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# GOVERNMENT SANCTIONED ABDUCTIONS: UNITED STATES V. ALVAREZ-MACHAIN

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# GOVERNMENT SANCTIONED ABDUCTIONS: *UNITED STATES V. ALVAREZ-MACHAIN**

## I. INTRODUCTION

As a small jet flew over the moon drenched ocean, a young American businessman awoke from a drug-induced sleep only to be confronted by his foreign captors.[1] Blinking his eyes to regain his focus, the young man started to remember the events of that evening. He recalled walking along a quiet street in New York City, when he was startled by a strong arm around his neck and a simultaneous pinch on his left arm. As his body went limp, he was thrown into the back seat of a nearby dark colored sedan. But who are these people? thought the young man, as he refocused visually on his immediate surroundings and listened to the faint roar of jet engines. As he sought an answer, his mind immediately recalled his company's recent criminal difficulties in a foreign land. His suspicion that his abduction was connected in some way to that situation was confirmed when his captors started questioning him about those exact charges. He thought for a while of how difficult his predicament would be in the near future, but he found relief in the thought that the United States government would rescue him from the nightmare.

While the events portrayed above appear to be something out of a Tom Clancy novel,[2] the basis for such a scenario lies within a United States Supreme Court decision—a decision that could impact the United

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* 504 U.S. 655 (1992).

1. *See Bills To Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad 1985: Hearing on S. 1373, S. 1429, and S. 1508 Before the Subcomm. on Security and Terrorism of Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985) (statements of Abraham Sofaer, Legal Adviser of the State Department). Mr. Sofaer, in his testimony before the Senate Committee, used a similar hypothetical to support his position and asked the Committee the following question: "[H]ow would we feel if some foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia . . . because we refused through normal channels of international, legal communications, to extradite that individual." *Id.*

2. Thomas Clancy is an American author well-known for his intricate spy novels.

States' position in the international community from both the moral and legal perspectives.

In *United States v. Alvarez-Machain*,[3] the United States Supreme Court decided the issue of whether United States courts have jurisdiction over a criminal defendant who was forcibly abducted by surrogates of the U.S. government and brought to the United States from a nation with which the United States had an extradition treaty.[4] In deciding the case, the Supreme Court examined the related issues of whether the abduction was outside the terms of an extradition treaty between the United States and the foreign nation, and whether general principles of international law provided a basis for interpreting the extradition treaty to include implied terms prohibiting international abductions.[5]

In *Alvarez-Machain*, the Supreme Court held that the forcible abduction of the respondent did not violate the extradition treaty between the United States and Mexico and, therefore, did not prohibit the respondent's trial in this country for violations of U.S. criminal laws.[6] Moreover, the Court resolved that neither the language nor the history of negotiations and practice under the extradition treaty supported the assertion that it prohibited abductions by the signatories.[7] The Court further concluded that it could not imply in the extradition treaty a term prohibiting international abductions.[8] While the Court conceded that the abduction of the respondent was "shocking" and a possible violation of principles of general international law, it determined that the final decision of whether the respondent should be returned to Mexico was a matter best left to the Executive Branch of the United States government.[9]

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3. 504 U.S. 655 (1992).

4. *Id.* at 657.

5. *Id.* at 655.

6. *Id.* at 669-70. The Court reversed the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), and remanded for further proceedings. *Id.* at 670.

7. *Id.* at 665. The Court noted that "[t]he 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 an such abduction occurs." *Id.* at 663.

8. *Id.* at 668-69. The Court stated that "to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice." *Id.*

9. *Id.* at 669. The Court conceded that "[the] respondent and his amici may be correct that respondent's abduction was 'shocking,' Tr. Oral Arg. 40, and that it may be in violation of general international law principles." *Id.*

This comment examines the case law relied upon by the majority of the Court to support the decision that the abduction of a foreign national from his home country does not violate the individual's right to due process under the United States Constitution. It also analyzes the Supreme Court's reasoning that such abductions do not violate the terms and conditions of an existing extradition treaty. Finally, this comment analyzes the *Alvarez-Machain* decision in terms of the underlying policy issues the Supreme Court addresses, and how the decision could, as previously stated, weaken the United States' legal and moral standing in future international legal challenges.

## II. THE FACTS

On February 7, 1985, Special Agent Enrique Camarena-Salazar of the United States Drug Enforcement Agency (D.E.A.) was abducted outside of the American Consulate in Guadalajara, Jalisco, Mexico.[10] Approximately one month later, Camarena-Salazar's mutilated body was discovered outside Guadalajara along with the body of Alfredo Zavala-Avelar, a Mexican pilot who assisted Camarena-Salazar in his assignment to locate marijuana plantations.[11] After an extensive D.E.A. investigation code named "Operation Leyenda,"[12] the United States government secured the indictment of twenty-two persons charged with various crimes in connection with the murders of Camarena-Salazar and Zavala-Avelar.[13]

Dr. Humberto Alvarez-Machain, a Mexican national who practiced obstetrics and gynecology in Guadalajara, Mexico, was one of the twenty-two persons indicted in connection with the murders.[14] The doctor was

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10. United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd*, 504 U.S. 655 (1992).

11. *Id.* at 602.

12. *Id.* at 601.

13. *Id.* Three of the twenty-two persons indicted were brought before the district court by means of forcible abduction from Mexico. *Id.* at 602.

