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Fighting the War on Drugs in the "New World Order": The Ker-Frisbie Doctrine As A Product of its Time

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NOTE

Fighting the War on Drugs in the "New World Order": The *Ker-Frisbie* Doctrine As A Product of its Time

ABSTRACT

This Note analyzes the United States policy of abducting fugitives from abroad to stand trial when an asylum nation refuses an extradition request. The United States has justified this so-called "snatch" authority under the century-old Ker-Frisbie *Doctrine. Pursuant to this doctrine, the Supreme Court has refused to examine the means by which a person has been brought before a court. In 1974, however, the United States Court of Appeals for the Second Circuit created a narrow exception that would bar jurisdiction if an accused proved acts of torture, but no defendant has ever met this standard.*

Since Ker *and* Frisbie *were decided, international and United States law have focused more on human rights and individual integrity and thus have antedated the* Ker-Frisbie *doctrine. Nevertheless, in light of an aggressive posture toward the war on drugs, neither the Bush Administration nor the Rehnquist Court currently seems willing to abandon the* Ker-Frisbie *doctrine.*

This Note concludes that the snatch policy may be a necessary tool in the war on drugs, but that a limitless Ker-Frisbie *doctrine fails to account for the increased sensitivity to human rights and individual integrity. The author proposes that meaningful due process limitations on the doctrine still would allow for a tough fight in the war on drugs, but would preserve the values underlying human rights and United States constitutional law.*

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I. INTRODUCTION

As the early 1990s finds the Soviet Union plagued by inner turmoil, the United States is emerging as the dominant international force. Without another superpower to counterbalance it in the foreign arena, the United States can exert great influence in leading the world into the twenty-first century. Recognizing this opportunity as Operation Desert Storm began in Iraq, President George Bush commented: "We have before us the opportunity to forge for ourselves and for future generations a new world order, a world where the rule of law, not the law of

the jungle, governs the conduct of nations."[1]

The policies of the United States will be the focus of world attention because of its leading role in this new world order. Also important in this scheme will be the means by which the United States carries out its policies. The behavior of the United States may determine whether it inspires the new world order to follow a rule of law or the law of the jungle.

The war on drugs presents the United States with a cruel dilemma in forging this new world order. In situations when a foreign government is unwilling or unable to extradite persons to the United States to stand trial, inaction by the United States leaves the drug dealers at large and even may foster the law of the jungle because drug cartels often influence government policy.[2] Alternatively, if the United States acts unilaterally and abducts drug dealers from within a foreign state's borders, world opinion may condemn the United States for following the laws of the jungle.[3]

Under the *Ker-Frisbie* doctrine, which is derived from two cases—one in 1886[4] and the other in 1952,[5] the Supreme Court has said that an illegal arrest, regardless of how it is carried out, does not void a subsequent conviction. Only the barest minimum standards of conduct must be met by United States officials for a court to acquire jurisdiction.[6]

This Note analyzes the current United States policy of abducting fugitives from abroad when other traditional methods fail. The Note examines the *Ker-Frisbie* doctrine with respect to developments in international law since 1886 and in light of the due process revolution since 1952. The *Ker-Frisbie* doctrine is a product of its time and needs to be

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1. *Transcript of the Comments by Bush on the Air Strikes Against the Iraqis,* N.Y. TIMES, Jan. 17, 1991, at A14.

2. *See* JAMES A. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY (1986); *see infra* notes 24-28 and accompanying text.

3. In Honduras, for example, the reaction to the United States kidnapping of drug king Juan Ramón Matta-Ballesteros, *see infra* note 22, was that the United States flagrantly disregarded provisions of the Honduran Constitution. Loren Jenkins, *Honduran Riot Poses Setback for U.S.*, WASH. POST, Apr. 10, 1988, at A24.

4. Ker v. Illinois, 119 U.S. 436 (1886).

5. Frisbie v. Collins, 342 U.S. 519 (1952).

6. *See, e.g.*, United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (defendant must establish government conduct "of a most shocking and outrageous character" to divest the court of jurisdiction); United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir.) (per curiam), *cert. denied*, 423 U.S. 985 (1975) (the defendant must make "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.").

brought into conformity with contemporary standards. Given the aggressiveness of the Bush Administration in fighting the war on drugs and the apparent willingness of the United States Supreme Court to allow this policy, this Note concludes that abandonment of the *Ker-Frisbie* doctrine is unlikely at present. The incorporation of due process notions, however, may prove an effective means by which to bring the war on drugs out from the jungle and into the realm of the rule of law.

II. LATIN AMERICAN INACTION INDUCING UNITED STATES ACTION: THE PROBLEM AND THE RESPONSE

A. *The Problem of Non-Cooperating Foreign Governments*

A major roadblock in the United States fight on the war on drugs has been foreign government reluctance to extradite drug traffickers who have been indicted in the United States.[7] Three main reasons explain this reluctance. First, many extradition treaties do not permit the asylum nation[8] to extradite its own nationals,[9] which is a category into which many drug traffickers fall. Second, the political climate in the foreign state might not tolerate formal extradition.[10] Third, and most troubling, the foreign government could be influenced by the traffickers, either by bribe or threat.[11]

The most common type of extradition treaty to which the United States is a party is one in which the surrender of nationals has been forbidden.[12] These treaties typically contain language such as "[n]either of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this Treaty."[13] At least one nation even

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7. Andrew B. Campbell, Note, *The* Ker-Frisbie *Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385, 430 (1990).

8. "Asylum nation" is used to designate the state in which the fugitive is residing. It does not mean necessarily that the nation has granted asylum status for the fugitive.

9. VED P. NANDA & M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 339 (1987).

10. Kim Murphy, *Extradition From Mexico: It's Tricky Going*, L.A. TIMES, Apr. 20, 1989, at I3.

11. INCIARDI, *supra* note 2, at 196.

12. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 435 (1975). These types of treaties are so numerous because the other signatory states have insisted upon the provision. Until recently, even the United States has refused to extradite its nationals unless the other signatory state explicitly agrees to extradite its nationals. *Id.*

13. Extradition Treaty, Apr. 17, 1900, U.S.-Chile, art. V, 32 Stat. 1850, 1853. While this language may seem discretionary, the Supreme Court has interpreted these treaties to bar extradition of nationals. Valentine v. United States *ex rel.* Neidecker, 299

has amended its constitution to forbid extradition of nationals.[14] The problem inherent in these treaties forbidding extradition is that drug traffickers can find absolute asylum in their home states.[15] As nationals of the state in which they operate, drug traffickers know that they will not be sent to the United States to stand trial.[16] Prosecution still may occur in their own state, but many governments do not have the willingness or ability to prosecute drug lords.[17] Even if the high profile traffick-

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U.S. 5, 10 (1936). For an example of an opposite type of treaty requiring extradition of nationals, see Extradition Treaty, Apr. 6, 1973, U.S.-Uru., art. 4, T.I.A.S. 10850 ("A requested Party shall not decline to extradite a person sought because such person is a national of the requested Party.").

14. Colombia's new constitution effective as of July 5, 1991, prohibits extradition. Douglas Farah, *Colombia's New Constitution Goes Into Effect*, WASH. POST, July 5, 1991, at A14. Following this lead, Bolivia suspended extradition for traffickers who turn themselves in. Michael Isikoff, *Bolivia Offers No-Extradition Deal to Traffickers*, WASH. POST, July 19, 1991, at A13.

15. The United Nations Division of Narcotic Drugs says that if a state cannot formally extradite a fugitive because the individual is a national or because of an absence of an extradition treaty, a last resort is to deport or expel the person to a state that will extradite. U.N. DIV. OF NARCOTIC DRUGS, EXTRADITION FOR DRUG-RELATED OFFENSES, at 67-68, U.N. Doc. ST/NAR/5, U.N. Sales No. E.85.XI.6 (1985). This resort assumes, however, that the requested state wants the fugitive to be prosecuted in another state. In situations in which the state would not want to extradite the fugitive, it most likely would also not find expulsion or deportation as viable alternatives. The United Nations Report also specifically denounces the doctrinal basis for the *Ker-Frisbie* doctrine, discussed *infra* at Section III. *Id.*

16. *See, e.g.*, Matta-Ballesteros v. Henman, 896 F.2d 255, 256 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990) ("He is a Honduran citizen and because Honduras does not extradite its own citizens, he believed that he had found a safe haven from the reach of United States law enforcement officials.").

17. In Colombia, for example, the drug cartels launched a self-proclaimed war on the government in retaliation for extraditing cartel leaders to the United States. As the violence increased and claimed the lives of many public servants, *see infra* notes 24-27 and accompanying text, the government lost its desire to extradite and began negotiating with the cartels. James Brooke, *Colombian Peace Pact Offers Leniency to Drug Traffickers*, N.Y. TIMES, Dec. 18, 1990, at A1. The resulting deal called for the drug traffickers to turn themselves in and to plead guilty to only one offense in exchange for a promise of nonextradition and a reduced sentence. Stan Yarbro, *Colombia Drug Cartel Leader Surrenders*, L.A. TIMES, Dec. 19, 1990, A8.

Pursuant to this deal and just hours after Colombia constitutionally banned extradition, Medellín Cartel leader Pablo Escobar turned himself in to the government. In anticipation of this incarceration, he constructed his own prison on a plush 10-acre lot in his home town of Envigado. The prison reportedly comes complete with guards chosen by Escobar. Douglas Farah, *Sweet Surrender in Colombia*, WASH. POST, June 10, 1991, at A1; Douglas Farah, *Top Colombian Trafficker Surrenders*, WASH. POST, June 20, 1991, at A1.

ers are jailed, the punishment may result in little more than an inconvenience.[18]

The second type of treaty prohibits extradition of nationals unless the executive branch deems the action to be appropriate.[19] These discretionary treaties often state that "[n]either Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall . . . have the power to deliver them up if, in its discretion, it be deemed proper to do so."[20] These treaties permit a government to refuse extradition for any reason.[21] Governments may refuse to extradite citizens for domestic political reasons. For example, if the fugitive is a popular national figure[22] or the public would be enraged if one of its citizens were sent abroad,[23] officials may be particularly unwilling to extradite.

