EXTRADITION—TREATY INTERPRETATION—ABDUCTION OF A DEFENDANT FROM MEXICO AT THE BEHEST OF THE UNITED STATES GOVERNMENT DOES NOT DEFEAT A COURT'S JURISDICTION DESPITE AN EXTRADITION TREATY BETWEEN THE TWO NATIONS—*United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

Extradition[1] is the rendering of an alleged criminal by one nation to another for trial or punishment.[2] The procedures for extradition are commonly outlined in an extradition treaty between the two nations.[3] Although it originally refrained from entering into such treaties, the United States currently employs extradition treaties with over one hundred countries.[4]

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[1] Extradition is the "surrender by one state or country to another of an individual accused or convicted of an offence outside its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." Terlinden v. Ames, 184 U.S. 270, 289 (1902). *See also* BLACK'S LAW DICTIONARY 585 (6th ed. 1990) (citing U.S. CONST. art. IV, § 2 and 18 U.S.C.A. § 3181 in defining extradition in language virtually identical to that of the *Terlinden* Court).

[2] *See* M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 25 (1973) (explaining that the reasoning behind extradition is that "all states have an obligation to cooperate in the suppression of criminality"); MAJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 727 (1968) (stating that extradition covers both those charged with a crime and those already convicted and escaped).

Extradition treaties have existed since ancient times and the first recorded treaty was between the Egyptian Pharaoh, Ramses II, and the Hittite King, Hattusili III, in 1280 B.C. Christopher J. Morvillo, Note, *Individual Rights and the Doctrine of Speciality: The Deterioration of* United States v. Rauscher, 14 FORDHAM INT'L L.J. 987, 989-90 (1990-91). Although treaties through the Middle Ages were designed to return political enemies, extradition treaties began to include ordinary crimes. *Id.* at 990-91. Today, many extradition treaties include exceptions for political offenses, focusing instead on common crimes. *Id.* at 991-92.

The Supreme Court has ruled that a person may not be extradited from the United States absent a treaty. Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 9 (1936). The Supreme Court reasoned:

> There is no executive discretion to surrender [a requested individual] to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that the statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Id.

[3] Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought from a Foreign Country by Force or by Fraud: A Comparative Study*, 32 IND. L.J. 427, 427-28 (1957).

[4] Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 154 (1991). The United States was originally disinclined to form extradition treaties because it did not want to discourage

Nations have sometimes disregarded extradition treaties, however, choosing instead to abduct a suspect in another sovereign's territory and prosecute him in their own courts.[5] The United States recently undertook such an action when it kidnapped a Mexican doctor despite an extradition treaty with Mexico.[6] Although the doctor argued that the court lacked jurisdiction because his seizure violated the extradition treaty, the Supreme Court held that the treaty did not prohibit either country from kidnapping the other country's citizens.[7]

On February 7, 1985, agent Enrique Camarena-Salazar, a Drug Enforcement Administration (DEA) agent, was kidnapped outside of the American Consulate in Guadalajara, Mexico.[8] A month later, Camarena's mutilated corpse was found sixty miles outside of Guadalajara.[9] In December of 1989, the United States

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immigration to the United States and wanted to provide a safe haven for refugees. *Id.*

[5] *See id.* at 155 ("[T]he Reagan and Bush administrations have consistently resorted to extralegal methods of acquiring jurisdiction over foreign suspects, indicating that the United States remains skeptical as to the utility of the extradition process."). *See also* Bassiouni, *supra* note 2, at 26 (explaining that kidnapping is one of the rendition methods used by governments to bring an individual before a court).

The Office of Legal Counsel of the Justice Department has issued two different opinions on the issue of the legality of abducting foreign citizens outside of the United States. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 481-82, 484 (1990). The first of these opinions, issued in 1980, required that United States agents receive permission from an asylum nation to capture a person within its territory. *Id.* at 483. The fact pattern presented to the Attorney General's office involved the Federal Bureau of Investigation (FBI) kidnapping a person from a nation which later protested. *Id.* at 481-82. The opinion held:

> [T]he *reasonableness* of the operation is questionable if it violates international or United States law. . . . Judges in abduction cases have expressed concern that such extraordinary apprehensions denigrate the rule of law in the name of upholding it. We think that concern, when coupled with a U.S. or international law violation, may well lead courts to conclude that the activity lies beyond the jurisdiction of the FBI.

Id. at 482 (citation omitted). This opinion was withdrawn in June of 1989, and a new ruling, which held that the abduction of criminals in other countries was not illegal under United States law, was issued. *Id.* at 484-85. This opinion was not disclosed to the public, but news of its existence sparked a congressional hearing on the issue. *Id.* at 484.

[6] United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D.Cal. 1990), *aff'd sub nom.*, United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

[7] United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193, 2195, 2197 (1992).

[8] *Caro-Quintero*, 745 F. Supp. at 601-02.

[9] *Id.* at 602. The Mexican pilot who had assisted Camarena in finding mari-

government began negotiations with Mexico for the extradition[10] of Doctor Humberto Alvarez-Machain, who was allegedly involved in Camarena's torture and murder.[11] After two failed negotiation attempts with Mexican officials,[12] the United States executed a plot to bring Dr. Alvarez-Machain to the United States via forcible abduction.[13]

On April 2, 1990, at the United States' behest, five armed Mexicans entered Dr. Alvarez-Machain's medical offices in Guadalajara, Mexico, and forced him to accompany them on a flight to El Paso, Texas, where DEA Agents took him into custody.[14] Soon thereafter, the Government of Mexico filed several protests

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juana plantations was also found murdered. *Id.* Over twenty-two persons were indicted for involvement in agent Camarena's abduction and murder. *Id.*

[10] Extradition Treaty, May 4, 1978, United States-United Mexican States, 31 U.S.T. 5059.

Mexican officials wanted to informally render Dr. Alvarez-Machain to United States officials, fearing that public knowledge of his extradition would upset Mexican citizens. *Caro-Quintero*, 745 F. Supp. at 602. Informal rendition involves an agreement between an asylum nation and a requesting nation to forgo the procedures outlined in an extradition treaty. Bassiouni, *supra* note 2, at 33. Informal rendition has been distinguished from abduction, which is characterized by "an absence of consultation with any responsible representatives of the asylum country's government." Abramovsky, *supra* note 4, at 155-56.

[11] *Caro-Quintero*, 745 F. Supp. at 602. Dr. Alvarez-Machain had allegedly used his skills as a physician to keep Camarena alive so that he could be further tortured and interrogated by drug barons. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992). Dr. Alvarez-Machain was charged with "conspiracy to commit acts in furtherance of racketeering activity (in violation of 18 U.S.C. §§ 371, 1959); committing violent acts in furtherance of racketeering activity (in violation of 18 U.S.C. § 1959(a)(2)); conspiracy to kidnap a federal agent (in violation of 18 U.S.C. §§ 1201(a)(5), 1201(c)); kidnap of a federal agent (in violation of 18 U.S.C. § 1201(a)(5)); and felony murder of a federal agent (in violation of 18 U.S.C. §§ 1111(a), 1114)." *Id.* at 2190 n.1. (citation omitted).

[12] *Caro-Quintero*, 745 F. Supp. at 602-03. The DEA had been contacted by the Mexican Federal Judicial Police (MFJP), which offered to exchange Dr. Alvarez-Machain for a Mexican fugitive living in the United States. *Id.* at 602. The exchange was agreed to, but then the MFJP requested $50,000 to cover the costs of transporting Dr. Alvarez-Machain to the United States. *Id.* The DEA refused to pay the money in advance, and Dr. Alvarez-Machain was not delivered as scheduled. *Id.* The MFJP once again attempted to set up an exchange, but the DEA, which initially agreed to meet to discuss the matter, ultimately refused. *Id.* This refusal was purportedly because of tensions between the United States and Mexico sparked by an NBC mini-series about the Camarena murder. *Id.* at 602-03.

[13] *Id.* at 603. Mexican contacts of the DEA told the DEA that they could abduct Dr. Alvarez-Machain and deliver him to United States officials. *Id.*; *Alvarez-Machain*, 112 S. Ct. at 2190 & n.2. The DEA promised its contacts in Mexico $50,000 plus expenses for Dr. Alvarez-Machain's delivery to the United States. *Caro-Quintero*, 745 F. Supp. at 603.

[14] *Id.* Dr. Alvarez-Machain alleged that while he was held captive in Mexico, his abductors hit him, shocked him and gave him an injection that made him feel " 'light-headed and dizzy.' " *Id.* Dr. Alvarez-Machain also alleged certain facts that

with the United States and demanded Dr. Alvarez-Machain's release.[15]

Dr. Alvarez-Machain was indicted in the United States District Court for the Central District of California and moved to dismiss the indictment.[16] Dr. Alvarez-Machain argued that the court lacked personal jurisdiction because he had been abducted by the United States government in violation of the Mexican-American extradition treaty.[17] The district court granted the motion, interpreting the extradition treaty as impliedly prohibiting one nation from violating the territorial integrity of another.[18] The court found that the United States' abduction of Dr. Alvarez-Machain in Mexican territory violated this implied prohibition and ordered his repatriation to Mexico.[19]

The Ninth Circuit Court of Appeals affirmed the district court's decision,[20] based upon its prior holding that a kidnapping sponsored by the United States, within Mexico, against Mexican protest, was a violation of the extradition treaty.[21] The Supreme

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indicated United States involvement in the actual kidnapping in Mexico, but a DEA agent testified that no agents took part in the kidnapping. *Id.*

15 *Id.* at 604. On April 18, 1990, Mexico requested an official report on the part the United States played in Dr. Alvarez-Machain's kidnapping. *Id.* On May 16, 1990, and July 19, 1990, Mexico sent notes of protest from its embassy to the State Department. *Id.* In the last note it requested the arrest and extradition of those involved in Dr. Alvarez-Machain's kidnapping. *Id.* The United States has not only refused to extradite his kidnappers, but has provided them with a reward of $20,000, paid $6,000 a week for their living expenses, and brought their families to the United States. *Id.* at 603-04.

16 *Id.* at 601.

17 *Id.*

18 *Id.* at 610.

