United States v. Alvarez-Machain: Kidnapping in the "War on Drugs" - A Matter of Executive Discretion or Lawlessness?

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I. INTRODUCTION

On June 15, 1992, the United States Supreme Court held that the unilateral abduction of a Mexican national by federal agents did not violate the U.S.-Mexico extradition treaty or the United States Constitution.1 Within hours of the opinion’s release, Mexico officially suspended its cooperation with the United States in drug investigations.2 The Mexican Foreign Ministry called the court ruling “invalid and unacceptable” and in contradiction with “essential principles of international law.”3 Other governments around the world similarly condemned the Court’s decision as unacceptable.4

3. Id. Shortly after the Supreme Court decision the Mexican Foreign Minister held a press conference and some of the highlights were as follows:
   Mexico repudiates as invalid and illegal the decision of the Supreme Court;
   Mexico will consider as a criminal act any attempt by foreign persons or governments to apprehend in Mexican territory any person suspected of a crime;
   Mexico demands the return of Alvarez-Machain;
   Mexico declares that the only legal means for moving a person from one nation to face trial in another are treaties and mechanisms of extradition established under international law; [and]
   Foreign law enforcement officials of any country who operate in Mexican territory will be asked to observe updated rules that the Government of Mexico will establish.
4. Sharon LaFraniere, Baker Offers Reassurances After Court Kidnap Ruling, WASH. POST, June 17, 1992, at A2. On June 26, 1992, the Presidents of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay issued a declaration that expressed their concern with the Supreme Court decision. The Alvarez-Machain Decision, 3 U.S. DEPT ST. DISPATCH 614(3) (1992). Specifically, they requested that the Inter-American Juridical Committee of the Organization of American States (OAS) issue an opinion
Ironically, the decision came at a time of unprecedented economic and political cooperation between the United States and Mexico. Enthusiasm for the long awaited North American Trade Agreement was at an all time high. Coordination in drug enforcement efforts had also progressed significantly between the two countries.

Mexican President Carlos Salinas de Gortari, who views drug trafficking as a national security threat, has worked more closely with United States in fighting "The Drug War" than any previous Mexican president.

In an effort to appease the Mexican government, Secretary of State James A. Baker III made a public statement that the United States still respected the sovereignty of foreign governments. The State Department, however, did not offer any guarantees that the United States would refrain from similar abductions in the future. Following Secretary Baker's statements, Attorney General William P. Barr stated that the United States would use its "snatch" authority "only in the most compelling circumstances." It is unclear, however, what circumstances would be "compelling." According to a former head of the Justice

on the "international juridical validity" of the Alvarez-Machain decision. Id.


6. Id.

7. The Salinas Administration increased the level of resources devoted to the "war on drugs" from $37 million in 1989 to $77 million in 1991. U.S.-Mexico Relations (Economic and Political Relations, North American Free Trade Agreement), 3 U.S. DEP'T ST. DISPATCH, 620(2) (1992). The Mexican government succeeded in eradicating one-third of the 1991 estimated marijuana crop and has implemented both a tougher stance against drug-related money laundering and a vigorous asset seizure program. Id.

8. Miller, supra note 5, at A3. Under the Salinas Administration, the United States and Mexico have implemented dozens of cooperative agreements intended to curb illegal narcotics trafficking. See GUIDE TO TREATIES IN FORCE, NUMERICAL LIST, 538-39 (1992) (listing U.S-Mexico treaties in drug enforcement). The flagship of these agreements is the Mutual Legal Assistance Treaty, signed on December 9, 1987, which enhances the capability of both governments to prosecute criminals operating on both sides of the border. See Mexico-United States: Mutual Legal Assistance Cooperation Treaty 27 I.L.M. 443, 447 (1988). The treaty includes mutual assistance in the taking of witness testimony, the execution of searches and seizures, and the serving of documents. Id.

9. LaFraniere, supra note 4, at A2. Soon thereafter, President Bush sent a letter to President Salinas assuring that the Bush Administration will "neither conduct, encourage nor condone" such trans-border abductions from Mexico. The Alvarez-Machain Decision, supra note 3, at 614(3).

10. In a statement before the House Subcommittee on Civil and Constitutional Rights, Deputy Legal Adviser Alan J. Kreczko stated that the State Department believes that the Court correctly decided Alvarez-Machain because it protects "important presidential prerogatives." The Alvarez-Machain Decision, supra note 3, at 614(3).

11. LaFraniere, supra note 4, at A2.
Department's Office of International Affairs, although such occasions would be rare, abductions are a necessary law enforcement tool when officially sanctioned terrorism or drug trafficking is involved.\(^2\) Despite public assurances that official abductions require "rare" and "compelling" circumstances, government abductions are in fact often used to gain custody over criminals located on foreign soil.\(^3\) Moreover, these abductions are commonly carried out with the acquiescence, and sometimes silent cooperation, of Mexican officials.\(^4\)

Notwithstanding the U.S. government's seemingly "unofficial" acceptance of abductions, international law experts strongly denounce the practice.\(^5\) These scholars argue that abductions violate fundamental

\(^{12}\) Id.

\(^{13}\) See Abraham Abramovsky, Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok, 31 Va. J. Int'l L. 151, 156-67 (1991) (discussing various cases involving the abduction of foreign criminals); Stephen J. Hedges & Gordon Witkin, Kidnapping Drug Lords; The U.S. Has Done It for Decades, But It Rarely Causes Trouble, U.S. News & World Report, May 14, 1990, at 28; Paul Lieberman, Camerena Case Spotlight Shifts to L.A. Unit's Tactics, L.A. Times, May 7, 1990, at A1. For United States law enforcement authorities, kidnapping is an attractive means of apprehension because it avoids often lengthy extradition proceedings and official corruption that can shield and even free suspects. See Abramovsky, supra note 12, at 151. For further discussion of the DEA's resort to official abductions, see infra notes 324-49 and accompanying text.

\(^{14}\) Abramovsky, supra note 13, at 162-67. In 1986, Mexican authorities shoved Rene Verdugo-Urquidez, a suspect in the murder of DEA agent Enrique Camerena, through a border fence to waiting U.S. Border Patrol agents. Id. at 163. Also, a former Mexican policeman planned and executed the abduction of Dr. Alvarez-Machain, another suspect in the Camerena case. Lieberman, supra note 13, at A1. However, the district court imputed the U.S. government with official responsibility because the DEA offered a bounty for Dr. Machain's arrest. United States v. Caro-Quintero, 745 F. Supp. 599, 609 (C.D. Cal. 1990) (finding that the DEA and its informants were sufficiently involved to impute state responsibility), aff'd sub nom. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992).

Mexico's official protest may be more the product of internal Mexican politics rather than a genuine fear that abductions violate Mexican territorial sovereignty. See Caro-Quintero, 745 F. Supp. at 602. During official negotiations with DEA agents, Mexican officials suggested that the transfer of Dr. Machain be carried out "under the table" because its revelation would "upset" Mexican citizens. Id. Only after these negotiations failed did the DEA solicit bounty hunters to carry out Dr. Machain's arrest. Id. at 603. For more detail on Mexico's official involvement, see infra notes 169-81 and accompanying text.

\(^{15}\) See Abramovsky, supra note 13, at 201-08; see generally Andreas F. Lowenfeld, Still More on Kidnapping, 85 Am. J. Int'l L. 655 (1991) [hereinafter Lowenfeld I]; H. Moss Crystle, Comment, When Rights Fall in a Forest . . . The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture, 9
principles of international law. Basic rules of territorial sovereignty and individual freedom from arbitrary arrest are utterly ignored when one nation kidnaps the nationals of another. Arguably, abductions also violate current extradition treaties. If the basic function of extradition treaties is to provide clear-cut procedures for obtaining custody of a fugitive, then abductions which circumvent these procedures undermine the very certainty and protection that extradition treaties are intended to provide. Lastly, these scholars argue that international abductions are inconsistent with the constitutional notions of due process that government agents must abide by at home.

In essence, it is argued that aside from violating specific international law principles and extradition treaties, abductions tend to undermine respect for international norms and human rights in general. Moreover, if this trend continues, the United States may find itself victimized.


16. See Crystle, supra note 15, at 401-06; Downing, supra note 15, at 688-89; Gentin, supra note 15, at 1252-68; Lowenfeld II, supra note 15, at 472-74. For further discussion on the illegality of abductions under international law, see infra notes 133-39 and accompanying text.

17. See Downing, supra note 15, at 589-91; Gentin, supra note 15, at 1252; Lowenfeld II, supra note 15, at 472-73.

18. Lowenfeld I, supra note 15, at 658-59; Abramovsky, supra note 15, at 206-08. For further discussion on abductions and extradition treaties, see infra notes 69-126 and accompanying text.


20. See Lowenfeld III, supra note 15, at 884-93. For a nation that fancies itself a protector of basic human rights and demands other governments to respect the rights of their own nationals, an official policy of abduction is hypocritical and harms United States credibility. See Crystle, supra note 15, at 387-400. For further discussion regarding the impact that abductions have on U.S. foreign relations, see infra notes 338-45 and accompanying text.

Historically, unilateral abductions by state agents violated defendants' due process rights under the Fifth Amendment (if kidnapped by federal agents) and Fourteenth Amendment (if by state agents). See Lowenfeld II, supra note 15, at 459-64. However, in Alvarez-Machain, the United States Supreme Court, relying on the Ker-Frisbie doctrine, disagreed and held that abductions alone do not violate due process. See United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196-97 (1992). For a discussion of the Ker-Frisbie doctrine, see infra notes 41-54 and accompanying text.

21. LaFraniere, supra note 4, at A2; Abramovsky supra note 13, at 206-08; Lowenfeld II, supra note 15, at 472-75.
by its own renegade practices as other nations resort to abductions in lieu of formal extradition procedures.22

These concerns formed the basis of the arguments before the United States District Court in the *Alvarez-Machain* case.23 In particular, Dr. Machain argued that his abduction by paid agents of the DEA violated due process, international law and the U.S.-Mexico extradition treaty, and therefore, the court should divest itself of jurisdiction.24 The district court for the central district of California granted Dr. Machain's motion, and the Court of Appeal for the Ninth Circuit affirmed.25 The United States Supreme Court, however, reversed and rejected Dr. Machain's arguments *in toto*.26 Announcing the opinion of the Court, Chief Justice Rehnquist concluded that neither the United States Constitution nor the U.S.-Mexico extradition treaty limit the government's discretionary power to resort to official abductions.27 As for the alleged violation of international law principles, the Court held that such complaints may be taken up with the executive branch, but present no cause of action in domestic courts.28

As the following analysis will show, there is support for the Supreme Court's conclusion in American jurisprudence. The separation of powers principle suggests strongly that the Court should afford the executive branch a large amount of discretion with respect to international


24. Id. at 600-01.


27. *Alvarez-Machain*, 112 S. Ct. at 2197. For historical support for the Court's conclusions with respect to the legality of abductions under the Constitution and the U.S.-Mexico extradition treaty, see *infra* notes 41-108 and accompanying text.

law enforcement. This, however, only partly explains the Court's refusal to apply general international law principles to executive actions. It seems equally clear that the Court is wary of engaging in the interpretation of a morass of international law principles, which by their nature tend to be ill-defined and ambiguous. In essence, the Court's opinion reflects its desire to escape the inherent political tension and legal uncertainty surrounding cases injected with a heavy element of foreign relations. As a result, the Supreme Court's decision afforded the executive branch significant discretion in the arena of international law enforcement. Whether the Bush Administration wisely exercised that discretion by adopting an official policy of unilateral abductions is another matter—a policy matter better left to the annals of Foreign Relations than the pages of a law review article.

Therefore, the focus of this article is on the legality of official abductions under the United States Constitution and American jurisprudence rather than on the propriety of abductions under normative or moral standards.

Part II of this Note examines the legal history behind the Supreme Court's opinion, including the 107-year-old Ker-Frisbie doctrine which prevents criminal defendants from challenging the judicial jurisdiction

30. See Alvarez-Machain, 112 S. Ct. 2106-07; see also infra notes 127-39 and accompanying text.
31. See Michael R. Pontoni, Comment, Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives, 21 CAL. W. INT'L L.J. 215, 235-36 (1991) (stating that cases implicating international or political matters are better addressed by the executive branch).
32. See id. at 235-38 (discussing cases that address separation of powers); see also discussion on separation of powers principle, infra notes 126, 139 and accompanying text.
33. See Pontoni, supra note 31, at 233-39. For commentary on the unique political and diplomatic factors that the executive branch must consider before gaining custody of criminals abroad, see infra notes 311-45 and accompanying text.
34. The negative impact of the Bush Administration's abduction policy on foreign affairs and international cooperation in law enforcement is clear. See infra notes 338-45, 359-62 and accompanying text. Then President-elect Clinton publicly questioned the legality of unilateral abductions as an official practice. Clinton, High Court Differ on Abduction, L.A. TIMES, Dec. 16, 1992, at A32. On the other hand, the President's ability to act unilaterally is an essential prerogative, and one that should not be ceded easily. The Alvarez-Machain Decision, 3 U.S. DEPT ST. DISPATCH 614(3) (1992) (statement by Deputy Legal Adviser Alan J. Kreczko before the House Subcommittee on Civil and Constitutional Rights); see also infra notes 345-50, 358 and accompanying text (discussing the need for executive discretion). Because the debate over official abductions involves serious political considerations, the Court perhaps correctly left resolution of the dispute to the political branches of the government. See Pontoni, supra note 31, at 235-39.
of a United States court. Part II also points out the recognized exceptions to the Ker-Frisbie doctrine and emphasizes the treaty violation exception and relevant principles of international law that Dr. Machain relied upon in Alvarez-Machain. Part III discusses the facts surrounding the abduction of Dr. Machain and outlines the procedural history of the case. Part IV briefs the Court's opinion in Alvarez-Machain and presents the two vastly different positions taken by the majority and dissenting opinions. Part V discusses the impact of the Court's decision on domestic and international law, and on the executive policies for securing custody of criminals abroad. Finally, part VI reviews both sides of the ongoing controversy regarding the Alvarez-Machain decision and concludes that the need to preserve executive discretion in international law enforcement justifies the Court's decision.

II. HISTORICAL BACKGROUND

A. The Ker-Frisbie Doctrine

The Supreme Court first addressed the issue of international abductions over 100 years ago in Ker v. Illinois. Until United States v. Alvarez-Machain, Ker represented the Court's last word on the legality of extraterritorial seizures under both the United States Constitution and applicable treaty law.