Finally, governments may refuse to extradite fugitives because officials are either bribed or intimidated. In Colombia during a period of extradi-

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18. In the first month of imprisonment, Escobar received 208 visitors, including Envigado's mayor, a world-class soccer goalie, and at least 12 fugitives, one with 13 outstanding arrest warrants. Douglas Farah, *Colombian Justice Officials Resign After Privileges for Inmates Revealed*, WASH. POST, Aug. 17, 1991, at A16. Editorial, *A Rough Start in Colombia*, WASH. POST, Aug. 21, 1991, at A20. Worse yet, Escobar still seems to be controlling his hit squads and possibly other facets of the cartel. Douglas Farah, *Latest Colombian Killings Laid to Jailed Drug Czar*, WASH. POST, July 26, 1991, at A25.

19. BASSIOUNI, *supra* note 12, at 435.

20. Extradition Treaty, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5059.

21. One legitimate excuse is an exception for political offenses. In this respect, the United States, for example, has refused to extradite members of the Irish Republican Army to Great Britain because the United States claimed these persons were being prosecuted for political crimes. *See, e.g., In re* Doherty, 599 F. Supp. 270 (S.D.N.Y. 1984).

22. Because politically popular figures are rarely extradited, examples of domestic reactions are scarce. One possible illustration may be the aftermath of the abduction of Juan Ramón Matta-Ballesteros. The United States did not formally extradite Matta under the United States-Honduras extradition treaty. Instead, Matta was taken from his home by force and flown to the United States. In Honduras, which is typically a strong ally of the United States, the reportedly worst ever anti-American riots ensued. During the protests, the United States Consulate in Tegucigalpa was set afire, four people were killed and two were wounded. Two hundred anti-riot officers and firefighters were required to stop the violence and control the crowd of 1500 protestors. Interestingly, however, the Honduran government did not make any protest to the United States. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 446-48 (1990).

23. *See* United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990) (Mexican officials suggested an arrangement with the United States Drug Enforcement Agency to abduct a Mexican national be carried out "under the table" because the agreement would "upset" Mexican citizens).

tions of drug traffickers to the United States, one cartel bribed at least four hundred judges,[24] executed nearly half of the Colombian Supreme Court,[25] assassinated three leading presidential candidates in a nine-month period,[26] and murdered at least twenty-one journalists.[27]

By virtue of a restrictive extradition treaty or through intimidation, fugitives in many Latin American states can remain virtually free of the threat of ever having to face criminal penalties for their drug-related activities. Recognizing this situation, *El Tiempo*, a Bogotá Colombian newspaper, ran an editorial in 1987 aptly entitled "Losing Ground." It stated:

> The country's legal structure is not enough to counter such a powerful empire, which can buy off anyone. . . . Our fragile judicial system has allowed drug-trafficking organizations to consolidate themselves very well. The extradition treaty—the only instrument the chieftains fear—has failed; a minister, judges, and journalists have been murdered; the justice sector is terrorized; the authorities have been infiltrated; and the country remains indifferent. Thus, the drug traffickers are guaranteed a sanctuary without risks.[28]

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24. INCIARDI, *supra* note 2, at 195. An example of this kind of influence is the case of Medellín Drug Cartel leader Jorge Ochoa. After being arrested at a roadblock, Ochoa was to be extradited to the United States. A judge, who previously vacated charges against Medellín leader Pablo Escobar, signed an order to release Ochoa. The prison warden disobeyed orders from his superiors and released Ochoa. He walked out of prison and into a waiting airplane. The suspicion in Colombia and the United States was that Ochoa was bought out of prison. ELAINE SHANNON, DESPERADOS: LATIN DRUG LORDS, U.S. LAWMEN, AND THE WAR AMERICA CAN'T WIN 412-13 (1988).

In 1989, Colombia saw the murder of at least 32 judges and attorneys and the resignation under death threats or intimidation of no less than 13 others. LAWYERS COMMITTEE FOR HUMAN RIGHTS, IN DEFENSE OF RIGHTS: ATTACKS ON LAWYERS AND JUDGES IN 1989 43-52 (1990) (detailing the circumstances of each of the individual attacks or threats).

25. Campbell, *supra* note 7, at 396. Eleven of the 24 members of Colombia's Supreme Court were murdered for refusing to find unconstitutional that state's extradition treaty with the United States. After the court was reformed, it was deadlocked 12-12 on the constitutionality of the extradition treaty. In an effort to break the tie, the court searched for another judge. Three candidates refused the job and a fourth accepted only after trying to beg his way out of the job. The court then struck down the law. *Id.* at 396-97.

26. John E. Lennon, *Blood and Ballots in Colombia*, WASH. POST, May 27, 1990, at B5.

27. Nick Fillmore, *Journalists on the Firing Line*, TORONTO STAR, Apr. 26, 1991, at A23.

28. Editorial, *Losing Ground*, EL TIEMPO, Nov. 8, 1987, *reprinted in* SHANNON, *supra* note 24, at 411.

B. *The United States Response: The Snatch Policy*

In response to safe havens created by drug traffickers and other terrorists, the Federal Bureau of Investigation (FBI) requested the authority to unilaterally abduct fugitives from foreign states.[29] In a secret Department of Justice opinion dated June 21, 1989 (1989 Opinion),[30] the Department expressed the belief that the President has the legal authority to order the apprehension of fugitives abroad, without permission from the foreign states, and to bring them to the United States for trial.[31] The 1989 Opinion is a response to increasing activities of drug traffickers and terrorists that foreign governments are unable or unwilling to prosecute.[32] The 1989 Opinion concludes that the President and the Attorney General have inherent executive power to order, without the consent of a foreign government, an extraterritorial abduction of a fugitive in that nation.[33]

Although the Bush Administration quickly indicated that this "snatch authority," as some Bush Administration officials have dubbed it,[34] would be used only after an interagency review and presidential approval,[35] the 1989 Opinion signals a significant change in policy for the United States. The Department of Justice previously had produced an opinion on the same issue in 1980 (1980 Opinion) when the FBI pro-

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29. Ronald J. Ostrow, *Ruling on FBI Seizures Defended In Congress*, L.A. TIMES, Nov. 9, 1989, at A18.

30. The Department of Justice has not released the opinion entitled *Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities* because it claims that the opinion is the product of attorney-client privilege between the President and the State Department. Michael R. Pontoni, Comment, *Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives*, 21 CAL. W. INT'L L.J. 215, 215 (1990-91). Though refusing a request to release the opinion to the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee for two years, the Department of Justice, facing a subpoena, agreed to allow several members of the subcommittee to review the document. *Justice Dept. Avoids Collision With House Over FBI Opinion*, WASH. POST, Aug. 1, 1991, at A13. The *Washington Post*, however, obtained a copy of the Opinion and published excerpts from it. Michael Isikoff, *U.S. "Power" on Abductions Detailed*, WASH. POST, Aug. 14, 1991, at A14.

31. Ronald J. Ostrow, *FBI Gets OK For Overseas Arrests*, L.A. TIMES, Oct. 13, 1989, at A1.

32. Isikoff, *supra* note 30, at A14.

33. *Id.*

34. Ostrow, *supra* note 31, at A1.

35. Ruth Marcus, *FBI Told It Can Seize Fugitives Abroad*, WASH. POST, Oct. 14, 1989, at A15.

posed the abduction of a fugitive financier from the Bahamas.[36] This 1980 Opinion advised against any abduction without the tacit approval of the asylum state.[37] If approval were received, then apprehension only should proceed "in the same manner as any professional arrest: with expedition, minimum restraint, and with full sensitivity to the fugitive's physical needs and constitutional rights."[38]

Assistant Attorney General William Barr, author of the 1989 Opinion, told a House Subcommittee that the 1980 Opinion was "fundamentally flawed."[39] The major problem with the earlier opinion, according to Barr, was that it viewed the United States legal authority as limited by the sovereignty of other states.[40] In short, Barr stated that the President may override customary international law,[41] and any restrictions imposed by this law should not restrict the exercise of the President's law enforcement power.[42] Even though the President may desire adherence to international law principles for political reasons, the 1989 Opinion permits extraterritorial fugitive abduction.

C. *The Snatch Policy and International Law*

The 1989 Opinion runs contrary to basic principles of international law. A fundamental tenet of international law is that one state unilaterally may not invade the sovereign territory of another state.[43] Abducting a person within the jurisdiction of another state, as the FBI now has

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36. 4B Op. Off. Legal Counsel 543 (1980). The target of the FBI operation was Robert L. Vesco. The Bahamas apparently refused a request from the United States to extradite Vesco to the United States to face multiple charges. He was accused of stealing hundreds of millions of dollars from mutual funds and secretly contributing $200,000 to the re-election campaign of Richard Nixon in 1972 in an effort to obstruct an investigation being conducted by the Securities and Exchange Commission. Ostrow, *supra* note 31, at A1.

37. 4B Op. Off. Legal Counsel at 556.

38. *Id.* at 556-57.

39. Ostrow, *supra* note 29, at A18; *see also* Isikoff, *supra* note 30, at A14 (1989 Opinion found the 1980 Opinion to be "erroneous").

40. Lowenfeld, *supra* note 22, at 485 (citing excerpts from Assistant Attorney General William Barr's prepared text before the subcommittee).

41. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986).

42. Lowenfeld, *supra* note 22, at 486 (citing excerpts from Assistant Attorney General William Barr's prepared text before the subcommittee).