19 *Id.* at 614. The district court rejected Dr. Alvarez-Machain's argument that his abduction constituted a violation of due process. *Id.* at 604-05 (citations omitted). The court noted that, under the *Ker-Frisbie* doctrine, how a defendant came before a court was irrelevant to jursidiction. *Id.* at 604-05. See *infra* notes 25-38 and accompanying text regarding the development of the *Ker-Frisbie* doctrine. Although recognizing the *Toscanino* "outrageous government conduct" exception to *Ker-Frisbie*, the court ruled that Dr. Alvarez-Machain's allegations of torture did not fall within the exception. *Id.* at 605-06. See *infra* notes 39-45 and accompanying text for a discussion of *Toscanino*. Ultimately, the court chose not to use its supervisory powers to dismiss Dr. Alvarez-Machain's indictment. *Id.* at 615. The supervisory power, the court explained, was a doctrine allowing a court to dismiss a case to avoid a violation of judicial integrity or apparent approval of illegal conduct. *Id.*

20 United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

21 *Alvarez-Machain*, 946 F.2d at 1466-67 (citing United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991)). The defendant in *Verdugo-Urquidez* was also allegedly involved in Camarena's torture and murder. *Verdugo-Urquidez*, 939 F.2d at 1343. Like Dr. Alvarez-Machain, he was abducted and brought to the United States

Court granted certiorari[22] and reversed, holding that the DEA's kidnapping of Dr. Alvarez-Machain did not violate the extradition treaty.[23] The Court declared that the treaty contained no prohibition, either explicit or implicit, against either country abducting the other's citizens.[24]

The Supreme Court's decision in *Alvarez* was based largely upon that Court's decision more than one hundred years ago in *Ker v. Illinois*.[25] The *Ker* Court held that a defendant may be tried by a court irrespective of the manner in which he came before it.[26] In *Ker*, the United States had intended to use an extradition treaty to gain jurisdiction over a United States citizen hiding in Peru.[27] The agent sent to Peru to request the citizen's extradition disregarded extradition procedure.[28] The agent kidnapped

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to face trial. *Id.* The *Verdugo-Urquidez* court narrowly interpreted Ker v. Illinois, 119 U.S. 436 (1886), as allowing the trial of a defendant kidnapped privately, but not a kidnapping authorized by the government. *Id.* at 1345-46. The *Verdugo-Urquidez* court also noted that Mexico had strongly protested the defendant's kidnapping, whereas Peru did not protest Ker's. *Id.* at 1346. The court remanded the case with instructions to repatriate the defendant upon a finding that the United States had been involved in his kidnapping. *Id.* at 1359.

22 United States v. Alvarez-Machain, 112 S. Ct. 857 (1992).

23 United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 (1992).

24 *Id.* at 2193, 2195.

25 119 U.S. 436 (1886).

26 *Id.* at 440, 444. The *Ker* decision was reaffirmed in Frisbie v. Collins, 342 U.S. 519, 522 (1952). *See infra* notes 34-38 and accompanying text. The rule derived from the two decisions has come to be known as the *Ker-Frisbie* doctrine. *See, e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D.Cal. 1990) (referring to the doctrine as "*Ker-Frisbie*"). The *Ker-Frisbie* doctrine is also known by its Latin name, "*mala captus bene detentus*," which is translated as "bad capture, good detention." Kirk J. Henderson, Note, *Fighting the War on Drugs in the "New World Order": The* Ker-Frisbie *Doctrine as a Product of Its Time*, 24 VAND. J. TRANSNAT'L L. 535, 547 (1991).

27 *Ker*, 119 U.S. at 439 (citing Peruvian-American Extradition Treaty, Sept. 12, 1870, 18 Stat. 719).

28 *Id.* at 438. In a famous and influential article, Professor Charles Fairman shared his research as to why the agent ignored the extradition procedures. Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 685 (1953). Quoting the Attorney General of Illinois, Fairman reported that when the United States agent arrived in Peru with the proper papers, ready to request Ker's extradition from the Peruvian government,

> a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipa, back in the mountains, eighty-five miles from Lima, but General Lynch, of the Chilean forces, was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the next best thing, applied to General Lynch.

Id. at 685 (citation omitted). From this passage, and other evidence, Fairman con-

the alleged felon and transported him to the United States where he was brought to trial.[29]

The *Ker* Court first rejected the defendant's claim that the irregular method of gaining his presence violated due process.[30] Rather, the Court held, due process was satisfied by the use of a grand jury and a fair trial.[31] Additionally, the Court stressed that the United States neither invoked the treaty with Peru nor authorized the kidnapping; therefore the Court ruled that there was no treaty violation.[32] Because defendant Ker did not come to the United States pursuant to the treaty, the Court decided, he was not "clothed with [the] rights" that the treaty granted.[33]

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cluded that "there was no invasion of Peruvian sovereignty or other breach of international law." *Id.* at 686. *See also* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1451 (1988) (distinguishing *Ker* from an ordinary extradition case because the courts and civil government of Peru were not operating).

29 *Ker*, 119 U.S. at 438. Ker was charged with larceny and embezzlement. *Id.* at 437.

30 *Id.* at 440.

31 *Id.* The Court also rejected the defendant's claim that he had a right to asylum in Peru, citing the fact that Peru could have delivered Ker up to the United States government. *Id.* at 442. The Court saw no language in the treaty that gave those in Peru a right to asylum and suggested that an agreement of that kind would be absurd. *Id.* In other words, the *Ker* majority decided that the Peruvian-American Treaty had limited Ker's right to asylum in Peru and did not give him any additional rights. *Id.*

32 *Id.* at 443. The Court stated that the treaty "was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States." *Id.*

33 *Id.* The *Ker* Court reminded that Ker was not without a remedy. *Id.* at 444. The Court asserted that Ker's kidnappers could be extradited for trial in Peru and that Ker could bring false imprisonment and trespass actions against them. *Id.*

Recent scholarship has questioned the validity of the *Ker* holding. *See, e.g.*, Abramovsky, *supra* note 4, at 156 (asserting that although "*Ker* has been cited in almost every case of extraordinary apprehension, and has been consistently followed, *Ker* was a judicial fluke and continued reliance upon it for our national policy is sheer folly"); Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 238 (1934) (stating that the result in *Ker* was "unsatisfactory in both its procedural and its substantive aspects," and questioning whether the presentation of the case to the Supreme Court led to the poor result); Kester, *supra* note 28, at 1449 (criticizing the holding of *Ker* as "questionable and dated"); Clare E. Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Dententus? Sidney Jaffe: A Case in Point*, 28 CRIM. L.Q. 341, 348 (1985-86) ("The critical distinction made by the common court in *Ker* and *Rauscher* appears to be that for American Government officials to ignore a valid extradition treaty in force and kidnap a fugitive on the territory of the foreign treaty signator does not involve a breach of the treaty. Only if the treaty is utilized, and a condition of it ignored, is there a breach of the treaty giving rise to a remedy. This distinction is not capable of rational justification and smacks of sophistry."); Jonathan Gentin, Comment, *Government-Sponsored Abduction of Foreign Criminals*

The Supreme Court reaffirmed the *Ker* decision in *Frisbie v. Collins*.[34] In *Frisbie*, an alleged murderer fled from Michigan to Chicago, where Michigan police captured him and brought him to trial in Michigan.[35] The *Frisbie* Court fervently rejected the defendant's argument that the enactment of a federal kidnapping statute[36] had changed the *Ker* holding.[37] The Court denied any judicial departure from the rule announced in *Ker v. Illinois*, which stated that a court's ability to try a defendant was not affected by the individual's forcible abduction.[38]

The Second Circuit, however, created an exception to the *Ker-Frisbie* doctrine in *United States v. Toscanino*.[39] The *Toscanino*

Abroad: Reflections on United States v. Caro-Quintero *and the Inadequacy of the* Ker-Frisbie *Doctrine*, 40 EMORY L.J. 1227, 1230 (1991) (calling *Ker-Frisbie* an "anachronism" and "antiquated").

One problem scholars have had with the *Ker* decision is that, at the time the messenger arrived in Peru, there was no government to request extradition from, no government to hand Ker over, and no government to denounce the forcible abduction and violation of its territorial integrity. Fairman, *supra* note 28, at 685. See also *supra* note 28 for further explanation of the state of the Peruvian government at the time of Ker's abduction.

Another criticism has been that the *Ker* holding is often overstated. *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1348 (9th Cir. 1991) ("It is manifestly untrue that a court may never inquire into how a criminal defendant came before it."), *cert. granted and judgment vacated by* 112 S. Ct. 2986 (1992). Scholars argue that the *Ker* holding is limited to cases where an alleged criminal is kidnapped by a private citizen and handed over to United States law enforcement officials; it does not, however, hold that a criminal may be tried when the government has instigated the kidnapping in a foreign country with which the United States has an extradition treaty. *See* Gentin, *supra*, at 1233 ("In essence, the Court decided that a private kidnapping—one not authorized or sponsored by the state—does not violate an extradition treaty."); Martin B. Sipple, Note, *The Wild, Wild Western Hemisphere: Due Process and Treaty Limitations on the Power of United States Courts to Try Foreign Nationals Abducted Abroad by Government Agents*, 68 WASH. U. L.Q. 1047, 1053 (1990) ("Because *Ker* involved a United States citizen abducted without official authorization, the case leaves open jurisdictional questions arising when the United States government kidnaps a foreigner from his home country.").

34 342 U.S. 519, 522 (1952).

35 *Id.* at 520. The district court denied Frisbie's request for a writ of habeas corpus, explaining that the state had the power to try a criminal " 'regardless of how [his] presence was procured.' " *Id.* The court of appeals reversed, holding that the Federal Kidnapping Act had altered the Supreme Court's previous decisions that a state court could try a person taken by force. *Id.*; Collins v. Frisbie, 189 F.2d 464, 467 (6th Cir. 1951), *rev'd*, 342 U.S. 519 (1952). The Supreme Court granted certiorari. Collins v. Frisbie, 342 U.S. 865 (1952).

36 Federal Kidnapping Act, 18 U.S.C. § 1201 (1948).

37 *Frisbie*, 342 U.S. at 522-23.