In Ker, a United States citizen, living in Peru, was wanted for larceny in Illinois. The State Department directed a Pinkerton agent to "receive" Ker from the Peruvian authorities in compliance with the extradition treaty between the United States and Peru. Instead of presenting extradition papers to the Peruvian authorities, the agent kidnapped Ker and placed him on a ship bound for Honolulu. Ker was eventually

35. See infra notes 41-54 and accompanying text.
36. See infra notes 55-152 and accompanying text.
37. See infra notes 164-97 and accompanying text.
38. See infra notes 198-278 and accompanying text.
39. See infra notes 279-350 and accompanying text.
40. See infra notes 351-64 and accompanying text.
41. 119 U.S. 436 (1886).
43. Ker, 119 U.S. at 437-38.
44. Id. at 438; United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974).
45. Ker, 119 U.S. at 438.
handed over to Illinois authorities and convicted in state court.\textsuperscript{46}

The Supreme Court faced two questions on appeal: first, whether Ker could successfully challenge the trial court's jurisdiction by arguing that his abduction violated his due process rights under the Fourteenth Amendment; and second, whether the trial court lacked jurisdiction because Ker's apprehension did not comply with the provisions of the United States-Peru extradition treaty.\textsuperscript{47} As to Ker's constitutional claim, the Court held that because both the indictment and trial conducted against Ker were proper, the defendant's rights to due process were fully satisfied.\textsuperscript{48} As to Ker's claim under the extradition treaty, the Court found that the treaty had not been invoked because the agent failed to present the extradition papers to the Peruvian authorities, and thus, the agent did not initiate the extradition process.\textsuperscript{49} It is clear then

\begin{itemize}
  \item[46.] Id. at 438-39.
  \item[47.] Id. at 439-41.
  \item[48.] Id. at 440. The Court applied the following definition of due process:
  \begin{quote}
    The 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.
  \end{quote}
  \item[49.] Ker, 119 U.S. at 442-43. The Court characterized the arresting agent's behavior
that *Ker* establishes that unless the defendant proves an improper indictment, an unfair trial, or that his abduction violates the express provisions of an extradition treaty, the defendant may not challenge a court's jurisdiction.\(^50\)

Sixty-six years later, in *Frisbie v. Collins,*\(^41\) the Supreme Court unanimously reaffirmed *Ker* and extended its application to domestic kidnappings by state agents.\(^52\) Citing *Ker,* the Court again held that such abductions do not offend notions of due process, even when the kidnappers are state officers acting under government authority.\(^53\)

as follows:

> [Although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing ... Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that 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 kidnaping [sic] within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States.]

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50. *See Ker,* 119 U.S. at 440-44. It is on this point that the courts have diverged. Prior to the Supreme Court's decision in *Alvarez-Machain,* the Ninth Circuit took a narrow view of *Ker* by limiting its application to abductions conducted by private individuals and not to abductions involving government officials. *See,* e.g., *United States v. Verdugo-Urquidez,* 939 F.2d 1341, 1346 (9th Cir. 1991) (relying on dicta from *Ford v. United States,* 273 U.S. 593, 605-06 (1927), *vacated,* 112 S. Ct. 2986 (1992)). Other circuits, and most recently the Supreme Court, interpret *Ker* far more broadly, and hold that the rule applies to all extraditions whether conducted by private individuals or state agents. *See* *United States v. Alvarez-Machain,* 112 S. Ct. 2188, 2197 (1992); *United States v. Winter,* 609 F.2d 975, 985-86 (5th Cir.), *cert. denied,* 423 U.S. 825 (1975); *United States v. Toscanino,* 500 F.2d 267, 279 (2d Cir. 1974); *United States v. Sobell,* 244 F.2d 520, 525 (2d Cir.), *cert. denied,* 355 U.S. 873 (1957).


52. *Id.* at 522-23. *Frisbie* was living in Chicago when Michigan policemen forcibly seized, handcuffed, blackjacked, and transported him to Michigan where he was tried for murder. *Id.* at 520. *Frisbie* claimed that his abduction violated his due process rights and that his trial and conviction violated the Federal Kidnapping Act, 18 U.S.C. § 1201. *Id.* at 520. As to the latter claim, the Court could not find any provision within the federal statute that bars a state from prosecuting persons abducted out of state by its officers. *Id.* at 523. *Frisbie* was not the first time that the Court applied *Ker* to interstate abduction cases. *See,* e.g., *Pettibone v. Nichols,* 203 U.S. 192, 212-13 (1906) (holding that although an out of state abduction was "a wrong" upon the defendant, it could not void the court's jurisdiction); *Mahon v. Justice,* 127 U.S. 700, 715 (1888) (finding that the district court correctly refused to void its jurisdiction over a defendant kidnapped in West Virginia and forcibly returned to Kentucky).

53. *Frisbie,* 342 U.S. at 522. The Court reasoned that "*[t]here is nothing in the
Therefore, the doctrine that emerges from the Ker and Frisbie holdings is that forcible abductions, whether by state agents or private individuals, do not violate due process. Thus, the only way a defendant can successfully challenge the court’s jurisdiction is by arguing that his abduction violated the provisions of an extradition treaty.\footnote{Id.}

\textit{B. The Toscanino Exception—Abductions That “Shock the Conscience” and Invoke Due Process}

In the area of extraterritorial arrests, the Ker rule stood unquestioned until 1974 when the Second Circuit, in \textit{United States v. Toscanino},\footnote{See Abramovsky, \textit{supra} note 13, at 156-60. Like its interpretation of Ker, the Ninth Circuit takes an equally narrow view of Frisbie, limiting its holding to domestic, and not international, abductions. \textit{See United States v. Verdugo-Urquidez}, 939 F.2d 1341, 1347 (1991), \textit{vacated}, 112 S. Ct. 2986 (1992).} recognized that the manner in which the defendant is abducted may void a court’s jurisdiction in some circumstances.\footnote{500 F.2d 267 (2d Cir. 1974).}

In \textit{Toscanino}, Brazilian officers kidnapped Toscanino from his home in Uruguay and tortured him for seventeen days in Brazil before flying him to the United States, where he was wanted for drug trafficking.\footnote{Id. at 272-75.} The appellate court held that in light of such extraordinary brutality, Ker was inapplicable, and if Toscanino could prove involvement by U.S. government officials, he should be released as a matter of “fundamental fairness.”\footnote{Id. at 270. Toscanino alleged 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 .... [He] was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten .... 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 .... [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 .... \textit{Id.} at 270. At trial, the government prosecutor did not affirm or deny Toscanino's allegations, but instead claimed that they were immaterial to the court's jurisdiction over the defendant. \textit{Id.}}\footnote{Id. at 275, 281. In fact, Toscanino was never released. On remand, the district court held that he failed to prove participation by U.S. officials, and thus, the court retained jurisdiction. \textit{United States v. Toscanino}, 398 F. Supp. 916, 917 (E.D.N.Y. 1975).}

The Second Circuit based its conclusion on the Supreme Court's broad interpretation of due process for cases involving “shock-
"police misconduct." Modern Supreme Court cases apply the exclusionary rule to evidence obtained in violation of the Fourth Amendment, and this also influenced the *Toscanino* court's decision. However, the Second Circuit went further than prior Supreme Court decisions by extending the exclusionary rule to the body of the defendant.

Although various federal courts have acknowledged the *Toscanino* exception, 59. *Toscanino*, 500 F.2d at 274. The appellate court relied heavily on the Supreme Court's decision in *Rochin v. California*, 342 U.S. 165 (1952), which established that police conduct may violate a defendant's Fourteenth Amendment right to due process when the conduct is so brutal that it "shocks the conscience." *Toscanino*, 500 F.2d at 273. For another Second Circuit case explaining the history and rationale behind the exception, see *United States ex rel. Lugan v. Gengler*, 610 F.2d 62, 65-66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1974).

In addition to the Second Circuit, the Ninth Circuit has also adopted this exception. *See United States v. Lovato*, 520 F.2d 1270, 1271 (9th Cir.) (per curiam) (holding that to fit within the exception a defendant must make "a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States"), *cert. denied*, 423 U.S. 985 (1975); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605 (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).


60. *See Toscanino*, 500 F.2d at 272-75; see also *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (applying the exclusionary rule to confessions or leads obtained from those confessions resulting from police behavior that violated the Fourth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to illegal searches or seizures by state officers in a state criminal trial); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that evidence acquired by an illegal search may not be admitted against the defendant in a federal court).

61. *See Toscanino*, 500 F.2d at 275. After stating the rationale behind the exclusionary rule—deterrence of official misconduct and preservation of judicial integrity—the court concluded that:

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

*Id.* (citation omitted). For an excellent discussion on the history and rationale of the *Toscanino* exception, see Gentin, *supra* note 15, at 1238-43.
exception, no court has actually applied it. Instead, courts either flat-ly refuse to recognize such an exception, or dismiss the defendant's claim for lack of proof that U.S. agents participated in the alleged brutality. Additionally, Supreme Court decisions that were decided after Toscanino clearly reject any expansion of the exclusionary rule to include the defendant's own body. For example, in United States v. Crews, the Court held that the body of a defendant is never suppress-ible as the fruit of an unlawful arrest. The Court reasoned that any deterrent effect gained by voiding jurisdiction could not outweigh the paramount public interest in bringing the guilty to trial. In sum, not only do courts rarely consider the Toscanino exception applicable, but subsequent Supreme Court holdings cast considerable doubt on that exception's validity. As a result, a defendant's due process claim will rarely defeat the Ker-Frisbie doctrine, and therefore, the rule stating that abductions alone do not divest a trial court of jurisdiction stands unchallenged.

62. Abramovsky, supra note 13, at 159.

There are two primary reasons why courts have refused to apply the exception. First, they have opined that in the cases before them the alleged conduct was not of such enormity as to trigger the “shock the conscience” doctrine. Second, even when presented with medical evidence which supports the defendant's allegation and might amount to such egregious conduct, defendants have been unable to persuade the court that U.S. law enforcement agents actively participated in such conduct.

Id. (footnote omitted).

On remand, Toscanino was unable to prove his allegations. Toscanino, 398 F. Supp. at 917; see also United States v. Lira, 515 F.2d 68, 71 (2d Cir.) (Chilean police tortured and interrogated the defendant but the court found no evidence that the DEA agent participated in or acquiesced to the torture), cert. denied, 432 U.S. 847 (1975); United States v. Degollado, 696 F. Supp. 1136, 1140 (S.D. Tex. 1988) (finding that the defendant failed to substantiate U.S. involvement in the torture carried out by Mexican police).

63. See Abramovsky, supra note 13, at 159.

64. See, e.g., INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (rejecting the defendant's objection to being summoned to a deportation hearing following his allegedly unlawful arrest); United States v. Crews, 445 U.S. 463, 474 (1980) (“Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest.”); Stone v. Powell, 428 U.S. 465, 485 (1976) (“[J]udicial proceedings need not abate when the defendant's person is unconstitutionally seized.”).

For a complete discussion of these cases and their effect on the Toscanino exception, see Gentin, supra note 15, at 1238-43.


66. Id. at 474.

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

68. Gentin, supra note 15, at 1242.

Although defendants have not been successful in challenging a court's jurisdiction due to an illegal arrest, the exclusionary rule still allows for the exclusion of
C. Treaty Violation Exception to Ker-Frisbie

Although the Ker-Frisbie doctrine stands as a formidable barrier to a defendant seeking relief for his wrongful abduction, the doctrine is not entirely invincible. If a binding extradition treaty exists between two nations, a defendant may assert that the kidnapping violated the treat-
ty and thus divests the court of its jurisdiction.70 However, to prevail on such a claim, the defendant must first have standing to object to the treaty violation.71 A defendant obtains standing either by an express treaty provision or by an objection from the asylum state.72 The defendant must also prove that state law enforcement agents, as opposed to private individuals, violated the treaty.73

Therefore, given the existence of a valid extradition treaty, a defen-

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70. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992) (recognizing that when the arrest by government agents violates a binding extradition treaty, the Ker-Frisbie doctrine is inapplicable and a court may divest itself of jurisdiction); Cook v. United States, 288 U.S. 102, 121 (1932) (same); Ford v. United States, 275 U.S. 593, 606 (1927) (same).

71. See Cook v. United States, 288 U.S. 102, 121 (1933); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1346 (9th Cir. 1991), vacated, 112 S. Ct. 2986 (1992); Crystle, supra note 15, at 398.

For a court to find a violation of an extradition treaty, the defendant must show "state action." Id. Showing state action is also essential to a successful invocation of the Toscanino due process exception. Id. If the arresting party is a state official, state action is clear. If the party is a private individual, generally no state action exists unless the defendant proves that the state incited, encouraged, or induced the private individual to make the arrest. Id. at 398-401; United States v. Caro-Quintero, 745 F. Supp. 599, 609 (C.D. Cal. 1990) (citing 1 M. Cherif Bassiouni, International Extradition: United States Law & Practice 71-74 (2d rev. ed. 1987)), aff'd sub nom. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992).

72. Government-paid bounty hunters fall into this latter category. United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir.) (finding torture inflicted by paid agents amounts to state action), cert. denied, 423 U.S. 985 (1975); Caro-Quintero, 745 F. Supp. at 609.

Interestingly, if Ker had been decided under modern state action rules, Ker's arrest by a state-hired agent would amount to state action. Crystle, supra note 15, at 398-99. Nonetheless, the court would have retained jurisdiction because the abduction did not violate any provisions of the extradition treaty with Peru. See United States v. Alvarez-Machain 112 S. Ct. 2188, 2193-95 (1992); Ker v. Illinois, 119 U.S. 436, 443-44 (1886).
dant seeking to utilize the treaty exception need only affirmatively an-
swer two questions: first, whether the government's conduct violates
the treaty provisions; and second, whether the foreign defendant has
standing to object to the court's jurisdiction by virtue of an express
treaty provision or a formal protest from the asylum state.  

1. Violation of an Extradition Treaty's Express Provision

When the defendant proves that the arrest or search violates an ex-
press term of a binding treaty, the Supreme Court has repeatedly held
that jurisdiction is void and that the case must be dismissed. 

In Cook v. United States, the Supreme Court addressed the issue of
whether the United States Government could assess a penalty on a
British ship for carrying alcoholic beverages in violation of prohibition
laws. In Cook, customs agents discovered the illegal cargo when they
boarded the ship eleven and a half miles off shore. However, a 1924
treaty signed between the United States and Britain provided that
boarding rights could not be exercised more than ten miles off shore.

The Court held that because the treaty confined the government's
authority to seize vessels to a ten mile zone, the government "lacked
power" to seize the defendant's vessel and thus "lacked power" to "sub-
ject the vessel to our laws." As a result, the trial court lacked juris-
diction to try the defendant, and could not apply the rule of Ker.

2. Violation of an Implied Provision—Violation of the Treaty's
Object and Purpose

Cases like Cook, in which the government action violated an express
provision of an extradition treaty, are rare. More commonly, the government makes an extraterritorial arrest or seizure that does not invoke any particular treaty provision, but rather violates an implied term of the agreement. In such cases, the defendant's only claim may be that such government action specifically defeats the treaty's underlying object or purpose.

Ironically, in United States v. Rauscher, a case decided the same day as Ker, the Supreme Court implied a term into a U.S.-Britain extradition treaty and held that the United States government's violation of that term prevented the trial court from exercising its jurisdiction. Rauscher was extradited to the United States from Great Britain on charges of murder on the high seas. Upon arrival, Rauscher was also charged with the lesser offense of inflicting cruel and unusual punishment on a fellow crew member. No provision in the extradition treaty expressly limited the prosecution's power to charge a defendant with an offense other than one listed in the extradition request. After examining the treaty's provisions, conflicting case law, and commentary

83. See id. at 102, 121; Ford v. United States, 273 U.S. 593, 616 (1927) (failing to decide whether a United States Coast Guard ship seizure violated an express provision of a treaty between United States and Great Britain because the defendant waived the issue at the trial court level).

84. See Abramovsky, supra note 13, at 153-56. There are a variety of reasons why governments choose not to invoke extradition treaties and instead resort to irregular means to apprehend suspects. First, extradition treaties are the slowest and most costly means of rendition. See id. at 155. Second, in many cases, national laws or internal politics of the asylum state prohibit extradition despite the existence of an extradition mechanism. Id. at 155 n.10; see also discussion of extradition difficulties, infra notes 314-24 and accompanying text.

