore, "[t]o contend that a violation of the law of nations will take away the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism." *Rose v. Himely*, 8 U.S. (4 Cranch) 241, 283 (1808) (Johnson, J., concurring). Contrast the Alien Tort Statute, discussed *supra* text, at notes 210-214.

Even in the prize context, however, the dictate of Congress is an overriding authority.²⁶¹

The *Paquete Habana*²⁶² is the quintessential example of the application of customary international law in American courts. The case involved the disposition of two Cuban fishing boats captured by an American blockading squadron off the coast of Cuba during the Spanish-American War. The owners of the fishing boats objected, claiming the vessels' seizure was invalid under customary international law.

The Supreme Court, sitting as a prize court, applied customary international law to determine the legality of the seizure,²⁶³ because "[b]y the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or not be, lawful prize."²⁶⁴ The Court's language is remarkable, both for the way in which it acknowledges the source of its law, and for the limitations it recognizes upon the application of that law:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, *and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations²⁶⁵

261. *Littlejohn & Co., Inc. v. United States*, 270 U.S. 215, 226-27, 46 S. Ct. 244, 245 (1926).

262. *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290 (1900). This case has been called "the leading case concerning incorporation of international law into United States domestic law." Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional*, 80 Nw. U. L. Rev. 321 (1985).

263. It has been argued by some commentators that the resort to customary international law to invalidate the seizure was an unnecessary exercise of judicial discretion; the officers making the seizure had clearly violated the terms of the Executive Order authorizing the blockade. See generally Glennon, *supra* note 262.

264. Wheaton, *supra* note 260, at 310.

265. *Id.* at 700. Interestingly enough, the Court cited *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139 (1894), as precedent for this assertion. This raises a problem insofar as *Hilton* dealt with a choice-of-law issue, namely the effect to be given foreign judgments, and not the application of customary international law as a controlling legal precept. One commentator has pointed out that, ironically, it may have been the great naturalist Justice Story, proponent of laws of nations derived from the laws of nature, who probably did more to exclude customary international law from American courtrooms than any other jurist:

In 1834, Story published his great work on Conflict of Laws. It destroyed at a stroke the entire underpinning of his natural law theory. It expressly rejected the notion of uniform natural law and "comity" as a reason for states to pay respect to the municipal laws of other states whose insight into eternal principles might not coincide with the views of the judge or legislator hearing a case. It replaced

The Court thus directly invoked the rule of customary international law to bind the Executive. In circumstances outside of the prize context, the result might have been different; the political question doctrine might have interposed itself as a bar to this decision, as it had in *Banco Nacional*. After all, what could implicate the President's "plenary" power over foreign affairs more than the naval capture of a foreign vessel while at war?

The Court, however, was very clear about the basis of its authority: "This rule of international law is one which *prize courts, administering the law of nations*, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter."²⁶⁶ Thus, in *Paquete Habana*, the substantive grant of admiralty law under Article III countered the presumption of deference accorded the Executive in the conduct of foreign affairs; there had been a "textual commitment," and the commitment in this case was to the Judiciary.

The dissent of Chief Justice Fuller, joined by Justices Harlan and McKenna, highlights another dynamic underlying the decision: may Executive action *alone* violate customary international law? The dissent began by recalling words uttered by Chief Justice Marshall addressing just such a violation of customary international law:

This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity and even of wisdom, is addressed to the judgement of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.²⁶⁷

the "law of nations" as a municipal law concept with choice of law theory. . . . The phrase "law of nations" dropped out of use except as an archaism of the sort some judges and publicists like to employ when clarity of expression is not their first priority. Increasingly, from about 1820 through the 1840s, it was replaced with regard to the law between states with the dualist-positivist phrase "international law."

Rubin, *supra* note 256, at 131.

266. *Paquete Habana*, 175 U.S. at 708, 20 S. Ct. at 302 (emphasis added).

267. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814), quoted in *Paquete Habana*, 175 U.S. at 715, 20 S. Ct. at 305 (Fuller, C.J., dissenting). In *Brown*, Justice Story disagreed heartily in dissent with the majority's view that "by virtue of the declaration of war, the executive would have a right to seize enemies' property which should actually come within our territory during the war." *Brown*, 12 U.S. at 151.