14. *Id.* Dr. Alvarez-Machain was charged in a superseding indictment, returned on January 31, 1990, with conspiracy to commit and committing violent acts in furtherance of an enterprise engaged in racketeering activity under 18 U.S.C. § 1959 (1994); conspiracy to kidnap a federal agent under 18 U.S.C. §§ 1201(a)(5), (c) (1994); kidnap of a federal agent under 18 U.S.C. § 1201(a)(5) (1994); and felony murder of a federal agent under 18 U.S.C. §§ 1111(a), 1114 (1994). *Id.* at 601 n.1.

accused of administering life-sustaining drugs to Camarena-Salazar during his interrogation and related torture by Mexican drug lords.[15]

Beginning in late 1989, the D.E.A. tried unsuccessfully to secure Dr. Alvarez-Machain's presence in the United States through informal discussions with representatives of the Mexican Federal Judicial Police (MFJP).[16] During this same period, the D.E.A. advised Garate, an informant, to convey to his contacts in Mexico that the D.E.A. would pay $50,000 for the delivery of Dr. Alvarez-Machain to the United States.[17] In subsequent conversations with the D.E.A., Garate informed agency personnel that his contacts could successfully apprehend the doctor and deliver him to the United States.[18]

On April 2, 1990, five or six armed men, one of whom flashed a Mexican federal police badge, burst into the office of Dr. Alvarez-Machain.[19] The doctor was abducted and placed on a twin engine airplane that transported him to El Paso, Texas, where he was immediately arrested by D.E.A. agents.[20] The D.E.A. subsequently paid a partial reward of $20,000 to the abductors and also assisted their families in relocating from Mexico to the United States.[21]

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15. *Alvarez-Machain*, 504 U.S. at 657 (1992).

16. *See Caro-Quintero*, 745 F. Supp. at 602-03. The attempts were started in December 1989, when MFJP Commandante Jorge Castillo del Rey, through D.E.A. informant Garate, sought a meeting with the D.E.A. to discuss the possible exchange of a Mexican national suspected of involvement in the murder of Camarena-Salazar for Isaac Naredo Moreno. *Id.* at 602. Moreno was residing in the United States and was wanted by Mexico's Attorney General in connection with the theft of large sums of money from Mexican politicians. *Id.* In a subsequent meeting with the D.E.A., Castillo del Rey agreed to deliver Dr. Alvarez-Machain to the United States in exchange for the United States' promise to determine Moreno's immigration status and begin deportation proceedings against him if he was determined to be deportable. *Id.* Shortly thereafter, D.E.A. informant Garate advised the D.E.A. that the Mexican officials would require $50,000 in advance to cover the expense of transporting Dr. Alvarez-Machain to the United States. *Id.* The D.E.A.'s refusal to front the money for the operation resulted in the undoing of the agreement. *Id.*

17. *Id.* at 603.

18. *Id.* A D.E.A. agent testified that the abduction and the final terms of the abduction had been approved by the D.E.A. in Washington, D.C., and that he believed the United States Attorney General's Office had also been consulted. *Id.*

19. *Id.*

20. *Id.* It was alleged that the D.E.A. actually participated in the related activities in Mexico; however, this allegation was denied by the D.E.A. agent who headed-up the investigation. *Id.*

21. *Id.*

Reacting to the abduction, the Mexican government presented a diplomatic note to the United States government requesting a detailed report on the possible participation by the United States in the abduction of Dr. Alvarez-Machain.[22] Subsequently, a second diplomatic note was transmitted to the U.S. government by the Mexican government. It contained the following statement:

> The Government of Mexico considers that the kidnapping of Dr. Alvarez-Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries.[23]

Finally, the Mexican government sent a third diplomatic note requesting the arrest and extradition of a D.E.A. informant and the D.E.A. agent-in-charge of the Camarena-Salazar murder investigation, both of whom had been charged in Mexico with crimes relating to the abduction of Dr. Alvarez-Machain.[24] The United States government ignored the request and moved to try the doctor on a number of charges: conspiracy to commit and committing violent acts in furtherance of an enterprise engaged in racketeering activity;[25] conspiracy to kidnap a federal agent;[26] kidnapping of a federal agent;[27] and felony murder of a federal agent.[28]

## III. ON THE ROAD TO THE U.S. SUPREME COURT: A JOURNEY THROUGH THE NINTH CIRCUIT

In *United States v. Caro-Quintero*,[29] Dr. Alvarez-Machain sought to

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22. *Id.* at 604 n.9. On May 20, 1990, the district court ordered the government to submit to the court "'any documents indicating that the government of Mexico has filed an official protest regarding the abduction of the defendant Machain with the United States government' as well as translated transcriptions of any such documents." *Id.* The diplomatic note was submitted by the government pursuant to the court's order. *Id.*

23. *Id.* The note demanded that Dr. Alvarez-Machain be returned to Mexico. *Id.*

24. *Id.*

25. 18 U.S.C. § 1959 (1994).

26. 18 U.S.C. §§ 1201(a)(5), (c) (1994).

27. 18 U.S.C. § 1201(a)(5) (1994).

28. 18 U.S.C. §§ 1111(a), 1114 (1994).