85. Prior to the Supreme Court's decision in Alvarez-Machain, federal courts were split on the issue of whether abductions violate the underlying purposes of extradition treaties. See, e.g., United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349-61 (9th Cir. 1991) (holding that abductions frustrate the object and purpose of U.S.-Mexico extradition treaty), vacated, 112 S. Ct. 2986 (1992); United States v. Caro-Quintero, 745 F. Supp. at 599, 609-610 (C.D. Cal. 1990) (same), aff'd sub. num. 946 F.2d 1466 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992). But see, e.g., Matta-Ballesteros ex rel. Stolar v. Henman, 697 F. Supp. 1040, 1044 (S.D. Ill. 1988) (holding that abduction alone, absent a protest from the asylum state, does not give the defendant a right to claim a treaty violation), aff'd, 896 F.2d 225 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); United States v. Sobell, 244 F.2d 520, 525 (2d Cir.) (holding that an illegal abduction did not violate the U.S.-Mexico extradition treaty), cert. denied, 355 U.S. 873 (1957); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (deferring the question of whether an abduction violated an extradition treaty to the executive branch).

86. 119 U.S. 407, 429-30 (1886).
87. Id. Justice Miller authored both Ker and Rauscher.
88. Id. at 409-10.
89. Id. at 409.
90. Id. at 422.

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from international law experts, Justice Miller found that the treaty impliedly limited prosecution to offenses for which the defendant was extradited. This implied provision, now widely incorporated in all extradition treaties, is the principle of "specialty." However, the Rauscher Court's more important contribution is in demonstrating that governments may violate both implicit and explicit terms of an extradition treaty. Although courts agree that implicit terms may exist, they differ markedly in their willingness to find such terms.

a. The Ninth Circuit view—implying a term that the extradition treaty is the exclusive means of rendition

Some courts, particularly the Ninth Circuit, find an implied provision that the extradition mechanism is the exclusive means of rendition, and therefore other means, such as abductions, are prohibited. These
courts begin by arguing that unilateral abductions are inherently inconsistent with the fundamental purposes of extradition treaties. They argue that an extradition treaty's function is to bind the signatory nations to a set of reciprocal promises which serve to safeguard each nation's sovereignty and to ensure the fair treatment of extradited individuals. Therefore, because the concept of abductions is antithetical to the protective function of extradition treaties, the only reasonable conclusion is that such treaties contain an implied provision that they are the exclusive means of rendition. Arguably, without this as-

claimed under it, and the other enlarging it, the more liberal construction is to be preferred.

Id. at 293-94 (citations omitted).


97. Verdugo-Urquidez, 939 F.2d at 1350; Caro-Quintero, 745 F. Supp. at 609-10 (citing I M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 194 (2d rev. ed. 1987)). In Caro-Quintero, Judge Rafeedie based his finding that extradition treaties are designed to protect territorial sovereignty on the reasoning in Rauscher. See Caro-Quintero, 745 F. Supp. at 609. In Rauscher, Justice Miller concluded that in all extradition treaties an implied term exists that limits prosecution to the charges for which the asylum nation granted extradition. United States v. Rauscher, 119 U.S. 407, 419-20 (1886). However, in reaching this conclusion, Justice Miller did not even mention the principle of territorial sovereignty. See id. Rather, he based his conclusion on protecting the extraditing country's inherent right under international law to refuse extradition requests in certain circumstances. See id. Justice Miller found that, absent a treaty obligation, extraditing countries generally refuse extradition requests unless they contain charges of some specific offense. Id. at 419. Therefore, to protect this right of refusal, an implied term should exist in all extradition treaties that limits prosecution to the specified charges. Id. In light of this reasoning, the analysis in Rauscher does not support Judge Rafeedie's assertion that extradition treaties exist to protect the sovereignty of signatory nations.

98. Verdugo-Urquidez, 939 F.2d at 1350; Caro-Quintero, 745 F. Supp. at 609. In Verdugo-Urquidez, the court noted that the typical extradition treaty sets forth in great detail the steps that each nation must take to compel the other to extradite a particular defendant. Verdugo-Urquidez, 939 F.2d at 1349. "For example, it lists the crimes for which individuals may be extradited and those for which they may not be, the evidence that must be adduced to obtain extradition, and the method by which such evidence must be presented." Id. The court eventually held that because the U.S.—Mexico treaty provided such detailed procedures for acquiring a fugitive and specific exceptions to the duty to extradite, the manifest intention of the parties was for the treaty to be the exclusive means to acquire fugitives. Id. at 1350-51. For commentary supporting this view, see generally Lowenfeld I, supra note 15. For an in-depth criticism of this approach finding that exclusivity defeats the purposes of extradition treaties, see Mitchell J. Matorin, Note, Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition, 41 DUKE L.J. 907, 910 (1992).

99. Verdugo-Urquidez, 939 F.2d at 1349-52. The Supreme Court ultimately rejected
sumption, the treaty's provisions are reduced to meaningless formalities.\(^{100}\)

b. The prevailing view—the argument against implying exclusivity

In contrast to the Ninth Circuit's approach, the Supreme Court and other commentators take a far narrower view of an extradition treaty's purpose. They refuse to hold that the treaty is the exclusive means of rendition or that abductions necessarily violate the treaty.\(^{101}\) Under this view, the fundamental purpose of extradition treaties is to provide no more than an \textit{optional} means of assistance in combating crime.\(^{102}\) The reciprocal duties are that \textit{if and when} the prosecuting country makes a formal request for a fugitive, the asylum state must deliver the


\textit{The ambitious purpose ascribed to the Treaty by the [Verdugo court], we believe, places a greater burden on its language and history than they can logically bear. In a broad sense, most international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations. This, however, does not mean that the violation of any principle of international law constitutes a violation of this particular treaty. \textit{Id.}}

\(^{101}\) \textit{Verdugo-Urquidez}, 939 F.2d at 1350. The \textit{Verdugo-Urquidez} court criticized any other conclusion as illogical. \textit{Id.} at 1351. Without exclusivity, the court argued that extradition treaties will be converted from "instruments for arranging orderly transfers between nations ... subject to certain agreed-upon limitations set forth in the treaties, into a license or charter for signatory nations to engage in unlawful conduct in all those categories of cases in which the treaty prohibits extradition." \textit{Id.} at 1351. For this proposition, the \textit{Verdugo-Urquidez} court relied heavily on the language in \textit{Rauscher}. \textit{See id.} United States v. Rauscher 119 U.S. 407, 420-21 (1886) (finding that the treaty's object and purpose would be utterly frustrated if prosecution was not limited to the charges specified in the extradition request).

\(^{102}\) \textit{Alvarez-Machain}, 112 S. Ct. at 2195 (holding that the language and history behind the U.S.-Mexico extradition treaty did not reveal that it was intended as the exclusive means of rendition). For further commentary proposing that extradition treaties are not intended as the exclusive means of rendition, see Matorin, \textit{supra} note 98, at 912, and \textit{infra} notes 212-21, 283-87 and accompanying text.

\(^{102}\) \textit{See} 1 M. CHERIF BASSIOUNI, A TREATISE ON INTERNATIONAL CRIMINAL LAW 351 (1973) (describing the extradition practices of the United States in general); Matorin, \textit{supra} note 98, at 913 ("Extradition treaties are designed to protect neither the sovereignty of nations nor the rights of individuals; rather ... they exist solely to assist the states in preventing and punishing crime.")
suspect or refuse based on certain exceptions provided for in the treaty. Aside from this conditional obligation, extradition treaties do not mandate that countries resort exclusively to the extradition mechanism. Therefore, other means of apprehension, such as abductions, cannot violate the treaty unless the treaty expressly prohibits them or provides on its face that the extradition procedures are the exclusive means of rendition. Thus, some authorities argue that this result is consistent with the treaty's purpose as a crime fighting device.

103. See Alvarez-Machain, 112 S. Ct. at 2193 (reasoning that an extradition treaty only obligates the parties to the extent that the parties seek to invoke its provisions); United States v. Sobell, 142 F. Supp. 515, 524-25 (S.D.N.Y. 1956) (same), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873 (1957). One commentator noted:

As a result of their history and purpose, two different obligations are imposed by extradition treaties. The sole effect on the asylum state is to bind it to deliver a suspect upon a proper request. If the requesting state fails to comply with the procedures set forth in the treaty, then the obligation to comply with the request does not arise. The sole obligation imposed upon the requesting state is that, if it invokes the extradition treaty, it will try the extradited suspect for the specific crime charged. An extradition treaty thus does not create a reciprocal agreement to use the process provided in the treaty exclusively; rather it creates two unilateral pledges.

Matorin, supra note 98, at 914 (footnotes omitted) (emphasis added).

104. See Alvarez-Machain, 112 S. Ct. at 2193-94. Typical provisions in an extradition treaty that an asylum country may invoke in order to refuse extradition are those that allow a nation to refuse to turn over a country's own nationals, or defendants charged with political or capital offenses. See, e.g., Extradition Treaty, May 4, 1978, U.S.-Mex., arts. 5, 8 & 9, 31 U.S.T. 5059, 5063-67.

105. Matorin, supra note 98, at 912-17; see also Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 534 (1987) (absent explicit support in the treaty, the Court refused to infer that the contracting states to the Hague Evidence Convention abandoned their right to resort to pre-treaty measures). Matorin argued that the rationale of Société may be applied with equal force in interpreting the U.S.-Mexico extradition treaty because "if the United States and Mexico had intended to impose mutual obligations to follow the procedures set forth in the treaty, they could have merely added an explicit statement to that effect." Matorin, supra note 98, at 921.

106. Matorin, supra note 98, at 920; see also United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195 (1992) (holding that absent any provision on the face of the treaty or a history of enforcement that concludes otherwise, abductions do not violate extradition treaties); United States v. Sobell, 244 F.2d 520, 524-25 (2d Cir.) (same), cert. denied, 355 U.S. 873 (1957).

107. Matorin, supra note 98, at 915. Others criticize the "treaty as exclusive means" approach because it attempts to "convert the treaty from a crime-fighting device into a straitjacket for law enforcement agencies. Exclusivity would open up the law enforcement arena to political and diplomatic forces that would undermine the efficiency of the fight against crime." Id. If a treaty's goal is to facilitate law enforcement procedures, one should not assume that the government intended to constrain itself or other nations in their fight against crime; rather, the assumption should be that each nation retains its freedom to arrest fugitives abroad using whatever means it
meant only as an optional aid to law enforcement agencies.108

c. Defendant's standing to object—adequate protest by the asylum state

In addition to showing a treaty violation, the defendant must also demonstrate his or her standing to object to the violation.109 An ex-deems most efficient and desirable. See id. at 916. The treaty merely provides governments with an alternative to formal extradition procedures should they wish to avoid that more diplomatically volatile means of abduction. See id. at 922.

108. See Alvarez-Machain, 112 S. Ct. at 2193-94. The assumption that governments do not intend to close off other means of apprehension recognizes that the extradition process is not fail-safe. See Matorin, supra note 98, at 916; Abramovsky, supra note 13, at 154-55. This is particularly true with treaties between the United States and its Latin American partners. See Abramovsky, supra note 13, at 155 n.10. Despite having extradition treaties with the United States, several Latin American countries refuse to extradite their own nationals. See, e.g., Alvarez-Machain, 112 S. Ct. at 2193-94 (noting that the U.S.-Mexico extradition treaty gives Mexico the right to refuse the extradition of its own nationals as long as Mexico submits the case to its own authorities); Matta-Ballesteros ex rel. Stolar v. Henman, 697 F. Supp. 1040, 1044 (S.D. Ill. 1988) (concluding that an extradition request would have failed because the Honduran Constitution prohibits extradition of nationals), aff'd, 896 F.2d 255 (7th Cir.), cert. denied, 498 U.S. 878 (1990); Abramovsky, supra note 13, at 155 n.10 (noting that the Colombian Supreme Court declared the extradition of Colombian nationals unconstitutional). In other cases, the demand for extradition may be futile given the defendant's ability to bribe government officers or otherwise intimidate the foreign government into refusing extradition. See Abramovsky, supra note 13, at 155. Thus, law enforcement agents' ability to resort to alternative means of apprehension is necessary for those cases in which corruption and intimidation prevent the asylum country from bringing a criminal to justice. See Matorin, supra note 98, at 914-15. For further commentary on the difficulties of formal extradition, see infra notes 314-24 and accompanying text.

109. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1355-56 (9th Cir. 1991), vacated, 112 S. Ct 2986 (1992); United States v. Caro-Quintero, 745 F. Supp. 599, 607-08 (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). The rule that a defendant lacks standing to object unless the offended nation protests the abduction stems from the concept that treaties are contracts respecting the rights of nations, not individuals. United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67-68 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); Caro-Quintero, 745 F. Supp. at 607; Matta-Ballesteros, 697 F. Supp. at 1043. Thus, when a treaty violation occurs, the contracting foreign government, not the defendant, has the right to complain about the violation. Caro-Quintero, 745 F. Supp. at 607 (citing Cordero, 668 F.2d at 38); see also United States v. Yunis, 681 F. Supp 909, 915-16 (D.D.C.) (precluding the defendant from objecting to alleged violations of the U.S.-Lebanon extradition treaty absent official objections from Lebanon), rev'd on other grounds, 859 F.2d

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press provision in the treaty, or more commonly, adequate protest by the asylum state confers such standing.\textsuperscript{110} Without a government's objection, courts assume that the asylum state acquiesces to the treaty violation.\textsuperscript{111} The rule is based on the concept that treaties are contracts between nations designed to further the sovereign interests of the state rather than the interests of the individual.\textsuperscript{112}

Federal courts disagree over the type of protest that is considered

\textsuperscript{108} Verdugo-Urquidez, 939 F.2d at 1355-56. The concept that a defendant may have a private right to assert a treaty violation stems from the Supreme Court's holding in United States v. Rauscher, 119 U.S. 407, 424 (1886), which held that an individual defendant has standing to allege a violation of the principle of specialty. See discussion on Rauscher, supra notes 86-93, 97 and accompanying text. The Court reasoned that because the U.S.-British treaty was self-executing and assumed the status of federal law, the citizens of the signatory countries could claim certain rights "growing out of the treaty." \textit{Id.} at 418-19. One of those rights was the right to be tried only for those charges specified in the extradition request. \textit{Id.} at 420. As the \textit{Verdugo-Urquidez} court noted, although many circuits recognize a defendant's right to assert a violation of specialty, no court recognizes a private right to assert other treaty violations absent adequate protest by the asylum state. \textit{Verdugo-Urquidez}, 939 F.2d at 1346-47. The \textit{Verdugo-Urquidez} court held that in abductions, the offended government must at least file a formal protest. \textit{Id.} at 1356. Other cases firmly support the formal protest requirement for conferring individual standing. See supra note 103.

\textsuperscript{111} \textit{Verdugo-Urquidez}, 939 F.2d at 1352-53; Caro-Quintero, 745 F. Supp. at 611-12. This assumption is necessary to allow signatory nations the option to silently acquiesce to treaty violations. See \textit{Verdugo-Urquidez}, 939 F.2d at 1352; see also Matorin, supra note 98, at 914 (discussing the \textit{Verdugo} court's conclusions). As in contract law, nations may decide not to hold the breaching party liable for a breach of the agreement. See, e.g., United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980) ("Thailand initiated, aided and acquiesced in Valot's removal to the United States."); Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) ("Without an official protest, we cannot conclude that Honduras has objected to Matta's arrest."); \textit{cert. denied}, 498 U.S. 898 (1990); Waits v. McGowan, 516 F.2d 203, 208 n.9 (3rd Cir. 1975) ("The pleadings do not allege that Canada has objected in any way to the removal of Waits to this country.").