It is generally accepted that if the Executive acts with the support of Congress, he may violate customary international law, and if he acts against the wishes of Congress,

The dissent then observed that this prerogative of sovereignty lay within the legislative domain, not the executive or judicial: "Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as written."²⁶⁸ The dissent concluded by finding that the Congressional declaration of war had authorized the United States to seize the vessels, regardless of the strictures of customary international law.²⁶⁹

In *Alvarez-Machain*, Chief Justice Rehnquist cited two cases, *The Ship Richmond*²⁷⁰ and *The Merino*²⁷¹ to support his position,²⁷² asserting these cases held "that a seizure of a vessel in violation of international law does not affect the jurisdiction of a United States court to adjudicate rights in connection with the vessel."²⁷³ Justice Stevens, countering, quoted a lengthy passage from *The Apollon*,²⁷⁴ in which it was declared "[i]t would be monstrous to suppose that our (law enforcement) officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws."²⁷⁵ Both of these excerpts were given far greater breadth by the current Court than they warrant.

he may only rely upon his enumerated Article II powers, and not his "plenary" power over foreign affairs. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S. Ct. 2972 (1981). A problem arises, however, when the Executive acts without either Congressional approbation or disapproval. Even the dissent in *Paquete Habana* rejected the power of the Executive to unilaterally violate this rule of nations, but the underlying premise is that the admiralty grant provided the substance of that rule in the first place.

268. *Paquete Habana*, 175 U.S. at 716, 20 S. Ct. at 305 (Fuller, J., dissenting).

269. *Id.* at 720-21, 20 S. Ct. at 307. In many ways, this argument about the right to derogate from rules of customary international law were similar to those made in *Brown*, 12 U.S. 110, although in this case the majority and dissenting positions were reversed. In the admiralty context, customary international law is the controlling legal substrate, although it may be derogated from by act of Congress. If not, the Executive is bound. The argument in both these cases was *not* whether an Executive acting alone could violate customary international law, but rather to what extent a Congressional declaration of war could provide such authorization by modification of the admiralty rule.

270. 13 U.S. (9 Cranch) 102 (1815).

271. 22 U.S. (9 Wheat) 391 (1824).

272. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2196 n.15 (1992). Both of these cases were distinguished in *Cook v. United States*, 288 U.S. 102, 122, 53 S. Ct. 305, 312 (1933).

273. *Alvarez-Machain*, 112 S. Ct. at 2196 n.15.

274. 22 U.S. (9 Wheat) 362, 370-71 (1824).

275. *Alvarez-Machain*, 112 S. Ct. at 2201-02 (Stevens, J., dissenting) (quoting *The Apollon*, 22 U.S. 370-71 (emphasis added)). Justice Stevens added that "[t]he law of nations, as understood by Justice Story in 1824, has not changed." *Id.* at 2202. As the conclusion to this note will indicate, this statement is not true, and some of the blame for that may be attributable to Story himself. See *supra* note 265.

In *The Ship Richmond*,²⁷⁶ the issue was whether customary international law, specifically the law of the sea, would act to supervene a seizure made by a United States vessel in foreign waters. The Court, with Chief Justice Marshall setting out the rule, found that “[t]he seizure of an American vessel within the territorial jurisdiction of a foreign power is certainly an offense against that power, which must be adjusted between the two governments.”²⁷⁷ The issue was adjudged a political question, a matter for the political branches to resolve, and not a bar to the Court’s exercise of jurisdiction. It did not, however, stand for the proposition that a “violation of international law” was no bar to judicial process, but merely that Congress, by legislating an offense and prescribing its boundaries, had acted to legislatively modify the customary law of the sea.

In *The Apollon*, Justice Story was arbitrating not just any seizure, but the seizure of a French vessel in a port ruled by the King of Spain. Justice Story did not say that Congress *could* not authorize such a seizure, only that it had not done so in this instance. He believed “the arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations.”²⁷⁸

On their facts, these cases are not incongruous. The seizures complained of in *The Richmond* and *The Merino* were made on the high seas, and the objects of those seizures were American vessels with American owners. *The Apollon* involved the seizure of a foreign vessel in a foreign port. In *The Richmond* and *The Merino*, the Congressional statute was found to apply; in *The Apollon*, it was concluded that Congress had simply not intended to reach foreign vessels in foreign ports.²⁷⁹

The point is, however, that these cases all involved actions in the admiralty jurisdiction. This is the only arena, without exception, where customary international law has been applied by the United States Supreme Court. It is a substantive grant within the text of Article III, and it exists because of the particular need to conform American law

276. *The Ship Richmond*, 13 U.S. (9 Cranch) 102 (1815), was cited in *The Merino*, 22 U.S. (9 Wheat) 391, 399 (1824).

277. *The Ship Richmond*, 13 U.S. at 104.

278. *The Apollon*, 22 U.S. at 371.