29. 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-

have the indictment against him dismissed. He argued that the District Court for the Central District of California did not have jurisdiction over his person and that the manner in which his physical presence was secured constituted outrageous government conduct.[30] The district court examined four theories asserted by the defendant as bases for relief.[31] First, the defendant claimed that he was deprived due process of law guaranteed by the Fifth Amendment to the United States Constitution.[32] Second, he argued that his presence in this country was obtained by means that violated the existing extradition treaty between the United States and Mexico.[33] Third, the defendant asserted that his presence in the United States was obtained by means that violated the terms of the Charters of the United Nations and the Organization of American States.[34] Finally, the defendant argued that the court should dismiss the indictment as an exercise of the court's supervisory power.[35]

The district court dismissed the defendant's due process claim noting that the defendant's allegations of physical mistreatment at the hands of United States representatives, even if true, did not rise to a due process violation warranting a dismissal of the indictment.[36] However, the district court held that the United States government violated the extradition treaty between the United States and Mexico when it participated in the abduction of Dr. Alvarez-Machain from Mexico.[37] Accordingly, the court concluded that it lacked jurisdiction to try the defendant and ordered the government to repatriate Dr. Alvarez-Machain to Mexico.[38]

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Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U.S. 655 (1992).

30. *Id.* at 601.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 605.

37. *Id.* at 614.

38. *Id.* The Court did not resolve the issues raised by Dr. Alvarez-Machain's claims based on the Charter of the United Nations and the Charter of the Organization of American States, and it did not address the court's supervisory power. *Id.* However, the court admonished the D.E.A. by citing the following warning made fifteen years prior by Judge Oakes in his concurring opinion in United States v. Lira, 515 F.2d 68 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).

> [W]e can reach a time when 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

The United States government appealed the district court's decision. While the appeal was pending, the Court of Appeals for the Ninth Circuit handed down its opinion in *United States v. Verdugo-Urquidez*.[39] As a result of its decision in *Verdugo*, the court of appeals affirmed the district court's decision in *Caro-Quintero* that it lacked jurisdiction over Dr. Alvarez-Machain.[40]

In *United States v. Verdugo-Urquidez*, the Court of Appeals for the Ninth Circuit addressed the same issues presented in *Caro-Quintero*: that is, whether a defendant has a valid defense against a United States court's jurisdiction where his presence before the court has been obtained by a government-sanctioned kidnaping in violation of an extradition treaty and where the violation has been officially protested by a party to the treaty.[41] The court determined that the facts of the case warranted an evidentiary hearing to determine if the defendant Verdugo had been kidnaped by the United States government.[42] The *Verdugo* court further determined that the very existence of an extradition treaty requires the signatories to abide by the terms of the treaty when seeking jurisdiction over a criminal defendant.[43] Moreover, the *Verdugo* court rejected the proposition that a country is free to invoke or ignore the terms of an extradition treaty at its own discretion.[44]

The court of appeals commented in *Verdugo* that the government's argument in favor of forcible abductions came as an abrupt change in policy after years of condemning the practice.[45] The court, somewhat suspicious of the government's motives, rejected its argument that because

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> our supervisory power. . . . To my mind the Government in its laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interest of the greater good of preserving respect for the law.

*Caro-Quintero*, 745 F. Supp. at 615 (quoting *Lira*, 515 F.2d at 73).

39. 939 F.2d 1341 (9th Cir. 1991), *vacated and remanded*, 505 U.S. 1201 (1992) (holding that the United States courts would not have jurisdiction over Verdugo if he had been kidnapped in violation of the extradition treaty with Mexico).

40. *Id.*

41. *Id.* at 1344.

42. *Id.* at 1359. The court remanded the case for a hearing to determine if the United States government had authorized or sponsored the abduction. *Id.* at 1362.

43. *Id.* at 1351.

44. *Id.* at 1350.

45. *Id.* at 1354.

the treaty did not expressly prohibit government-sanctioned abductions, such abductions were permissible.[46]

## IV. THE DAY OF RECKONING: A QUESTION OF ABDUCTION

The United States Supreme Court granted certiorari in the matter of *United States v. Alvarez-Machain*[47] to review both the decision of the district court that it lacked jurisdiction to try Dr. Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico, and the decision by the Court of Appeals for the Ninth Circuit affirming that decision.[48] The Supreme Court held that the forcible abduction of an individual does not violate the extradition treaty between the United States and Mexico.[49] Moreover, the Court opined that there was nothing in the extradition treaty that directly or implicitly banned forcible abductions by the U.S. government.[50] The Court noted that although it had not previously addressed the specific issues raised in Dr. Alvarez-Machain's case, it had decided cases involving violations of extradition treaties and proceedings against defendants brought before U.S. courts by means of forcible abduction.[51]

In developing its decision, the Supreme Court analyzed four principal cases that address the issues of whether an extradition treaty prohibits abduction by the contracting nations and whether general principles of international law provide a basis for interpreting a treaty to include implied terms prohibiting international abductions.[52]

In *United States v. Rauscher*,[53] the Court examined the issue of whether the Webster-Ashburton Treaty of 1842, which governed extradition between Great Britain and the United States, prohibited, under the doctrine of specialty, the prosecution of the defendant Rauscher for a crime other than the one for which he had been extradited.[54] The Court held that a defendant whose presence before a U.S. court was the result