38 *Id.* at 522. The Court further opined that there is nothing in the Constitution to prevent a court from trying a person wrongfully captured. *Id.*

39 500 F.2d 267, 275 (2d Cir. 1974). *See* Andrew M. Wolfenson, Note, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 724-38, 746 (1989-90) (chronicling the rise and fall of the *Tos-*

court held that due process was violated if the government abducted a person from another country, tortured him and brought him before a United States court for adjudication.[40] The circuit court, after reviewing the *Ker-Frisbie* doctrine, consulted other Supreme Court decisions that had expanded constitutional due process protections.[41] The *Toscanino* court stated that these cases stood for the principle that "the government should be denied

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canino exception to the *Ker-Frisbie* doctrine and arguing that *Toscanino* should be used to prevent agents from benefitting from unlawful conduct).

[40] *Toscanino*, 500 F.2d at 275-76. Francisco Toscanino, an Italian citizen, was indicted under drug smuggling charges and brought forcibly from Uruguay to the United States. *Id.* at 268-69. Toscanino claimed that the proceedings in the district court against him were void because he had been brought before the court illegally, and offered to prove his assertions that he had been brutally tortured and abducted by agents of the United States, and that the evidence against him had been illegally obtained. *Id.* at 269, 271. Toscanino alleged that he was tortured and interrogated for three weeks. *Id.* at 269. He further claimed that:

> "[His] 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 unconscious for indeterminate periods of time but again leaving no physical scars."

Id. at 270.

The district court had refused to grant him a hearing, citing to *Ker* and *Frisbie*. *Id.* at 271. The district court "held that the manner in which Toscanino was brought into the territory of the United States was immaterial to the court's power to proceed, provided he was physically present at the time of trial." *Id.*

[41] *Id.* at 272-75 (citing Mapp v. Ohio, 367 U.S. 643 (1961); Rochin v. California, 342 U.S. 165 (1952); Weeks v. United States, 232 U.S. 383 (1914)).

Mapp held that illegally-seized evidence should be excluded from state court trials, overturning Wolf v. Colorado, 338 U.S. 24 (1949), which had allowed evidence to be admitted which was the product of unreasonable search and seizure. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961).

In *Rochin*, which involved three state police officers forcing a suspect to have his stomach pumped against his will, the Court held that such a method of obtaining evidence "shocks the conscience" and violates the Due Process Clause of the Fourteenth Amendment. Rochin v. California, 342 U.S. 165, 166, 172-73 (1952).

In *Weeks*, the Court held that evidence seized in violation of the Fourth Amendment protection against unreasonable search and seizure must be returned and that its use at trial constitutes a prejudicial error. Weeks v. United States, 383, 398 (1914).

the right to exploit its own illegal conduct"[42] and opined that when this principle stood inapposite to the *Ker-Frisbie* doctrine, the latter should yield.[43] The court remanded the case for a hearing on Toscanino's allegations.[44] The Second Circuit later narrowed the outrageous government conduct exception to *Ker-Frisbie*.[45]

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[42] *Toscanino*, 500 F.2d at 275 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

[43] *Id.* The court ruled that due process required "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." *Id.* The Court retreated, however, from this bold statement by distinguishing *Ker* and *Frisbie* based on the fact that neither of the abductions in those cases were instigated by the United States government. *Id.* at 277.

The court also ruled that, when Toscanino alleged the United States government had placed wiretaps on his phone in violation of the Fourth Amendment, the Due Process Clause's prohibition against the illegal gathering of evidence applied to citizens of other countries within those countries. *Id.* at 280. The Supreme Court has since repudiated this position, in United States v. Verdugo-Urquidez. 494 U.S. 259, 261 (1990).

The Supreme Court in *Verdugo-Urquidez* rejected the notion that the Fourth Amendment prohibition against unreasonable search and seizure applied to actions outside the United States upon non-Americans. *Id.* at 274-75. Verdugo-Urquidez, like Dr. Alvarez-Machain, was allegedly involved in the murder of DEA agent Enrique Camarena, as well as drug trafficking. *Id.* at 262. After Verdugo-Urquidez was arrested, his property in Mexico was searched without a warrant. *Id.* Construing the words "the people" in the Fourth Amendment, the Supreme Court refused to extend the exclusionary rule to aliens illegally searched outside of the United States. *Id.* at 265, 270.

For discussions of the *Verdugo-Urquidez* decision, see generally Mark A. Marionneaux, Note, *International Scope of Fourth Amendment Protections:* United States v. Verdugo-Urquidez, 52 LA. L. REV. 455, 476-77 (1991) (examining the *Verdugo-Urquidez* decision and questioning whether the Fourth Amendment will now protect aliens residing in the United States); Mary L. Nicholas, Comment, United States v. Verdugo-Urquidez: *Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267, 294 (1990-91) (discussing *Verdugo-Urquidez* and criticizing the decision as "misguided"); Mindy A. Oppenheim, Comment, United States v. Verdugo-Urquidez: *Hands Across the Border—The Long Reach of United States Agents Abroad, and the Short Reach of the Fourth Amendment*, 17 BROOKLYN J. INT'L L. 617, 618 (1991) (reviewing the *Verdugo-Urquidez* decision and bemoaning the erosion of the Fourth Amendment).

[44] *Toscanino*, 500 F.2d at 281. On remand, the district court followed the Second Circuit's order to consider Toscanino's claim of abduction and torture. United States v. Toscanino, 398 F. Supp. 916, 916 (E.D.N.Y. 1975) (citing United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974)). Because Toscanino failed to allege that United States officials had participated in his torture and abduction and offered no evidence that it was directed by such officials, the district court refused to hold an evidentiary hearing and did not dismiss the indictments against Toscanino on jurisdictional grounds. *Id.* at 917.

[45] *See* United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.) (narrowing the *Toscanino* exception to the *Ker-Frisbie* doctrine), *cert. denied*, 421 U.S. 1001

While the *Ker-Frisbie* doctrine became entrenched in American criminal law, another important principle developed, estab-

(1975); United States v. Lira, 515 F.2d 68 (2d Cir.) (same), *cert. denied*, 423 U.S. 847 (1975).

In *Lujan*, the court held that an irregularity in the capture of a criminal does not itself violate due process. *Lujan*, 510 F.2d at 66. Rather, the court decided, the conduct must rise to the level of shocking the conscience, as had the alleged facts of *Toscanino*. *Id.* The defendant in *Lujan*, indicted on drug charges, was allegedly lured from Argentina to Bolivia by American agents, where he was taken into custody by Bolivian police acting on behalf of the United States. *Id.* at 63. He was subsequently placed on a plane bound for the United States and arrested by federal agents. *Id.* Unlike Toscanino, however, the defendant in *Lujan* did not allege torture, but only illegality in his seizure. *Id.* at 66.

The *Lujan* court considered an argument that the defendant's capture violated international law, embodied in the charters of the United Nations and the Organization of American States. *Id.* at 66. The Court did not find a violation of international law, however, because neither Bolivia or Argentina objected to his abduction. *Id.* at 67.

The Second Circuit further narrowed the *Toscanino* holding in United States v. Lira, 515 F.2d 68, 71 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). In *Lira*, the court ruled that a criminal must not only prove torture and unlawful abduction to fit into the *Toscanino* exception, but must also prove that agents of the United States were directly involved in the misconduct. *Id.* at 71. The defendant in *Lira* alleged that Chilean police had arrested him at the home of his common-law wife and had brought him to a police station where he was "blindfolded . . . beaten, strapped nude to a box spring, tortured with electric shocks, and questioned . . ." *Id.* at 69. Although he alleged that he had heard English spoken and Americans referred to, he offered no proof that agents of the United States took part in his torture and there was testimony by a DEA agent that no agents were present at the police station. *Id.* at 69-70.

The court also rejected Lira's contention that the government was vicariously responsible for his mistreatment, and that *Toscanino* should thus apply. *Id.* at 71. The court noted that the exclusionary rule under Mapp v. Ohio, 367 U.S. 643 (1961), was intended to "deter police misconduct." *Id.* The court reasoned that there was no point in releasing Lira, because such a release would not deter Chilean police from engaging in conduct such as torture. *Id.* at 71.

The *Toscanino* exception has been recognized in several courts of appeals. Wolfenson, *supra* note 39, at 726-33. *See, e.g.*, United States v. Pelaez, 930 F.2d 520, 525 (6th Cir. 1991) (distinguishing a defendant's allegations of mistreatment from the facts alleged in *Toscanino*); United States v. Yunis, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) (recognizing *Toscanino* as a limited exception to the *Ker-Frisbie* doctrine but deciding it did not apply to the facts of *Yunis*); Davis v. Muellar, 643 F.2d 521, 527 (8th Cir.) (same), *cert. denied*, 454 U.S. 892 (1981); United States v. Cordero, 668 F.2d 32, 37 (1st Cir. 1981) (same); United States v. Fielding, 645 F.2d 719, 723-24 (9th Cir. 1981) (stating that because the defendant did not allege the involvement of United States agents *Toscanino* did not apply).

Other circuits, however, have rejected the exception. Wolfenson, *supra* note 39, at 734-38. *See, e.g,* Matta-Ballesteras v. Henman, 896 F.2d 255, 260-61 (7th Cir.) (noting *Toscanino*'s "ambiguous constitutional origins," the court rejected the exception even though the defendant had been allegedly abducted and subdued with a gun), *cert. denied*, 111 S. Ct. 209 (1990); United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984) (questioning *Toscanino*'s validity as the Supreme Court had continued to reaffirm the *Ker-Frisbie* doctrine), *cert. denied sub nom.* Yamanis v. United

lishing that a court did not have jurisdiction over a case if the trial would result in a treaty violation.[46] *Ker v. Illinois* can be distinguished from this principle because in *Ker* the Supreme Court emphasized that the defendant was not protected by the Peruvian-American treaty because he was not acquired under it.[47] Therefore, no treaty violation occurred.[48] On the same day that *Ker* was decided, however, the Court also held, in *United States v. Rauscher*, that when a defendant was acquired through the invocation of a treaty, he could be tried only for the crimes for which he had been extradited.[49]

In *Rauscher*, the United States acquired the defendant from Britain under an extradition treaty for the purposes of trying him for murder.[50] A court subsequently tried him, however, for cruel and unusual punishment.[51] Rauscher argued that this action constituted a treaty violation.[52] The *Rauscher* Court ended a

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States, 471 U.S. 1100 (1985); United States v. Winter, 509 F.2d 975, 986-87 (5th Cir.) (same), *cert. denied sub nom.* Parks v. United States, 423 U.S. 825 (1975).

