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High Noon at the Court: Wild West Justice Is Alive and Kicking in United States v. Alvarez-Machain

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HIGH NOON AT THE COURT: WILD WEST JUSTICE IS ALIVE AND KICKING IN *United States v. Alvarez-Machain*

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

Yvonne W. Jicka

I. INTRODUCTION

In recent years, extradition incidents have often demanded the public's attention. Consider the case of the Cleveland auto worker John Demjanjuk. Accused of being a murderous guard at the Nazi Treblinka death camp in Poland during World War II,[1] Demjanjuk was stripped in 1981 of his United States citizenship and was extradited to Israel in 1986.[2] Convicted of war crimes by an Israeli court in 1988, he was sentenced to death.[3] Despite the appearance of a successful extradition, the wisdom of Demjanjuk's extradition and the investigation preceding it are now being questioned,[4] especially in light of his recent acquittal by an Israeli court.[5]

When, for whatever reasons, the gears of the extradition machine are immobilized, the parties seeking custody may resort to more forceful means to acquire the desired person. For instance, Adolf Eichmann, an infamous Nazi war criminal, was kidnapped from Argentina by Israeli agents and taken to Israel to stand trial for war crimes.[6] Also, the civilian airliner carrying the *Achille Lauro* hijackers to safety in Tunis was forced by United States Navy fighter planes to land in Italy where the terrorists were charged for their offenses in the hijacking.[7] Finally,

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1. Eric Harrison, *Ex-U.S. Official Denies 'Stonewalling' in Nazi Case; Hearing: Lawyers for Accused War Criminal John Demjanjuk Charge that Justice Dept. Withheld Evidence. Former Chief of Probe Defends Policies*, L.A. TIMES, Nov. 14, 1992, at A2 [hereinafter L.A. TIMES].

2. *"Ivan the Terrible" Identification Challenged*, N.Y. TIMES, Nov. 13, 1992, at A20 [hereinafter N.Y. TIMES].

3. *See* L.A. TIMES, *supra* note 1, at A2.

4. *See Demjanjuk Riddles*, WASH. POST, Nov. 23, 1992, at A20; L.A. TIMES, *supra* note 1, at A2; N.Y. TIMES, *supra* note 2, at A20; Ruti Teitel, *The "Ivan" Case: Cold War Injustice*, WASH. POST, Dec. 10, 1992, at A21.

5. Chris Hedges, *Acquittal in Jerusalem*, N.Y. TIMES, July 30, 1993, at A1; Chris Hedges, *Israel Recommends That Demjanjuk Be Released*, N.Y. TIMES, Aug. 12, 1993, at A15; Stephen Labaton, *Demjanjuk's Lawyers Seek Return of U.S. Citizenship*, N.Y. TIMES, Sept. 4, 1993, at 6. The Clinton Administration, in a reversal of policy, has stated that it would not oppose a temporary return of Demjanjuk to the United States while the Sixth Circuit Court of Appeals considers whether to reopen the proceedings which stripped him of his American citizenship in 1981. Clyde Haberman, *Israel Again Puts off Demjanjuk Deportation*, N.Y. TIMES, Sept. 3, 1993, at A5. The Israeli Supreme Court also considered, but rejected, pleas by Nazi hunters and Holocaust survivors to charge Demjanjuk with new war-related crimes. *Id.*; Michael deCourcy Hinds, *2 Views of Demjanjuk, but Similar Frustrations*, N.Y. TIMES, Aug. 22, 1993, at A20. Charging him with additional crimes, however, would be in direct conflict with the doctrine of specialty, discussed *infra* at notes 110-18 and accompanying text.

6. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341, 1361 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992). A diplomatic settlement was reached between Argentina and Israel without Eichmann's repatriation to Argentina. *Id.*

7. *See* John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447 (1987).

consider the case of Dr. Humberto Alvarez-Machain. Wanted in connection with the murder of Drug Enforcement Administration Agent Enrique Camarena-Salazar, Dr. Machain was kidnapped and brought to "justice" in the United States.[8]

This Note will briefly examine the history of extradition law and the policy of extradition in the United States. This Note will explore the Court's basis for its decision in *United States v. Alvarez-Machain*[9] by looking at the existing precedent and questioning its relevance and applicability in the post cold-war world. The Note will also examine how differing judicial philosophies affected the decision.