46. *Id.*
47. 502 U.S. 1024 (1992).
48. *Id.* at 657-58.
49. *Id.* at 657.
50. *Id.* at 663, 668-69.
51. *Id.* at 659.
52. *Id.*
53. 119 U.S. 407 (1886).
54. *Id.* at 424.

of an extradition could only be tried for the crime that served as the basis for his or her extradition.[55]

William Rauscher, an American sailor, was indicted by the United States government for inflicting cruel and unusual punishment upon another sailor.[56] In actuality, Rauscher had murdered the sailor and sought asylum in Great Britain.[57] Under the terms of the Webster-Ashburton Treaty, Great Britain extradited the defendant to the United States on the charge of murder.[58] Once in the United States, Rauscher was charged not with murder but instead with the infliction of cruel and unusual punishment, an offense not specified in the treaty.[59]

The *Rauscher* Court concluded that the treaty required that both nations abide by its terms.[60] The Court stated that, even in the absence of express language limiting the power of a signatory nation to prosecute an extradited defendant for a crime other than the crime for which the defendant had been extradited, the treaty required good faith compliance with its scope and purpose.[61]

The *Alvarez-Machain* Court distinguished Dr. Alvarez-Machain's abduction from the facts of *Rauscher*.[62] The Court stated that Rauscher had been brought to the United States through the use of an extradition treaty and was not forcibly abducted, while Dr. Alvarez-Machain had been abducted without the invocation of such a treaty.[63]

## V. THE *KER-FRISBIE* DOCTRINE

In analyzing the issue of whether the extradition treaty between the U.S. and Mexico prohibited abductions, the *Alvarez-Machain* Court relied on its holding in *Ker v. Illinois*,[64] which the Court had decided nearly a century ago. The *Ker* decision and the Court's subsequent decision in *Frisbie v. Collins*[65] combine to form what is commonly referred to as the

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 421.
59. *Id.*
60. *Id.* at 421-22.
61. *Id.* at 422.
62. United States v. Alvarez-Machain, 504 U.S. 655, 660-61 (1992).
63. *Id.* at 660.
64. *Id.* at 655 (citing Ker v. Illinois, 119 U.S. 436 (1886)).
65. 342 U.S. 519 (1952).

*Ker-Frisbie* doctrine.[66] Under this doctrine, a court's power to try an individual for a crime is not impaired by the fact that the person had been brought within the court's jurisdiction by forcible abduction.[67] Even though *Ker* dealt with an international abduction and *Frisbie* involved a domestic abduction, the decisions are combined because both hold that a person who has been abducted and brought before a United States court can be detained and subsequently tried.[68]

In *Ker*, the Supreme Court held that a court's jurisdiction over a defendant was sustainable regardless of the method used to bring that individual within the jurisdiction of the court.[69] The case stemmed from the criminal activities of Frederick M. Ker, an American citizen.[70] Ker fled to Lima, Peru, after being charged with larceny by authorities of Cook County, Illinois.[71] Governor John Hamilton of Illinois made a written request to the United States Secretary of State that a warrant be issued seeking Ker's extradition from Peru.[72] The United States government issued the warrant and, pursuant to the extradition treaty between the United States and Peru, directed Henry Julian, a Pinkerton agent hired by the Chicago bank from which Ker had embezzled funds, to receive the defendant from the Peruvian authorities upon a charge of larceny.[73]

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66. United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990), *aff'd sub nom.*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (per curiam), *rev'd*, 504 U.S. 655 (1992).

67. *Id.* at 605.

68. *See supra* notes 63-64.

69. *Ker*, 119 U.S. 436, 444 (1886). In *Ker*, the Court stated that

> [t]he question of how far [the defendant's] forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the state court, for the offense now charged upon him, is one which we do not feel called upon to decide; for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.

*Id.* at 444.

70. *Id.* at 437.

71. *Id.* at 438.

72. *Id.*

73. *Id.*

Instead of presenting the necessary papers to the Peruvian authorities or making any demand upon the Peruvian government to surrender Ker, Julian forcibly abducted Ker from Peru and placed him in confinement aboard a United States vessel bound for Honolulu.[74] Ker was subsequently transferred to another vessel that eventually arrived in California.[75] Once in California, Ker was turned over to an agent of the State of Illinois who transported him back to Cook County, Illinois, where he was ultimately tried and convicted for embezzlement.[76]

Ker made three arguments before the Supreme Court, two of which dealt substantively with the legality of his abduction from Peru.[77] First, he argued that his arrest in and subsequent removal from Peru, and his delivery to the authorities in Cook County, denied him due process of law.[78] The Court dismissed Ker's argument deciding that his due process guarantees had not been deprived by his abduction.[79] The Court stated that Ker was not entitled to say he should not be tried at all for the crime charged in the indictment simply because of the irregularities in the manner in which he was brought before the trial court.[80]

Ker's main argument was that by virtue of the extradition treaty between the United States and Peru, he acquired a positive right that shielded him from being forcibly removed from Peru without the United States' complying with the provisions of the treaty.[81] The Court rejected

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 439. Ker's third argument concerned the proceedings between the authorities of the state of Illinois and the state of California relating to the timing of the issuance of the warrant and the defendant's presence in the state of California. *Id.* at 440.