279. Justice Story relied upon the rule of statutory construction, discussed earlier in this comment, at *supra* note 190, that “[i]t cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.” *Id.* at 371. Although this note suggests this rule of statutory construction serves a role in the separation of powers by avoiding potential conflicts between Congress and the Executive, it may in fact have evolved in the particular context of legislation affecting matters in admiralty. A court interpreting statutes within that particular context would probably want to conform their dictate to the comprehensive and universal law of the sea, insofar as that was possible.

to international practice which exists within the admiralty jurisdiction. The abduction of Dr. Alvarez does not fall within the admiralty jurisdiction. Therefore, lacking a textual basis, either Constitutional or Congressional in origin, with which to limit the Executive, the Court in *Alvarez-Machain* was forced to defer to the constitutional mandate assigning the Executive wide discretion in the conduct of foreign affairs.

V. CONCLUSION

This note has sought to explain why the Constitution, given its current reading, demanded the *Alvarez-Machain* decision. The ways in which the Supreme Court's options were narrowed by a strict construction of the constitutional text were described in an effort to make clear the dilemma facing the American legal establishment. The United States is a member of the community of nations; the future of the world lies in the development and interrelationship of that community,²⁸⁰ and that growth in turn depends upon universally accepted rules of public order. Decisions like *Alvarez-Machain* are destructive of that aspiration, but nonetheless valuable for the lessons they impart. The lesson to be learned here is that the Supreme Court's current view of the Constitution generally precludes judicial cognizance of customary international law.

The arguments presented have concentrated upon the Constitution as a document establishing a tripartite separation of powers, a trisected sovereignty being adjudged by the Founding Fathers to be the best way to prevent the centralization of power and the tyranny inevitably resulting from such an aggregation.²⁸¹ To be certain, the text of the document suggests the painstaking way in which, with an almost mechanical precision, the artifices of power were conceived, formulated, honed, and drafted by the Founding Fathers. They knew that liberty was not occasioned by chance, but could only be the result of deliberate effort and reflection. Out of that formative process came the separation of powers principle.

But in analyzing the edifices constructed by the Founding Fathers, the context in which the Constitution was composed should not be casually ignored. To simply rely upon the basic structure and text of the Constitution as a guide to its meaning is to ignore the influences which affected daily the Founding Fathers as they deliberated upon it.

280. "As the international system becomes more integrated, international law is likely to take on more of the characteristics of domestic law—concerned with many aspects of human activity, and sensitive to changes in institutions and values." Cyril E. Black & Richard Falk, *The Future of the International Legal Order: Retrospect and Prospect* 63 (1982).

281. *The Federalist* Nos. 47, 48 (James Madison), Nos. 78, 80 (Alexander Hamilton).

Yet, whether it be through design, accident, or the unfathomable natural selection of history, this is exactly what has occurred.²⁸²

The problem facing the Founding Fathers was one of configuration and apportionment, not one of origination. In considering the law of nations, the Founding Fathers decided to allocate its operation to the discretionary sphere of the Executive, this sphere marked by both the treaty power and the inherent powers of the Executive. This grant, however, was never intended to be so compartmentalized as to obviate judicial review.

No doubt the Founding Fathers would have viewed *Alvarez-Machain* in utter disbelief. To Alexander Hamilton, differences in the application of the law of nations raised federalism concerns, not separation of powers concerns.²⁸³ In 1793, Secretary of State Thomas Jefferson was concerned that the "sole arbiter of the line of conduct for the U.S. towards foreign nations" was turning out to be the Attorney General.²⁸⁴ The loquacious oratory of John Jay, charging the grand jury in the indictment of the pirate Gideon Henfield, leaves no doubt as to his perception of the law of nations' preeminent position among the laws of the United States.²⁸⁵

282. See *supra* text at note 221. The author wishes to recognize at this juncture that the arguments presented in this comment are to some extent the product of *post hoc* analysis of a jurisprudence marked by a seemingly perpetual state of flux, and therefore at best inconstant. The purpose of this note is to point out a problem, a problem which is made manifest by the *Alvarez-Machain* decision but has far deeper roots. A work describing comprehensively the evolution of the judicial conceptualization of the status of customary international law *qua* the law of the United States remains to be done. This note merely presents a current perspective, based upon a survey of the relevant jurisprudence.

283. "A distinction may perhaps be imagined, between cases arising upon treaties and the laws of nations, and those which may stand merely upon the footing of municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the states." The Federalist No. 80 (Alexander Hamilton). The basic problem encountered by Hamilton and other Federalists was that their assumptions were based upon the existence and perpetuation of a federal common law. "It is indubitable that the customary law of European nations is a part of the common law, and, by adoption, that of the United States." Letters of Camillus, No. 20 (quoted in Ziegler, *supra* note 245, at 6).

284. David R. Deener, *The United States Attorneys General and International Law*, 14 (1957). Jefferson's fears were somewhat quieted when the Supreme Court decided in *The Charming Betsy* that federal district courts could apply the law of nations. *The Charming Betsy* was a prize case, within the admiralty jurisdiction. *Id.* at 14.