\textsuperscript{112} \textit{Caro-Quintero}, 745 F. Supp. at 607 (holding that the defendant's standing to assert a violation of international law must be accompanied by a protest from the offended government because individual rights arising out of international law are only derivative through the states); \textit{Matta-Ballesteros}, 697 F. Supp. at 1043 (same); 668 F.2d at 37-38 (same); \textit{Gengler}, 510 F.2d at 67-68 (same).
sufficient to void a court's jurisdiction. Generally, a mere complaint about the abduction is insufficient; instead, the state must explicitly demand the defendant's repatriation.

Some courts, the Ninth Circuit in particular, require only that the offended government formally protest the abduction. In United States v. Verdugo-Urquidez, Mexico made a formal complaint three months after the abduction, and requested notification to U.S. judicial authorities. The appellate court, in finding sufficient grounds for a dismissal, indicated that an official protest alone is enough. In United States v. Caro-Quintero, the Alvarez case at the district court level, Mexico immediately protested the abduction as a violation of the extradition treaty and demanded the defendant's return. The district court ultimately held, in accord with Verdugo, that official protest to the abduction, and not an explicit demand for repatriation, was sufficient to confer standing.

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113. See Matorin, supra note 98, at 926 and n.92.
114. RESTATEMENT (THIRD), supra note 108, at § 432 cmt. c (“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.”); see also Verdugo-Urquidez, 939 F.2d at 1365 (Browning, J., concurring and dissenting) (dissenting from the assertion that a mere formal protest by the offended government is sufficient, because “under international practice a nation's protest that its treaty rights have been violated . . . does not in itself constitute an objection to the defendant's trial or a demand for his return”).
115. Verdugo-Urquidez, 939 F.2d at 1360 n.22 (“None of the principal cases discussing derivative standing suggests that anything more than a formal protest is required.”); Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir.) (requiring “an official protest”), cert. denied, 498 U.S. 878 (1990); Gengler, 510 F.2d at 67 n.8 (defendant must prove that the sovereign "registered an official protest with the United States Department of State").
117. Id. at 1360.
118. Id. at 1360 n.21.
120. Id. at 604.
121. Id. at 608. In contrast to Verdugo-Urquidez and Caro-Quintero, the majority of cases involving international abduction show an absence of any actual protest by the foreign government. See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.) (finding that the defendant failed to show any protest by the Honduran government), cert. denied, 498 U.S. 878 (1990); United States v. Zabeneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (finding neither Guatemala nor Belize protested the defendant's abduction); United States v. Cordero, 668 F.2d 32, 38 (1st Cir. 1981) (finding that Panama and Venezuela did not object to the defendant's arrest and deportation); United States v.
Some authorities criticize the Ninth Circuit approach for ignoring the possibility that the government protest may not actually be intended to effect the fugitive's return.\textsuperscript{122} Often, protesting nations do not wish—or are unable—to bring the defendant to trial in their own courts, but still object to the abduction in order to satisfy internal political concerns.\textsuperscript{123} Therefore, to ascertain the offended nation's true intent, courts should retain jurisdiction until the foreign country clearly demands the defendant's repatriation.\textsuperscript{124} Some courts go farther and deny standing even after a demand for repatriation has been made, regarding the alleged treaty violation as a matter purely for the executive branch.\textsuperscript{125} Such holdings reflect the traditional tendency of the judicia-

Reed, 639 F.2d 896, 902 (2d Cir. 1981) ("[A]bsent protest or objection by the offended sovereign, Reed has no standing to raise a violation of international law as an issue."); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 67-68 (2d Cir.) (finding no showing of objection to defendant's abduction by Bolivia or Argentina), cert. denied, 421 U.S. 1001 (1975); United States v. Yunis, 681 F. Supp 909, 915-16 (D.D.C.) (precluding the defendant from objecting to alleged violations of the U.S.-Lebanon extradition treaty absent an official objection from Lebanon), rev'd on other grounds, 859 F.2d 953 (D.C. Cir. 1988).

122. United States v. Verdugo-Urquidez, 939 F.2d at 1341, 1366-67 (9th Cir. 1991) (Browning, J., concurring and dissenting), vacated, 112 S. Ct. 2886 (1991); Matorin, supra note 98, at 929.


124. Matorin, supra note 98, at 929.

125. Jamaica v. United States, 770 F. Supp. 627, 622-23 (M.D. Fla. 1991) (holding official complaints that the United States violated the U.S.-Jamaica extradition treaty, and demands for defendant's repatriation must be remedied through the diplomatic process); United States v. Noriega, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990) (holding that the protest by the former Noriega government in Panama has no effect on the court's jurisdiction over defendant General Noriega because the United States did not recognize the Noriega regime as Panama's legitimate government at the time of arrest); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (holding that a violation of the extradition treaty and the Mexican government formally demanding the defendant's repatriation were matters for the executive branch).

Occasionally, a court may assert "universal" jurisdiction over a defendant despite an official protest to the abduction. Pontoni, supra note 31, at 241; see, e.g., Attorney General v. Eichmann, 36 Int'l L. Rep. 5 (D.C. Jerusalem 1961), aff'd, 36 Int'l L. Rep. 277 (S. Ct. Israel) (holding that Argentina's objection to the Nazi war criminal's abduction cannot defeat the court's "universal" jurisdiction given the severity of the defendant's war crimes). Universal jurisdiction holds that some crimes are so universally condemned that any nation that has custody of the perpetrators may prosecute them under their laws. See Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (noting crimes such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism) (quoting RESTATEMENT OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §404 (1984)), cert. denied, 475 U.S. 1016 (1986). At
ry to rely on the separation of powers principle to avoid the more difficult issues of treaty interpretation.126

D. Alternative Theories for Dismissal

1. Violations of Human Rights

Because physical abuse and arbitrary detention commonly accompany abductions, they usually violate various international covenants protecting human rights.127 In U.S. courts, however, claims based on such covenants rarely prevail128 because human rights treaties are executo-

126. See Pontoni, supra note 31, at 235-36. Under a separation of powers argument, courts cite Baker v. Carr for the proposition that the treaty violation is a non-justiciable political question. See Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that an issue is non-justiciable when there are no "judicially discoverable and manageable standards" or when its proper resolution requires "initial policy determination[s]" better left to the political branches). Similarly, a court may argue that certain issues affecting foreign policy are properly the subject of executive discretion, not judicial review. See Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (holding that the President's discretionary award of overseas airline routes is not subject to judicial review).

For a discussion of the Supreme Court's current adoption of this approach, see infra note 231.

127. See International Covenant on Civil and Political Rights, art. 9(1), adopted December 18, 1966, effective March 23, 1976 ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."). The Human Rights Committee, which implements the International Covenant, ruled that abductions constitute arbitrary arrest and detention. Crystle, supra note 15 at 402-04. United States and China are the only major powers that have not signed this document. Id. at 402 n.10. See also Universal Declaration of Human Rights, art. 9, signed Dec. 1948, U.N.G.A. Res. 217A. (III), U.N. Doc. A/810 (1948); American Convention on Human Rights, art. 7, signed Nov. 22, 1969, entered into force July 18, 1978, OAS Treaty Series no. 36, at 1, OAS Official Records OEA/Ser.L/VII. 23 Doc. 21 Rev. 6 (1979) ("Every person has the right to have his physical, mental, and moral integrity respected.").

128. Crystle, supra note 15, at 403. The executive branch occasionally recognizes human rights law when forming foreign policy. Under the Carter Administration the State Department considered certain human rights instruments binding as customary international law by stating:

There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. This consen-
ry and do not become law until implemented by the legislature. Courts employ this same argument to deny judicial enforcement of various international charters of the United Nations and Organization of American States, which prohibit member nations from using force against the territorial integrity of other member states. Therefore, in abduction cases, alleged violations of such charters fail to persuade a court to divest itself of jurisdiction.

sus is reflected in a growing body of international law: The Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights . . . and other international and regional human rights agreements. There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.


129. Crystle, supra note 15, at 403. For a commentary on the distinction between executory and self-executing treaties, see supra note 69.

130. For cases generally indicating the non-binding nature of these conventions, see Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th Cir. 1985) ("Articles 55 and 56 [of the U.N. Charter] do not create rights enforceable by private litigants in American courts."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (reasoning that the U.N. Charter is not "self executing"), cert. denied, 470 U.S. 1003 (1985); see also United States v. Davis, 905 F.2d 245, 248 n.1 (9th Cir. 1990) ("International law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts."), cert. denied, 111 S.Ct. 753 (1991).

However, if the provisions of such treaties or charters rise to the level of customary international law, some courts may find them enforceable in federal courts. See Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (stating that "several commentators have concluded that the Universal Declaration of [Human Rights] has become, in toto, a part of binding, customary international law"). Customary international law is considered part of the federal common law. The Pacquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts.").


2. Violations of Customary International Law

Unlike their treatment of executory conventions, federal courts consider customary international law as part of the federal common law and as enforceable when international rights or duties are involved.

Under customary international law, extraterritorial abductions conducted without the asylum state's consent clearly violate the fundamental principle of territorial sovereignty. Moreover, if the offended state adequately protests and demands repatriation, international law requires the offending nation to return the defendant.

133. Customary international law consists of norms created by settled practice and is regarded as obligatory by two or more states. D.J. Harris, Cases and Materials on International Law 27 (4th ed. 1991); Restatement (Third), supra note 109, at § 102(2), cmt. b (1987) (stating that such practices may come in the form of diplomatic acts as well as silent acquiescence). Although "there is no precise formula to indicate how widespread a practice must be" to attain customary law status, "it should reflect wide acceptance among states particularly involved in the relevant activity." Id. Once the practice becomes sufficiently accepted to acquire the status of law, it is binding on all states not objecting to it. Id. at § 102 cmt. d. A state may opt out of customary international law by refusing consent during the law's formative stage.

134. Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941) ("International law is part of our law and as such is the law of all States of the Union . . . but [it] is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties."); The Pacquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts."). However, the United States Constitution is silent on the applicability of international law principles, and leaves the negotiation and ratification of international agreements to the executive and legislative branches. See U.S. Const. art. I, § 8.

135. See Gengler, 510 F.2d at 66-67 (concluding that an abduction from another country without that country's consent violates customary international law); United States v. Toscanino, 500 F.2d 267, 275-76 (2d Cir. 1974) (holding that the abduction violated a U.N. Charter provision which incorporated the customary international law principle of territorial sovereignty); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1362 (9th Cir. 1991) (finding a breach of fundamental international law principles incorporated in both the U.N. and the O.A.S. charters), vacated, 112 S. Ct. 2986 (1992); see also Restatement (Third), supra note 109, at § 432(2) cmt. b (1987) ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."). However, no federal court concludes that a violation of international law gives a defendant standing to object. See Gengler, 510 F.2d at 67; Caro-Quintero, 745 F. Supp. at 615; Matorin, supra note 98, at 926.

136. Restatement (Third), supra note 109, at § 432 cmt. c ("The state from which
To the contrary, the Supreme Court has repeatedly held that alleged violations of international law do not void a court's jurisdiction, even when the foreign government firmly protests the breach and demands repatriation. The Court reasons that, like violations of executory treaties, violations of general international law are matters best left to the executive branch, and therefore fall beyond judicial review.

In conclusion, arguments based on customary international law and

the person was abducted may demand return of the person and international law requires that he be returned. If the state ... does not demand his return, under the prevailing view the abduction state may proceed to prosecute him under its laws.

137. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992); Cook v. United States, 288 U.S. 102, 121 (1933) (holding that absent a treaty violation, seizures which violate general international law do not affect a court's jurisdiction); The Merino, 22 U.S. (9 Wheat) 391, 398-401 (1824) (same); The Richmond v. United States, 13 U.S. (Cranch) 102 (1815) (finding the seizure of vessels within the territorial waters of a foreign power violates territorial sovereignty, but does not void jurisdiction). Although federal courts do not void jurisdiction for mere violations of international law, courts use international law to interpret extradition treaties. See United States v. Rauscher, 119 U.S. 407, 419-20 (1886) (using international law to imply a "specialty" into the U.S.-Britain extradition treaty); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1352, (9th Cir. 1991) (stating that international law principles are relevant to the background assumptions underlying extradition treaties), vacated, 112 S. Ct. 2886 (1992). But see Alvarez-Machain, 112 S. Ct. at 2188, 2196 (refusing to interpret the U.S.-Mexico extradition treaty in light of general international law principles).

In concluding that the U.S.-Mexico extradition treaty prohibited unilateral abductions, the Verdugo-Urquidez court relied on the principle of territorial sovereignty as embodied in Article 17 of the O.A.S. Charter and numerous provisions of the U.N. Charter, noting that the United States and Mexico are signatories to both documents. Verdugo-Urquidez, 939 F.2d at 1352. The Supreme Court in Alvarez-Machain rejected this approach, focusing instead on the actual language of the treaty and its history of enforcement. Alvarez-Machain, 112 S. Ct. at 2196 n.14.


139. Alvarez-Machain, 112 S. Ct. at 2196-97; see also Pontoni, supra note 31, at 235-39. Courts may adopt other reasons for rejecting a violation of international law as a basis for voiding its jurisdiction. For example, certain executive acts may override customary international law. See, e.g., Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (dismissing an alleged claim of arbitrary detention in violation of international law because the Attorney General's power to detain aliens indefinitely preempts international law).
human rights covenants appear equally ineffective in voiding a court's jurisdiction, despite the apparent enforceability of customary law in federal courts.

3. Appealing to the Court's Supervisory Power—A Light That Offers Little Hope

Although courts defer issues involving political questions to the executive branch, the courts always retain supervisory powers that can restrain executive conduct.\(^{140}\) Under this power, the court may sanction government conduct the court believes is improper but not unconstitutional.\(^{141}\) Like the exclusionary rule, one purpose is to preserve judicial integrity from the taint of the governmental wrongdoing.\(^{142}\) Another purpose is to deter future government misconduct.\(^{143}\)

The Supreme Court, however, has limited federal courts' exercise of supervisory powers and may require that the government wrongdoing actually be found unconstitutional.\(^{144}\) In *United States v. Payner*,\(^{145}\) the Court refused to uphold the use of supervisory power to exclude evidence wrongfully obtained from a non-defendant.\(^{146}\) The Court stat-

\(^{140}\) Supervisory power is a judicially created rule permitting the court to exclude evidence or dismiss a case in the name of judicial integrity. Crystle, supra note 15, at 405. The Court first exercised the power in *McNabb v. United States*, 318 U.S. 332, 341 (1943), by holding that incriminating statements obtained during a prolonged detention were inadmissible, due to "considerations of justice not limited to strict canons of evidentiary relevance."

\(^{141}\) *United States v. Hastings*, 461 U.S. 499, 505 (1983). Generally, courts invoke their supervisory powers to dismiss indictments that have been reached as a result of prosecutorial misconduct. See, e.g., *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (holding that the cumulative effect of errors and prosecutorial misconduct produced a biased grand jury).

\(^{142}\) *McNabb*, 318 U.S. at 345 (asserting that courts should not become "accomplices in willful disobedience of law").

\(^{143}\) *Hastings*, 461 U.S. at 505. The Court stated that the purposes underlying supervisory powers are . . . "to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *Id.*

\(^{144}\) See *United States v. Russel*, 411 U.S. 423, 435 (1973) (admonishing the lower courts from exercising their supervisory powers as a "chancellor's foot" veto over disfavored law enforcement practices).

\(^{145}\) 447 U.S. 727 (1980).

\(^{146}\) *Id.* at 738-42. The Court reasoned that to allow otherwise would circumvent the established rule of excluding evidence only when an unlawful search or seizure...
ed that federal courts could exercise such supervisory powers only when the defendant's own rights are violated, and thus severely limited the effective use of the power. In light of this limitation, the courts' supervisory powers offer little hope to defendants in need of a last-ditch defense against the Ker-Frisbie doctrine.