78. *Id.*

79. *Id*

80. *Id.* The *Ker* Court went on to state that a defendant

> may be arrested for a very heinous offense by a person without any warrant, or without any previous complaint, and brought before a proper officer, and this may be in some sense said to be 'without due process of law.' But it would hardly be claimed that, after the case had been investigated and the defendant held by the proper authorities to answer for the crime, he could plead that he was first arrested 'without due process of law.' So here, when found within the jurisdiction of the State of Illinois, and liable to answer for a crime against the laws of that state, unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision.

*Id.*

81. *Id.* at 441. Ker claimed that he acquired by his residence in Peru a right of asylum

Ker's argument, finding no language in the treaty between the two countries that said that an individual fleeing punishment becomes entitled to asylum in the country to which he or she has fled.[82] Moreover, the Court noted that because the agent who seized Ker did not act or profess to act under the terms of the treaty, the treaty was not operable.[83] Ker's abduction was viewed by the Court as a clear case of kidnapping within Peru without any pretext of authority under the treaty or by the government of the United States.[84]

In *Frisbie v. Collins*,[85] the Supreme Court applied its earlier ruling in *Ker* and held that a court's jurisdiction over a defendant is not jeopardized by the fact that he or she is brought before the court by means of a forcible abduction.[86] The defendant in *Frisbie* had been kidnapped in Chicago, Illinois, by Michigan police officers and brought before a Michigan court.[87] The Court rejected the defendant's argument that he should be released as a result of the forcible manner in which the Michigan court gained jurisdiction over him.[88] In its opinion, the Court made the following statement:

> This court has never departed from the rule announced in [*Ker*] that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised 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.[89]

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and a right not to be harassed for the crime he committed in Illinois. *Id.*

82. *Id.* at 442.

83. *Id.* at 443.

84. *Id.*

85. 342 U.S. 519 (1952).

86. *Id.* at 522.

87. *Id.* at 522 n.5.

88. *Id.*

89. *Id.* at 522.

The Court of Appeals for the Second Circuit created an exception to the *Ker-Frisbie* doctrine in *United States v. Toscanino*.[90] In *Toscanino*, an Italian citizen was abducted from his home in Uruguay and brought to the United States, where he was charged with conspiracy to import narcotics into the United States.[91] Toscanino's principal argument was that the proceedings against him were void because his presence within the territorial jurisdiction of the court had been illegally obtained.[92]

In its decision, the *Toscanino* court noted that it was faced with two conflicting concepts of due process.[93] The first being the restrictive view of the *Ker-Frisbie* doctrine, and the other being the more expanded and enlightened interpretation of due process, declared in the more recent decisions of the U.S. Supreme Court.[94] The court decided that the *Ker-Frisbie* version of due process must yield to the more enlightened version, which required a court to dispossess itself of jurisdiction over a defendant where such jurisdiction was acquired as "a result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[95] The *Toscanino* court suggested that the principles behind the exclusionary rule should be applied to persons as well as evidence.[96] In making this suggestion, the court observed that

> [w]here suppression of evidence will not suffice . . . we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.[97]

The Second Circuit's decision in *Toscanino* not only extended the exclusionary rule, but also the federal courts' power to refuse jurisdiction

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90. 500 F.2d 267 (2d Cir. 1974).

91. *Id.* at 268.

92. *Id.* at 269. The United States government never made a formal or informal request for the extradition of Toscanino. Moreover, the Uruguayan government claimed that it had no prior knowledge of the abduction and never consented to such an action. *Id.* at 270.

93. *Id.* at 275.

94. *See id.*

95. *Id.*

96. *Id.*

97. *Id.*

in civil cases where a party's presence in a jurisdiction was secured by force or fraud.[98] The *Toscanino* court also viewed the government's action as being subject to the court's supervisory power.[99] Under its supervisory power, the court could apply the *McNabb-Mallory* rule,[100] which allows courts to refuse to permit trials that are the outgrowth or fruit of the federal government's illegality because such trials would degrade the process of justice.[101] The *Toscanino* court stated that supervisory power should be used to prevent trial courts from becoming accomplices in illegal acts.[102]

The court of appeals remanded the case to the district court to determine whether the defendant's allegation of outrageous conduct on the part of the government could be substantiated.[103] It also directed the district court to divest itself of jurisdiction over the defendant if it found the government's conduct to be outrageous.[104]

While the Second Circuit provided an exception to the *Ker-Frisbie* doctrine in *Toscanino*, the same court later narrowed the exception in *United States ex rel. Lujan v. Gengler*.[105] In *Lujan*, the court held that an irregularity in the capture of a defendant does not in itself violate due process.[106] The Second Circuit decided that the government conduct complained of must rise to the level of shocking the conscience, as did the conduct alleged by the defendant in *Toscanino*.[107] Unlike the defendant in *Toscanino*, the defendant in *Lujan* never alleged torture; instead, he alleged the illegal seizure of his person.[108]

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98. *Id.*

99. *Id.* at 276.

100. *See* McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). The so-called *McNabb-Mallory* rule is an exclusionary rule developed by the U.S. Supreme Court and used "in the exercise of its supervisory authority over the administration of criminal justice in the federal courts" to render certain confessions inadmissible. *McNabb*, 318 U.S. at 341.

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

102. *Id.*

103. *Id.* at 275.

104. *Id.* at 281.

105. 510 F.2d 62 (2d Cir. 1975), *cert. denied*, 421 U.S. 1001 (1975).