Moreover, the Supreme Court, in dicta, has since reaffirmed the broad *Ker-Frisbie* rule. *See* United States v. Crews, 445 U.S. 463, 474 (1980) (citations omitted) (stating that a defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."); Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (citations omitted) ("Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction."); I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (citations omitted) ("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."); Stone v. Powell, 428 U.S. 465, 485 (1976) (citations omitted) ("judicial proceedings need not abate when the defendant's person is unconstitutionally seized").

46 *See, e.g.*, Cook v. United States, 288 U.S. 102, 121 (1933) (holding that the government lacked power to seize a boat because a treaty limited such power and thus the court lacked jurisdiction); Johnson v. Browne, 205 U.S. 309, 321 (1907) (holding that an extradited individual could not be punished for a crime for which he had not been extradited); United States v. Rauscher, 119 U.S. 407, 424 (1886) (holding that an extradited individual could not be tried for a crime for which he had not been extradited).

47 Ker v. Illinois, 119 U.S. 436, 443 (1886). See *supra* notes 25-33 and accompanying text for a discussion of the facts and holding of *Ker*.

48 *Id.*

49 *Rauscher*, 119 U.S. at 424.

50 *Id.* at 409.

51 *Id.* The defendant was a sailor who, after assaulting and killing a subordinate crew member in violation of United States laws, fled to Great Britain. *Id.* Britain rendered him for the charge of murder pursuant to a treaty which provided for extradition. *Id.* at 409-10 (citing Webster-Ashburton Treaty of 1842, 8 Stat. 576).

52 *Id.*

great controversy over the Anglo-American extradition treaty[53] by deciding that the extradition treaty precluded the prosecution of a defendant for any offenses other than those for which the defendant had explicitly been extradited.[54] The notion that the state requesting extradition could prosecute an extradited defendant only for crimes specified to a granting nation has become known as the doctrine of speciality.[55]

The *Rauscher* Court began its analysis by listing the seven extraditable offenses included in the treaty, and observed that cruel and unusual punishment was not among them.[56] The Court noted that a nation would be unlikely to turn over one of its citizens to another nation if the requesting country did not make

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[53] Morvillo, *supra* note 2, at 993-95. During the middle 1800's, the United States and Great Britain were embroiled in a heated debate over whether a criminal extradited to the United States for a specified crime could be tried for an offense other than the one for which he had been extradited. *Id.* The United States refusal to try a defendant only for the crimes for which he had been extradited caused considerable tension between Britain and the United States, precipitating suspension of extradition between the nations for six months. *Id.*

[54] *Rauscher*, 119 U.S. at 424.

[55] Morvillo, *supra* note 2, at 987 (explaining that "[t]he doctrine of speciality embodies the theory in international law that compels the requesting state to prosecute the extradited individual upon only those offenses for which the requested country granted extradition.").

One scholar has explained the reason behind the doctrine of speciality:

> The *raison d'etre* of this doctrine lies in the well founded apprehension that the principle whereby a state is not obliged to surrender political offenders would be of no practical value if States were free to prosecute an extradited fugitive for an act different from that for which his extradition was granted. For, in principle, it would be quite simple for a State to demand the extradition of a fugitive for a common crime and once the accused is within its jurisdiction to prosecute him for a political offense.

Garcia-Mora, *supra* note 3, at 439.

[56] *Rauscher*, 119 U.S. at 410-11, 420-21. Article X of the Treaty provided:

> It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed.

Id.

The Court went on to consult previous cases, the constitutional basis for treaties, the treaty in question, and recent scholarship arguing that the doctrine of speciality should be implied in extradition treaties. *Id.* at 412-16.

assurances that the alleged criminal would only be tried for the specified crimes.[57]

The *Rauscher* majority rebuffed the government's assertion that, once in the country, a criminal brought in by means of an extradition treaty could be tried for any crime.[58] Instead, the Court opined, the treaty was based on a good faith commitment to follow the procedures outlined in the treaty.[59] Thus, the Court decided, a criminal brought to the United States through the use of a treaty could only be tried for those crimes specified to the asylum nation at the outset.[60] After the guilt or innocence of the alleged criminal was determined for the originally-specified crime, the Court required that he must be given adequate time to leave the country before rearrest was permissible.[61]

A number of years later, the Court implied the doctrine of

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[57] *Id.* at 420-21. The *Rauscher* Court discussed one of the underlying reasons for the rule of speciality; specifically, that a country does not wish to allow a person who had sought asylum to be tried for a political offense in another nation. *Id.* at 420. *See also* Garcia-Mora, *supra* note 3, at 439 (warning that it "would be quite simple for a State to demand the extradition of a fugitive for a common crime and once the accused is within its jurisdicition to prosecute him for a political offense.").

[58] *Rauscher*, 119 U.S. at 422. It should be noted that the government argued in *Rauscher* with the same reasoning it again relied on in *Alvarez-Machain*: in the absence of an express restriction in the extradition treaty, the defendant could be tried for any offense that the government decided to prosecute. *Id.*; United States v. Alvarez-Machain, 112 S. Ct. 2188, 2194 (1992). The *Rauscher* Court rejected this argument after finding that it directly contravened the treaty's purpose. *Rauscher*, 119 U.S. at 422-23. The *Alvarez-Machain* Court, however, embraced this argument. *Alvarez-Machain*, 112 S. Ct. at 2194.

[59] *Rauscher*, 119 U.S. at 422-23. The Court additionally consulted federal statutes, and claimed the statutes supported its interpretation of the treaty. *Id.* at 423-24. The first of these statutes permitted the Secretary of State to extradite a person to another country " 'to be tried for the crime of which such person shall be accused.' " *Id.* (citation omitted). The second statute provided for the protection of those extradited to the United States " 'until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition.' " *Id.* (citation omitted).

The *Rauscher* Court's consultation of these statutes later became important in *Alvarez-Machain*. *Alvarez-Machain*, 112 S. Ct. at 2191. The majority there mentioned the statutes in an attempt to prove that the *Rauscher* Court had more solid ground to stand on when it implied a term into the treaty it was interpreting. *Id.* The *Alvarez-Machain* dissent criticized the majority's reading of the *Rauscher* Court's reference to the statutes. *Id.* at 2201 n.18 (Stevens, J., dissenting).

[60] *Rauscher*, 119 U.S. at 424.

[61] *Id.* Justice Gray concurred in the result, but would have decided the case solely by reference to the federal statutes. *Id.* at 433 (Gray, J., concurring). Chief Justice Waite dissented, rejecting the Court's ruling that the treaty contained an implied term of speciality. *Id.* at 434 (Waite, C.J., dissenting). The dissent accepted the government's argument that the treaty contained no provision protecting an extradited person from prosecution for an offense other than the one for which he had been extradited. *Id.*

speciality into another extradition treaty, holding that punishing a defendant for crimes for which he had not been extradited would violate an implied term of the treaty.[62] In *Johnson v. Browne*, pending an appeal for a conviction for crimes he committed as a customs worker, the defendant escaped to Canada.[63] Upon Canada's initial refusal to extradite for fraud, the United States again applied for his extradition but for a different offense, for which the defendant had not been tried or convicted.[64] Canada granted extradition and surrendered the defendant, Browne, to the United States.[65] Browne was not, however, tried for the crime specified in the extradition agreement, but was imprisoned at Sing Sing Penitentiary under the charge of fraud.[66]

Browne asserted that the United States had violated the extradition treaty and the Supreme Court agreed.[67] The Court held that, contrary to the government's reading of the treaty, the treaty language implied that an extradited person could only be punished for crimes for which he had been extradited.[68] The Court held that, although the punishment of criminals was a high priority, an even higher priority was that treaties be "construed in accordance with the highest good faith."[69]

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62 Johnson v. Browne, 205 U.S. 309, 321 (1907).

63 *Id.* at 311. Browne had been convicted of conspiring to defraud the United States government. *Id.* at 310-11. He was sentenced to two years in prison, and his conviction had been affirmed by the Second Circuit. *Id.* at 311. While Browne's petition for certiorari was pending in the Supreme Court, he fled to Canada. *Id.* The United States applied to Canada for his extradition for fraud, a crime listed as an extraditable offense in the treaty. *Id.* Although he had also been indicted for knowingly attempting to bring silks into the country for less than the required duty, Browne was not convicted of this offense. *Id.* at 310-11. A Canadian court ruled that the provision did not allow extradition for conspiracy to defraud the United States government. *Id.* at 311-12. Under the Treaty "[f]raud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries" was an extraditable offense. *Id.* at 311 (citation omitted).

64 *Id.* at 312.

65 *Id.*

66 *Id.*

67 *Id.* at 312, 322.

68 *Id.* at 319-20. The government's argument focused on the fact that although Article III of the treaty prevented a person extradited under it from being tried for a crime for which he was not extradited, it did not state that a person could not be punished for a crime for which he had been extradited. *Id.* The Court rejected this argument, looking to the objectives of the treaty, one of which was to make imprisonment for crimes for which a defendant had not been extradited illegal. *Id.* at 320.

69 *Id.* at 321. The Court declared as follows:

> While the escape of criminals is, of course, to be greatly deprecated, it is still more important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith,

During prohibition, another controversy arose over a treaty between the United States and Britain requiring a Supreme Court interpretation of the treaty in *Cook v. United States*.[70] The treaty in *Cook* permitted the United States government to board British ships within an hour's journey from the coast of the United States to search for alcohol improperly transported.[71] The British government argued that the treaty impliedly prevented the boarding of ships at a distance greater than an hour's travel.[72] Upon protest that a search and seizure of a British ship violated the treaty with Britain, the district court dismissed the case.[73] The court of appeals reversed, however, finding that the treaty did not alter a pre-existing American law that allowed officers to board at a greater distance.[74]

> and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense.

Id.

[70] Cook v. United States, 288 U.S. 102, 109, 111 (1933) (citing Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, U.S.-Gr. Brit., Art. II, 43 Stat. 1761). The treaty with Britain was entered into as a measure to prevent prohibition from stymieing trade between the United States and Britain, as the United States claimed the right to search all boats within its territorial waters. *Id.* at 116-17. The treaty allowed British ships to have alcoholic beverages on board as long as they were sealed. *Id.* at 117.