43. Abraham Abramovsky & Steven J. Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?* 57 OR. L. REV. 51, 63 (1977).

authority to do, is contrary to this principle of national sovereignty.[44] For this reason, the practice has received virtually universal criticism.[45]

The United States has tried to justify its position by characterizing the abductions as self-defense. Testifying before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, Abraham Sofaer, Legal Adviser of the State Department, said the activities of the drug traffickers may be approaching the point at which the United States has a right to self-defense.[46] Although acknowledging that abductions would violate the principle of "territorial integrity," Sofaer said: "we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law."[47] Concluding, Sofaer said that "where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense."[48]

In the context of drug trafficking, the self-defense rationale is tenuous at best. Article 51 of the United Nations Charter limits the right of self-defense to responsive action against an armed attack and, until the Security Council acts, to maintenance of international peace and security.[49] Destructive as the drug lords may be in the United States, they do not pass the article 51 test.[50] Despite concerns that drug traffickers are above the law, the snatch policy, nonetheless, is a violation of international law.

D. *The Snatch Authority and the United States Constitution*

The international drug trafficking problem, thus, has created a dilemma in law enforcement. In situations in which drug traffickers sufficiently have corrupted or intimidated their government, they can rest free from the fear of being brought to justice in their home nation or in the state in which their narcotics are exported. If another state such as the

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44. Lowenfeld, *supra* note 22, at 451 ("It is evident that acting under authority of the United States on foreign soil contrary to the will of the foreign state is wrong under international law.").

45. *See, e.g.*, M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 195 (1987) (most scholarly works have opposed this practice); *but see, e.g.*, Campbell, *supra* note 7, at 430 (commentators' criticisms against abduction "illustrate the dichotomy between the way things should be and the way things are.").

46. Lowenfeld, *supra* note 22, at 487 (citing excerpts from Sofaer's prepared text before the subcommittee).

47. *Id.*

48. *Id.*

49. U.N. CHARTER art. 51.

50. Lowenfeld, *supra* note 22, at 488 n.222.

United States attempts to act against these people, however, this state also violates international law. The problem then becomes how to strike the balance between these competing concerns, who should strike this balance, and under what restraints this practice can be carried out.

In the United States, the decision of how to weigh international law when devising foreign policy rests with the political branches of government.[51] The President and Congress have the power to authorize extraterritorial abductions, provided they act within their constitutional authority.[52] The Constitution does not forbid the President or Congress from violating international law.[53] Consequently, the judicial branch must enforce decisions of the political branches that violate international law when these authorizations are within the bounds of the Constitution.[54]

Although the snatch policy may violate international law, nonetheless, it is valid under United States law to the extent it does not violate the Constitution. Therefore, the issue then becomes what restraints the Constitution places on the exercise of the snatch authority.

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51. *See generally*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 205-24 (1972); Pontoni, *supra* note 30, at 219.

52. Pontoni, *supra* note 30, at 223. The authority is usually exercised by the President as the "sole organ of the nation in its external relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). A prerequisite for presidential assertion of United States criminal laws abroad, however, is congressional authorization. Pontoni, *supra* note 30, at 223. Congress, thus, can limit the exercise of the President's discretion in this area with legislation. Title 28 of the United States Code empowers the FBI to "detect and prosecute crimes against the United States." 28 U.S.C. § 533(1) (1989). Judicial interpretations of this authority have turned on the matter the FBI is investigating. Pontoni, *supra* note 30, at 220. Following Supreme Court precedent, the authority conferred by the 1989 Opinion seems to be within the legitimately conferred power of the FBI. *See* Pontoni, *supra* note 30, at 220-24 (analyzing precedents for congressional authority for the FBI to perform abductions abroad).

Congress, additionally, has authorized DEA personnel to be present at and to assist in arrests made abroad by the foreign state's law enforcement officials so long as the United States ambassador in that state authorizes the DEA participation. 22 U.S.C. § 2291(c)(1), (2) (1988); *see also* Campbell, *supra* note 7, at 422-28 (history surrounding the Mansfield Amendment, which confers this authority).

53. HENKIN, *supra* note 51, at 221-22.

54. *Id.* at 222. In this regard, Chief Justice John Marshall said in an early landmark case that "usage [of the law of nations] is a guide which the sovereign follows or abandons at his will." Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814).

III. THE *KER-FRISBIE* DOCTRINE: HISTORY AND PROSPECT

The United States Supreme Court consistently has found extraterritorial abductions to be constitutional. In a line of cases known as the *Ker-Frisbie* doctrine, the Court has held that the means by which a person is brought before a court are irrelevant when exerting jurisdiction over that person.[55] This section will analyze the development of the *Ker-Frisbee* doctrine and will examine how it comports with the ideals of the 1990s.

A. *The* Ker-Frisbie *Doctrinal Framework*

1. *Ker v. Illinois*

In 1886, the Supreme Court first decided the issue of extraterritorial abductions in *Ker v. Illinois*.[56] This case originated with a request from the governor of Illinois to the United States Secretary of State for the extradition of Frederick Ker from Peru.[57] The President of the United States directed one Henry Julian, a Pinkerton agent, to receive Ker from Peruvian authorities pursuant to the extradition treaty between the two states.[58] Julian arrived in Lima, Peru, with the necessary papers, but neither presented them to any government agent, nor made a request of the government for the surrender of Ker.[59] Instead, Julian "forcibly and with violence arrested him, placed him [on board a ship], kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred, in the same forcible manner, on board another vessel, . . . to San Francisco. . . ."[60] Ker then was transferred to Cook County, Illinois, to stand trial.[61]

Ker claimed that the Illinois courts did not have jurisdiction because his due process rights had been violated by the abduction.[62] In one of the first cases involving the Fourteenth Amendment Due Process Clause,[63]

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55. *See infra* p. 548.

56. 119 U.S. 436 (1886).

57. *Id.* at 438.

58. *Id.* The Court said that because Ker was brought to the United States by abduction, the extradition was rendered moot. *Id.* at 443.

59. *Id.* When Julian arrived in Peru, it was in a state of war with Chile, and Lima the capital of Peru, was occupied by Chilean forces. Unable to find the appropriate governmental representatives, Julian abducted Ker. BASSIOUNI, *supra* note 45, at 197.

60. *Ker*, 119 U.S. at 438.

61. *Id.* at 439.

62. *Id.*

63. The Fourteenth Amendment, ratified in 1868, was just 18 years old at the time of *Ker*.

the Court said that the clause dealt only with a fair trial.[64] The Court said that if the defendant was properly indicted, was given a procedurally correct trial, and was afforded all of the rights given to criminal defendants, then no due process violation had occurred.[65] The Court concluded by saying that abduction by "violence, force or fraud" could not divest a court of jurisdiction to try a defendant.[66] Thus, *Ker* established the concept of *mala captus bene detentus*, otherwise known as "bad capture, good detention," in United States jurisprudence.[67]

2. *Frisbie v. Collins*

Unlike *Ker*, the 1952 decision of *Frisbie v. Collins*[68] did not deal with an international fugitive abduction. The defendant in *Frisbie* alleged that "while he was living in Chicago, Michigan officers forcibly seized, handcuffed, blackjacked and took him to Michigan."[69] Subsequently, Collins was convicted of murder and sentenced to life imprisonment.[70]

The Supreme Court, in a very terse opinion by Justice Hugo Black,[71] affirmed *Ker* without limitation.[72] The Court stated "that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "[73] As in *Ker*, the *Frisbie* Court found the defendant's due pro-

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

65. *Id.*

66. *Id.* at 444. The Court supported this proposition with "authorities of the highest respectability." These seven cited cases, decided in various jurisdictions between 1815 and 1866, discussed the relevant principle, but did not consider the Fourteenth Amendment. The Court appears to have ignored cavalierly the new amendment and applied pre-amendment jurisprudence, as it did in other early Fourteenth Amendment cases. *See, e.g.*, The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (the Court said that the Fourteenth Amendment was not intended to federalize the enforcement of privileges and immunities, but left this to the states by using a notion of federalism predating the Civil War and ignoring a reason for the amendment).

67. The Court's final point in *Ker* was that releasing Ker was not the appropriate remedy for an illegal abduction. The Court acknowledged that the rights of both Ker and Peru had been violated by the abduction. Ker's remedy was to sue Julian for trespass and false imprisonment. Peru could seek redress by requesting extradition of Julian to try him for kidnapping. *Ker*, 119 U.S. at 444.

68. 342 U.S. 519 (1952).

69. *Id.* at 520.

70. *Id.*

71. The entire opinion covers less than five pages of the official reporter of the Supreme Court. *See id.* at 519-23. The discussion of *Ker* and forcible abductions is dismissed in one paragraph on about half of a page. *Id.* at 522.

72. *Id.* at 522.

73. *Id.*

cess claim overridden by a procedurally regular trial. The Court said that due process requirements were considered to be fulfilled when the defendant has been notified of the charges and has been granted a trial in conformance with the Constitution.[74] Justice Black concluded the brief discussion by stating that "[t]here 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."[75]

Hence, the *Ker-Frisbie* doctrine stands for the premise that illegal fugitive abductions could not divest a court of jurisdiction to try the defendant. The Supreme Court, in neither *Ker* nor *Frisbee*, was concerned with the methods used by the abductors. In both cases, the Court summarily dismissed the appellants' due process claims, requiring only procedurally fair trials. As a result, *mala captus bene detentus* became firmly ingrained in United States law.