106. *Id.* at 66. The defendant in *Lujan*, indicted on drug charges, was enticed by American agents from Argentina to Bolivia where he was arrested by Bolivian authorities on behalf of the United States. *Id.* at 63. He was later transported to the United States. *Id.*

107. *Id.* at 66.

108. *Id.*

The Second Circuit further limited the *Toscanino* ruling in *United States v. Lira.*[109] In that case the court held that a defendant alleging a violation of due process must not only show torture and abduction, but must also show that government agents were directly involved in the misconduct.[110] The narrower interpretation of the *Ker-Frisbie* doctrine as expressed in *Toscanino* has been recognized in several circuits.[111] However, other circuit courts have rejected the *Toscanino* exception as having "ambiguous constitutional origins"[112] and questioned its validity in light of the fact that the Supreme Court continued to reaffirm the *Ker-Frisbie* doctrine.[113]

Within the framework of the *Ker-Frisbie* doctrine, the majority of the Court in *Alvarez-Machain* compared the facts of Dr. Alvarez-Machain's case to those of *Ker.*[114] The Court stated that the only difference between the *Ker* and *Alvarez-Machain* cases was that *Ker* was decided based on the premise that the government was not involved in the kidnapping of the defendant.[115] Dr. Alvarez-Machain found that difference to be dispositive and argued that his prosecution, like the prosecution of the defendant in *Rauscher*, violated the implied terms of a valid extradition treaty.[116] The U.S. government argued that the *Rauscher* exception to the *Ker* rule only applied when the terms of an extradition treaty are invoked and a breach of those terms restricts the jurisdiction of the court.[117] The Court stated that before it could determine whether the abduction of Dr. Alvarez-Machain violated the U.S.-Mexico extradition treaty, it first had to determine whether the treaty in fact prohibited abductions.[118] The Court opined that if the treaty did not prohibit abductions, the *Ker* rule would

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109. 515 F.2d 68 (2d Cir. 1975), *cert denied*, 423 U.S. 847 (1975).

110. *Id.* at 71.

111. *See, e.g.*, United States v. Palaez, 930 F.2d 520, 525 (6th Cir. 1991) (distinguishing a defendant's allegations of mistreatment from the facts alleged in *Toscanino*); United States v. Yunis, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) (recognizing *Toscanino* as a limited exception to the *Ker-Frisbie* doctrine but deciding it did not apply to the facts of *Yunis*).

112. *See, e.g.*, Matta-Ballesteras v. Henman, 896 F.2d 255, 260-61 (7th Cir. 1990), *cert. denied*, 481 U.S. 878 (1990).

113. *See, e.g.*, United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984), *cert. denied sub nom.* Yamanis v. U.S., 471 U.S. 1100 (1985).

114. United States v. Alvarez-Machain, 504 U.S. 655, 660-61 (1992).

115. *Id.* at 662.

116. *Id.*

117. *Id.*

118. *Id.*

apply, and it would not have to inquire into how the defendant came before the Court.[119]

The Court construed the treaty by looking to its terms and noted that it said nothing about either country refraining from or the consequences for forcibly abducting citizens from the territory of the other country.[120] Moreover, the Court noted that the history of both the negotiations of and practice under the treaty also did not indicate that abductions outside the treaty constituted a violation of the treaty.[121]

After determining that the language of the treaty did not support the argument that the treaty prohibited abductions, the Court then went on to examine whether the treaty should be interpreted to include an implied term prohibiting the prosecution of a defendant whose presence before a U.S. court is obtained by means not established under the treaty.[122] Dr. Alvarez-Machain argued that there was no need to incorporate a prohibition against abductions into the treaty since international law clearly prohibits such acts;[123] however, the general principles of international law cited by the defendant failed to convince the Court that a term prohibiting international abduction should be implied in the treaty.[124] The Court stated that a decision based on an inference that the treaty and its terms prohibited all means of obtaining jurisdiction over an individual outside the terms of the treaty would exceed the bounds of established precedent and practice.[125] While the Court viewed the abduction as shocking, and possibly a violation of general international law principles, it concluded that the abduction was not a violation of the extradition treaty between the United States and Mexico and, applying the *Ker* rule, held that the Court had jurisdiction over the defendant.[126]

## VI. A DISSENT FROM A "MONSTROUS" DECISION

The dissenting Justices viewed the *Alvarez-Machain* case as unique and factually distinguishable from *Ker* and *Frisbie* because they involved

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119. *Id.*
120. *Id.* at 663.
121. *Id.* at 665.
122. *Id.* at 666-69.
123. *Id.* at 666.
124. *Id.* at 668-69.
125. *Id.*
126. *Id.* at 669-70.

neither an abduction by a private citizen or bounty hunter[127] nor the arrest of a fugitive in another state.[128] The dissenting Justices believed that, given the involvement of the U.S. government, the abduction of Dr. Alvarez-Machain could be seen as a violation of the territorial integrity of a country outside of the scope of the extradition treaty the country had signed with the United States.[129] The dissent opined that a fair reading of the U.S.-Mexico extradition treaty, in light of the Court's ruling in *United States v. Rauscher* and coupled with applicable principles of international law, leads to the inescapable conclusion that the district court had correctly interpreted the treaty as prohibiting jurisdiction over a defendant who had been forcibly abducted and brought to the United States.[130]