[71] *Id.* at 117-18. The compromise reached by the governments in the treaty did not define a specific territorial zone in which ships could be boarded and searched, but rather adopted the "hour's distance" language. *Id.*

[72] *Id.* at 106. The treaty read in Article II:

> (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States . . . .
>
> . . . .
>
> (3) The rights conferred by this article shall not be exercised at a greater distance from the Coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.

Id. at 110-11 (quoting Convention for the Prevention of Smuggling of Intoxicating Liquors, Jan. 23, 1924, U.S.-Gr. Brit., Art. II, 43 Stat. 1761).

[73] *Id.* at 108.

[74] *Id.* at 108-09. A British boat, the *Mazel Tov*, had been boarded and searched four leagues off the coast of Massachusetts. *Id.* at 107. Although this was a legal search and seizure under United States law, it was not within the one hour's journey permitted by the treaty with Britain. *Id.* The *Mazel Tov* was 11.5 miles off the United States coast, and could travel at a maximum of 10 miles an hour. *Id.* The

The Supreme Court granted certiorari and reversed.[75] After finding that the treaty prevented seizure by the United States, the Court rejected the United States government's argument that a court could exercise jurisdiction despite a treaty violation.[76] The Court ruled that the seizure was improper because the United States government lacked the power to seize the ship in that area due to self-imposed "territorial limitations of the treaty."[77] Moreover, the Court emphasized that permitting jurisdiction over a matter subsequent to an improper seizure would "nullify the purpose and effect of the treaty."[78]

Mazel Tov's only cargo was alcohol, intended to be shuttled into the United States by other boats. *Id.*

75 *Id.* at 109, 122.

76 *Id.* at 120-21. To interpret the treaty, the Court first looked at its history, finding that the agreement intended to limit the United States ability to search and seize vessels. *Id.* at 118. The Court also noted the Treasury Department's practice of boarding ships only within the hour's journey. *Id.* at 119. The Court then rejected the government's contention that a federal statute had modified the treaty. *Id.* at 119-20.

77 *Id.* at 121. The Court concluded:

> The objection to the seizure is not that it was wrongful merely because [it was] made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its authority. The Treaty fixes the conditions under which a 'vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws.

Id. at 121-22.

78 *Id.* (citing United States v. Rauscher, 119 U.S. 407 (1886)). Justices Sutherland and Butler dissented, declaring that the treaty did not curtail the United States rights but was intended to expand its ability to enforce prohibition. *Id.* at 122 (Sutherland and Butler, J.J., dissenting).

One scholar highly praised the *Cook* decision, maintaining that it rested "upon a firm foundation of sound logic and wise judicial policy. If the original arrest or seizure is illegal because in violation of treaty, it is logical to conclude that no competence is acquired thereby. Surely the ratification of an illegal act should not purge it of illegality." Dickinson, *supra* note 33, at 236. Professor Dickinson reconsidered British and American precedent in light of *Cook*'s holding. *Id.* at 237. He concluded:

> If the person or thing which is the subject of controversy has been brought within reach of the court's process by a breach of treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation it represents. If there was no jurisdiction in the nation to make the original seizure or arrest, there should be no jurisdiction in the court subject to the nation's law. In terms of Amer-

Although the Supreme Court had never, before the recent *Alvarez* decision, considered whether kidnapping by the government would constitute a violation of an extradition treaty, lower courts have implied that such abductions could amount to such a violation.[79] Rejecting defenses to jurisdiction either because an asylum nation did not object to the extradition or because private citizens performed the kidnapping, these courts implied that if the abductor were the United States and if the nation from which the citizen was abducted had objected to the abduction, a court would lack jurisdiction.[80]

The Eleventh Circuit decision in *Jaffe v. Smith* exemplifies the presumption that extradition treaties prohibit the United States from kidnapping in the treaty partner's territory.[81] Sidney Jaffe, indicted for illegal land sales, jumped bail and fled to Canada.[82] Jaffe's failure to appear for trial prompted his bail bonding company to dispatch two bounty hunters, who kidnapped him in Canada and returned him to the United States.[83] Before the court of

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> ican precedents, this means that the underlying principle of United States *v.* Rauscher is correct and that the distinction attempted in Ker *v.* Illinois is arbitrary, unsound, and should be repudiated; [and] that the principle of [*Cook*] is unimpeachable. . . .

Id. at 244.

79 *See, e.g.*, United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (citation omitted) ("[U]nder international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation. The record here provides no basis for any inference that either Panama or Venezuela objected to appellants' departure from their territories. To the contrary, it was Panamanian and Venezuelan authorities who deported them."); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (where Thai authorities handed over a fugitive to United States agents without the use of an extradition treaty, no treaty violation occurred); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) ("[T]he failure of Bolivia and Argentina to object to Lujan's abduction would seem to preclude any violation of international law which may have occurred."), *cert. denied*, 421 U.S. 1001 (1975); United States v. Sobell, 244 F.2d 520, 525 (2d Cir.) (kidnapping of Mexican in Mexico, despite an extradition treaty, did not violate the treaty, but Mexico did not object and the kidnappers were not authorized to kidnap by the United States), *cert. denied*, 355 U.S. 873 (1957).

80 See *supra* note 79 for a discussion of those cases suggesting that if the United States government performed the abduction then a United States court would lack jurisdiction. Notably, such was the factual setting of Dr. Alvarez-Machain's kidnapping. United States v. Caro-Quintero, 745 F. Supp. 599, 601-04 (C.D.Cal. 1990), *aff'd sub nom.*, United States v. Alvarez-Machain, 946 F.2d 1467 (9th Cir.), *rev'd*, 112 S. Ct. 2188 (1992).

81 825 F.2d 304 (11th Cir. 1987).

82 *Id.* at 305. Authorities arrested Jaffe in Florida and charged him with twenty-eight counts of illegal land sale practices. *Id.*

83 *Id.* Although an attorney for the state twice applied to the Governor of Florida for the extradition of Jaffe, the applications were rejected by the state Attorney General for reasons of form. *Id.* After Jaffe was convicted of both the original

appeals, Jaffe argued that his abduction from Canada violated the United States' extradition treaty with Canada and thus rendered his conviction invalid.[84] The court ruled, however, that establishing a treaty violation required a defendant to prove that the United States was involved in the abduction.[85]

Against this background of the *Ker* and *Rauscher* lines of cases, the Supreme Court decided *United States v. Alvarez-Machain*,[86] holding that the DEA's kidnapping of Dr. Alvarez-Machain did not violate the extradition treaty with Mexico, because the treaty neither explicitly nor implicitly prohibited either country from abducting the other's citizens.[87] Noting that the case was one of first impression, the Court examined precedent regarding both the violation of extradition treaties and forcible abductions which nonetheless gave courts personal jurisdiction.[88]

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crimes and failure to appear at trial, he appealed to the Florida Court of Appeals, which reversed his illegal land sale convictions but affirmed his conviction for failure to appear at trial. *Id.* at 305-06. While the appeal was pending, Jaffe filed a habeas corpus petition with the federal district court on the grounds that Florida had no jurisdiction to try him because his kidnapping violated the extradition treaty with Canada. *Id.* at 306 (citing Treaty of Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983).

84 *Id.*

85 *Id.* at 307. The court ruled as follows:

> Unless a defendant can prove that she or he was removed from the asylum state by [United States] governmental action, and therefore establish a treaty violation, she or he may not object to trial in the United States.

Id.

The political tensions between Canada and the United States ran high during this period. Lewis, *supra* note 33, at 356; Kristofer R. Schleicher, Update, *Transborder Abduction by American Bounty Hunters—The* Jaffe *Case and a New Understanding between the United States and Canada*, 20 GA. J. INT'L & COMP. L. 489, 497 (1990). To placate Canada, former Secretary of State George M. Shultz attempted to get an early parole for Jaffe. *State Territory and Territorial Jurisdiction*, 78 AM. J. INT'L L. 207, 207-08 (1984). Secretary Shultz wrote in a letter to Florida authorities:

> As no good reason appears the extradition treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty.

Id. at 208.

The United States extradited Jaffe's abductors to Canada, where they stood trial for kidnapping. Schleicher, *supra*, at 497. Both abductors were convicted and sentenced to twenty-one months in prison for the kidnapping. *Id.*

86 112 S. Ct. 2188 (1992).

87 *Id.* at 2190, 2196-97.

88 *Id.* at 2191-92. The Chief Justice cited United States v. Rauscher, 119 U.S. 407 (1886) and Ker v. Illinois, 119 U.S. 436 (1886). *Id.*

Chief Justice Rehnquist, writing for the majority, first discussed *United States v. Rauscher*[89] and distinguished Dr. Alvarez-Machain's abduction from the facts of *Rauscher*.[90] The Court noted that, while Rauscher had been brought to the United States through the use of a treaty and not through forcible abduction, Dr. Alvarez-Machain had been abducted without invocation of the treaty.[91] The majority next compared the *Alvarez-Machain* case to *Ker v. Illinois*,[92] noting that in *Ker* the government was not involved in Ker's kidnapping and Peru did not object to his abduction.[93] The majority noted that Dr. Alvarez-Machain contended that the United States government's involvement in his kidnapping, against Mexico's objection, violated an implied term of the treaty just as the abduction in *Rauscher* violated an implied term of a treaty.[94]

The pivotal question in *Alvarez-Machain*, the Court asserted, was whether the extradition treaty precluded unauthorized abductions of persons by the contracting nations.[95] The Chief Justice began by analyzing the terms of the treaty[96] and pointed to the absence of language prohibiting forcible abductions.[97]

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89 119 U.S. 407 (1886). See *supra* notes 49-61 and accompanying text for a discussion of *Rauscher*.

90 *Alvarez-Machain*, 112 S. Ct. at 2191-92.

91 *Id.* The Chief Justice quoted a passage from *Rauscher*, emphasizing that the Court stressed that Rauscher did not come to the United States " 'by virtue of proceedings under an extradition treaty.' " *Id.* at 2191 (quoting *Rauscher*, 119 U.S. at 430). The Court also noted that the *Rauscher* Court had based its holding, in part, on two federal statutes. *Id.*

92 *Ker*, 119 U.S. 436 (1886). See *supra* notes 25-33 and accompanying text for a discussion of *Ker*.