Despite the Supreme Court's curtailments on the use of supervisory powers, some courts still state in dicta that they will employ their power in situations where the government's misconduct is pervasive or shocking. Nonetheless, what these opinions reveal is that the remedy offered by the court is not based on supervisory power, but is garnered from fundamental due process, as recognized in Toscanino.

violates the defendant's constitutional rights. Id. at 733. Thus, the Court sought to prevent an "end run" around settled Fourth Amendment law. See United States v. Noriega, 746 F. Supp. 1506, 1536 (S.D. Fla. 1990).

147. Gentin, supra note 15, at 1250-51; accord Thomas v. Arn, 474 U.S. 140, 148 (1985) ("Even a sensible and efficient use of the supervisory power ... is invalid if it conflicts with constitutional or statutory provisions."). Justice Marshall commented that limiting supervisory powers to a constitutional framework goes against the very reason for creating a supervisory power.

The Court's decision to engraft the standing limitations of the Fourth Amendment onto the exercise of supervisory powers is puzzling not only because it runs contrary to the major purpose behind the exercise of the supervisory powers—to protect the integrity of the court—but also because it appears to render the supervisory powers superfluous . . . .

Payner, 447 U.S. at 748-49 (Marshall, J., dissenting).

148. For commentary on Supreme Court cases curtailing supervisory power, see Gentin, supra note 15, at 1246-52.

149. In Caro-Quintero, Judge Rafeedie adopted this approach and attempted to breath new life into the supervisory power doctrine by arguing:

[W]e can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power . . . . To my mind the Government in its laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power . . . .


In dicta, the Noriega court stated that if "confronted with a pure law enforcement effort in which government agents deliberately killed and tortured individuals for the sole purpose of . . . secure[ing defendant's] arrest, the Court would face a situation which properly calls for invocation of its supervisory powers." Id. at 1536.

150. See Noriega, 746 F. Supp. at 1536. The district court stated that the Court in Payner did not render the supervisory power doctrine meaningless because the government conduct at issue did not rise to the "pervasive or shocking misconduct standard." Id. The court thus applied Toscanino's due process language in its determina-
Thus, viewed from this perspective, absent a treaty violation, a defendant's only chance to void a court's jurisdiction is through appeals to due process. As explained previously, a due process objection is unlikely to succeed given the courts' extreme reluctance to even apply due process in abduction cases.

E. Remedies

1. Repatriation

If a defendant successfully demonstrates that his abduction violates a treaty, and if the offended nation files an adequate protest, the court may remedy the treaty violation by ordering the defendant's repatriation. Under such circumstances, the United States would be ordered to offer the kidnapped individual to the offended government. In the event that the offended nation refuses to accept repatriation, however, the court may view this as a withdrawal of protest and thereby reinstate any previously dismissed indictment.

151. For discussion on the Toscanino due process exception, see supra notes 55-68 and accompanying text.
152. See supra notes 62-68 and accompanying text.
153. See, e.g., United States v. Verdugo-Urquidez, 939 F.2d 1341, 1360 (9th Cir. 1991), vacated, 112 S. Ct. 2188 (1992). The objective underlying the remedy of repatriation is to restore the offended nation to the position it would have occupied if the United States had complied with the treaty. RESTATEMENT (THIRD), supra note at 109, § 901, R.N. 3 ("[The] reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.") (quoting Chorzow Factory (Indemnity) case (Ger. v. Pol.), 1936 P.C.I.J. (ser. A) No.17, at 47).
154. Verdugo-Urquidez, 939 F.2d at 1360; see also United States v. Rauscher, 119 U.S. 407, 430 (1886) (holding that when a receiving state seeks to prosecute an individual for crimes other than those stated in the request for extradition, the receiving state must first afford the individual an opportunity to return to the asylum nation); United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974) (stating that when one state abducts an individual from another state, such conduct violates the second state's territorial sovereignty and is remedied by returning the kidnapped person).
155. Verdugo-Urquidez, 939 F.2d at 1362. The Ninth Circuit reasoned that such a remedy is proper because the offended nation, not the defendant, actually seeks the remedy. Thus, "[a] country that lodges a protest which affords a defendant standing . . . must be willing to accept the necessary consequences of that action. The nation that has unlawfully obtained jurisdiction over an individual cannot be expected to turn him loose within its borders." Id.
2. Alternative Remedies

As the foregoing discussion indicates, in absence of a treaty violation, courts very rarely hold that the appropriate remedy for an abduction is voiding jurisdiction. Both the strength of the Ker-Frisbie doctrine and the strong preference of courts to leave claims regarding breaches of territorial sovereignty to the executive branch, indicate that the remedy for unlawful abduction lies within the purview of the State Department rather than that of the courts.

The Restatement (Third) of the Foreign Relations Law of the United States sets forth that "[i]f 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." Reparations may take the form of monetary damages paid to the offended state. However, the remedy most often applied—and least costly and embarrassing to the offending nation—is the use of diplomatic channels, which include the exchange of letters between departments of state, and occasionally a formal apology from the offending government. Additionally, the offended nation may demand further remedies, such as extradition of the

156. See supra notes 41-68, 127-52 and accompanying text.
157. See supra notes 41-68, 133-39 and accompanying text.
158. RESTATEMENT (THIRD), supra note at 109, § 432 cmt. c; see also id. at § 901 cmt. d ("Principles of international law concerning remedies are not rigid or formalistic and give an international tribunal wide latitude to develop and shape remedies, but the tribunal is usually restricted to measures proposed by the parties.").
159. See id. at § 901 cmt. d (1987) ("[I]n some instances compensation may be required even though no monetary damage had occurred."); id. at § 901 cmt. e ("When an intergovernmental claim derives from an injury to a private person, the compensation to the state need not be measured by or limited to the loss suffered by the individual, although that loss usually provides a basis for calculating the compensation due to the state."). A neutral third party, such as the United Nations, could determine the amount of the settlement. Pontoni, supra note 31, at 240.
160. See RESTATEMENT (THIRD), supra note 109, at § 901 cmt. d ("Acknowledgment of a violation and an apology are common forms of redress, sometimes supplemented by compensation.").

Following Israel's abduction of Nazi war criminal Adolph Eichmann from Argentina, the Israeli government, though refusing to relinquish custody of Eichmann responded to Argentina's protests with a conditional apology stating that if they broke any laws they expressed their regrets. Pontoni, supra note 31, at 240. Following the Supreme Court's ruling in Alvarez-Machain, Mexico threatened to sever all cooperation with the United States concerning drug investigations. LaFraniere, supra note 4, at A2. In response, the State Department offered something short of an apology, stating that despite the Supreme Court ruling, the United States respects the sovereignty of foreign governments and would carefully weigh foreign policy considerations before engaging in future abductions. Id.
state agents and other persons involved in the abduction.\textsuperscript{161}

For the abducted fugitive, there is the potential remedy of a civil suit against the individual abductors,\textsuperscript{162} and possibly even a civil remedy against the abducting nation's federal officials for false imprisonment, false arrest, assault or battery.\textsuperscript{163}

III. STATEMENT OF THE CASE

A. Facts

1. The Camerena Murder and Indictment of Dr. Machain

On February 7, 1985, DEA agent Enrique Camerena Salazar was kidnapped outside the American consulate in Guadalajara, Jalisco, Mexico.\textsuperscript{164} One month later, agent Camerena's mutilated body and the body of a Mexican pilot who assisted in a drug investigation were found about sixty miles outside of Guadalajara.\textsuperscript{165} After an extensive DEA investigation, a federal grand jury convened in Los Angeles to indict those believed to have been involved in the murder.\textsuperscript{166} The indictment charged nineteen persons, including Dr. Humberto Alvarez-Machain, a Mexican national who was believed to have assisted in Camerena's torture.\textsuperscript{167} United States prosecutors believed that gaining custody of Dr. Machain would be difficult, since Mexico traditionally refuses to extra-

\begin{footnotes}
\item[162] See Ker v. Illinois, 119 U.S. 436, 444 (1886) (concluding that the individual would probably have a cause of action for trespass and false imprisonment).
\item[164] Caro-Quintero, 745 F. Supp. at 601-02.
\item[165] Id.
\item[166] Lieberman, supra note 13, at 11.
\item[167] Id.
\end{footnotes}
dite its own citizens, and insists on bringing criminal proceedings in Mexico.168

2. Failed Negotiations with the MFJP

The Drug Enforcement Agency (DEA) first attempted to secure Dr. Machain's custody through informal negotiations with Mexican officials.169 The commandante of the Mexican Federal Judicial Police (MFJP) agreed to hand over Dr. Machain in exchange for Isaac Mereno, a Mexican national residing in the United States and wanted by Mexican authorities for embezzlement.170 However, prior to the exchange, the MFJP demanded $50,000 in advance to cover the costs of transporting Dr. Machain to the United States.171 The DEA refused to make the payment.172

3. The Abduction

Previous to and during negotiations, the DEA instructed its informant, Antonio Garate, a former member of the MFJP, to relate to his contacts in Guadalajara that the DEA would pay for information leading to apprehension and seizure of Dr. Machain.173 Shortly after negotiations failed, Garate told the DEA that his "associates" believed that they could successfully apprehend Dr. Machain and deliver him to the United States.174 The DEA in Washington, D.C., approved the plan and the final terms of the abduction.175

On April 2, 1990, Dr. Machain was kidnapped from his office in Guadalajara and flown to awaiting DEA agents in El Paso, Texas.176

168. Id. Under the current extradition treaty between the United States and Mexico, the Mexican government has the right to refuse extradition of its own nationals, provided that it initiate criminal proceedings in Mexico. See Extradition Treaty, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5069, 5065.
170. Id. The Mexican officials proposed that this plan be performed "under the table" because its disclosure would "upset" Mexican citizens. Id.
171. Id.
172. Id.
173. Id. at 603.
174. Id. According to Garate, his "associates" included former and current military police officers, and various civilians. Id.
175. Id.
176. Id. Upon arrival, government agents asked Dr. Machain "whether he had been tortured, mistreated or abused" by his kidnappers. Id. at 604. He stated that none of those incidents occurred. Id. Further a physician who examined Dr. Machain after his arrival in El Paso found no sign of mistreatment or abuse. Id.

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The DEA testified that none of its agents participated in the actual abduction, and that when they received Dr. Machain one of the abductors claimed that they were members of the Mexican police.\textsuperscript{177} One month later, the DEA made a partial reward payment of $20,000 to the Mexican abductors, and in several cases, the DEA evacuated the abductors and their families from Mexico to the United States.\textsuperscript{178}

4. The Mexican Response

On April 18, 1990, the Mexican Embassy sent a diplomatic note to the State Department requesting a detailed report on possible United States involvement in Dr. Machain's abduction.\textsuperscript{179} One month later, the Mexican Embassy sent a second diplomatic note stating that it believed Dr. Machain's abduction was "carried out with knowledge of persons working for the United States government, in violation of the extradition treaty in force between the two countries."\textsuperscript{180} The note also demanded Dr. Machain's return.\textsuperscript{181}

5. Dr. Machain's Defense

Dr. Machain faced several charges: conspiring to kidnap a federal agent, committing violent acts in furtherance of racketeering activity, and felony murder.\textsuperscript{182} Dr. Machain filed a motion to dismiss for lack of personal jurisdiction based on four theories: first, his abduction violated his due process rights under the Fifth Amendment;\textsuperscript{183} second, the methods used to obtain his presence violated the U.S.-Mexico extradition treaty;\textsuperscript{184} third, the means of apprehension violated the Charters of the United Nations and the Organization of American States;\textsuperscript{185} and

\textsuperscript{177} Id. at 603.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 604.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 601 n.1.
\textsuperscript{183} Id. at 604. For commentary on the weakness of this constitutional claim in federal courts, see discussion of the \textit{Ker-Frisbie} doctrine, supra notes 41-68 and accompanying text.
\textsuperscript{184} Caro-Quintero, 745 F. Supp. at 606. The treaty violation exception to the \textit{Ker-Frisbie} doctrine is discussed supra notes 69-126 and accompanying text.
\textsuperscript{185} Caro-Quintero, 745 F. Supp. at 614. For a discussion of the effect of human rights and international law violations on a court's jurisdiction, see supra notes 127-39 and accompanying text.
finally, the government's misconduct called for an exercise of the court's supervisory power.\footnote{186}

B. Opinions of the Lower Courts

Judge Rafeedie granted the defendant's motion to dismiss, holding that the government sponsored abduction violated the extradition treaty between the United States and Mexico.\footnote{187} The court reasoned that the Ker-Frisbie doctrine, which holds that abductions do not void a court's jurisdiction,\footnote{188} is inapplicable when the abduction violates an extradition treaty and the offended nation adequately protests the violation.\footnote{189} The court relied heavily on its interpretation of United States v. Rauscher\footnote{190} to determine that the extradition treaty impliedly prohibited unilateral abductions.\footnote{191} Regarding Dr. Machain's due process claim, the court found the allegations of mistreatment, even if true, were not so egregious to warrant dismissal.\footnote{192} In addressing the defendant's claims under the UN and OAS conventions, the court recognized that those international instruments are not self-executing, and therefore, without implementing legislation, they are not enforceable in federal courts.\footnote{193} The court also rejected Dr. Machain's appeal to the court's supervisory power, asserting the irrelevance of the issue in light of the other basis for dismissal.\footnote{194} The court intimated, however, that repeated abductions by the DEA may invite the court's supervisory power in the future.\footnote{195}

\footnote{186. Caro-Quintero, 745 F. Supp. at 615. The court's supervisory power is discussed supra notes 140-52 and accompanying text.}

\footnote{187. Caro-Quintero, 745 F. Supp. at 615. The court imputed the United States government with responsibility for the abduction because the government paid the abductors to effect the kidnapping. Id. at 609. The court found no official participation by the Mexican government because, although some current and former Mexican officials participated in the abduction, they were not officially acting under government authority. Id. at 612. For a discussion of the need for state action in finding violations of an extradition treaty, see supra note 73 and accompanying text.}

\footnote{188. Caro-Quintero, 745 F. Supp. at 611; see also Ker v. Illinois, 119 U.S. 436, 442-43 (1886). For a further discussion of the Ker-Frisbie doctrine, see supra note 50 and accompanying text.}

\footnote{189. Ker, 119 U.S. at 603-08.}

\footnote{190. 119 U.S. 407 (1886). For a further discussion of Rauscher, see supra notes 86-94 and accompanying text.}

\footnote{191. Caro-Quintero, 745 F. Supp. at 610. For a more complete discussion of Judge Rafeedie's "permissive" interpretation of Rauscher, see supra notes 96-97 and accompanying text.}

\footnote{192. Caro-Quintero, 745 F. Supp. at 605-06.}

\footnote{193. Id. at 614.}

\footnote{194. Id. at 615.}

\footnote{195. Id. (quoting United States v. Lira, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring), cert. denied, 423 U.S. 847 (1975)).}
The Ninth Circuit affirmed,196 and the Supreme Court granted certiorari.197

IV. ANALYSIS OF THE COURT'S OPINION

A. The Majority Opinion: Abductions Do Not Violate Due Process or Extradition Treaties—Ker-Frisbie Revisited

Chief Justice Rehnquist, writing for the Court,198 identified the main issue as whether Dr. Machain's abduction violated the extradition treaty between the United States and Mexico, thereby warranting the lower court's dismissal of the case for lack of jurisdiction.199

1. Application of the Ker-Frisbie Doctrine—The Legality of Abductions

Citing both Ker v. Illinois,200 and Frisbie v. Collins,201 the Court started with the basic premise that abductions alone do not divest a court of jurisdiction.202 The Court reasoned that due process is satisfied when the defendant receives a lawful indictment and a fair trial.203 Further, "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."204

2. The Treaty Violation Exception—Neither the Express Terms Nor Any Implied Terms Prohibit Official Abductions

In contrast to the Ker-Frisbie doctrine, the Court acknowledged that

199. Id. at 2191.
200. 119 U.S. 436 (1886).
202. Alvarez-Machain, 112 S. Ct. at 2192. For further discussion of the Ker-Frisbie doctrine, see supra notes 41-54 and accompanying text.
203. Id. at 2192 (citing both Ker, 119 U.S. at 444, and Frisbie, 342 U.S. at 522).
204. Id. (quoting Frisbie, 342 U.S. at 522).
the rule of Ker does not apply when an abduction violates the terms of a binding extradition treaty. Finding no express provision in the U.S.-Mexico extradition treaty which prohibits abductions, the Court addressed Dr. Machain's contention that his abduction violated an implied term of the treaty. The Court noted that United States v. Rauscher addressed the same issue. In Rauscher, the court found that the terms and history of the U.S.-Britain extradition treaty gave rise to an implied term of "specialty," prohibiting indictments for charges other than those specified in an extradition request. Thus, within the framework provided by Rauscher, the Court examined whether the terms and history of the U.S.-Mexico extradition treaty impliedly prohibited abductions as a method for obtaining jurisdiction.