The dissent observed that the extradition treaty between the United States and Mexico was a comprehensive document designed to assist both countries in their joint efforts against crime.[131] To the dissenting Justices, the treaty appeared to have been fashioned to cover every aspect of extradition, including the delineation of procedural and evidentiary requirements for extradition.[132] In analyzing the terms of the treaty, the dissent noted that Article 9 of the treaty expressly states that neither contracting party is required to deliver up its own nationals to the other party, although it may chose to do so in its discretion.[133] In the event the nation decides not to deliver the national to the requesting nation, it is required under the treaty to "submit the case to its competent authorities for purposes of prosecution."[134]

The dissent rejected the government's argument that the treaty did not constitute the exclusive means by which the United States could obtain jurisdiction over Dr. Alvarez-Machain.[135] The dissenting Justices observed that reading the treaty in such a manner would transform its provisions

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127. *Id.* at 670.

128. *Id.*

129. *Id.*

130. *Id.* at 671.

131. *Id.* at 671-73. The dissent observed that the preamble to the treaty stated that both governments desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition." *Id.* at 672-73.

132. *Id.* at 671-73.

133. *Id.* at 673.

134. *Id.* The dissent observed that Mexico had already tried a number of the conspirators involved in the murder of the D.E.A. agent. *Id.* at 671. For instance, it was noted that Rafael Caro-Quintero, a co-conspirator of Dr. Alvarez-Machain, had already been sentenced and imprisoned to a term of forty years. *Id.* at 671 n.2.

135. *Id.* at 673.

into little more than verbiage because the purposes of its provisions would be frustrated if a requesting nation could simply kidnap an individual.[136] Finally, the dissent concluded that the provisions of the treaty only make sense when understood as requiring each signatory to comply with the procedures for securing jurisdiction over an individual detailed in the treaty.[137]

Justice Stevens, writing for the dissent, recognized and acknowledged that the treaty did not contain an express commitment on the part of either nation to refrain from forcibly abducting individuals in the territory of the other nation.[138] However, he criticized the majority for concluding that the parties silently reserved the right to exercise forcible abduction instead of following the legal procedures outlined in the treaty.[139] Justice Stevens found that the intent of the treaty plainly implied a mutual respect for the territorial integrity of the other nation.[140]

The dissenting opinion stressed that the extradition treaty construed in *Rauscher* was far less comprehensive than the extradition treaty between the United States and Mexico.[141] The dissent pointed out that, notwithstanding this fact, the Court in *Rauscher* found that the treaty constituted the exclusive means by which the United States could secure jurisdiction over the defendant within the territory of Great Britain.[142] This finding was based on the *Rauscher* Court's reasoning that it did not make sense to view a treaty that included specific requirements as allowing, at the same time, a requesting nation to circumvent the positive

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136. *Id.* In United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), the court of appeals stated that the provisions of the treaty "would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." *Id.* at 1349.

137. *Alvarez-Machain*, 504 U.S. at 673-74.

138. *Id.* at 674.

139. *Id.* at 674-75. The dissent observed that, based on the majority's reasoning, the United States could torture or execute people rather than attempt to extradite them since those options were not expressly prohibited by the treaty. *Id.* Moreover, the dissent remarked in a pointed fashion that "the Court had in effect written into Article 9 of the treaty a new provision which states: 'Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other.'" *Id.* at 675 n.11.

140. *Id.* at 675. The dissent noted that such an opinion is confirmed by the legal context in which the treaty was negotiated and the fact that the United States government never offered any evidence which supports the theory that a different understanding was reached with Mexico. *Id.* at 675 n.15.

141. *Id.* at 675-76.

142. *Id.* at 676-77.

requirements and just implications of the treaty.[143] To the dissenting Justices, the end result of such an interpretation of an extradition treaty was obviously contrary to both the intent of the parties and the purpose of the treaty.[144]

After examining the treaty itself, Justice Stevens then cited the uniform opinion that exists in the international community that the violation of a nation's territorial integrity by another nation should be condemned.[145] Justice Stevens quoted various commentators who view forcible abduction as nothing short of a gross violation of international law.[146] He compared the dissenters' objection to the forcible abduction of a foreign national to the shock expressed by Justice Story in *The Apollon*[147] at the United States' attempt to justify the seizure of a foreign vessel in a foreign port.

> [E]ven supposing, for a moment, that our laws had required an entry of the Apollon, in her transit, does it follow, that the power to arrest her was meant to be given, after she had passed into exclusive territory of a foreign nation? We think not. *It would be monstrous to* suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations.[148]

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143. *Id.* at 677.

144. *Id.* The dissent commented that an interpretation of the treaty in such a fashion could lead to a request for the extradition based on one of the stated offenses covered by the treaty, and then an attempt to try the person for political crimes which were not covered by the treaty. *Id.*

145. *Id.* at 678.

146. *Id.* at 680-81. The dissent quoted the following passage from a leading work on international law:

> It is . . . a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended.

*Id.* at 680 (quoting 1 OPPENHEIM'S INTERNATIONAL LAW 295 n.1 (H. Lauterpacht ed., 8th ed. 1955)).

147. 22 U.S. (1 Wheat.) 362 (1824).