3. *United States v. Toscanino*: The Empty Exception

The Court of Appeals for the Second Circuit announced the only exception to *Ker-Frisbie* in *United States v. Toscanino*.[76] The defendant alleged that he had been kidnapped and brutally tortured by agents of the United States government.[77] He claimed that he had been knocked unconscious by a blow with a gun and had been driven bound and blindfolded from Uruguay to Brazil.[78] Once in Brazil, Toscanino claimed that he had been "incessantly tortured and interrogated" for seventeen days.[79] During this time, he said that a United States Attorney was aware of the

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74. *Id.*
75. *Id.*
76. 500 F.2d 267 (2d Cir. 1974).
77. *Id.* at 269-70.
78. *Id.* at 269.
79. *Id.* at 270. Toscanino alleged the following acts during his captivity:

> [Toscanino's] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino 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 unconsious [sic] for indeterminate periods of time but again leaving no physical scars.

Id.

interrogation and that an agent from the United States Department of Justice had been present at one or more of the interrogations.[80] Following the interrogations, Toscanino had been drugged and placed on a flight bound for the United States.[81] He awoke in the United States and was arrested on the airplane.[82] Toscanino was convicted of conspiracy to import and distribute narcotics,[83] was sentenced to twenty years of imprisonment, and was fined twenty thousand dollars.[84]

The *Toscanino* court determined that if, on remand, the defendant could prove his allegations, no jurisdiction to try him would exist.[85] The Second Circuit said that the Supreme Court, in the intervening years since *Frisbie*, had expanded the concept of due process to include the kinds of abuses alleged by *Toscanino* and, to this extent, this line of intervening cases and the *Ker-Frisbie* doctrine could not be reconciled.[86] The *Toscanino* court found that the Supreme Court had expanded the notion of due process to encompass more than just a procedurally fair trial.[87]

As authority for this new interpretation of the Due Process Clause, the *Toscanino* court primarily relied on two cases.[88] *Rochin v. California*,[89] decided during the same term as *Frisbie*, precluded using evidence obtained by "conduct that shocks the conscience."[90] The *Rochin* Court additionally said it is no longer "true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."[91] The *Toscanino* court also cited *Mapp v. Ohio*[92] as undercut-

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 267.
84. *Id.* at 268.
85. *Id.* at 275.
86. *Id.*
87. *Id.* at 274.
88. *Id.* at 273-74.
89. 342 U.S. 165 (1952). In *Rochin*, the police entered the defendant's dwelling and saw two capsules on a table next to the bed on which he was sitting. Rochin grabbed the capsules and put them in his mouth. After an ensuing struggle to obtain the capsules proved unsuccessful, the police handcuffed Rochin and took him to a hospital. Upon orders of one of the officers and against Rochin's will, a doctor forced an emetic solution through a tube into the defendant's stomach to induce vomiting. In the regurgitated material, two capsules containing morphine were found. *Id.* at 166.
90. *Id.* at 172.
91. *Id.*
92. 367 U.S. 643 (1961). *Mapp* dealt with an illegal search carried out by three Cleveland police officers. While searching for a suspect in a bombing and for related paraphernalia, the police forcibly opened Mapp's door and entered her house. When she

ting the *Ker-Frisbie* doctrine. Through the Due Process Clause of the Fourteenth Amendment, *Mapp* applied the exclusionary rule to the states so that evidence obtained by an illegal search and seizure would no longer be admissible at trial.[93] The basis for the *Mapp* decision was the deterrence of governmental disregard for constitutionally protected rights.[94]

In light of this "enlightened interpretation" of due process evidenced by *Rochin* and *Mapp*, the *Toscanino* court determined that the rigid *Ker-Frisbie* doctrine must be modified.[95] The *Toscanino* court stated: "[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."[96] Thus, *Toscanino* created an exception to the *Ker-Frisbie* doctrine whereby government "conduct that shocks the conscience" divests a court of jurisdiction.

After creating the *Toscanino* exception, the Second Circuit was quick to limit its reach. Only eight months after *Toscanino*, the Second Circuit decided *United States ex rel. Lujan v. Gengler*.[97] In *Gengler*, the defendant was hired to fly a paid United States agent from Argentina to Bolivia.[98] After landing in Bolivia, Lujan immediately was taken into

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demanded to see their search warrant, an officer held up a piece of paper. Mapp grabbed the paper and placed it in her bosom. After a struggle, the police recovered the paper and handcuffed Mapp. The police searched through the defendant's dresser, a chest of drawers, a closet, some suitcases, a photo album, a trunk in the basement, and other personal affects. During this broad search, the police found obscene materials. At trial, the prosecution could not produce a warrant and could not explain the lack of one. Mapp subsequently was convicted of possession of these obscene materials. The Ohio Supreme Court affirmed because the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant." *Id.* at 644-45.

93. *Id.* at 655.

94. *Id.* at 656.

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

96. *Id.*

97. 510 F.2d 62 (2d Cir.), *cert. denied* 421 U.S. 1001 (1975). Interestingly, the *Gengler* panel contained two of the same judges from the *Toscanino* panel. Judges Robert Anderson and James Oakes decided both cases, but wrote neither opinion. *Toscanino* was written by Judge Walter Mansfield, and *Gengler* was written by Chief Judge Irving Kaufman. *See* 510 F.2d at 63 n.1. Also, Lujan and Toscanino were apparently coconspirators. A grand jury indicted Lujan, Toscanino, and seven others of conspiracy to import and distribute enormous amounts of heroin. Arrest warrants were issued for all of the conspirators except Toscanino because he had been convicted two weeks earlier of another conspiracy to import heroin. *Id.* at 63.

98. *Id.* at 63.

custody by Bolivian police acting as paid agents of the United States.[99] Lujan was not allowed to communicate with anyone and, on the following day, was transported to the Bolivian capital, La Paz.[100] Five days later, the Bolivian police and other United States agents placed Lujan on an airplane destined for New York.[101] In New York's Kennedy Airport, federal agents formally arrested Lujan.[102] At no time during this ordeal had the Bolivian police charged Lujan or had the United States made a request for extradition.[103]

The Second Circuit affirmed the conviction because *Toscanino* did not stretch to mere illegal conduct by the government, but went to "government conduct of a most shocking and outrageous character."[104] Lujan did not allege any torture or custodial interrogation, but merely claimed that his abduction was illegal.[105] This case did not contain any "shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process."[106] In short, this governmental activity was not sufficiently "shocking" to warrant nullification of the indictment.

Three months after *Gengler*, the Second Circuit further limited the reach of *Toscanino* in *United States v. Lira*.[107] The defendant in *Lira*[108] alleged that he was arrested by Chilean police and held at the local police station for four days.[109] During this time, he testified that he had been repeatedly tortured and interrogated.[110] Lira also claimed that he

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 65.
105. *Id.* at 66. In distinguishing *Toscanino*, the court focused on the gun blow knocking Toscanino unconscious, the drugs used to subdue him during his flight to the United States, and the knowledge of a United States Attorney that Toscanino was captured and interrogated. *Id.*
106. *Id.*
107. 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). This case also involved two judges from the *Toscanino* case. Judges Mansfield and Oakes also sat on this panel, and Judge Mansfield wrote the opinion. *Id.* at 69. Judge Oakes sat on all three panels.
108. Lira's real name is Rafael Mellafe. *Id.* at 69. For purposes of clarity, however, he will be referred to as Lira.
109. *Id.*
110. *Id.* The allegations of torture were similar to those alleged in *Toscanino*. Lira claimed "he was blindfolded by the Chilean police, beaten, strapped nude to a box spring, tortured with electric shocks, and questioned about the whereabouts of [his alleged coconspirator]." *Id.*

had heard unidentified people speaking English during this period.[111] After this incarceration at the local Chilean station, Lira was transferred to the Chilean Naval Prison for three weeks. During that time, he claimed to have been beaten and tortured again.[112] Chilean authorities forced Lira to sign a decree expelling him from Chile and photographed him for United States authorities.[113] At this time, Lira claimed to have seen two men identified by a fellow prisoner as agents of the United States Drug Enforcement Agency (DEA).[114] After being examined by a person Lira thought was a United States doctor, he was put on a plane to New York.[115] The DEA agent working on the case[116] testified that the DEA had requested Lira's arrest and subsequent expulsion.[117] While Lira was incarcerated, the agent said the DEA had been informed of the arrest and the place of incarceration, but it had received no other reports about Lira and had not been involved in the investigation conducted by the Chilean police.[118]

The Second Circuit again said these facts did not warrant a *Toscanino* exception to the *Ker-Frisbie* doctrine. Central to the court's holding was Lira's inability to prove that any of the questionable activities were conducted by agents of the United States.[119] The Second Circuit said that divesting a court of jurisdiction in these circumstances would have served no purpose because the exclusionary rule would not be effective in deterring unlawful conduct of a foreign government.[120] The Second Circuit also noted that the DEA could not be held responsible for ensuring that foreign governments carry out arrests consistent with

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111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 69-70.

116. This testimony was given by Special Agent Charles Cecil, one of the people Lira claims to have seen in prison. Special Agent George Frangulis, the other person Lira claimed to see, apparently also was involved in the investigation. *Id.* at 69-70.

117. *Id.* at 70. The United States requested that Lira be expelled because the extradition treaty between the United States and Chile in effect at the time did not permit a Chilean national to be extradited to the United States. *Id.* at 70 n.1. For a discussion of treaties barring the extradition of nationals, see *supra* notes 12-18 and accompanying text. On expelling nationals in this situation, see *supra* note 15.

118. *Lira*, 515 F.2d at 70.

119. *Id.* at 70-71. The court took a narrow view of what constituted participation by agents of the United States. Even if Lira did see two DEA agents while he was in captivity, the court said it would not have to divest itself of jurisdiction because Lira was not tortured after that point. *Id.* at 71 n.2.

120. *Id.* at 71.