Dr. Machain argued that Articles 22(1) and 9 of the Treaty show that the signatory nations intended the agreement to be the exclusive means of rendition. He reasoned that Article 22(1), which applies to offenses specified in Article Two, evidences the parties' intent to surrender custody only for those specified offenses. Dr. Machain further ar-

205. Id. at 2193. The Court distinguished Ker from Rauscher by emphasizing that in Ker the United States did not invoke the extradition mechanism, whereas in Rauscher the United States used the extradition treaty to gain custody of the defendant. See id. at 2191-92. The Court relied on this distinction to support its proposition that the formal use of the extradition treaty mechanism is a necessary element of the treaty violation exception to the Ker-Frisbie. See id. at 2193.

206. Id. at 2193. The court first examined the treaty on its face and found no provision expressly prohibiting either country's use of abductions to gain custody over defendants. Id. ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." (citing Air France v. Saks, 470 U.S. 392, 397 (1985))). Had the Court found an express violation, it would have analyzed the case under Cook v. United States 288 U.S. 102 (1933), and held that the treaty prohibited the government from seizing Dr. Machain without Mexico's consent. See Cook, 288 U.S. at 120-22. For further discussion on violations of express treaty provisions, see supra notes 76-82 and accompanying text.

207. See Alvarez-Machain, 112 S. Ct. at 2194-96.

208. 119 U.S. 407 (1886).


210. Id. For further discussion of Rauscher, see supra note 86-94 and accompanying text. The Court pointed out that Rauscher is not completely analogous to the present case because the defendant in Rauscher was brought to the United States through extradition process, not by abduction. Alvarez-Machain, 112 S. Ct. at 2192-93. This distinction became the springboard for the Court's conclusion that Dr. Machain's abduction did not violate the U.S.-Mexico extradition treaty. See infra notes 212-21 and accompanying text.

211. Id. at 2193.

212. Id.

gued that Article 9, which allows either party to refuse extradition of its own nationals, shows that the parties intended to preserve their sovereign right to prosecute their own citizens in their own courts. Dr. Machain argued that these provisions would be utterly frustrated if one nation could abduct foreign nationals without the asylum state's consent.

The Court rejected these arguments by concluding that Articles 22(1) and 9 did not limit either country's freedom to use alternative methods of rendition. The Court based its conclusion on two crucial premises. First, the function of extradition treaties is not to limit the respective law enforcement agencies to a single method of gaining custody; rather, extradition treaties are merely cooperative mechanisms, which if used impose an obligation on the requested state to extradite certain individuals, subject to any express exceptions. Second, an examination of the history of negotiations and state practice under the U.S.-Mexico treaty shows that the signatories did not intend to limit each other's ability to use abductions. The Court noted that as early as 1905, Mexico was aware of the Ker doctrine and the longstanding practice of the U.S. courts to extend jurisdiction over defendants despite their illegal abductions. Nonetheless, the Court noted that the cur-

214. Alvarez-Machain, 112 S. Ct. at 2183-94. Article 9 of the Treaty provides:

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.


215. Id. at 2194. The Ninth Circuit also adopted this argument in United States v. Verdugo-Urquidez, 939 F.2d 1341, 1350 (9th Cir. 1991), vacated, 112 S. Ct. 2986 (1992). The appellate court in Verdugo-Urquidez additionally found that both Article 5, which prohibits extradition for political offenses, and Article 8, which prohibits extradition for military offenses, would be rendered meaningless if either party was allowed to resort to kidnapping. Id.


217. Id. at 2194 (citing 1 J. Moore, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 72 (1891)). For a commentary on diverging views concerning the object and purpose of extradition treaties, see supra notes 95-108 and accompanying text.


219. Id. The Court essentially contended that the Mexican government had "notice" of the United States position that abductions were outside the scope of the extradi-
rent version of the Treaty does not contain any provision that curtails the effect of Ker.\footnote{220} Moreover, the Court added, Mexican and American treaty drafters specifically rejected proposals made by international law scholars in 1935, which sought to generally prohibit abductions in all extradition treaties.\footnote{221}

3. The Non-Effect of Customary International Law

Having concluded that abductions do not violate any express or implied treaty terms, the Court next considered whether international norms prohibiting abductions could be read into the Treaty.\footnote{222} Citing \textit{Rauscher}, Dr. Machain contended that because abductions so clearly violate international law, the drafters had no reason to expressly prohibit them.\footnote{223} This proposition, however, assumes that treaties are interpreted against a backdrop of customary international law—an assumption the Court was unwilling to make.\footnote{224} The Court argued that a

\begin{itemize}
\item See id. Evidence of this notice appears in the diplomatic exchange between Mexico and the United States which followed the 1905 abduction of Martinez, a Mexican national. \textit{Id.} at 2194 n.11. In that exchange, the Mexican government wrote to the U.S. Secretary of State, protesting that Martinez' arrest was an illegal action because the method of arrest was outside the procedures established in the extradition treaty. \textit{Id.} at 2194. The Secretary of State responded that the Court's decision in \textit{Ker} controlled, and therefore, U.S. courts had valid jurisdiction over Martinez. \textit{Id.}
\item 220. \textit{Id.}
\item 221. \textit{Id.} at 2194-95; see Malvina Halberstam, \textit{Agora: International Kidnapping: In Defense of The Supreme Court Decision in Alvarez-Machain}, 86 Am. J. Int'l L. 736 (1992). In 1935, the Advisory Committee of Research in International Law proposed:
\begin{quote}
In exercising jurisdiction . . . no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State . . . whose rights have been violated by such measures.
\end{quote}
\textit{Id.} at 738 n.15.
\item 223. \textit{Id.} The relevant international law principle in this case is the concept of territorial sovereignty which states that one government may not exercise its police power in the territory of another state. See \textit{Restatement (Third), supra} note 109, at § 432(2) cmt. b ("It is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent."). For further commentary on territorial sovereignty as embodied in the U.N. and O.A.S. charters, see \textit{supra} note 130.
\item 224. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195 (1992). The Court argued that to imply the principle of territorial sovereignty into the Treaty would be to expand the Treaty's scope beyond its logical boundaries. See \textit{Id.} at 2196. The Court noted that many actions "would violate this principle, including waging war, but it cannot seriously be contended that an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations." \textit{Id.}
more appropriate backdrop, and one that is in line with the parties' expectations, is the history of enforcement between the treaty partners and the general practices of states regarding extradition treaties. Therefore, the Court maintained that although abductions violate principles of international law, that does not necessarily translate into a violation of any particular treaty. In the Court's view, to hold otherwise would imply terms of general international law, which, as evidenced by the agreement's actual language, the parties neither intended nor expected.

The Court criticized Dr. Machain's use of *Rauscher* for the proposition that a court may imply a backdrop of international law into an existing extradition treaty. The Court explained, "In *Rauscher*, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, [Dr. Machain] would imply terms in the extradition treaty from the practice of nations with regards to international law more generally." Thus, the Court concluded that *Rauscher* does not support a far reaching inquiry into generalities of international law.

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225. *Id.* at 2195-96. The backdrop that the Court proposed, the history of enforcement between the treaty parties and state practice regarding extradition treaties is analogous to the backdrop for contracts in general commercial law. Under the Uniform Commercial Code, the courts may interpret ambiguous contract terms by course of dealing between contracting parties and general trade usage. *See* U.C.C. §2-202 (1990) (providing that ambiguous contract terms may be "explained or supplemented" by course of dealing or usage of trade).


227. *Id.* at 2196. The Court relied on prior decisions holding that violations of international law alone do not affect a court's jurisdiction. *See id.* at 2196 n. 15. (citing *Cook v. United States*, 288 U.S. 102 (1933)); *The Merino*, 22 U.S. (9 Wheat) 391 (1824); *Richmond*, 13 U.S. (9 Cranch) 102 (1815). For historical discussion of these cases, see *supra* note 133-39 and accompanying text.

228. *Id.* at 2195-96.

229. *Id.* at 2195-96. In *Rauscher*, the Court addressed whether the doctrine of specialty, which prohibits the prosecution of an extradited defendant for crimes other than those the subject of extradition, was an implied term in the U.S.-Britain extradition treaty. *United States v. Rauscher*, 119 U.S. 407, 411 (1886). After examining the terms and history of the treaty, the practice of other nations in enforcing their treaties and noting the existence of two federal statutes imposing the doctrine of specialty upon U.S. extradition treaties, the *Rauscher* Court concluded that the doctrine was impliedly part of the Treaty even though no provision explicitly so provided. *Id.* at 430.

230. *Alvarez-Machain*, 112 S. Ct. at 2196. The Court intimated that the difference between *Rauscher* and *Alvarez-Machain* was merely one of degree. *See id.*
4. Conclusion

In summary, the Court held that general international law principles have no bearing on the interpretation of extradition treaties.231 The Court stressed that the appropriate backdrop is the history of enforcement between the treaty partners and the state’s practices in relation to extradition treaties generally.232 More significantly, in applying that backdrop to the present case, the Court found no indication that the parties intended to prohibit unilateral abductions.233 Therefore, having found that Dr. Machain’s abduction did not violate the terms of the U.S.-Mexico extradition treaty, the Court concluded that the Ker rule applied and the lower court erred in voiding its jurisdiction.234

B. The Dissent—Government Abductions Violate the Object and Purpose of Extradition Treaties

1. The Distinction Between Government and Private Abductions—The Inapplicability of the Ker-Frisbie Doctrine

Justice Stevens, writing for the dissent,235 criticized the majority’s application of the Ker-Frisbie doctrine to the present case.236 Justice Stevens emphasized that Ker involved the abduction of a United States citizen by private individuals rather than by paid agents of the government.237 Also, unlike the present case, Frisbie involved an abduction

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In Rauscher, the implication of a doctrine of specialty into the terms of the U.S.-British treaty which, by its terms, required the presentation of evidence establishing probable cause of the [crime] before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it.

Id.

231. See id. at 2195-96. The Court finally noted that objections to violations of international law, which concern issues outside the scope of the treaty, are matters for the executive branch. See id. Although not specifically stated, the Court’s deference to the executive branch invokes the separation of powers principle, traditionally relied on by courts facing difficult questions of treaty interpretation. For further discussion on this point, see supra notes 125-26, 137-39 and accompanying text.


233. See id. at 2193-96.

234. Id. at 2197.

235. Justices Blackmun and O’Connor joined in the dissenting opinion. Id.

236. Id. at 2197 (Stevens, J., dissenting). For a full discussion of the Ker-Frisbie doctrine, see supra notes 41-54 and accompanying text.

which occurred within the United States. Therefore, Justice Stevens believed that neither case spoke to the precise issue before the Court: the legality of "[one government's] abduction of another country's citizen." However, Stevens noted that the Court addressed very similar issues in United States v. Rauscher and Cook v. United States, where, after finding government responsibility for the alleged illegal acts, the Court refused to apply the Ker rule. Therefore, Justice Stevens argued that the Court should have similarly rejected the Ker doctrine due to official U.S. involvement in the present case.

Despite this initial criticism, Justice Stevens agreed with the majority that the Court must ultimately decide whether the provisions of the U.S.-Mexico extradition treaty prohibit abductions. Unlike the majority, Justice Stevens interprets the treaty far differently by conducting "a fair reading" of the treaty in light of Rauscher and "applicable principles of international law."

2. Unilateral Abductions Contradict the Treaty's Object and Purpose

Under recognized rules of treaty interpretation, Justice Stevens determined that the Court must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." Justice Stevens defined American and Mexican expectations by examining the purposes of the Treaty as stated in its preamble: "to cooperate more closely in the fight against crime and to this end, to

239. Alvarez-Machain, 112 S. Ct. at 2197 (Stevens, J., dissenting).
240. 119 U.S. 407 (1886).
241. 288 U.S. 102 (1933).
242. Alvarez-Machain, 112 S. Ct. at 2203 (Stevens, J., dissenting). In Cook, United States customs agents seized the defendant's vessel 11 miles off American shores. Cook, 288 U.S. at 104. In Rauscher, United States and British authorities were involved in extraditing the defendant. Rauscher, 119 U.S. at 409. In contrast, the agent in Ker who made the arrest acted independently, not under the authority of any government. Ker v. Illinois, 119 U.S. 436, 438 (1886). Thus, "[t]he invasion of the sovereignty of Peru . . . was by individuals perhaps some of them owing no allegiance to the United States, and not by the Federal government." Id. at 634.
244. Id. (Stevens, J., dissenting).
245. Id. (Stevens, J., dissenting).
246. Id. at 2198 n.4 (Stevens, J., dissenting) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)).
mutually render better assistance in matters of extradition.\textsuperscript{247} Justice Stevens argued that an interpretation that encourages abductions is inherently inconsistent with the stated purposes of cooperation and mutual assistance.\textsuperscript{248} He claimed that the majority's interpretation is also inconsistent with the historical purpose of treaties in general.\textsuperscript{249} Justice Stevens argued that nations created these agreements to reduce potential international conflict caused by various countries' law enforcement agencies.\textsuperscript{250} Therefore, the treaty mechanism is meant not only as a cooperative tool for law enforcement agencies, but also as a safeguard against territorial invasions of one country caused by law enforcement activities of another.\textsuperscript{251} In light of this purpose, Justice Stevens concluded that courts cannot interpret extradition treaties as permitting unilateral abductions.\textsuperscript{252}

3. Interpreting the Treaty as the Exclusive Means of Rendition

Justice Stevens went on to criticize the majority for failing to recognize that the particular construction of the U.S.-Mexico treaty evidences a clear intent that the treaty is the exclusive means of rendition.\textsuperscript{253} First, Stevens noted that the treaty is a comprehensive instrument and "appears to cover the entire subject of extradition."\textsuperscript{254} Of particular importance are the provisions listing extraditable offenses,\textsuperscript{255} and those provisions that preserve the asylum country's right to refuse delivery of its own nationals\textsuperscript{256} or those charged with political offenses.\textsuperscript{257} Justice Stevens argued that the effect of these provisions would

\textsuperscript{247. Id. at 2198 (citations and footnotes omitted) (Stevens, J., dissenting).
248. Id. at 2198 n.4 (Stevens, J., dissenting).
249. Id. (Stevens, J., dissenting).
250. Id. (Stevens, J., dissenting) (citing 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 6 (1974)).
251. Id. at 2198 (Stevens, J., dissenting). Several international scholars support Justice Stevens' enlightened view of extradition treaties. See e.g., Lowenfeld I, supra note 15, at 655-61; Abramovsky, supra note 13, at 173-74; BASSIOUNI, supra note 102, at 6. Judge Rafeedie also adopted this view. See United States v. Caro-Quintero, 745 F. Supp. 599, 609 (C.D. Cal. 1990), aff'd sub nom. United States v. Alvarez-Machain, 946 F.2d 1499 (9th Cir. 1991), rev'd, 112 S. Ct. 2188 (1992). For commentary which criticizes this view of extradition treaties, see Matorin, supra note 98, at 913.
253. Id. (Stevens, J., dissenting).
254. Id. at 2198 (Stevens, J., dissenting).
256. Id. at 5065. For the complete text of this provision, see supra note 168.
257. Id. at 5063. Article 5 states that "Extradition shall not be granted when the of-
be utterly frustrated if alternative means of rendition were permitted. Therefore, the dissent concluded that the only rational interpretation that gives effect to the treaty provisions is that unilateral abductions are prohibited.