II. FACTS

Drug Enforcement Administration Agent Enrique Camarena-Salazar [hereinafter Camarena] was abducted outside the American consulate in Guadalajara, Jalisco, Mexico, on February 7, 1985.[10] The agent's mutilated body was found about one month later, approximately sixty miles outside of Guadalajara together with the body of Alfredo Zavala-Avelar [hereinafter Zavala], the Mexican airplane pilot who had helped Camarena locate marijuana plantations.[11] On January 31, 1990,[12] Dr. Machain and twenty-one other people were indicted in the United States for crimes in connection with the deaths of Camarena and Zavala.[13]

It is believed that Dr. Machain's role in Camarena's murder was to inject the agent with the drug lidocaine to keep his heart from failing during torture.[14] Camarena was supposedly kidnapped and tortured by drug king-pin Raphael Caro-Quintero so that Caro-Quintero could learn the extent of Drug Enforcement Administration [hereinafter DEA] knowledge concerning corruption in the Mexican law enforcement system.[15] After attempted negotiations with persons supposedly representing the Mexican government, the DEA hired men who abducted Dr. Machain on April 2, 1990, and turned him over to the DEA in El Paso, Texas, on April 3, 1990.[16]

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

9. 112 S. Ct. 2188 (1992). For studies of Dr. Machain's case and the *Ker-Frisbie* doctrine, see Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991); Charles D. Siegal, *Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez-Machain's Case*, 13 LOY. L.A. INT'L & COMP. L.J. 765 (1991); Jonathan Gentin, Comment, *Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on* United States v. Caro-Quintero *and the Inadequacy of the* Ker-Frisbie *Doctrine*, 40 EMORY L.J. 1227 (1991); and Wilson G. Jones, Note, *The Ninth Circuit's Camerena Decisions: Exceptions or Aberrations of the* Ker-Frisbie *Doctrine?*, 27 TEX. INT'L L.J. 211 (1992).

10. United States v. Caro-Quintero, 745 F. Supp. 599, 601-02 (C.D. Cal. 1990). The case at the district court level was styled to reflect the names of others charged in connection with the death of Camarena. *Id.* The facts in the opinion are based on an evidentiary hearing on this matter in which Dr. Machain testified. *Id.* at 601.

11. *Id.* at 602.

12. *Id.* at 601 n.1.

13. *Id.* at 602. At the time of the trial at the district court level, seven of the 22 persons indicted in connection with Camarena's death had been brought before the court to face charges. *Id.* Three of those persons had been forcibly abducted. *Id.*

14. Elaine Shannon, *Snatching "Dr. Mengele,"* TIME, Apr. 23, 1990, at 27.

15. *Id.*

16. United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990).

A. Negotiations

In December, 1989, a Mexican Federal Judicial Police [hereinafter MFJP] commandante[17] contacted a DEA informant,[18] hoping to arrange a meeting with the DEA to discuss the exchange of Machain for a Mexican national residing in the United States.[19] DEA agents met with persons purporting to act on behalf of the MFJP to work out an exchange of the wanted Mexican national for Dr. Machain.[20] The DEA and the MFJP agents agreed that upon the post-Christmas delivery of Dr. Machain, the United States would begin deportation proceedings against the Mexican national if it were determined that he could be deported.[21]

The negotiations, however, did not proceed smoothly.[22] On January 7, 1990, the informant told the DEA that the Mexican officials required a payment of $50,000 up front to cover the expense of delivering Dr. Machain to the United States.[23] The DEA would not advance the funds, and the deal collapsed.[24] Later that month, the parties once again tried to work out an exchange for Dr. Machain.[25] This meeting was later cancelled due to the tense relations between the United States and Mexico resulting from NBC's airing of a mini-series based upon Camarena's life and the investigation of his death.[26] There were no further meetings between the DEA and the Mexican representatives.[27]

B. Machain's Abduction

During this period of negotiations, the DEA informant relayed to his contacts in Mexico that the DEA would pay for information leading to the capture and arrest of those responsible for Camarena's death.[28] In March of 1990, a group surfaced which was interested in apprehending and delivering Dr. Machain to the DEA.[29] The DEA offered the men a $50,000 reward plus expenses for the successful delivery of Machain to authorities in the United States.[30]

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17. The commandante was Jorge Castillo del Rey. *Id.* at 602.