United States constitutional standards.[121] The court also rejected Lira's claim that the United States was "vicariously responsible" for the torture because the United States request set the process in motion.[122] Under the Second Circuit's reasoning, the United States cannot be faulted for asking the Chilean government to arrest and expel one of its citizens in accordance with its own procedures.[123]

Just eleven months after its creation, the *Toscanino* exception was narrowed almost to the point of extinction. Under the original *Toscanino* test, the defendant already had a difficult burden to meet. Not even Toscanino himself could meet the requirements on remand.[124] After the *Gengler* and *Lira* limitations, the test became almost impossible to meet. Since the inception of these limitations, no court has found conduct so shocking as to require the divesting of jurisdiction to try the defendant.[125] Despite at least five additional circuits adopting *Toscanino*,[126] its

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121. *Id.*

122. *Id.*

123. *Id.*

124. United States v. Toscanino, 398 F. Supp. 916 (E.D. N.Y. 1975). In an opinion spanning a mere one and a half pages, the district court declined to hold an evidentiary hearing on Toscanino's allegations because he did not show any involvement by agents of the United States. "Assuming all the allegations of the affidavit to be true, there is no claim of participation by United States officials in the abduction or torture of the defendant." *Id.* at 917.

125. Matta-Ballesteros v. Henman, 896 F.2d 255, 261 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Caro-Quintero, 745 F. Supp. 599, 605 n.10 (C.D. Cal. 1990). Conceivably, one reason that courts reject many of the *Toscanino* claims is that they border on being frivolous. For example, Manuel Antonio Noriega, former strongman of Panama, claimed that his indictment should be dismissed because of personal mistreatment at the hands of the United States forces in Panama. In response, the district court said:

> [T]he only incident which comes close to any kind of personal mistreatment . . . [occurred when] American troops blasted the Papal Nunciature in Panama City with loud rock-and-roll music in an apparent effort to drive Noriega out. While there are those who might consider continued exposure to such music an Eighth Amendment violation, it is the opinion of the Court that such action does not rise to the level of egregious misconduct sufficient to constitute a due process violation.

United States v. Noriega, 746 F. Supp. 1506, 1531 n.27 (S.D. Fla. 1990). These cases aside, it is hard to believe that in the 17 years since *Toscanino* was decided that not even one case has merited dismissal.

126. *See* United States v. Pelaez, 930 F.2d 520, 525 (6th Cir. 1991) (*Toscanino* distinguished and not applicable, but the exception is recognized); United States v. Yunis, 924 F.2d 1086, 1093 (D.C. Cir. 1991) (no shocking conduct, so a *Toscanino* exception is not met); Davis v. Muellar, 643 F.2d 521, 527 (8th Cir.) (the facts do not suggest shocking conduct of the kind necessary to refuse jurisdiction, so *Toscanino* recognized, but it does not apply), *cert. denied* 454 U.S. 892 (1981); United States v. Cordero, 668 F.2d

continued existence is questionable. The courts acknowledging a *Toscanino* exception have distinguished every case as not involving "conduct that shocks the conscience."[127] Furthermore, at least three circuits have rejected *Toscanino* outright.[128]

The Supreme Court has reaffirmed the principle of the *Ker-Frisbie* doctrine at least four times since *Toscanino*.[129] Two of these four cases did not even involve illegal abductions.[130] None of the cases involved any of the due process concerns that formed the heart of *Toscanino*.[131] The defendants in these subsequent cases did not claim torture or other shocking conduct, but merely that their illegal arrest should divest the court of jurisdiction to continue the proceedings.[132] Although these cases reaffirm *Ker-Frisbie,* they do not overrule the principles of *Toscanino.*

32, 37 (1st Cir. 1981) (conditions were "hardly decent," but did not involve deliberate torture, so the *Toscanino* exception is recognized, but not applicable); United States v. Valot, 625 F.2d 308, 309 (9th Cir. 1980) (*Toscanino* exception not met, but, impliedly, the exception is valid).

127. *See, e.g.*, cases cited at *supra* note 126.

128. *See* Matta-Ballesteros v. Henman, 896 F.2d 255, 263 (7th Cir.) ("*Toscanino*, at least as far as it creates an exclusionary rule, no longer retains vitality and therefore [we] decline to adopt it as the law of this circuit."), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Darby, 744 F.2d 1508, 1531 (11th Cir.) (*Toscanino* called into question by the subsequent Supreme Court decision of Gerstein v. Pugh, 420 U.S. 103 (1975) (*see infra* notes 129-32 and accompanying text)), *cert. denied*, 471 U.S. 1100 (1984); United States v. Winter, 509 F.2d 975, 986-88 (5th Cir.) (the Supreme Court has not rejected the *Ker-Frisbie* doctrine and neither will this court), *cert. denied*, 423 U.S. 825 (1975).

129. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." (citing *Gerstein* and *Frisbie*)); United States v. Crews, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." (citing *Gerstein*, *Frisbie*, and *Ker*)); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) ("Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction." (citing *Frisbie* and *Ker*)); Stone v. Powell, 428 U.S. 465, 485 (1976) ("[J]udicial proceedings need not abate when the defendant's person is unconstitutionally seized." (citing *Gerstein* and *Frisbie*)).

130. *See infra* note 132.

131. *See infra* note 132.

132. The *Gerstein* Court cited *Ker-Frisbie* for the proposition that an illegal pretrial detention does not void a subsequent conviction. *Gerstein*, 420 U.S. at 119. In *Stone*, the Court referred to the doctrine as an example of the limitations of a judicial integrity rationale for excluding evidence. *Stone*, 428 U.S. at 485. *Crews* concerned an illegal arrest, but in the context of whether an in-court identification was admissible because the witness saw a picture taken during the illegal arrest. *Crews*, 445 U.S. at 474. *Lopez-Mendoza*, likewise, focused on an illegal arrest but this arrest was for a civil deportation proceeding, not a criminal trial. *Lopez-Mendoza*, 468 U.S. at 1039-40.

The *Ker-Frisbie* doctrine, thus, virtually stands the same as it did 105 years ago when *Ker* was decided. Despite changes in the United States and the world in the past century, United States courts have held fast to the concept of *mala captus bene detentus.*

B. *The Vitality of* Ker-Frisbie *at the Close of the Twentieth Century*

Both international and United States law have changed drastically since *Frisbie* was decided in 1952 and especially since *Ker* was handed down in 1886. The underlying premise of these changes has been respect for individual rights. This section will examine the extent to which this evolution has antiquated the *Ker-Frisbie* doctrine in light of the values of the 1990s.

1. Incongruence With Contemporary Notions of International Law

The face of international law has changed drastically since the era of *Ker.* Changing conceptions of international cooperation and the development of human rights law have created a world in which international abductions are viewed differently than they were in 1886.

The prominent line of thought in international law at the end of the nineteenth century was led by the positivist school.[133] Characterized by strong feelings of nationalism, each state primarily did what was in its own interests as defined by its own laws.[134] Higher notions of justice and moral law were subservient to the "criterion of effectiveness, of 'is' over 'ought.' "[135]

The twentieth century twice has seen the emergence of an international organization dedicated to international cooperation. The League of Nations, though surviving only tenuously from 1920 to 1939,[136] signaled

133. GERHARD VON GLAHN, LAW AMONG NATIONS 51 (4th ed. 1981).

134. *See id.*

135. *Id.* During this period, many of the foreign actions of the United States can be viewed as reflecting "is over ought." Aside from the situation that occurred in *Ker*, the United States was exercising pseudo-imperialism in the western hemisphere in the years following *Ker.* Invoking the Monroe Doctrine to bar European and Asian states from influencing affairs in the Americas, the United States proceeded to dominate the governments of Central and South America. J.A.H. HOPKINS & MELINDA ALEXANDER, MACHINE-GUN DIPLOMACY 16-18, 143-50 (1928). This was the era when President Theodore Roosevelt spoke the words, "Speak softly and carry a big stick; you will go far." The new president wasted little time in applying this philosophy to Latin America. AMERICA AS A WORLD POWER, 1872-1945 98 (Robert H. Ferrell ed., 1971).

136. A. LEROY BENNETT, INTERNATIONAL ORGANIZATIONS: PRINCIPLES AND ISSUES 26-31 (1977).

a radical change in the direction of international law.[137] A universal organization dedicated to promoting peace and cooperation according to a higher law marked a sharp break with the nationalistic thought of the previous century.[138] The creation of the United Nations in 1945 continued this trend. In its founding Charter, the United Nations listed several purposes and principles for the new organization.[139] The aspirations of the United Nations include the maintenance of international peace and security,[140] the achievement of international cooperation to resolve any international problems,[141] and the promotion and encouragement of universal human rights.[142] The Charter also declares that each sovereign is equal with all other states.[143] In the field of international law, the United Nations has been a front-runner in creating a global system to resolve differences and to protect rights.[144]

Contemporary human rights standards developed with the United Nations.[145] The United Nations Charter declares the protection of human rights as one purpose of the organization.[146] In 1948, the United Nations adopted without dissent the Universal Declaration of Human Rights.[147] Other major agreements from the United Nations include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both completed in 1966 and effective since 1976.[148] The degree to which these declarations are binding on nations is debated,[149] but they indicate, at the very least, an international consensus on the importance of human rights.[150]

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137. *Id.* at 31-32.

138. *Id.*

139. U.N. CHARTER art. 1-2.

140. *Id.* art. 1, para. 1.

141. *Id.* art. 1, para. 3.

142. *Id.*

143. *Id.* art. 2, para. 1. The structure of the United Nations, however, adheres only partially to this principle. Every nation gets an equal vote in the General Assembly. The Security Council, however, has five permanent members (China, France, Great Britain, Soviet Union, and the United States) and each has veto power. BENNETT, *supra* note 136, at 48.

144. *See* Bennett, *supra* note 136, at 384-85; UNITED NATIONS FOR A BETTER WORLD at v (J.N. Saxena et al. eds., 1986).

145. *See* U.N. CHRONICLE, THE UNITED NATIONS FOR A BETTER WORLD: FORTY YEARS IN PICTURES 5 (1985).