Justice Stevens also disagreed with majority's analysis that the treaty partners' historical practice demonstrates that abductions are a valid alternative to extradition. The dissent argued that according to the Mexican government's amicus curiae brief, Mexico believes that the Treaty is the exclusive means of rendition. Justice Stevens also noted that the Canadian government's view that the U.S.-Canada treaty has exclusivity lends further support to an assumption of exclusivity in the present case. Therefore, he argued that the burden should fall on the United States government to prove that the treaty's is not the exclusive means of rendition. Because "[t]he United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico" to overcome their burden, the assumption of defense for which it is requested is political or of a political character." Id.; see also United States v. Alvarez-Machain, 112 S. Ct. 2188, 2198 (1992) (Stevens, J., dissenting).

258. Alvarez-Machain, 112 S. Ct. at 2198 (Stevens, J., dissenting). Stevens criticized the majority approach as too textualistic and narrow. See id. (Stevens, J., dissenting). Moreover, he complained that the Court's conclusion that "the Treaty merely creates an optional method [of rendition], and that the parties silently reserved the right to resort to self help," ultimately leads to absurd results. Id. (Stevens, J., dissenting). Thus, Justice Stevens argued that under the majority's interpretation, torture or assassination are also alternative remedies to extradition which are permissible under the treaty. Id. (Stevens, J., dissenting).

259. Id. at 2198-99 (Stevens, J., dissenting). For a similar analysis, see United States v. Verdugo-Urquidez, 939 F.2d 1341, 1349 (1991), vacated, 112 S. Ct. 2188 (1992) (concluding that the treaty provisions only make sense if each nation must comply with those procedures).


261. Id. at 2200 (Stevens, J., dissenting). Following the Court's decision, Mexican officials publicly condemned the ruling and expressed their belief that the treaty was the only legitimate and legally recognized means of obtaining custody. Marjorie Miller, Mexico Attacks Ruling; Halls Drug War Role, L.A. TIMES, June 16, 1992, at A6. These statements are misleading because Mexico and the United States often recognize alternative means of rendition. See infra notes 325-37 and accompanying text.

262. Id. at 2200 n.14 (Stevens, J., dissenting). Following the Court's decision, the Canadian government issued an official statement that proclaimed that "[a]ny attempt by a foreign official to abduct someone from Canadian territory is a criminal act." LaFraniere, supra note 4, at A2.

263. Alvarez-Machain, 112 S. Ct. at 2199 n.15 (Stevens, J., dissenting).
exclusivity should control.\textsuperscript{264}

Justice Stevens found further support in \textit{United States v. Rauscher}.\textsuperscript{265} In \textit{Rauscher}, the Court, held that the purpose of an extradition treaty between the United States and Great Britain could only be served by implying the doctrine of specialty.\textsuperscript{266} Justice Stevens argued that the holding in \textit{Rauscher} permits courts to imply terms into a treaty which are consistent with the purpose of that instrument.\textsuperscript{267} Therefore, the dissent believed that in light of the extradition treaty's purpose of avoiding infringements of territorial sovereignty by law enforcement agents, the Court should have implied a term prohibiting abductions.\textsuperscript{268}

4. The Effect of International Law

Justice Stevens attacked the majority's opinion as inconsistent with "the consensus of international opinion that condemns one Nation's violation of the territorial sovereignty of a friendly neighbor."\textsuperscript{269} Stevens cited numerous provisions of the U.N. and O.A.S. charters which define the principle of territorial sovereignty as a fundamental right of nations.\textsuperscript{270} He then noted the opinions of international legal scholars who condemn abductions as a clear breach of that right.\textsuperscript{271}

\textsuperscript{264} Id. (Stevens, J., dissenting).
\textsuperscript{265} See id. at 2200 (Stevens, J., dissenting); see United States v. Rauscher, 119 U.S. 407 (1886).
\textsuperscript{266} See Rauscher, 119 U.S. at 429. For a detailed treatment of \textit{Rauscher}, see supra notes 86-94 and accompanying text.
\textsuperscript{267} \textit{Alvarez-Machain}, 112 S. Ct. at 2200 (Stevens, J., dissenting).
\textsuperscript{268} Id. at 2201 (Stevens, J., dissenting). The majority seemed to agree with Stevens' opinion that \textit{Rauscher} permits courts to imply terms into a treaty that are consistent with the treaty's object and purpose. See id. at 2194-95. However, the majority disagreed with Stevens regarding the object and purpose of an extradition treaty. The majority took a narrower view in holding that the sole object of an extradition treaty is to facilitate the transfer of criminals from one nation to another. See id. In contrast, Justice Stevens took an expansive view by stating that the object is to protect the treaty partners' territorial sovereignty. See id. at 2200-01 (Stevens, J., dissenting). For further discussion of these contrasting views, see supra notes 95-108 and accompanying text.
\textsuperscript{269} Id. at 2201 (Stevens, J., dissenting).
\textsuperscript{270} Id. at 2201 n.20 (Stevens, J., dissenting). For commentary on these international conventions, see supra notes 127, 131.

Justice Stevens also drew upon Justice Story's opinion in The Apollon, 22 U.S. (9 Wheat.) 362 (1824), which denounced the seizure of a foreign ship in a Spanish port by U.S. agents by remarking that "[i]t cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations." \textit{Alvarez-Machain}, 112 S. Ct. at 2201-02 (Stevens, J., dissenting) (quotations omitted).
\textsuperscript{271} Id. at 2201-02 (Stevens, J., dissenting). "It is . . . a breach of International Law for a State to send its agents to the territory of another
Therefore, Stevens concluded that given the overwhelming consensus within the international community that abductions are an improper means of apprehending fugitives, extradition treaties, like other international agreements, are in accord with this view.\textsuperscript{272}

5. Judicial Integrity and Support for the Rule of Law—A Call for the Court’s Supervisory Powers

Justice Stevens aimed his final assault at the majority’s devastating impact on the integrity of the Rule of Law.\textsuperscript{273} Justice Stevens claimed that by permitting the illegal actions of the government to avoid even the slightest judicial scrutiny, the Court essentially sanctions criminal activity.\textsuperscript{274} He furthered argued that approving such lawlessness undermines the Court’s integrity and endangers the very foundations of the Rule of Law it has a duty to uphold.\textsuperscript{275} More importantly, the decision invites individuals and other governments to take the law into their own hands.\textsuperscript{276}

Justice Stevens conceded that the government has an “intense interest” in punishing brutal crimes such as the alleged torture-murder in the present case.\textsuperscript{277} However, he concluded that pursuing that interest in a manner which ignores the rule of law and jeopardizes the well being of
the entire legal system is a risk not worth taking.278

V. IMPACT

A. Legal Impact—Traditional Rules Affirmed

1. Ker-Frisbie Unscathed

The Alvarez-Machain decision clearly affirmed the 107 year old Ker-Frisbie doctrine. Extraterritorial abductions alone neither violate a defendant’s due process rights nor divest a court of its jurisdiction.279 The Court rejected assertions by Justice Stevens and the Ninth Circuit that Ker-Frisbie does not apply to government sponsored extraterritorial abductions.280 According to the current Court majority, Ker-Frisbie applies to all extraterritorial abductions, whether conducted by private individuals or government officials.281 Apparently, the only instance where the doctrine does not apply is when an abduction violates the express terms of an extradition treaty.282

2. The Treaty Violation Exception—The “Plain Meaning” Approach to Treaty Interpretation

Alvarez-Machain made clear that for this limited exception to apply, the abduction must either violate an express provision of an extradition treaty,283 or contradict recognized state practices regarding extradition treaties.284 One effect of this narrow approach is that it provides the

278. Id. at 2206 (Stevens, J., dissenting).
279. Id. at 2191-92; see also supra notes 200-04 and accompanying text. The present Court’s adoption of Ker-Frisbie reflects its general reluctance to apply constitutional principles to government acts abroad. See Crystle, supra note 15, at 394-96; see also United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1066 (1990) (refusing to apply the Fourth Amendment to illegal government searches abroad).
280. See Alvarez-Machain, 112 S. Ct. at 2196-97; see also supra notes 200-04 and accompanying text.
281. See Alvarez-Machain, 112 S. Ct. at 2191-92; see also supra notes 200-04 and accompanying text.
282. See Alvarez-Machain, 112 S. Ct. at 2193. For a full discussion on the treaty violation exception to the Ker-Frisbie doctrine, see supra notes 69-94 and accompanying text.
283. Alvarez-Machain, 112 S. Ct. at 2193. The Court regards Cook v. United States, 288 U.S. 102 (1933), as the best example of a case in which the violation of an express treaty provision may affect a court’s jurisdiction. Id. at 2192 n.16. For further discussion on Cook, see supra notes 76-82 and accompanying text.
284. Alvarez-Machain, 112 S. Ct. at 2194. The majority did not completely rule out implying terms into an extradition treaty. See id. For example, the weight of United States v. Rauscher, in which the Court implied the doctrine of specialty into an extradition treaty, prohibits the foreclosure of that possibility. See United States v.
parties with considerable certainty in negotiating and drafting treaties. More importantly, the Court wisely avoided second-guessing the final terms of the agreement. In the end, adherence to the agreement's actual language allows the Court to preserve the parties' original expectations.

Rauscher, 119 U.S. 407, 419 (1886); see also notes 86-94 and accompanying text (discussing Rauscher). Nonetheless, the Court's strict textualistic approach to treaty interpretation indicates an obvious reluctance to recognize implied terms. See Alvarez-Machain, 112 S. Ct. at 2194-95; see also supra notes 206-21 and accompanying text (revealing the Court's textualistic approach in Alvarez-Machain).

285. See Alvarez-Machain, 112 S. Ct. at 2194-97. The Court's deference to the executive branch in the areas of treaty negotiation and enforcement also finds support in the Constitution, which expressly mandates that the executive branch negotiate treaties. U.S. CONST. art. I, § 8; see also Jamaica v. United States, 770 F. Supp. 627, 631 (M.D. Fla. 1991) ("[Q]uestions of treaty interpretation, clarification and implementation are functions necessarily carried out by the executive branch."); Ex parte Lopez, 6 F. Supp. 342, 344 (S.D. Tex. 1934) (deferring treaty violation claims to the executive branch).

286. See Alvarez-Machain, 112 S. Ct. at 2193-97. The Court's limited view of extradition treaties furthers this point because it considers treaties as optional, cooperative agreements that serve only to aid the signatory countries in law enforcement. See id. at 2194; see also supra notes 216-21 and accompanying text. The Court reasoned that if the governments intended the treaty to act as the parties' exclusive means of rendition, they would have stated so in the agreement. See Alvarez-Machain, 112 S. Ct. at 2194; see also supra notes 216-21 and accompanying text. The proposition that nations intend to use extradition treaties to safeguard their territorial integrity or provide substantive protections to persons subject to extradition is conspicuously missing from the treaty's text or its preamble. See Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5061 (treaty preamble). The absence of such language constitutes strong evidence that nations intend a restrictive interpretation rather than an expansive one. See Alvarez-Machain, 112 S. Ct. at 2194; see supra notes 216-21 and accompanying text.


1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

Id. (emphasis added). In its commentary to article 31, the International Law Commission indicated that the drafters adopted a "textual," or "plain meaning," approach to treaty interpretation. HARRIS, supra note 133, at 770.
3. Standing

Ironically, on the issue of standing the majority appeared far more "liberal" than both the dissent and the Ninth Circuit. The majority stated that formal government protests or demands for repatriation are unnecessary to give the defendant standing to object to treaty violations. The majority explained that because extradition treaties are self-executing and have the force of law, courts must enforce them on behalf of an individual regardless of any protest by the offended nation.

The influence this point will have on future lower court cases is unclear. Federal courts, which require government protest to confer standing, may disregard the Court's reasoning as dicta. However, other circuits will likely embrace the Court's reasoning because it eliminates time consuming and needless discussion concerning what constitutes "adequate" government protest.

4. Effect of International Law

The Court strenuously rejected the contention that violations of international law affect a court's jurisdiction. As explained in the historical background section of this Note, several early Supreme Court cases support this restrictive approach. Under the Court's treaty interpre-

288. *Alvarez-Machain*, 112 S. Ct. 2195. For further commentary on the lower courts' standing requirement, see supra notes 109-26 and accompanying text.

289. *Alvarez-Machain*, 112 S. Ct. at 2195. *United States v. Rauscher* directly supports the Court's reasoning. See United States v. Rauscher, 119 U.S. 407, 417-18 (1886). In *Rauscher*, the Court found that private citizens had automatic standing to enforce their rights in federal court because extradition treaties, as self-executing agreements, have the force of law and may be challenged like any other federal statute. *Id.; see also* U.S. CONST. art. VI ("Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . . ").


291. For further commentary on the difficulties that courts may have in determining an adequate government protest, see supra notes 113-26 and accompanying text.


293. See, e.g., *The Merino*, 22 U.S. (9 Wheat.) 391 (1824) (holding that the seizure of a vessel in violation of international law does not affect jurisdiction); *The Rich-
tation rules, only the explicit terms of the treaty control. However, the practice of nations with regard to extradition treaties or the history of enforcement between the treaty partners may help to explain the treaty terms. All references to other sources, even the most well recognized authorities on general international norms, have no persuasive effect on this Court's treaty analysis. Consequently, the only time that international norms apply is when the parties expressly provide for them in their agreement. This restrictive approach has the arguable advantage of providing increased certainty to the parties in negotiating, drafting and interpreting agreements.

5. Upholding the "Rule of Law"

According to the dissent, the Court's decision has a decidedly negative impact on the "Rule of Law." Because the decision apparently confirms the government's resort to kidnapping, society can arguably expect an increased disrespect for the law, both domestically and internationally. More importantly, commentators argue that by denigrating the extradition process and fostering an international norm of self-help, the decision jeopardizes the safety of American citizens. For example, nations hostile to the United States could point to Alvarez-Machain to justify the abduction of American nationals suspected of...
crimes in their countries. In fact, Iran, has claimed a right to seize people in the United States for crimes against the state of Iran.

In defense of the majority's position, it may be argued that Alvarez-Machain upheld the “Rule of Law.” As the historical analysis section of this Note indicates, Alvarez-Machain is in complete accord with the Court's well-settled principles and the United States Constitution. Moreover, in response to the special hazards raised by the Court's decision, it should be noted that the Court is bound “to render judgment evenly and dispassionately according to [the] law.” Therefore, the risk of an unpopular opinion or social backlash should not affect the Court's decisions.