18. The DEA informant contacted by the commandante was Antonio Garate-Bustamante. *Id.* at 601. Garate was a former advisor to a Mexican drug lord. *Id.* Garate was one of the persons who testified in the evidentiary hearing conducted by the court. *Id.*

19. *Id.* at 602. This Mexican national, Isaac Naredo Moreno, was wanted by the Mexican Attorney General in connection with the theft of huge amounts of money from Mexican politicians. *Id.*

20. *Id.* One of the DEA agents who met with the MFJP was DEA Special Agent Hector Berrellez, chief of "Operation Leyenda," the code name for the Camarena murder investigation. *Id.* at 601.

21. *Id.* at 602.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 602-03. NBC aired *Drug Wars: The Camarena Story* on January 7, 8, and 9, 1990. *Id.* at 603 & n.6.

27. *Id.* at 603.

28. *Id.*

29. *Id.* This group included "former military police officers, various civilians, and at least two current police officers." *Id.*

30. *Id.* The operation head, Berrellez, testified that the DEA in Washington, D.C., agreed to the final terms of the abduction and that he believed the DEA had conferred with the United States Attorney General's Office on the abduction. *Id.*

Accepting the DEA's offer, the group of men entered Dr. Machain's office in Guadalajara on April 2, 1990, and kidnapped him.[31] After a few hours, Dr. Machain was transported to a nearby airport where he and his kidnappers boarded a twin engine plane and flew to El Paso, Texas.[32] Upon arrival in El Paso on April 3, only Machain left the plane, and the DEA took him into custody.[33] Machain was promptly charged with several crimes in connection with Camarena's murder.[34]

Mexico immediately protested the incident.[35] Between April 18 and July 19, 1990, the Mexican Embassy presented three diplomatic notes to the United States Department of State in Washington, D.C.[36] These notes requested a full report on the incident, demanded the return of Machain, and requested the extradition of DEA agents for crimes relating to Machain's abduction.[37]

C. United States v. Caro-Quintero[38]

Machain filed a motion to dismiss the charges against him in the Federal District Court for the Central District of California.[39] Since Mexico had protested his kidnapping, the court reasoned that Machain had derivative standing to challenge his abduction as a violation of the Extradition Treaty between the United States and Mexico.[40] The court found that the United States had indeed acted without the consent of the Mexican government and that the kidnapping violated the Extradition Treaty between the two countries.[41] Therefore, the court lacked personal jurisdiction over Machain and ordered his immediate repatriation to Mexico and a dismissal of all charges against him.[42]

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31. *Id.*

32. *Id.* Dr. Machain testified that a " 'fair-skinned' " man joined them at the plane and identified himself as being " 'with the DEA.' " *Id.* Agent Berrellez testified that no DEA agents were present during the actual kidnapping. *Id.*

33. *Id.* As of May 25, 1990, the DEA had paid a $20,000 partial reward for the capture of Dr. Machain. *Id.* The DEA later evacuated seven of the persons who took part in the kidnapping and their families to the United States. *Id.* As of August 14, 1990, the DEA was paying approximately $6,000 per week to support these people. *Id.* at 604.

34. *Id.* at 601 n.1. Machain was charged with the following crimes: conspiracy to commit violent acts and violent acts in furtherance of an enterprise engaged in racketeering activity, 18 U.S.C. § 1959 (1990); conspiracy to kidnap a federal agent, 18 U.S.C. § 1201(c) (1990); kidnap of a federal agent, 18 U.S.C. § 1201(a)(5) (1990); felony-murder, 18 U.S.C. §§ 1111(a), 1114 (1990); and accessory after the fact, 18 U.S.C. § 3 (1990). *Id.*

35. United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990).

36. *Id.*

37. *Id.*

38. 745 F. Supp. 599 (C.D. Cal. 1990). At the trial court's proceeding, Dr. Machain was one of five defendants indicted on charges relating to Camarena's murder. *Id.*

39. *Id.* at 601.