93 *Alvarez-Machain*, 112 S. Ct. at 2193. The Court stated that the "only differences between *Ker* and the present case are that *Ker* was decided on the premise that there was no governmental involvement in the abduction . . . and Peru . . . did not object to his prosecution." *Id.* The Court also cited Frisbie v. Collins, 342 U.S. 519 (1952). *Id.* at 2192. See *supra* notes 34-38 and accompanying text for a discussion of *Frisbie*.

94 *Id.* at 2193. The Court also acknowledged the government's contention that *Rauscher* was a narrow exception to the *Ker* rule which only applied when an extradition treaty was invoked. *Id.*

95 *Id.*

96 *Id.* (citing Air France v. Saks, 470 U.S. 392, 397 (1985); Valentine v. United States ex. rel. Neidecker, 299 U.S. 5, 11 (1936)). The *Air France* Court had declared that "analysis [of a treaty] must begin . . . with the text of the treaty and the context in which the words are used." *Air France*, 470 U.S. at 397.

97 *Alvarez-Machain*, 112 S. Ct. at 2193. The Court stated that the "Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs." *Id.* The Court rejected the respondent's argument that a passage in the Treaty which stated that the treaty

The Court next evaluated the respondent's argument that, because the treaty gave the asylum nation the option to refuse to extradite a defendant, the treaty was intended to encompass all extraditions.[98] The respondent also argued that any other interpretation would allow either government to kidnap the other country's citizens without regard to the rights reserved in the treaty, rendering the formation of treaties pointless.[99] The Court responded that, absent a treaty, there was no obligation to extradite a person.[100] Therefore, the Court noted that nations formed extradition treaties to create such an obligation and to provide a mechanism for executing requested extraditions.[101] Examining the history of the treaty's negotiation and practice, the Court found no evidence that abduction violated the treaty.[102]

" 'shall apply to offenses specified in Article 2 [including murder] committed before and after this Treaty enters into force,' " demonstrated an intent to make use of the treaty compulsory for the crimes listed. *Id.* (quoting Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059, 5073-74). The Court instead concluded that this clause was included to allow extradition for crimes committed both before and after the treaty was signed. *Id.*

98 *Id.* at 2193-94. Article 9 of the treaty provided:

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

Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059, 5065.

99 *Alvarez-Machain*, 112 S. Ct. at 2194. The respondent had argued that the United States, by entering into the treaty, had waived the option of self-help as a means of gaining jurisdiction over a defendant, and that the contracting countries could choose to either try defendants themselves or turn them over to a requesting country. *Id.* at 2193-94. The *Verdugo-Urquidez* court had accepted this reasoning. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1350 (9th Cir. 1991) (stating that under the same treaty with Mexico, Mexico had two options: extradite or prosecute under its own authority), *cert. granted and judgment vacated by* 112 S. Ct. 2188 (1992) (remanding to be decided in light of *Alvarez-Machain*). The dissent in *Alvarez-Machain* also adopted this logic. *Alvarez-Machain*, 112 S. Ct. at 2198 (Stevens, J., dissenting).

100 *Id.* at 2194.

101 *Id.*

102 *Id.* at 2194-95. The Court essentially reasoned that because the contracting parties had not repudiated *Ker* in the treaty, the rule in *Ker* applied. *Id.* at 2194. The majority also cited to a proposed clause for extradition written in 1935 by a group of scholars which would have given the exact right for which Dr. Alvarez-Machain argued. *Id.* at 2194 & n.13. This clause, however, was not included in the Mexican-American extradition treaty. *Id.* at 2194-95. The majority also asserted that the Mexican government was well aware of the *Ker* decision and therefore was on notice of the United States position on extradition treaties. *Id.* at 2194. Sup-

Finding no explicit prohibition against kidnapping in either the treaty's express language or history, the Court considered the respondent's assertion that Mexico's protest against the abduction evidenced a treaty violation.[103] The Court deemed this argument inconsistent with the rest of the respondent's arguments and opined that if the extradition treaty had the force of law and was self-executing, a court should enforce it irrespective of the trespassed nation's protests.[104]

The majority also criticized the respondent's argument that international law should be implied into the treaty.[105] Although the majority acknowledged that the Supreme Court previously had implied international law into the *Rauscher* treaty, the Court justified that implication on the existence of speciality[106] as solely

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porting this claim, the Court cited a similar occurrence in 1905, when a Mexican national was abducted and brought to the United States to stand trial. *Id.* at 2194 n. 11. Responding to a protest by the Mexican government, the Secretary of State replied that the issue had been decided under *Ker* and that Mexico's remedy consisted of requesting the extradition of its citizen's kidnappers. *Id.* (citation omitted).

[103] *Id.* at 2195. The respondent argued that an objection was necessary because an individual's rights were only derived from the contracting nation's rights under the treaty. *Id.*

The Restatement of Foreign Relations suggests that if a nation from which a defendant has been abducted does not object to the abduction, the abducting country may proceed against the defendant. RESTATEMENT OF FOREIGN RELATIONS § 432 cmt. c. *See, e.g,* United States v. Toro, 840 F.2d 1221, 1235 (5th Cir. 1988) (stating that because neither nation objected to a kidnapping the court decided not to depart from the rule of trying unlawfully seized individuals); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (deciding that Venezuelan and Panamanian assistance in deportation evidenced no treaty violation); United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (asserting that absent protest by asylum nation, abducted person has no standing to assert treaty violation); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) (holding that Thai acquiescence to abduction proved no treaty violation); Waits v. McGowan, 516 F.2d 203, 208 & n.9 (3d Cir. 1975) (declaring that "[t]he protections or rights which accrue to the extradited person primarily exist for the benefit of the asylum nation."); United States ex. rel. Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.) (stating that "the failure of Bolivia and Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred"), *cert. denied*, 421 U.S. 1001 (1975).

[104] *Alvarez-Machain*, 112 S. Ct. at 2195. The Chief Justice noted that the *Rauscher* Court did not appear to care whether England protested the defendant's trial for a crime for which he had not been extradited. *Id.*

[105] *Id.* The Court restated the respondent's argument that the treaty should be interpreted in the context of international law and that "international abductions are 'so clearly prohibited in international law' that there was no reason to include such a clause in the Treaty itself." *Id.* (quoting Brief for Respondent at 11).

[106] See *supra* note 55 and accompanying text for a discussion and explanation of speciality.

an extradition treaty concept.[107] The majority asserted that the authorities cited by the respondent did not apply specifically to extradition treaties but were general international law principles.[108] The Court rejected an interpretation of the treaty that would imply terms preventing the United States from acquiring jurisdiction over a Mexican national by any method other than the treaty.[109]

While admitting Dr. Alvarez-Machain's abduction may have been "shocking" and possibly violative of international law, the Court refused to consider the abduction a treaty violation and deferred to the executive branch's discretion.[110] The Court therefore ruled that, despite his abduction, Dr. Alvarez-Machain could be tried for violations of United States law, and remanded the case for further proceedings.[111]

In dissent,[112] Justice Stevens attacked the majority's reading of the treaty and related precedent.[113] The dissent distinguished Dr. Alvarez-Machain's kidnapping from the kidnappings in *Ker* and *Frisbie*, stating that the United States government, not a private citizen, violated the territorial integrity of Mexico by kidnapping Dr. Alvarez-Machain.[114] The Justice advocated affirmance

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107 *Alvarez-Machain*, 112 S. Ct. at 2195-96.

108 *Id.* at 2196. The Court exaggerated the respondent's position by suggesting that the respondent's argument would prohibit the United States from invading Mexico. *Id.* This use of hyperbole may also have been geared toward rebutting the dissent's assertion that the holding of the Court would permit United States agents to torture or kill a suspect in Mexico. *See id.* at 2199 (Stevens, J., dissenting).

109 *Id.* at 2196. The Court characterized the implied term in *Rauscher* as a "small step to take," but suggested that implying the respondent's requested term to the Mexican-American treaty required "a much larger inferential leap, with only the most general of international law principles to support it." *Id.*

110 *Id.* at 2196-97. As support for the advantages of executive resolution of the matter, the Court cited the prohibition treaty involved in *Cook v. United States*. *Id.* at 2196 n.16 (citing Cook v. United States, 288 U.S. 102 (1933)). According to the Chief Justice, it was an earlier decision by the Supreme Court that forced Britain and the United States to form that treaty to settle differences over prohibition. *Id.*

111 *Id.* at 2197. On remand, United States District Court Judge Edward Rafeedie threw out the charges against Dr. Alvarez-Machain for lack of evidence. Seth Mydans, *Judge Clears Mexican in Agent's Killing*, N.Y. TIMES, Dec. 15, 1992, at A20. Judge Rafeedie was quoted as saying that "[t]here is suspicion and there may be hunches, but there is no proof that he participated in the kidnapping of Camarena, or that he even knew about it." Don DeBenedictis, *Scant Evidence Frees Abducted Doctor*, A.B.A. J., Feb. 1993, at 22.

112 Justice Stevens was joined in dissent by Justices O'Connor and Blackmun. *Id.* at 2197 (Stevens, J., dissenting).

113 *Id.*

114 *Id.* The dissent characterized *Ker* as involving "an ordinary abduction by a private kidnapper, or bounty hunter" and *Frisbie* as the "apprehension of an American fugitive who committed a crime in one state and sought asylum in another." *Id.*

of the lower courts' rulings based on both *Rauscher* and international law.[115]

The dissent closely analyzed the treaty's contents, noting that it comprehensively covered every aspect of extradition.[116] Justice Stevens enumerated the excuses for withholding extradition that the treaty provided.[117] The Justice then declared that the government's claim, that the treaty did not provide the only means for bringing an individual to the United States, would transform those excuses "into little more than verbiage."[118]

The Justice then attacked the Court's inference that, because the treaty contained no provision disallowing abduction of the other party's citizens, that activity was permissible.[119] The dissent also criticized the Court's interpretation that the parties had secretly reserved the option of self-help.[120] The Justice suggested that the majority's position could have been that the treaty would allow the government's agents to torture or kill a national within Mexico, because the treaty similarly did not prohibit those activities.[121] The dissent rejected such an interpretation, assert-

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115 *Id.*

116 *Id.* at 2198 (Stevens, J., dissenting). Justice Stevens wrote:

> From the preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party, the delineation of the procedures and evidentiary requirements for extradition, the special provisions for political offenses and capital punishment, and other details, the Treaty appears to have been designed to cover the entire subject of extradition.