285.

As to the laws of nations - they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.

Henfield's Case, 11 F.Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360).

The belief that the "law of nations" was an implied component of the Constitution was lost sometime in the century after the document was inscribed. Whatever the reason for this, the reality today is that the Supreme Court will generally not apply customary international law as a limitation upon the Executive Prerogative. The Court requires a positive expression of substantive law before it will act,²⁸⁶ an example of this being the only judicially recognized realm of a substantive federal "common law"—the admiralty jurisdiction.²⁸⁷

Given the extent of American involvement abroad, it would seem prudent to attempt to solve this problem in a way that would increase international confidence in the American legal system while not undermining American dignity and constitutional integrity. Most discussion surrounding the problem has involved a legislative extension of the Mansfield Amendment.²⁸⁸ This statute specifically prohibits the abduction of foreign subjects by federal agents in order to bring them to trial for narcotics trafficking.²⁸⁹ This statute would have applied to Dr. Alvarez had he been charged with smuggling drugs, and not kidnapping, murder, and racketeering. While this solution would seem adequate to overrule the result in *Alvarez-Machain*, the overarching problem of the Executive's freedom to violate norms of customary international law without fear of judicial redress remains.

To address this difficulty, it is likely that a constitutional amendment would be required to enact such a far-reaching alteration of the separation of powers equation. A Congressional statute seeking to accomplish

286. This result is of course mandated by the constitutional separation of powers, which demands that the Court not intrude into the Executive sphere unless serving a constitutionally ordained mandate of its own. See *supra* note 219.

287. Although the substantive law of admiralty is immediately derived from the ancestral courts of England, it is far more than merely "common law:"

That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world.

The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871).

288. 22 U.S.C. § 2291(c) (1988).

289. The Mansfield amendment originally read as follows: "Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotic control efforts." It was subsequently amended to cover interrogation of United States nationals, to provide for a waiver by the Secretary of State, and then to eliminate the Secretary's waiver. *Kidnapping Subjects Abroad*, *supra* note 4, at 18.

the same goal would likely find itself invalidated on just those grounds.²⁹⁰ An amendment, perhaps one based upon analogous elements drawn from the German Basic Law,²⁹¹ would have the effect of resetting the constitutional calculus by augmenting the constitutional duties of the Judiciary. It would provide violations of customary international law with what is at present currently unavailable—a judicial remedy.

There are certainly those who would decry such a step, finding in the wholesale and binding adoption of customary international law an enervation of the sovereign power of the United States, and a concomitant derogation from the principle of rule by the people *qua* sovereign.²⁹² These voices would have the Constitution considered as a solitary document, offering no limitations upon the sovereignty which it conceived save those which it alone provides. This is unfortunate, because in many ways the ardent spirit of the young Constitution derived from the inspired vision the Founding Fathers had of the United States as a new nation among the community of nations. If the United States is unable to

290. Note that this applies only to a unilateral attempt to deprive the Executive of its wide-ranging discretion in the area of foreign affairs. A legislative overruling of *Alvarez-Machain* would not implicate separation of powers concerns, given Congress's specific constitutional grant of power to "make Rules concerning Captures on Land and Water." U.S. Const., art. I, § 8, cl. 11.

291. Specifically, Articles 24 and 25 of the German Basic Law, which provide respectively for the German entry into a supranational security system, and more importantly Article 25, which reads as follows:

The general rules of public international law shall be an integral part of federal law. *They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.*

G.G. 25. "From the comparatist point of view, it is interesting to note that several constitutions of Member States of the European Community have similar supranational clauses . . ." Albrecht Weber, *The Supranationality Problem, in Rights, Institutions and Impact of International Law According to the German Basic Law 223, 227* (Ed. Starck, 1987).

292. Such concerns are, to some extent well-founded. Part of the risk any nation faces when it adopts the customary law of nations is the resultant erosion of its own, in all likelihood previously plenary, sovereign power. When the influence of political and economic ideologies are brought into the picture, the situation becomes miasmatic:

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 396, 430, 84 S. Ct. 923, 941 (1964). See also *The Antelope*, 23 U.S. (10 Wheat.) 66, 121 (1825) ("Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful").

accommodate itself to fundamental and internationally shared notions of community order, then the conceptualization of a rule of law, the penultimate articulation of the American "social contract," has been debased. Justice Stevens closed his dissent with a quote from the Complete Writings of Thomas Paine; the words seem fitting here as well: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates his duty he establishes a precedent that will reach himself."²⁹³

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293. *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2206 (1992) (Stevens, J., dissenting) (quoting 2 *The Complete Writings of Thomas Paine* 588 (1945)).