40. *Id.* at 608.

41. *Id.* at 608-09.

42. *Id.* at 614. The court did not reach the issues of whether the abduction violated the charters of the Organization of American States and the United Nations. *Id.* The court found that these agreements were not self-executing and, therefore, were not enforceable in federal courts without enabling legislation. *Id. See* 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW & PRACTICE § 4.2, at 74 (2d ed. 1987). The court further declined to rest its decision on its supervisory authority. *Caro-Quintero*, 745 F. Supp. at 615. It warned the DEA, however, that the increased use of abductions invites the exercise of that power. *Id.*

D. United States v. Alvarez-Machain[43]

The Ninth Circuit Court of Appeals affirmed the dismissal of the charges and the repatriation order for Machain.[44] Relying on *United States v. Verdugo-Urquidez*,[45] the court stated that the proper remedy for violation of the Extradition Treaty was repatriation.[46] The court noted that the abduction had been sponsored by the DEA and that the Mexican government had strongly protested it.[47] The DEA's involvement and Mexico's protests gave Machain the right to invoke the treaty violation, thereby defeating the district court's jurisdiction over him.[48]

III. Background and History

A. Extradition Treaties Generally

Extradition "is the formal surrender, based upon reciprocating arrangements, by one nation to another of an individual accused or convicted of an offense outside its own territory and within the jurisdiction of the other which, being competent to try and punish him, demands the surrender."[49] Two aspects of extradition which make it preferable to unilateral action are that of returning a criminal to the jurisdiction with the most interest in punishing him and the principle of reciprocity assured by formal agreements between countries.[50]

The origins of extradition have been traced to 1280 B.C. to a peace treaty between Egypt's Rameses II and the Hittite prince Hattusili III, which provided for the return of escaped criminals who were found in the other country's territory.[51] Although the basic concept has remained the same throughout the centuries, the origins of modern extradition treaties are found in the Eighteenth Century.[52] The United States, Great Britain, and France led the development of extradition treaties during the late Eighteenth and throughout the Nineteenth Centuries.[53] Extradition treaties became highly specialized documents providing, among other

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43. 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

44. *Id.* at 1466-67.

45. 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992). In January, 1986, Verdugo-Urquidez was apprehended in Mexico and transported to the United States where he was subsequently charged with various crimes relating to the murder of Camarena. *Id.* at 1343. The Honorable Edward Rafeedie presided over Verdugo-Urquidez's trial at the district court level and found that Verdugo-Urquidez could be tried in United States courts. *Id.* at 1343 n.1. The Ninth Circuit, however, reversed Judge Rafeedie's finding and held that a forcible abduction of a Mexican national without the Mexican government's permission violated the existing Extradition Treaty between the two countries. *Id.* at 1341. Judge Rafeedie subsequently presided over Machain's case and, after further research, reversed his position that the court had proper jurisdiction over an abducted individual. *Id.* at 1343 n.1.

46. *Alvarez-Machain*, 946 F.2d at 1467.

47. *Id.*

48. *Id.*

49. Ivan A. Shearer, Extradition in International Law 21 (1971) [hereinafter Shearer].

50. *Id.*

51. *Id.* at 5.

52. *Id.* at 6.