Id. (footnotes omitted).

The dissent noted that in construing a treaty, a court should " 'give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.' " *Id.* at 2198 n.4 (Stevens, J., dissenting) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).

117 *Id.* at 2198 (Stevens, J., dissenting). The dissent cited provisions which (1) required "sufficient" evidence to grant extradition, (2) allowed a party to withhold extradition when the statute of limitations for the crime had expired, (3) allowed a party to withhold extradition when the alleged criminal had been tried for that crime already, (4) allowed refusal of extradition when the party sought could face the death penalty, and (5) allowed an asylum country to refuse extradition when the offense was of a military or political nature. *Id.*

118 *Id.* The majority held that the treaty itself and the provisions within it provided the governments with a "mechanism which would not otherwise exist," and which require, when certain conditions were met, the contracting governments to turn over their own nationals. *Id.* at 2194.

119 *Id.* at 2199 (Stevens, J., dissenting). The dissent pointed out that the *Rauscher* majority did not follow this logic with respect to implying the term of speciality into the extradition treaty; rather, the dissent in *Rauscher* had followed this logic. *Id.* at 2199 n.10 (Stevens, J., dissenting).

120 *Id.* at 2199 & n.11 (Stevens, J., dissenting).

121 *Id.* at 2199 (Stevens, J., dissenting).

ing that the treaty was built upon a mutual understanding between the countries that each would respect the territorial integrity of the other.[122]

The dissent then analyzed the method by which the *Rauscher* Court resolved the jurisdictional issue.[123] The Justice summarized that the *Rauscher* Court determined that the treaty completely covered the subject of extradition and its purpose was to limit prosecution to crimes for which a person was extradited via an extradition treaty.[124] From this analysis, the dissent concluded that an extradition treaty could limit the government's ability to prosecute criminals despite a treaty's omission of certain provisions.[125]

Turning to principles of international law, the dissent posited that, by entering into a treaty with another nation, a government was impliedly recognizing another nation's territorial integrity.[126] Justice Stevens cited *The Apollon*[127] as precedent in

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[122] *Id.* Justice Stevens also noted that both Mexico and Canada, the United States' only bordering neighbors, considered their extradition treaties with the United States to be the exclusive and comprehensive means of acquiring a person from the other nation. *Id.* n.14 (Stevens, J., dissenting) (citing Brief for United Mexican States as *Amicus Curiae*, at 6; Brief for Government of Canada as *Amicus Curiae*, at 4).

[123] *Id.* at 2200 (Stevens, J., dissenting). The dissent also criticized the majority's insinuation that the *Rauscher* Court's holding was based partly upon federal statutes. *Id.* at 2201 n.18 (Stevens, J., dissenting). Justice Stevens argued that the statutes only protected the defendant before trial and did not decide jurisdictional limits. *Id.* The Justice observed:

> [T]he Court suggests that the result in *Rauscher* was dictated by the fact that two federal statutes had imposed the doctrine of specialty upon extradition treaties. The two cited statutes, however, do not contain any language purporting to limit the jurisdiction of the Court; rather, they merely provide for protection of the accused pending trial.

Id. at 2201 n.18 (Stevens, J., dissenting) (citation omitted).

[124] *Id.* at 2200 (Stevens, J., dissenting) (quoting United States v. Rauscher, 119 U.S. 407, 423 (1886)). The Justice asserted:

> To interpret the [*Rauscher*] treaty in a contrary way would mean that a country could request extradition of a person for one of the seven crimes covered by the Treaty, and then to try the person for another crime, such as a political crime, which was clearly not covered by the Treaty; this result, the Court concluded, was clearly contrary to the intent of the parties and the purpose of the Treaty.

Id. The dissent also quoted a passage from the *Rauscher* opinion that condemned the government's position that, once a criminal was in a court of the United States, it did not matter what offense he had been extradited for under the treaty. *Id.* at 2200-01 (Stevens, J., dissenting) (citations omitted).

[125] *Id.* at 2201 (Stevens, J., dissenting).

[126] *Id.* The dissent cited to two landmark documents which the United States has signed, The Charter of the United Nations and the Charter of the Organization of

which the Court affirmed another country's territorial integrity.[128] In *The Apollon*, Justice Story condemned the American seizure of a foreign ship in a Spanish port, characterizing the violation of international law as "monstrous."[129] The dissent also cited two scholars who asserted that performing abductions within another country's jurisdiction violated international law.[130] The Justice opined that the doctrine of speciality, which

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American States, to prove that international opinion generally denounced the violation of the territorial integrity of another nation. *Id.* at 2201 & n.20 (Stevens, J., dissenting).

The Charter of the United Nations, formulated in 1945, states that the United Nations and its members

> shall act in accordance with the following Principles.
> 1. The Organization is based on the principle of the sovereign equality of all its Members . . . .
> . . . .
> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
> . . . .

U.N. CHARTER art. 2, June 26, 1945, 59 Stat. 1037.

The O.A.S. Charter states in Article 17 as follows:

> The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

O.A.S. CHARTER, Apr. 30, 1948, 2 U.S.T. 2394, at 2420, as amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607.

127 22 U.S. (9 Wheat.) 362 (1824).

128 *Alvarez-Machain*, 112 S. Ct. at 2201-02 (Stevens, J., dissenting).

129 *The Apollon*, 22 U.S. (9 Wheat.) at 363, 371. In *The Apollon*, the Collector of Customs had seized a ship in Spanish territory for alleged duty violations. *Id.* The question was whether the statute, the Collection Act of 1799, permitted seizure within the territory of another sovereign. *Id.* at 368, 369-70. The *Apollon* Court decided that Congress would not intentionally violate international law in its statute:

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

Id. at 370-71.

130 *Alvarez-Machain*, 112 S. Ct. at 2202 & n.24 (Stevens, J., dissenting) (citing OP-

the *Rauscher* Court had implied into a treaty, was less apparent than the international repudiation of abductions by nations.[131]

The dissent next contended that the majority neglected to recognize the important distinction between the government's involvement in Dr. Alvarez-Machain's abduction and the actions of a private citizen in *Ker*.[132] To demonstrate this difference, the Justice relied on *Cook v. United States*.[133] The dissent recalled that the *Cook* Court had rejected the government's argument that how

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PENHEIM'S INTERNATIONAL LAW 295 & n.1 (H. Lauterpacht 8th ed. 1955); Louis Henkin, *A Decent Respect for the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992)).

131 *Id.* The Justice cited to the RESTATEMENT OF FOREIGN RELATIONS § 432, cmt. c, as proof that governments generally condemn abductions by one nation within another nation's territory. *Id.* at 2202 n.23 (Stevens, J., dissenting). Section 432 of the RESTATEMENT OF FOREIGN RELATIONS states in pertinent part:

> (2) A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.

RESTATEMENT OF FOREIGN RELATIONS § 432(2). In the comments to this section, the requirements under international law are stated for a violation of this principle:

> If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws.

RESTATEMENT OF FOREIGN RELATIONS § 432 cmt. c.

Writers on international law concur that abductions against the will of asylum nations violate international law. *See*, Bassiouni, *supra* note 2, at 29 (arguing that unlawful abduction "involves three distinct violations [of international law]: disruption of world public order; infringement of the sovereignty and territorial integrity of another state; and violation of the human rights of the individual unlawfully seized"); SATYA D. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 21 (1966) (asserting that the abduction of a fugitive by one nation within the territory of another nation "is *prima facie* a breach of international law for which the seizing state is liable to the state of refuge"); 1 OPPENHEIM'S INTERNATIONAL LAW 295 & n.1 (H. Lauterpacht 8th ed. 1955) (claiming that international law is breached when one country kidnaps an individual within the territory of another country and "the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended"); Lowenfeld, *supra* note 5, at 451 (maintaining that abductions by the United States within the territory of another nation are a clear violation of international law); Henderson, *supra* note 26, at 544 (arguing that, although drug smugglers appeared to be above the law, the "catch-and-snatch" policy violated international law).

132 *Alvarez-Machain*, 112 S. Ct. at 2203 (Stevens, J., dissenting).

133 *Id.* (citing Cook v. United States, 288 U.S. 102 (1933)). See *supra* notes 70-78 and accompanying text for an examination of *Cook*.

a ship came into a court's jurisdiction was irrelevant.[134] The dissent emphasized that the *Cook* Court had held that a court might have jurisdiction over a boat seized by private citizens, but jurisdiction did not exist when the government seized a vessel in violation of a treaty which limited the government's authority to seize.[135] The dissent also cited to *Ker* for the proposition that the rules which applied to the actions of private citizens did not exhaust the restrictions on the government's actions.[136]

Although recognizing the government's desire to bring Dr. Alvarez-Machain to justice for his alleged crime, Justice Stevens asserted that the Court was bound to uphold the rule of law.[137] The Court's duty to uphold the law and set an example for other nations, the dissent averred, should not bend to the will of the executive.[138]

As the *Alvarez-Machain* majority emphasized and the dissent conceded, the general basis of the *Ker-Frisbie* rule is reasonable. Justice would not be furthered if criminals were freed because of their unlawful acquisition. The justification for the exclusionary rule for evidence — deterrence of unconstitutional conduct in law enforcement — is not sufficiently compelling to exclude the defendant himself in most cases. Nevertheless, the *Ker-Frisbie*

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134 *Id.* at 2204 (Stevens, J., dissenting).

135 *Id.*

136 *Id.* at 2204-05 (Stevens, J., dissenting). Justice Stevens stressed that the arresting officer in *Ker* did not pretend to be acting in any official capacity when he kidnaped Ker. As Justice Miller noted, "the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty *or from the government of the United States.*" Ker v. Illinois, 119 U.S. at 443. The exact opposite is true in this case, as it was in *Cook*. *Id.* at 2204 (Stevens, J., dissenting) (quoting *Ker*, 119 U.S. at 443).

137 *Id.* at 2205 (Stevens, J., dissenting).