148. *Alvarez-Machain*, 504 U.S. at 678-79 (quoting Justice Story's opinion in The Apollon, 22 U.S. 362, 370-71 (1824) (emphasis added)).

According to the dissent, the most serious flaw in the majority's opinion is its failure to differentiate between the actions of private citizens, which do not violate the terms of the treaty, and the conduct of the federal government, which constitutes a violation of international law.[149] The dissent supported this criticism with the opinion written by Justice Brandeis in *Cook v. United States*.[150] The *Cook* case involved the boarding of a British vessel by American prohibition agents eleven and one-half miles from the coast line of the United States. The agents had boarded the vessel to determine if it was illegally importing alcoholic beverages.[151] At the time of the boarding, a treaty existed between the United States and Great Britain which provided that the boarding rights of a contracting nation could not be exercised at a greater distance from the coast line than the vessel could travel in one hour.[152] The vessel that was boarded and seized could only travel ten miles per hour. Strictly construing the terms of the treaty, the Court held that the seizure violated the treaty because it occurred at a greater distance from the shore line (eleven and one half miles) than the distance travelled by the vessel in one hour (ten miles).[153] In his opinion, Justice Brandeis also rejected the U.S. government's argument that the illegality of the seizure was not material because, as in *Ker*, the jurisdiction of the court depended upon the defendant's presence before the court rather than whether the seizure violated the terms of the treaty.[154] Justice Brandeis conceded that such an argument would succeed only if the seizure were made by a private party, as opposed to the government.[155] The dissenting Justices in *Alvarez-Machain* also noted that the majority of the Court had used reasoning similar to that in *Ker* to explain why its holding in *Rauscher* did not apply.[156] In the *Ker* opinion, Justice Miller commented that the arresting officer was not acting on behalf of the government or under the extradition treaty when he kidnapped the defendant Ker.[157] The dissent stated that the majority's disregard for the clear distinction between acts of private

149. *Id.* at 682.
150. 288 U.S. 102 (1933).
151. *Alvarez-Machain*, 504 U.S. at 682.
152. *Id.* at 683 n.28.
153. *Id.* at 682-83.
154. *Id.* at 683.
155. *Id.*
156. *Id.* at 684-85.
157. *Id.*

citizens and those of the government led the majority to misinterpret prior case law.[158]

Finally, the dissent voiced its concern that the Executive Branch's interest in punishing Dr. Alvarez-Machain in a United States court was not a satisfactory reason for disregarding the rule of law.[159] The dissent noted that it is at the point of revenge that the Court should remember that its duty is to render judgment evenly and dispassionately according to the law.[160] Unlike the majority, the dissent expressed concern at how the international community would view the Court's decision in *Alvarez-Machain*. Since every nation that has an interest in maintaining the rule of law will be affected by the Court's decision in the case,[161] the dissent concluded that "most courts throughout the civilized world will be deeply disturbed by [this] monstrous decision."[162]

## VII. ANALYSIS AND CONCLUSION

In *United States v. Alvarez-Machain*, the Supreme Court held that a defendant who is forcibly abducted from his homeland is subject to the jurisdiction of United States courts as long as the abduction is not expressly prohibited by any existing extradition treaty between the two nations.[163] If an extradition treaty does not specifically prohibit abductions in its text, the *Ker* rule applies and a trial court is not required to determine how the defendant came within its jurisdiction.[164] The failure of the Supreme Court to consider the distinction between the actions of private citizens and those sanctioned by the U.S. government makes the decision in *Alvarez-Machain* a clear assault on the sovereignty of nations.[165] The decision permits the Executive Branch to commit

158. *See id.* at 685-86.

159. *Id.* at 686.

160. *Id.* at 687.

161. *Id.* at 687-88.

162. *Id.* at 687.

163. *Id.* at 655.

164. *Id.* at 662.

165. *See id.* at 680-81. In support of his conclusion that an abduction outside of the terms of an extradition treaty is a violation of international law, Justice Stevens cited the following comments of the chief reporter of the American Law Institute of Foreign Relations:

> When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation

kidnappings and related criminal acts to facilitate an abduction in a foreign nation when the applicable extradition treaty fails to expressly prohibit such abductions.[166] Moreover, by its decision in *Alvarez-Machain,* the Court allows the Executive Branch to usurp and to interfere with the legal system of the foreign nation where the original criminal act occurred, especially if the government is not satisfied with the progress or outcome of a case involving extraterritorial jurisdiction.[167]

While the nation was justifiably appalled by the brutal murder of an American agent, the desire to seek revenge must be tempered by the desire to adhere to the rule of law.[168] Quoting from Thomas Paine, Justice Stevens noted in his dissent that "avidity to punish is always dangerous to liberty" because it leads a nation "to stretch, to misinterpret, and to misapply even the best of laws."[169] The United States' good faith commitment to the concept and validity of extradition treaties, as well as the general principles of international law, will be seriously undermined as a result of this decision.[170]

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of the territorial integrity of another state; it eviscerates the extradition system. *Id.* at 681 (quoting Henkin, *A Decent Respect to the Opinions of Mankind*, 25 JOHN MARSHALL L.J. 215, 231 (1992) (citation omitted)).

166. *See id.* at 673-74.

167. *See id.* at 673-75.

168. *See id.* at 687.

169. *Id.* at 688 (quoting THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed. 1945)).

170. *See id.* at 687-88.