53. *Id.* at 11-19. The first extradition treaty of the modern era was the Jay Treaty of 1794 between the United States and Great Britain. *Id.* at 13.

things, lists of extraditable crimes,[54] the exemption for political offenders,[55] and the doctrine of specialty.[56]

United States courts followed the British courts' general practice of leaving the construction of foreign policy to the political arms of government.[57] Additionally, both American and British courts have followed the general rule that there is no duty to extradite without a treaty[58] because extradition is not viewed as an inherent obligation.[59] Therefore, states must secure their rights by negotiating extradition treaties.[60]

B. Extradition Treaties Between the United States and Mexico

The first extradition treaty between the United States and Mexico was signed in Mexico City on February 22, 1899.[61] As a general extradition treaty, the agreement included crimes such as murder, robbery, forgery, and kidnapping as extraditable offenses.[62] In 1902, bribery was added to the list of extraditable crimes.[63] The treaty was further supplemented in 1925 with the addition of crimes relating to drug trafficking and smuggling.[64] The crimes included in the extradition treaty were enlarged once again in 1939 with the addition of the offense of accessory before or after the fact.[65]

The present treaty under which the United States and Mexico operate was negotiated and enacted during the Carter Administration.[66] With an eye toward the suppression of the drug trade, the new treaty includes offenses relating to narcotics, obstruction of justice, and aircraft hijacking.[67] Of particular interest to the *Machain* case is Mexico's grant of discretionary power to the executive branch to extradite its own nationals.[68] This deserves note since civil law countries, such as Mexico, generally do not surrender their nationals to other jurisdictions.[69] Ratified by the Senate on November 30, 1979, the treaty superseded and terminated

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54. *Id.* at 13-14.

55. *Id.* at 14.

56. *Id.* at 18. The specialty doctrine is "[the] limitation of trial to the offense for which extradition had been given." *Id.*

57. SATYA D. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 98 (1968) [hereinafter BEDI].

58. SHEARER, *supra* note 49, at 24-25.

59. SHEARER, *supra* note 49, at 27.

60. SHEARER, *supra* note 49, at 27.

61. Extradition Treaty, Feb. 22, 1899, U.S.-Mex., T.S. No. 242, *reprinted in* I.I. KAVASS & A. SPRUDZS, EXTRADITION LAWS & TREATIES: UNITED STATES 590.3 (1979) [hereinafter KAVASS].

62. KAVASS, *supra* note 61, at 590.3.

63. Extradition Treaty, supp. June 25, 1902, U.S.-Mex., T.S. No. 421, *reprinted in* KAVASS, *supra* note 61, at 590.11.

64. Extradition Treaty, supp. Dec. 23, 1925, U.S.-Mex., 44 Stat. 2409, *reprinted in* KAVASS, *supra* note 61, at 590.13.

65. Extradition Treaty, supp. Aug. 16, 1939, U.S.-Mex., 55 Stat. 1133, *reprinted in* KAVASS, *supra* note 61, at 590.15.

66. Presidential Proclamation, Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

67. Cyrus Vance, Letter of Submittal to the President, S. Exec. Rep. No. 21, 96th Cong., 1st Sess. 5 (1979).

68. *Id.* at 6.

69. BEDI, *supra* note 57, at 94.

previous extradition agreements between the two countries[70] and entered into force on January 25, 1980.[71]

C. Alternatives to Extradition

In some instances nations resort to methods other than extradition to obtain persons when it appears that the process of extradition will be more time-consuming and expensive than the available alternatives.[72] These alternative methods are the refuge state's assumption of jurisdiction, deportation, and abduction.[73] Of chief interest here is abduction, which is the "removal of a person from the jurisdiction of one State to another by force, the threat of force or by fraud."[74] The use of an abduction to gain a person's presence, as in Machain's case, completely ignores the official proceedings demanded by the laws of the nation in which the person was found.[75] One of the purposes achieved by kidnapping is that the person is removed so quickly that he does not have an opportunity to command the protections of the refuge nation's legal system.[76]

A successful abduction, such as Machain's, is generally considered to be a violation of the territorial sovereignty of the country where the act was committed.[77] This notion of a territorial violation is derived from international law which prohibits one state from performing acts of sovereignty within the territory of another state.[78] However, when the officials of the state where a person has taken refuge conduct the abduction, the state desiring the fugitive does not break international law.[79] Furthermore, when private citizens kidnap a fugitive in the hope of receiving a reward, the territorial sovereignty of the asylum state is not violated.[80] The idea of private action has been criticized by scholars who find that

> state responsibility attaches to acts committed by agents of a state or by private individuals acting for or on behalf of the state . . . . [The private parties' acts may be imputed to the state] where the state, through its agents, incited, encouraged or induced private individuals to undertake such actions with a view to benefit from its outcome.[81]

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70. Jimmy Carter, Letter of Transmittal to the Senate, S. Exec. Rep. No. 21, 96th Cong., 1st Sess. 3 (1979).

71. Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059 [hereinafter Extradition Treaty].

72. SHEARER, *supra* note 49, at 67.

73. SHEARER, *supra* note 49, at 67. For a discussion of the alternatives of the assumption of jurisdiction and deportation, see SHEARER, *supra* note 49, at 68-72, 76-91, respectively. *See also* M. Cherif Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25 (1973) (The same article also appears in M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER ch. III (1974).). A discussion of these other methods is beyond the scope of this Note.

74. SHEARER, *supra* note 49, at 72.

75. SHEARER, *supra* note 49, at 72.

76. SHEARER, *supra* note 49, at 72.

77. SHEARER, *supra* note 49, at 72.

78. Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279, 280 & n.3 (1960) [hereinafter O'Higgins]. For a study of the British practice regarding abductions, see *id.* at 280-304.

79. O'Higgins, *supra* note 78, at 303.

80. SHEARER, *supra* note 49, at 72.

81. 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE § 5.2, at 216 (2d ed. 1987).

These tenets of international law shed new light onto the Machain incident, for there was minimum involvement of Mexican officials in Machain's kidnapping, although these officials were found to be acting outside the scope of their employment.[82] Additionally, the persons who abducted Machain did so in hopes of claiming a reward.[83]

D. American Extradition Law

The landmark case in American extradition law is the 1886 decision of *Ker v. Illinois*.[84] In *Ker*, the defendant Frederick M. Ker was wanted in Illinois on charges of larceny and embezzlement[85] for the theft of funds while he was working as a clerk at a Chicago bank.[86] The bank requested that the State Department extradite Ker from Lima, Peru, where he was hiding.[87] Complying with the extradition treaty between Peru and the United States, the State Department issued a warrant for Ker's arrest and sent Pinkerton agent Henry G. Julian to Peru with the necessary papers to obtain Ker.[88] The agent, however, never presented his papers to the Peruvian government.[89] Instead, the agent kidnapped Ker and brought him back to the United States to stand trial.[90]

At his proceeding, Ker argued that the abduction and his delivery to officials in Cook County, Illinois, violated his due process rights as guaranteed by the Fourteenth Amendment.[91] Ker also alleged that his kidnapping was in violation of the existing extradition treaty between the United States and Peru.[92] The Court disposed of the due process matter by pointing to a fair indictment and trial as evidence of due process compliance.[93] The Court went on to say that "but, for *mere irregularities* in the manner in which [Ker was] brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment."[94] In other words, since he was

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82. United States v. Caro-Quintero, 745 F. Supp. 599, 612 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *and rev'd*, 112 S. Ct. 2188 (1992).

83. *Caro-Quintero*, 745 F. Supp. at 603.

84. 119 U.S. 436 (1886). This case is the basis for the Court's decision in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

85. *Ker*, 119 U.S. at 437.

86. Statement of Illinois Attorney General George Hunt, Brief for Defendant in Error at 19-21, Ker v. Illinois, 119 U.S. 436 (1886), *quoted in* Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 684-85 (1953).

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

88. *Id.*

89. *Id.* One reason stated for Julian's action is that Lima, where Ker was hiding, and a large part of Peru were under the control of Chilean forces at the time. Statement of Illinois Attorney General George Hunt, Brief for Defendant in Error at 19-21, Ker v. Illinois, 119 U.S. 436 (1886), *quoted in* Charles Fairman, Ker v. Illinois *Revisited*, 47 AM. J. INT'L L. 678, 684-85 (1953). Julian did not have a military pass by which he could cross the Chilean lines and reach the actual Peruvian government headquarters. *Id.* at 685. He did, however, receive cooperation from the Chilean military governor in his seizure of Ker. *Id.*

90. *Ker*, 119 U.S. at 438-39.

91. *Id.* at 439.