6. The Use of Supervisory Powers

As the historical background section reveals, in recent years the Court has undermined the utility of the supervisory powers doctrine as an alternative to the Toscanino due process exception. However, in his dissent, Justice Stevens attempted to breathe new life into supervisory powers, suggesting that the Court should have exercised such power in the present case and dismissed Dr. Machain's indictment. Judge Rafeedie in the lower court opinion similarly discussed the use of supervisory powers, but dismissed the case on other grounds. It is not clear from either Justice Stevens' or Judge Rafeedie's opinion exactly what fact pattern would compel a court's use of supervisory pow-

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302. Downing, supra note 15, at 594; see also Abramovsky, supra note 13, at 201-03. Professor Abramovsky depicted a scenario in which four armed Iranian agents abduct Aramco's CEO at its corporate headquarters in Houston, Texas. See Abramovsky, supra note 13, at 151. On route to Teheran, “[t]he captive is informed that he is under indictment for complicity in the plundering of national resources from the Rumaila oil fields in violation of the sovereignty of Iran.” Id.


304. See Alvarez-Machain, 112 S. Ct. at 2191-93; see also historical discussion, supra notes 41-163 and accompanying text.


306. See supra note 55-68 and accompanying text.

307. See Alvarez-Machain, 112 S. Ct. 2206 (Stevens, J., dissenting); see also supra note 273-78 and accompanying text. Justice Stevens seemed to invoke the Court's supervisory powers in the final pages of his analysis when he discussed the need for the Court to preserve its integrity and stand against illegal government practices. See Alvarez-Machain 112 S. Ct. at 2206 (Stevens, J., dissenting). Interestingly, instead of citing McNabb or other sources of the supervisory power doctrine, Justice Stevens cited Toscanino, a due process case. Id. at 2206 n.37 (Stevens, J., dissenting).

ers.\textsuperscript{309} What is clear from the majority opinion, however, is that abductions alone are not enough.\textsuperscript{310}

B. Impact on the Executive Branch—Free Reign in the War on Drugs

The \textit{Alvarez-Machain} decision provides the executive branch with considerable discretion in the realm of international law enforcement. In particular, the decision represented an important victory for the Bush Administration's "War on Drugs."\textsuperscript{311} Because of \textit{Alvarez-Machain}, the DEA's right to pursue a variety of extralegal methods in arresting drug traffickers abroad stands unquestioned.\textsuperscript{312} Supporters of the Court's decision argue that executive discretion is necessary to effectively handle the unique political and diplomatic factors involved in gaining custody over criminals abroad.\textsuperscript{313}

1. Official Means of Rendition—The Costs and Improbabilities

After a foreigner has been indicted, the United States government must decide whether to utilize formal extradition procedures or resort to other means. An essential consideration in this decision is whether the Justice Department believes that the foreign government will comply with an extradition request.\textsuperscript{314}

With respect to Mexico, the Mexican government can invoke several valid exceptions to extradition, all of which are specified in the extradition treaty.\textsuperscript{315} For example, in Dr. Machain's case, the Mexican govern-

\textsuperscript{309} See United States v. Lira, 515 F.2d 68, 73 (2d Cir.) (Oakes, J., concurring) (suggesting that the federal government's repeated illegal abductions of drug traffickers invite exercise of the court's supervisory power) \textit{cert. denied}, 423 U.S. 847 (1975).

\textsuperscript{310} See \textit{Alvarez-Machain}, 112 S. Ct. at 2196 (holding that the defendant's abduction was shocking, but it did not prohibit him from being brought to trial).

\textsuperscript{311} Terry Eastland, \textit{Supreme Court Rightly Passes the Ball}, L.A. TIMES, June 18, 1992, at B7.

\textsuperscript{312} Id. Prior to the Court's decision, the Justice Department gave FBI agents authorization to carry out abductions abroad without the asylum nation's consent. \textit{Hearings before the House Subcommittee on Civil and Constitutional Rights}, 101st Cong., 1st Sess. 3 (1989) (statement by William P. Barr, Assistant U.S. Attorney General).


\textsuperscript{314} See Abramovsky, \textit{supra} note 13, at 153-56.

\textsuperscript{315} See, e.g., \textit{Extradition Treaty}, May 4, 1978, U.S.-Mex. art. 5, 31 U.S.T. 5066, 5063-65 (providing exceptions to extradition when the offense charged is of a political or military nature); id. at art. 8 (providing an exception for capital offenses); id. at art.
ment could have refused a request for extradition by relying on Article 9(1) of the Treaty. Article 9(1) provides that neither party must deliver its own nationals, provided that the requested party submit the case to its own courts. However, despite assurances that Mexican authorities would proceed against Dr. Machain, the alleged slowness and corruption of the Mexican judicial system raised doubts among U.S. prosecutors whether vigorous prosecution would actually occur.

In the case of Colombia, U.S. prosecutors have absolutely no hope of winning extradition because the Colombian Constitution forbids it. Thus, while Colombian courts have exclusive jurisdiction over the most powerful drug traffickers in the world, the Colombian judicial system is virtually incapable of prosecuting alleged offenders because Colombian drug traffickers wield such enormous power.

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9(1) (providing that neither party must deliver its own nationals as long as the requested party submits the case for prosecution at home).

316. See id. at art. 9. U.S. prosecutors predicted that this would happen because official Mexican policy is to extradite its own nationals only in "extraordinary circumstances." Lieberman, supra note 13, at A3; Abramovsky, supra note 13, at 206 n.271.

317. Extradition Treaty, supra note 315, at art. 9(1).

318. William S. Smith, A Question of Morality Over Legality, L.A. TIMES, Oct. 25, 1992, at M5; see also Abramovsky, supra note 13, at 155 n.12 (noting that the principle defendant in the Camerena murder case bribed his way out of an airport after the Mexican police surrounded his jet); Jim Newton, Camerena's Abduction and Torture Described, L.A. TIMES, Dec. 10, 1992, at B2 (noting that at least two Mexican Cabinet members and the governor of Jalisco were involved in the Camerena murder); Jim Newton, Top Mexican Officials Tied to Drug Cartel, L.A. TIMES, Dec. 3, 1992, at B2 (reporting high-ranking Mexican officials' alleged involvement in drug trafficking and attempts to evade the DEA).


320. Rachel Ehrenfeld, Perspective on the Drug War, L.A. TIMES, Dec. 6, 1992, at M5. After years of violence and a virtual reign of terror by the Medellin Cartel, President Gaviria promised to repeal Colombia's extradition treaty with the United States if the principle drug traffickers would turn themselves in. Id. After the treaty was repealed, Pablo Escobar, one of Colombia's most infamous druglords, surrendered to Colombian authorities. Mathea Falco, Don't Knock Colombia for Dealing With the Devil, L.A. TIMES, June 25, 1991, at B7. However, Escobar's captivity became a mockery of the Colombian penal system. Pablo Escobar: The Getaway, WASH. POST, July 24, 1992, at A26. Escobar bribed his own corrections officers and continued his drug operations uninhibited while in jail. Id. Escobar later escaped from his plush hillside "prison" when Colombian soldiers came to transfer him to a more secure military prison. Id.

Moreover, in Colombia and in other drug producing countries such as Bolivia and Peru, the local economic dependence on drug trafficking hampers government cooperation in extradition proceedings. In Bolivia and Peru, roughly a quarter of the working population depends upon the coca enterprise for survival. Therefore, when dealing with drug producing countries, the chances of gaining custody over drug traffickers or cartel leaders through formal extradition are slim at best.

2. Unofficial Means of Rendition—Sub Rosa Agreements and Abductions

When extradition is not available, the executive branch must consider "unofficial" means of rendition. Sub rosa, or "under the table" arrangements, in which the respective governments agree to some sort of informal exchange, are common, particularly between the United States and its southern neighbors.

In 1989, following Dr. Machain's indictment, the DEA and the Mexican Federal Judicial Police (MFJP) attempted to reach such an agreement. Under the terms of the arrangement, the MFJP offered to deliver Dr. Machain in return for deportation of Isaac Moreno, a United States resident wanted in Mexico for theft. When Mexican officials attempted to modify the bargain by demanding a $50,000 advance for...
transporting Dr. Machain to the United States, the DEA refused and negotiations were discontinued.\textsuperscript{328} Only then did the DEA seek to gain custody of Dr. Machain by abduction.\textsuperscript{329}

However, when sub rosa agreements work, they offer an expedient and effective alternative to the slow and even risky process of formal extradition.\textsuperscript{330} Because of the delay involved in fulfilling an extradition request, the criminal may be able to bribe government officials or leave the country.\textsuperscript{331} Thus, in pursuing Rafael Caro-Quintero, another suspect indicted for the Camerena murder, the United States government purposely avoided formal extradition and persuaded Costa Rican authorities to informally deport Caro-Quintero.\textsuperscript{332} Not surprisingly, such cooperative "arrangements" are the most desirable course of action because they efficiently secure custody without infringing on the sovereignty of the asylum government.\textsuperscript{333}

After the Justice Department attempts both formal and other cooperative means of gaining custody, the government will ultimately consider abduction.\textsuperscript{334} The dominant concern with abduction is the impact such
action will have on foreign relations. In the majority of cases, the costs of a possible international incident outweigh the benefits of gaining custody. However, when a heinous crime or a more notorious criminal is involved, the Justice Department will more likely risk paying the political costs.

a. The abduction of Dr. Machain and the Mexican reaction

The DEA made such an assessment in the case of Dr. Machain. Dr. Machain was one of nineteen persons indicted for their involvement in the 1985 torture and murder of DEA agent Enrique Camerena. During Camerena's kidnapping, the doctor allegedly prolonged his life so that his captors could continue their interrogation and torture. Given the heinousness of the crime, the victim's status as an officer of the United States government, and that Mexican police officers would be taking part in the abduction, the Justice Department likely reasoned that the diplomatic repercussions, if any, would be minimal. However, to its surprise, the Mexican government lodged a formal protest and demanded the doctor's return. Mexico's discontent eventually culminated into a formal but brief suspension of DEA activities in Mexico following the Supreme Court's decision in Alvarez-Machain. World reaction to the Court's decision was equally negative. As a result, Secretary of State James Baker III offered reassurances to Mexico that

336. Id. Resorting to abduction will most likely have negative ramifications on U.S. relations with its extradition partners. Id. For many countries, the extradition treaty is an important cooperative agreement, and therefore, "self-help" remedies are breaches of trust by the United States. Id. The resulting loss in confidence in the extradition treaty mechanism reduces the chances that a foreign nation will grant formal extradition requests. Id. The distrust engendered in the area of extradition naturally affects the United States' influence in other spheres of international cooperation. Id.
337. Id. at 574-77. For instance, when attempting to gain custody of known terrorists, abduction is less objectionable because a strong international consensus approves of bringing such criminals to justice. Id.
338. See Lieberman, supra note 13, at A5.
339. Id.
340. Id.
341. See id. For coverage of the negotiations leading up to the abduction of Dr. Machain, see supra notes 169-78 and accompanying text.
343. Id.
344. LaFraniere, supra note 4, at A2.
the United States respected Mexico's territorial sovereignty.\textsuperscript{345}

\textit{b. The utility of abduction as a "Tool" of law enforcement}

Despite the negative reaction from the world community, Secretary Baker's pronouncements did not renounce the United States' right to resort to abductions in the future.\textsuperscript{346} Justice Department officials regard abduction as a necessary law enforcement tool, particularly when there is officially sanctioned terrorism or drug trafficking.\textsuperscript{347} Thus, although the Administration promised to carefully weigh the foreign policy considerations before it undertakes an abduction, its statement assumed that the ability to implement such irregular means is an inherent part of executive discretion.\textsuperscript{348}

It is precisely this view of executive discretion that Chief Justice Rehnquist appears to support in \textit{Alvarez-Machain}.\textsuperscript{349} In ruling that the extradition treaty does not prohibit abductions, the Court silently recognized the executive's need to resort to a variety of means to gain custody over criminals abroad.\textsuperscript{350}

\section*{VI. CONCLUSION}

The flurry of press reports and editorials immediately following \textit{Alvarez-Machain} have for the most part denounced the Supreme Court's decision.\textsuperscript{351} Justice Stevens called the decision a "monstrous" affront to accepted principles of international law which insults Mexican sovereignty and harms United States foreign relations on a global scale.\textsuperscript{352} Notwithstanding the potency of these attacks, from a purely legal point of view the \textit{Alvarez-Machain} decision is supportable.\textsuperscript{353}

\begin{itemize}
\item \textsuperscript{345} Id.
\item \textsuperscript{346} See id.
\item \textsuperscript{347} See id. (statement by Robert S. Ross Jr., former head of the Justice Department's Office of International Affairs).
\item \textsuperscript{348} See id.
\item \textsuperscript{349} See Terry Eastland, \textit{Supreme Court Rightly Passes the Ball}, L.A. TIMES, June 18, 1992, at B5; supra notes 198-99 and accompanying text.
\item \textsuperscript{350} See United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196-97 (1992); see also supra notes 198-234 and accompanying text.
\item \textsuperscript{352} \textit{Alvarez-Machain}, 112 S. Ct. at 2206 (Stevens, J., dissenting).
\item \textsuperscript{353} See \textit{On U.S. Kidnapping, The Issue is Who Decides to Do It or Not}, WASH. TIMES, June 21, 1992, at B2; Terry Eastland, \textit{Supreme Court Rightly Passes the Ball}, L.A. TIMES, June 18, 1992, at B5; \textit{Court Decision Was Right, But U.S. Policy May Not Be}, ATLANTA J., June 17, 1992; see generally Matorin, supra note 98; see also histor-
Supreme Court precedent aptly supports the holding that the official abduction did not violate the U.S.-Mexico extradition treaty.\(^{354}\) Admittedly, the Court's approach to treaty interpretation is narrow and textualistic, but not without reason. Treaties are negotiated contracts between nations, and thus the absence of a particular term is the strongest evidence that the parties never intended the term to exist.\(^{355}\) Moreover, preventing the implication of terms through general international law is justified when such norms would inject an unwanted element of uncertainty into treaty creation and enforcement.\(^{356}\) Therefore, in light of the foregoing, it is the policy behind the State Department's choice in authorizing unilateral abductions that must be subject to criticism, not the Supreme Court's decision.\(^{357}\)

On one hand, the case for abductions in rare circumstances is compelling. Failing formal methods of rendition, abduction may be the only way to bring a criminal to justice when the foreign government participates in or sanctions his criminal activity.\(^{358}\)

On the other hand, the government's resort to extralegal methods seriously undermines international cooperation in law enforcement.\(^{359}\) Unilateral abductions have a decidedly negative effect of weakening existing treaties, both in extradition and other areas of law enforcement.\(^{360}\) Of greater concern, however, is the negative effect that ab-
ductions may have on the future of cooperative sub rosa arrangements, by far the most efficient and least costly means of gaining custody. Finally, there is the fear that other nations will feel justified in adopting their own kidnapping policy, thereby endangering United States citizens both abroad and at home.

Given the highly deleterious effect that official kidnappings can have on United States foreign relations and international comity in law enforcement, current United States policy makers may wish to formally renounce unilateral abductions. Fortunately, even if they do so, the Alvarez-Machain decision at least preserves the executive branch's ability to use extralegal methods in rare and compelling cases in which officially sanctioned terrorism or drug trafficking prevents notorious criminals from being brought to justice.

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361. Abramovsky, supra note 13, at 206.
362. Id. at 201-02; Scheffer, supra note 350, at A19; Dershowitz, supra note 301, at 36.
363. Abramovsky, supra note 13, at 209-10; Downing, supra note 15, at 596-99; Dershowitz, supra note 301, at 36.