146. U.N. CHARTER art. 1, para. 3.

147. LOUIS HENKIN, THE AGE OF RIGHTS 16 (1990).

148. *Id.* at 17.

149. *See id.* at 21.

150. *See* THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 1 (1986); AMNESTY INTERNA-

Changes in the world order since the *Ker* decision question the legitimacy of the actions that the *Ker* Court originally condoned. Most of the world community no longer accepts the concept of "is over ought." A more integrated international system now seeks to remedy situations without resorting to force. Human rights law also casts doubt upon *Ker*-like actions and the snatch policy, and it definitely prohibits the treatment like that alleged by Toscanino and Lira. A new world order presumably will be one aspiring to move forward from the United Nations achievements, not backwards to a regime of "is over ought."

2. The Intervention of the Due Process Revolution

As the *Toscanino* court indicated, a revolution in criminal procedure in the United States has occurred since *Frisbie* was decided.[151] Working largely with notions of due process and fairness, the United States Supreme Court began to examine the conduct of government officials. Al-

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TIONAL—USA LEGAL SUPPORT NETWORK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL 33 (1988).

151. *See* SHELVIN SINGER & MARSHALL J. HARTMAN, CONSTITUTIONAL CRIMINAL PROCEDURE HANDBOOK 5-8 (1986); Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 12-13 (1988). During the 1960s, the Supreme Court, under the direction of Chief Justice Earl Warren, redefined the rights of those accused of a crime. The eight year period from 1961 to 1969 saw most of the guarantees of the Bill of Rights made applicable to the states. In 1961, the Fourth Amendment exclusionary rule was made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961), discussed *infra* at notes 154-57 and accompanying text. In 1962, the prohibition against cruel and unusual punishment of the Eighth Amendment was made obligatory on the states in Robinson v. California, 370 U.S. 660 (1962). In 1963, the right to counsel in the Sixth Amendment was guaranteed to those indigents accused of a felony in Gideon v. Wainwright, 372 U.S. 335 (1963). In 1964, the Fifth Amendment privilege against self-incrimination was made applicable to the states in Malloy v. Hogan, 378 U.S. 1 (1964). In 1965, the Sixth Amendment right to confront witnesses was guaranteed in state proceedings in Pointer v. Texas, 380 U.S. 400 (1965). In 1966, the Court extended the Fifth Amendment privilege against self-incrimination to police custodial interrogation and required a detailed warning of the suspect's constitutional rights in Miranda v. Arizona, 384 U.S. 436 (1966), discussed *infra* at notes 158-63 and accompanying text. In 1967, the Sixth Amendment's right to a speedy trial was imposed on the states in Klopfer v. North Carolina, 386 U.S. 213 (1967). In 1968, the Sixth Amendment's right to a jury trial was made obligatory on the states in Duncan v. Louisiana, 391 U.S. 145 (1968). Finally, in 1969, the Fifth Amendment protection against double jeopardy was made applicable to the states in Benton v. Maryland, 395 U.S. 784 (1969). By the end of the decade, all of the provisions of the Bill of Rights had been incorporated through the Fourteenth Amendment Due Process Clause except the Seventh Amendment provisions for bail and indictment by a grand jury. SINGER & HARTMAN, *supra* at 7.

though both *Ker*[152] and *Frisbie*[153] rejected invitations to inquire into the means by which the government had seized a defendant, the Court of the 1960s accepted this challenge in certain contexts.

The first major case to signal a change in the Supreme Court's attitude toward official misconduct during this period was *Mapp v. Ohio* in 1961.[154] *Mapp* held that illegally seized evidence could not be admitted in state criminal proceedings.[155] The Court based its ruling on the premise that exclusion of the evidence would deter police violations of the Fourth Amendment[156] and would compel respect for the Constitution.[157]

The other major case during the 1960s that showed concern for governmental abuses of the criminal process was *Miranda v. Arizona*.[158] This landmark case held that the Fifth Amendment[159] right against self-incrimination extended to police custodial interrogation of those accused of a crime and that any confessions obtained during this period would be admissible only if the defendant had been given detailed warnings of individual constitutional rights.[160] Among the reasons the Court posited for its holding was a concern for the methods that some police officers

152. The *Ker* Court said "for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment." Ker v. Illinois, 119 U.S. 436, 440 (1886). In other words, the methods of the government, whether regular or irregular, are irrelevant in this context.

153. In *Frisbie*, the Court rejected the assertion that granting the defendant relief "would in practical effect lend encouragement to the commission of criminal acts by those sworn to enforce the law." Frisbie v. Collins, 342 U.S. 519, 522 (1952) (quoting the court of appeals).

154. 367 U.S. 643 (1961); *see supra* note 92 for the facts of *Mapp*. This case overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), a case decided only twelve years earlier, but three years before *Frisbie*. *Wolf* said the Fourth Amendment applies to the states but the exclusionary rule does not. Exclusion may be an effective deterrent, but it was not compelled by the Due Process Clause. 338 U.S. at 26-33. Apparently, the *Mapp* Court viewed this deterrent effect differently.

155. *Mapp*, 367 U.S. at 660.

156. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

157. *Mapp*, 367 U.S. at 656.

158. 384 U.S. 436 (1966).

159. The relevant portion of the Fifth Amendment to the United States Constitution reads as follows: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

160. *Miranda*, 384 U.S. at 444.

had been using to obtain confessions.[161] The Court feared that custodial interrogation had led to instances of "physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions" and that this "use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country."[162] Implicit in the Court's opinion was the hope that incidents of physical abuse and violations of constitutional rights would be reduced by the presence of the accused's attorney in the interrogation room.[163]

Several other cases during this period discussed the issues addressed by the *Mapp* and *Miranda* Courts—police disregard of the law and poor treatment of those accused of a crime. For example, the Court in *Spano v. New York*[164] stated that the abhorrence of involuntary confessions does not rest solely on their inherent untrustworthiness, but also "on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[165] Two years later, the Court in *Rogers v. Richmond*[166] held that coerced confessions are inadmissible. The inadmissibility of coerced confessions stems not because the "confessions" are untrustworthy, but rather because the methods used to extract them are antithetical to systemic values.[167] Even if corroborating evidence supports the confessions, they must be inadmissible because of the unacceptable police conduct.[168]

Another line of cases dealt specifically with the extent to which the government could invade a person's body in the search for evidence. The concern was not with police misconduct, but with the limits to which society would tolerate violation of a person's bodily integrity. The semi-

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161. *Id.* at 445-58.

162. *Id.* at 446.

163. In a footnote, the Court listed ten cases that had gone all the way to the Supreme Court in the preceding 30 years that dealt with police violence and the "third degree." *Miranda*, 384 U.S. at 446 n.6. In the succeeding footnote, the Court discussed five state court cases involving brutal police misconduct. *Id.* at 446 n.7. Finally, the Court said "[u]nless a proper limitation upon custodial interrogation is achieved—such as [this] decision[] will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future." *Id.* at 447.

164. 360 U.S. 315 (1959).

165. *Id.* at 320-21.

166. 365 U.S. 534 (1961).

167. *Id.* at 540-41.

168. *Id.* at 541. *But see* Arizona v. Fulminante, 111 S. Ct. 1246, 1264-66 (1991) (admission of an involuntary confession is subject to harmless error analysis).

nal case in this area, as the *Toscanino* Court indicated, is *Rochin v. California*,[169] decided the same term as *Frisbie*. The Court in *Rochin* found that the accused's due process rights had been violated when the police tried to pry open the accused's mouth and subsequently took him to a hospital to have his stomach pumped to obtain two morphine capsules that he had swallowed.[170] Invoking an amorphous standard, the Court held that police action that "shocks the conscience"[171] violates due process protections, which were defined as those rights "implicit in the concept of ordered liberty."[172]

Fourteen years later, during the Court's revolution, *Schmerber v. California*[173] seemingly limited the reach of *Rochin*. In *Schmerber*, the police instructed a physician in a hospital to obtain a blood sample from the accused over his objection. Because the taking of a blood sample did not offend a "sense of justice"[174] as had the stomach pumping in *Rochin*, the Court held that this procedure was not a due process violation.[175] The Court found that this commonplace procedure that "ha[d] become routine in our everyday life" did not constitute a due process violation.[176]

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169. 342 U.S. 165 (1952). *See supra* notes 89-91 and accompanying text for the *Toscanino* Court's treatment of *Rochin*.

170. 342 U.S. at 166. The Court said these actions are "bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." *Id.* at 172. If stomach pumping supervised by a physician in a hospital is "too close to the rack and the screw," then the horribles allegedly suffered by Toscanino and Lira also must be on the unacceptable side of the due process line in government action. *See supra* notes 79 and 110 (facts of alleged tortures in *Toscanino* and *Lira*, respectively).

171. *Rochin*, 342 U.S. at 172.

172. *Id.* at 169 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

173. 384 U.S. 757 (1966). Interestingly, Justice William Brennan, the Court's liberal mainstay for 34 years, wrote this opinion. *Id.* at 758.

174. *Id.* at 760 (quoting Breithaupt v. Abram, 352 U.S. 432, 435 (1957) (quoting *Rochin*, 342 U.S. at 173)).

175. *Schmerber*, 384 U.S. at 760.

176. *Id.* at 771, and 771 n.13 (quoting *Breithaupt*, 352 U.S. at 436). All four dissenting justices said they would follow Chief Justice Warren's dissent in *Breithaupt*, 352 U.S. at 440. In that case, blood was extracted from the accused as he lay unconscious in a hospital. *Id.* at 433. The Chief Justice said in dissent,

> Only personal reaction to the stomach pump [used in *Rochin*] and the blood test can distinguish them. . . . We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.

Id. at 442 (Warren, C.J., dissenting).