92. *Id.*

93. *Id.* at 440.

94. *Id.* (emphasis added).

physically within the boundaries of the State of Illinois, the court had lawful jurisdiction over him.[95] This point is particularly relevant to Machain's situation, for it shows a basis for the Court's ignoring the method by which the person comes before the Court.

The Court then focused on Ker's argument that the treaty was violated.[96] Noting that this was a case of pure kidnapping, the Court stated that the treaty between the countries was never triggered nor was the act committed under any guise of official authority.[97] Furthermore, because Ker was not brought into the United States on the basis of a treaty, none of the treaty's rights flowed to him.[98] Based on this reasoning, it could be inferred that Machain's kidnapping was outside the present Extradition Treaty between the United States and Mexico.

The 1952 benchmark decision of *Frisbie v. Collins*[99] reinforced the *Ker* principle.[100] In *Frisbie*, the defendant Collins was wanted in Michigan on a murder charge.[101] While Collins was living in Chicago, Illinois, he was kidnapped by Michigan police officers and taken back to Michigan where he was convicted of murder.[102] Collins claimed that his trial and conviction violated his due process rights as afforded by the Fourteenth Amendment[103] and that the Michigan officers' actions violated the Federal Kidnapping Act.[104]

The Court summarily dismissed Collins' arguments.[105] The Court reiterated its holding in *Ker* that "the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "[106] In the Court's opinion, due process was served by apprising the defendant of his charges and affording him a fair trial.[107] The Court stated that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[108] In disposing of the Federal Kidnapping Act issue, the Court said that it was not within the Court's jurisdiction to decide that the Act included actions by state officials.[109] Thus, the legality of the concept of state officials taking a person charged with a crime from another jurisdiction without the latter's

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95. *Id.*
96. *Id.* at 441.
97. *Id.* at 443.
98. *Id.*
99. 342 U.S. 519 (1952).
100. The two cases form what is commonly called the *Ker-Frisbie* doctrine, the principle that "criminal jurisdiction is not impaired by the illegality of the method by which the court acquires in personam jurisdiction over the relator." 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE § 4, at 201 (2d ed. 1987).
101. *Frisbie*, 342 U.S. at 520.
102. *Id.*
103. *Id.*
104. *Id.* & n.2.
105. The opinion is a mere four and one-half pages. *Frisbie*, 342 U.S. at 519-23.
106. *Id.* at 522.
107. *Id.*
108. *Id.*
109. *Id.* at 523.

permission was reinforced, albeit under interstate circumstances rather than in an international context.

Decided the same day as *Ker*, *United States v. Rauscher*[110] dealt with extradition but explored the slightly different issue of the doctrine of specialty.[111] The doctrine of specialty provides that a person extradited may only be tried for the crime for which he was obtained.[112] William Rauscher, the defendant, murdered one of his shipmates while on board an American vessel on the high seas.[113] Taking refuge in Great Britain, he was extradited from that country on the murder charge within the framework of the existing extradition treaty[114] between the countries, the 1842 Webster-Ashburton Treaty.[115] Once in court, however, Rauscher was also tried on a lesser offense of cruel and unusual punishment.[116]

Looking to the structure and text of the treaty, as well as to statutes and scholarly works, the Court adopted the rule that a country could not proceed against a defendant on charges other than those for which the defendant was extradited.[117] This case can be distinguished from *Ker* in that Rauscher was brought into the United States cloaked with the protections of a treaty, whereas Ker entered with no treaty-conferred rights.[118] Thus, a person who is not brought into the United States under the color of a treaty cannot claim the protections of a treaty.