138 *Id.* at 2205-06 (Stevens, J., dissenting). As an example of the United States Supreme Court's influence in the area, Justice Stevens cited to a recent case decided by South Africa's highest court. *Id.* at 2206 (Stevens, J., dissenting) (citing State v. Ebrahim, 1991(2) S.A. 553, 582). Based on its understanding of United States Supreme Court cases, including *Ker*, the South African court dismissed the prosecution of a person kidnapped from another country. *Id.* The dismissal was based on principles

> that maintained and promoted human rights, good relations between states and sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to court with clean hands. . . . This requirement was not satisfied when the State was involved in abduction across its borders.

Henkin, *supra* note 130, at 232 (citing *Ebrahim*, 1991(2) S.A. at 582).

rule should not have been extended to allow jurisdiction over those kidnapped in the territory of a treaty partner at governmental direction. *Alvarez-Machain*'s extension of *Ker-Frisbie* not only violated treaty interpretation principles such as good faith,[139] respect for the sovereignty of a treaty partner and construction of treaties in harmony with international law,[140] but it also ignored sound precedent and policy.

Two distinct lines of cases, begotten on the same day over one hundred years ago, finally came into their inevitable conflict in *Alvarez-Machain*. Under the *Ker v. Illinois*[141] line of cases, a defendant may be tried despite the manner in which he came before a court. Under *United States v. Rauscher*[142] and its progeny, a defendant may not be prosecuted if doing so would violate a treaty. By reading the Mexican-American extradition treaty to allow self-help by the signatories, the Supreme Court permitted the *Ker* principle to triumph. The Court's mistake was to look only to the explicit words of the treaty to determine whether a treaty violation took place, rather than to the obvious intent of the parties that the treaty would be the sole means[143] of conveying alleged criminals from one nation to the other.[144]

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139 *See, e.g.*, Johnson v. Browne, 205 U.S. 309, 321 (1907) (stating that "[w]hile the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith").

140 See *supra* note 126 for a discussion of international law and its implication on treaties.

141 119 U.S. 436 (1886). See *supra* notes 25-33 and accompanying text for a discussion of the facts and holding of *Ker*.

142 119 U.S. 407 (1886). See *supra* notes 49-59 and accompanying text for a discussion of the facts and holding of *Rauscher*.

143 Nations sometimes agree to forego the procedures set out in an extradition treaty resulting in "informal rendition." *See* Bassiouni, *supra* note 2, at 33. These informal renditions usually occur between neighboring nations. *Id.* at 34. For example, the United States often receives informally rendered individuals from Mexico and Canada. *Id.* Informal renditions have been analogized to parties to a contract assenting to utilize processes other than the ones set out in a contract. *See, e.g.*, United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352 (9th Cir. 1991) (noting that "treaties are in the nature of contracts between nations. Just as a private party may waive a term in a contract that is in the contract for his benefit, so a signatory to an extradition treaty may waive the requirement that the other signatory follow the procedures set forth in the treaty."), *rev'd and remanded and judgment vacated*, 112 S. Ct. 2986 (1992).

144 Pursuant to *Air France v. Saks*, a court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." 470 U.S. 392, 399 (1985) (citations omitted). In *Alvarez-Machain*, Mexico submitted an *amicus curiae* brief to the Court, as did Canada, asserting that it understood the treaty to be the exclusive means by which their citizens could be brought before a United States court. *See* Brief for the United Mexican

The Court's logic in *Alvarez-Machain* is flawed, however, in light of precedent such as *United States v. Rauscher*[145] and *Johnson v. Browne*.[146] The *Alvarez-Machain* Court created a troubling inconsistency through its decision. The law now holds that a defendant brought to this country through an extradition treaty with Mexico may be tried only for those crimes that the extradition treaty allows. For example, a defendant acquired through the extradition treaty with Mexico may not be tried for political crimes, for crimes for which he has already been tried, or for crimes not specified to the Mexican government. Under the *Alvarez-Machain* decision, however, if the United States desires to try a defendant for any of the aforementioned crimes, it may simply ignore the treaty and utilize the "tool" of abduction. As one writer has declared, this distinction between those defendants acquired by invocation of the treaty and those acquired by abduction "is not capable of rational justification and smacks of sophistry."[147]

Had the Court applied a *Rauscher* analysis to Dr. Alvarez-Machain's kidnapping, it would have found a violation of the extradition treaty because the United States had resorted to self-help and Mexico had repeatedly protested the violation of its territorial sovereignty. The remedy, as in *Rauscher* and *Johnson*, would have been to return the individual to Mexico. Not only would such a ruling have been consistent with the *Rauscher* line of

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States as *Amicus Curiae* in Support of Granting Review at 2-3, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); Brief for the Government of Canada as Amicus Curiae at 2-3, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). The United States, during the time period in which the current extradition treaty was formed, also seemed to believe that extraterritorial abductions would be a violation of international law. *See* Lowenfeld, *supra* note 5, at 482, 484-85. If a court is to interpret treaties consistently with the expectations of the parties involved, and both Mexico and the United States assumed kidnapping was precluded by international law, the Supreme Court should have interpreted it with such a meaning.

It might also be noted that at the turn of the century the Secretary of State wrote to the Governor of Texas that:

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of the other.

4 MOORE, A DIGEST OF INTERNATIONAL LAW § 603 at 330 (1906).

145 119 U.S. 407 (1886).

146 205 U.S. 309 (1907). See *supra* notes 62-69 and accompanying text for a discussion of the facts and holding of *Johnson*.

147 Lewis, *supra* note 33, at 348.

precedent, to which the Court should have looked for guidance, but it also would have served several important policy interests.

First, a ruling that a kidnapping in a treaty partner's territory constitutes a treaty violation would have fulfilled the Court's duty to interpret the treaty in harmony with principles of international law and the shared expectations of the parties. In the past the Supreme Court has faithfully guarded the rights of nations with which the United States has contracted, often rejecting the government's arguments that an illegal proceeding was permissible because the treaty did not expressly prohibit the action.[148] The pact made with Mexico, and the more than one hundred other nations that have formed extradition treaties with the United States,[149] contains an orderly procedure for bringing a defendant to justice. The United States' blatant disregard for an instrument that is built upon mutual trust and respect is unconscionable, as was the Court's failure to interpret it in this light. Under international law, reparation is to be made for such a violation of territorial sovereignty.[150]

Second, contrary to the Court's assertion that the need for a protest by the nation whose territory is violated was inconsistent with the rest of the respondent's argument, a protest should be necessary to find a treaty violation. Because governments with which the United States has extradition treaties sometimes hand a defendant over to the United States through informal rendition,[151] a protest evidences that a government objects to the defendant's trial in the United States.[152]

Even considered from an enlightened self-interest perspective, the *Alvarez-Machain* decision and the current American "catch-and-snatch" tactics are bad policy, because they endanger United States citizens.[153] By reading extradition treaties to permit kidnapping by the signators, the Court has implicitly held

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148 *See* United States v. Rauscher, 119 U.S. 407 (1886); see *supra* notes 49-61 and accompanying text for a discussion of *Rauscher*; Johnson v. Browne, 205 U.S. 309 (1907); see *supra* notes 62-69 and accompanying text for an explanation of *Johnson*; Cook v. United States, 288 U.S. 102 (1973); see *supra* notes 70-78 and accompanying text for a discussion of *Cook*.

149 Abramovsky, *supra* note 4, at 154.

150 RESTATEMENT OF FOREIGN RELATIONS § 432, cmt. c; see *supra* note 131 for further discussion of the right to reparation.

151 See *supra* notes 10 and 143 for an explanation of informal rendition.

152 See *supra* note 103 for caselaw discussing such protests.

153 *See, e.g., Iran Bill Allows Arrest of Americans Who Offend Nation*, L.A. Times, Nov. 1, 1989, at A7, col. 4 (noting that in response to the Justice Department's opinion, the Iranian Parliament passed a bill which would allow it to seize any American who offends the nation of Iran, anywhere in the world.).

that a nation may kidnap citizens of the United States within its boundaries. Should such a violation of United States territorial sovereignty occur, the *Alvarez-Machain* decision has destroyed the credibility it would have had under world opinion and before the United Nations, and will once again force the United States to choose between inaction and brute force to free its abducted citizen. This is not a "new world order," but the law of the jungle.

As a result of the *Alvarez-Machain* decision, Mexico, one of the United States' closest allies, is powerless to prevent further violations of its sovereignty. The United States has refused to honor Mexico's request for the extradition of Dr. Alvarez-Machain's abductors to face kidnapping charges and has instead paid them a sizable reward and brought their families to this country.[154] The United Nations is also an avenue of redress seemingly closed to Mexico because the United States, a Security Council member, has veto power over all resolutions presented.[155] Although Mexico can give the United States the "cold diplomatic shoulder," it is unlikely to do so, because of its dependency upon American aid and cooperation. Thus, world opinion and the desire to act in good faith are the only forces preventing the United States from violating the territorial integrity of a treaty partner, and neither seems to be a sufficient deterrent.

Not surprisingly, Mexico has demanded that the extradition treaty be amended to prohibit any further abductions by the United States. Whether the United States will amend the treaty remains to be seen. There can be no doubt, however, that the *Alvarez-Machain* decision informs every government that a treaty with the United States will be construed to allow any action not specifically prohibited. Nations can no longer trust the Supreme

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154 See *supra* note 15 for facts regarding the treatment of Dr. Alvarez-Machain's abductors.

155 An example of a case in which the United Nations Security Counsel took action over a kidnapping was its condemnation of the Israeli kidnapping of Adolf Eichmann. Helen Silving, In re Eichman: *A Dilemma of Law and Morality*, 55 AM J. INT'L L. 307, 311-13 (1961). Eichman, a Nazi war criminal, had been living in Argentina under an assumed name when he was abducted by concentration camp survivors and brought to Israel to stand trial. *Id.* at 311-12. Upon Argentina's protest to the United Nations Security Council, the Council recognized a violation of Argentina's sovereignty and the danger of such acts to international order and peace. *Id.* at 312. The resolution proceeded to request that Israel make appropriate reparation within the U.N. Charter. *Id.* Argentina declined to exercise its right "as a joint member of the United Nations," to demand Eichman's return. Lewis, *supra* note 33, at 344. Instead, an agreement was reached in which Israel "formally apologized to Argentina and the latter expressed satisfaction." *Id.*

Court to hold the United States to the spirit of its obligations, but only to their exact words.

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