Whether following the majority's test or the dissent's test, the actions alleged by Tos-

In 1985, the Court again addressed this issue of violation of bodily integrity in *Winston v. Lee*.[177] In *Lee*, the government was seeking to compel the accused to undergo surgery to recover a bullet thought to connect the accused with the crime.[178] Although not relying on due process grounds, the Court found this action to be an unreasonable search contrary to the Fourth Amendment.[179] The Court reached this decision by balancing the state's interest in obtaining evidence and a conviction against the accused's interest in privacy and bodily integrity.[180] Surgery under general anesthetic was considered to be such a severe intrusion into the accused's bodily integrity that the operation was held to be unconstitutional.[181]

These cases, therefore, signal that the Supreme Court is now willing to examine police treatment of those accused of a crime and to draw lines, amorphous though they be, limiting the extent to which the government may violate a person's bodily integrity. Since the due process revolution, the police no longer have a free hand to bring suspects to justice. In this vein, the Court, in a opinion written by then-Associate Justice William Rehnquist,[182] said that it "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. . . ."[183] Due process, thus, has boundaries. Additionally, the drastic changes in international law during the twentieth century place limits upon how and when the United States may abduct drug traffickers in foreign nations. Consequently, international law also contains boundaries. The extent to which the anything goes approach of *Ker-Frisbie* remains valid in the new world order is questionable.

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canino and Lira would still seem to be unacceptable. A blood sample is one thing, but systematic torture is a different animal.

177. 470 U.S. 753 (1985). This opinion, like *Schmerber*, was written by Justice Brennan. *Id.* at 755.

178. *Id.* at 756. The bullet was lodged approximately one inch deep in the accused's chest. He would have had to undergo general anesthesia during the procedure and the operation carried possibilities of permanent nerve damage and a remote chance of death. *Id.* at 756-57.

179. *Id.* at 766.

180. *Id.* at 763-67.

181. *Id.* at 766. Again, if major surgery in a controlled hospital environment is unacceptable in the United States, the tortures alleged by Toscanino and Lira must be as well.

182. Justice Rehnquist was appointed to the Chief Justiceship by President Ronald Reagan in 1986.

183. United States v. Russell, 411 U.S. 423, 431-32 (1973).

C. *The Rehnquist Court's Direction*

Despite the transformation of international law and the revolution of due process jurisprudence, the demise of *Ker-Frisbie* is hardly a certainty. The Supreme Court of Chief Justice William Rehnquist has not yet had the occasion to rule upon the *Ker-Frisbie* doctrine. This Section will analyze subjects related to the *Ker-Frisbie* question and surmise how the doctrine probably will fare in the Supreme Court of the 1990s.

1. *United States v. Verdugo-Urquidez:* Territorial Limit of the Constitution

The Rehnquist Court's most telling opinion to date on how it views limits on governmental action abroad came in the 1990 case of *United States v. Verdugo-Urquidez.*[184] In 1986, Mexican police officers apprehended the defendant, a Mexican citizen, and delivered him by pre-arrangement to United States marshals at the United States-Mexico border.[185] The United States suspected Verdugo-Urquidez of leading one of the largest drug smuggling organizations in Mexico and of being involved in the torture and murder of DEA agent Enrique Camarena Salazar.[186]

While Verdugo-Urquidez was incarcerated and awaiting trial, the DEA sought to search his residences in Mexicali and San Felipe, both in Mexico.[187] The DEA did not seek or obtain a warrant from a United States magistrate or from a judicial officer in Mexico, as required under the Mexican Constitution.[188] After receiving approval and a promise for cooperation from the Director General of the Mexican Federal Judicial Police, the DEA searched both residences.[189] In a fairly broad search, at least by United States standards, the Mexican police seized unexamined files and turned them over to the DEA agents.[190] The files contained a tally sheet that allegedly indicated the quantities of marijuana that Verdugo-Urquidez had smuggled into the United States.[191]

In a plurality opinion by Chief Justice Rehnquist, the Court held that the Fourth Amendment does not apply to nonresident aliens abroad. The

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184. 110 S. Ct. 1056 (1990).
185. *Id.* at 1059.
186. *Id.*
187. *Id.*
188. Ruth Wedgwood, *International Decision, United States v. Verdugo-Urquidez*, 84 AM. J. INT'L L. 747, 748 (1990).
189. *Verdugo-Urquidez*, 110 S. Ct. at 1059.
190. Wedgwood, *supra* note 188, at 748-49.
191. *Verdugo-Urquidez*, 110 S. Ct. at 1059.

Court first noted that any constitutional violation that may have occurred happened solely in Mexico.[192] By disregarding any actions that took place in the United States, either before or after Verdugo-Urquidez's arrest, the Court framed the issue as the extent to which the Constitution applies abroad and to whom its protections apply.

Drawing heavily upon principles of social compact theory,[193] the plurality held that "the people" protected by the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[194] The Court then said that the Fourth Amendment's purpose was to restrict the power of the government when conducting domestic searches and seizures.[195] Fourth Amendment protections, thus, are extended only to United States citizens and to aliens with a "previous significant voluntary connection with the United States."[196] Because the search at issue in *Vedugo-Urquidez* occurred abroad and involved a noncitizen lacking the requisite contacts with the United States, the defendant was not one of "the people" protected by the Fourth Amendment.

Apparently, the Court also was looking to operations such as the 1989 invasion of Panama and the subsequent arrest of General Manuel Noriega.[197] The plurality concluded by saying: "[A]pplication of the [F]ourth [A]mendment [abroad] . . . could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest."[198]

Despite the language of the Court, the impact of *Verdugo-Urquidez* in other situations, like a *Ker-Frisbie* case, remains unclear. The departure of Justices William Brennan and Thurgood Marshall, two of the dissenting justices, may yield a majority to the idea of a territorial limit on the Constitution. The split on the Court, however, may result in at least certain provisions of the Constitution being applicable abroad. Four justices claimed that the Constitution does not apply abroad,[199] four justices asserted that the Constitution does apply to nonresident aliens abroad,[200]

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192. *Id.* at 1060.

193. George E. Collins, Recent Development, 30 VA. J. INT'L L. 827, 833 (1990).

194. *Verdugo-Urquidez,* 110 S. Ct. at 1061.

195. *Id.* at 1061-62.

196. *Id.* at 1064.

197. *See* Wedgwood, *supra* note 188, at 753.

198. *Verdugo-Urquidez,* 110 S. Ct. at 1065.

199. This includes the plurality of Chief Justice Rehnquist and Justices Byron White, Sandra Day O'Connor, and Antonin Scalia.

200. This includes dissenting Justices William Brennan, Thurgood Marshall, and

and one justice, Justice Anthony Kennedy, wrote that some, but not all, provisions of the Constitution apply abroad.

Justice Kennedy's concurrence, necessary for the majority, said that the Warrant Clause of the Fourth Amendment does not apply abroad.[201] Justice Kennedy did say, however, that nonresident aliens may be entitled to certain constitutional protections, such as due process.[202]

The impact of *Verdugo-Urquidez* on the future of the *Ker-Frisbie* holding remains uncertain. The Court does not appear willing to involve itself in nondomestic criminal operations. Limiting the reach of the Constitution by excluding nonresident aliens abroad, the *Ker-Frisbie* doctrine of *mala captus bene detentus* seems to be alive and well. The Constitution apparently does not constrain the actions of United States agents conducting operations against nonresident aliens abroad. Justice Kennedy's concurrence, however, raises the possibility of a *Toscanino*-like exception to cover due process violations. Extending certain constitutional protections abroad, especially due process protections, may open the door for some judicially imposed restrictions on the actions of United States agents acting within the borders of other nations.[203]

2. The War on Drugs Exception to the Constitution

Beginning with the last years of the Burger Court and continuing with the Rehnquist Court, some writers have commented on a drug exception to the Constitution.[204] Although no case has mentioned a drug exception, the Court has rolled back some protections—especially in the Fourth Amendment context—in cases involving narcotics offenses.[205]

Harry Blackmun and concurring Justice John Paul Stevens. While Justice Stevens joined in the majority's decision, he believed that Verdugo-Urquidez was one of "the people" protected by the Constitution. Justice Stevens joined in the majority's decision because he thought the search was not unreasonable and because United States magistrates have no authority to issue warrants for searches abroad. *Verdugo-Urquidez*, 110 S. Ct. at 1068 (Stevens, J., concurring).

201. *Id.* at 1067 (Kennedy, J., concurring). Justice Kennedy did not reach this result by narrowly reading the words "the people" as a restriction on the class of protected persons. Instead, Justice Kennedy said that other factors such as "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials" make the warrant requirement inapplicable. *Id.* at 1067-68.

202. *Id.* at 1068.

203. *See* Collins, *supra* note 193, at 839-40.

204. *See e.g.*, Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987); David O. Stewart, *The Drug Exception*, 76 A.B.A. J., May 1990, at 42.

205. Stewart, *supra* note 204, at 42.

In the 1980s, the Court gave its approval to increasingly intrusive activities of law enforcement agencies fighting the war on drugs.[206] For example, without probable cause to believe a person is acting illegally, police now can stop, detain, and question persons solely because they fit a drug courier profile[207] and can stop all vehicles at a roadblock to search for drunk drivers.[208] Additionally, the Court has been willing to find increasingly more exceptions to the warrant requirement of the Fourth Amendment. Authorities no longer need a warrant to search automobiles and closed containers located in the vehicle,[209] to search open fields adjacent to a person's residence,[210] to conduct aerial surveillance over private property,[211] to search the purse of a public school student,[212] or to search a suspect's house abroad when the suspect is a nonresident alien without sufficient contacts to the United States.[213] The Court also has made warrants more easily obtainable by loosening the standards for determining the reliability of an anonymous tip.[214] Finally, unconstitutionally seized evidence now may be admissible under a good faith exception to the exclusionary rule.[215]

The Court may be aware of this drug exception, but, other than an occasional reference to the situation,[216] it does not seem concerned with

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206. Wisotsky, *supra* note 204, at 907-10.

207. Florida v. Royer, 460 U.S. 491, 502 (1983). The profile has triggered searches by the DEA for the following behavior: wearing gold chains, carrying a gym bag, carrying new suitcases, carrying old suitcases, buying one-way tickets, buying round-trip tickets, traveling to or from a source city (such as Miami, Los Angeles, Detroit, or New York), traveling alone, traveling with a companion, being a member of "ethnic groups associated with the drug trade," deplaning from the front of the airplane, deplaning from the middle of the airplane, deplaning from the rear of the airplane. Barbara Ehrenreich, *The Usual Suspects*, MOTHER JONES, Sept./Oct. 1990, at 7, 7.

208. Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481, 2487 (1990).

209. California v. Acevedo, 111 S. Ct. 1982 (1991).

210. Oliver v. United States, 466 U.S. 170 (1984).

211. California v. Ciraolo, 476 U.S. 207 (1986); Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

212. New Jersey v. T.L.O., 469 U.S. 325 (1985).

213. United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990); *see supra* notes 184-203 and accompanying text.

214. Illinois v. Gates, 462 U.S. 213 (1983). *Gates* adopted a broad "totality of the circumstances" approach to determining the reliability of the tip. *Id.* at 230-39. The previous approach, developed in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), required a showing of the informant's veracity, basis for knowing the information, and sufficient facts as a foundation.

215. United States v. Leon, 468 U.S. 897, 905 (1984).

216. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982, 2002 (1991) (Stevens, J., dissenting) ("No impartial observer could criticize this Court for hindering the progress of

the trend. Hence, the Court has raised the war on drugs to the highest of constitutional standards—the compelling governmental interest.[217] When the Court balances individual privacy interests against the compelling interest of fighting illicit drug trade, the latter usually will weigh heavier.[218]

Because most modern *Ker-Frisbie* cases involve drug trafficking,[219] the doctrine appears to be within the parameters of the so-called drug exception. With the Court reluctant to release a defendant on a technicality, abandonment of *Ker-Frisbie* does not appear likely. Given the drug exception with the implications of *Verdugo-Urquidez* and the recent affirmations in principle of *Ker-Frisbie*,[220] the direction of the Rehnquist Court seems clear: *mala captus bene detentus* will remain the law of the United States. The question, then, is whether the President will be given unfettered discretion in how this power is to be exercised.

IV. MEANINGFUL LIMITATIONS AS A PART OF THE *KER-FRISBIE* DOCTRINE

The United States is faced with a dilemma in fighting the war on drugs. In several nations, drug traffickers, by treaty or by corruption, have found safe havens and remain free from the possibility of extradition to the United States. In these situations, the only viable alternative for the United States may be to abduct the drug trafficker to stand trial

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the war on drugs. . . . [This decision] will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime."); Employment Division v. Smith, 110 S. Ct. 1595, 1616 (1990) (Blackmun, J., dissenting) (In holding that state benefits may be denied because of religious use of peyote by Native Americans, "[o]ne hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 641 (1989) (Marshall, J., dissenting) ("There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest."); United States v. Karo, 468 U.S. 705, 717 (1984) ("Those suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses."); Stewart, *supra* note 204, at 42 ("At the beginning of oral argument in a Fourth Amendment case in the 1979 term, Chief Justice Warren Burger leaned over to ask the prosecutor if the case was not covered by the 'drug exception' to the Fourth Amendment.").

217. United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) ("The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.").

218. Wisotsky, *supra* note 204, at 909.

219. *See supra* notes 76-132 and accompanying text.

220. *See supra* notes 129-32 and accompanying text.

in the United States. The Supreme Court doctrine that allows this, however, is a product of its time. Subsequent developments in international and domestic law raise serious doubts as to whether *Ker-Frisbie* should remain good law. Despite these changes, the Bush Administration is intent on using its snatch authority. The Rehnquist Court, furthermore, seems unlikely to reject the *Ker-Frisbie* doctrine outright and to forbid extraterritorial abductions.

The result is that agents of the United States are free to take whatever means they deem necessary to retrieve a fugitive and to extract desired information. Giving such unbridled discretion to agents acting abroad creates the possibility of mistreatment of the accused and of disintegration of the integrity of the United States criminal justice system. To prevent these effects, courts should impose limits on government actions either as a matter of due process[221] or as part of their supervisory power over the administration of criminal justice.[222]

Although courts have indicated recognition of this problem through the adoption of *Toscanino*, the criteria established to meet the exception are so strict that not one defendant has succeeded in seventeen years.[223] Courts could take several steps to ensure that abuses like those alleged by Toscanino[224] and Lira[225] are not sanctioned by the judiciary.

First, rather than requiring the defendant to prove United States involvement,[226] a rebuttable presumption should be created that presumes the United States to be at least vicariously responsible for the treatment of the defendant. This rebuttable presumption is necessary because proving the involvement of a United States agent can be difficult or impossible in some instances. In *Lira*,[227] for example, the defendant alleged that during blindfolded interrogation and torture, he had heard English being spoken.[228] If the DEA were involved, virtually the only way Lira could prove this fact would be via the unlikely testimony of an agent regarding DEA involvement in a torture. Additionally, the presumption reflects that, in many of these situations, the United States at least initiated the

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221. United States v. Russell, 411 U.S. 423, 431-32 (1973); Rochin v. California, 342 U.S. 165 (1952); *see supra* notes 182-83 and accompanying text.

222. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

223. *See supra* note 125 and accompanying text.

224. *See supra* note 79 (details of Toscanino's torture).

225. *See supra* note 110 (details of Lira's torture).

226. *See* United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974).

227. United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); *see supra* notes 107-23 and accompanying text.

228. *Lira*, 515 F.2d at 69.

process by arranging for the abduction of the accused.[229] The United States government should be permitted to rebut the presumption by showing that it had no knowledge of or control over the mistreatment of the accused and that the abductors were not United States agents.

Second, the level of mistreatment necessary for relief should be somewhat less than that required under a shocks the conscience standard. Currently, the standard has never been met,[230] but this failure is not because treatment of the accused has been acceptable. Although one court correctly stated that "not every violation by prosecution or police is so egregious that . . . nullification of the indictment [is required],"[231] not every act short of torture should be disregarded. The Supreme Court recently held that the Due Process Clause "protects a pretrial detainee from the use of excessive force that amounts to punishment."[232] Situations such as relatively poor jail conditions or lack of an attorney in the foreign state, consequently, may not be conditions warranting dismissal of an indictment.[233] Reasonable use of force by the foreign officials, likewise, should not divest a court of jurisdiction over the defendant.[234]

Purposeful and unreasonable violations of the accused's bodily integrity, however, should warrant dismissal of the indictment. Although all constitutional protections may not travel abroad, clearly unreasonable government conduct should not be condoned by United States courts of law. Violations of international human rights standards or of accepted due process limitations in the United States could provide standards for agencies operating abroad. As the *Miranda* Court was concerned with judicial integrity and with police mistreatment of defendants,[235] this rule would apply the same principles to agents working abroad.

Courts also have said that dismissal of an indictment would not deter misconduct by foreign officials.[236] These abductors, however, surely are

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229. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990) (the DEA offered to pay $50,000 plus expenses if the defendant were delivered to the United States).

230. *See supra* note 125 and accompanying text.

231. United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

232. Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (citing Bell v. Wolfish, 441 U.S. 520, 535-39 (1979)).

233. *See, e.g.*, United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981) (conditions in prison abroad were "hardly decent," but this by itself did not amount to an exception to *Ker-Frisbie*).

234. *See* United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981).

235. *See supra* notes 158-63 and accompanying text.

236. *See, e.g.*, Matta-Ballesteros v. Henman, 896 F.2d 255, 262-63 (7th Cir.), *cert. denied*, 111 S. Ct. 209 (1990).

not acting purely with altruistic motives. Either the accused is a person the abductors want out of their state or the abductors are being paid to deliver the fugitive to United States agents.[237] Directions from United States agents that the accused should not be mistreated would have some effect on the behavior of the abductors if these abductionists knew that their actions would be worthless because the defendant would be released.

An exception like the one previously outlined would allow an aggressive fight in the war on drugs, but it also would put limits on how far the government could go to bring a fugitive to justice. As the drug war intensifies and the Bush Administration pledges to use the snatch authority, the time has arrived for judicial limitations on the exercise of abductions. In those few cases actually involving unacceptable treatment of the accused, courts should bar jurisdiction to foster adherence to the rule of law rather than participation in the law of the jungle.[238]

V. CONCLUSION

The world has changed drastically since *Ker* and *Frisbie* were decided. Subsequent changes in international law and United States constitutional law have rendered unacceptable the practices then condoned by the Supreme Court. The massive drug trafficking industry and the power wielded by drug lords, however, were unknown to the world of *Ker* and *Frisbie*. Inaction by the United States advances the law of the jungle by allowing drug traffickers to run free or even to become de facto governments. Nevertheless, unacceptable conduct by the United States also can lead to the law of the jungle. Situations involving torture or any other unacceptable treatment are no better than the actions of the drug lords, even if done in the name of justice.

Meaningful due process limitations to the *Ker-Frisbie* doctrine will allow the United States to fight the drug war while upholding important

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237. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990) (the DEA offered to pay $50,000 plus expenses if the defendant were delivered to the United States).

238. Anticipating this situation, Judge James Oakes, eloquently stated:

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

United States v. Lira, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring) (footnotes omitted), *cert. denied*, 427 U.S. 847 (1975).

systemic values. The rule of law will be fostered by bringing these fugitives to justice. The means by which the accused are abducted will demonstrate United States commitment to individual integrity and human rights. Fighting a war as the leader of the new world order demands no less.

Kirk J. Henderson