Like *Rauscher*, *Factor v. Laubenheimer*[119] interpreted the 1842 Webster-Ashburton Treaty between the United States and Great Britain. In *Factor*, the Court held that in the absence of extradition laws no legal obligation existed on the part of the country harboring the fugitive to surrender him.[120] While the defendant, John Factor, was in London, he received money which he knew had been obtained fraudulently.[121] Although this act was a crime in Great Britain, the offense was not a crime under the laws of Illinois, where Factor had taken refuge.[122] The British Consul requested Factor's extradition from the United States under the 1842 Webster-Ashburton Treaty[123] and the Blaine-Pauncefote Convention of 1889.[124]

The Court found that Factor could be extradited because the crime was one of a number of offenses under the treaty which were not required to be crimes in both

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110. 119 U.S. 407 (1886).
111. *Id.*
112. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2191 (1992).
113. *Rauscher*, 119 U.S. at 409.
114. Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-G.B., art. 5, 8 Stat. 572, 576.
115. *Rauscher*, 119 U.S. at 409.
116. *Id.*
117. *Id.* at 416-19.
118. Ker v. Illinois, 119 U.S. 436, 443 (1886).
119. 290 U.S. 276 (1933).
120. *Id.* at 287.
121. *Id.* at 286.
122. *Id.*
123. *Id.* (citing 1 MALLOY'S TREATIES 650, 655, 8 Stat. 572, 576).
124. *Id.* (citing 1 MALLOY'S TREATIES 740, 26 Stat. 1508).

countries in order for the accused to be extradited.[125] Most notably, however, the Court also found that the legal right to demand extradition and the subsequent duty to surrender the person existed "only when created by treaty."[126] In determining this point, the Court looked to the construction of the treaty and the meaning of its terms.[127]

Involving a conflict of treaty and statutory law, *Cook v. United States*[128] examined how the Tariff Act of 1930[129] was modified by a prohibition era treaty[130] with Great Britain.[131] The Tariff Act authorized the Coast Guard to stop and board any ship within twelve miles of the United States seashore if it appeared that the ship might have undeclared liquor on board.[132] However, the prohibition era treaty declared that the United States' power to enforce the treaty extended only to the distance the suspect vessel could travel in one hour.[133]

On November 1, 1930, the *Mazel Tov*, a British vessel, was stopped and boarded by the Coast Guard at a point eleven and one-half miles off the American shore.[134] Finding liquor as the only cargo on board, the Coast Guard seized the vessel and took it to the Port of Providence, Rhode Island, where it was delivered to customs officials.[135] Frank Cook, the master of the ship, argued that since the top speed of the *Mazel Tov* was only ten miles per hour, the ship when seized eleven and one-half miles from shore was beyond the jurisdiction of the United States as determined by the prohibition era treaty.[136] The Court agreed, stating that as the treaty was passed after the Tariff Act, the treaty superseded any inconsistent terms in the Act.[137]

Most significant to Machain's case, the government argued that because the ship was brought within the Port of Providence, the federal court in Rhode Island thereby acquired jurisdiction over the ship, in spite of the illegal seizure at sea.[138] The Court, however, ruled that the government lacked the power to ratify the seizure since it had been done in violation of the treaty.[139] By contrast, a seizure

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125. *Id.* at 290.

126. *Id.* at 287.

127. *Id.*

128. 288 U.S. 102 (1933). Both *Ker* and *Cook* are discussed further in Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231 (1934).

129. 19 U.S.C. § 1581 (1930).

130. Prohibition Treaty, May 22, 1924, U.S.-U.K., 43 Stat. 1761, *cited in Cook*, 288 U.S. at 107.

131. *Cook*, 288 U.S. at 107.

132. *Id.*

133. *Id.* at 111.

134. *Id.* at 107.

135. *Id.* at 107-08. It apparently was the practice of smugglers to have a ship remain in one area off the coast so that the illegal cargo could be unloaded to smaller boats and then smuggled into the United States. *Id.* at 114.

136. *Id.* at 109-10.

137. *Id.* at 118.

138. *Id.* at 121.

139. *Id.*

within the government's territorial limit as set forth by the treaty, followed by adjudication, would have been acceptable.[140]

In *Valentine v. United States ex rel. Neidecker*,[141] the Court again exhibited a reluctance to look outside the extradition treaty at issue for guidance in its decision.[142] The defendants in *Valentine* were American citizens who had committed crimes in France.[143] These crimes were among the extraditable offenses listed in the 1909 Extradition Treaty between the United States and France.[144] After committing the offenses, the defendants fled to the United States, where they were arrested in New York City and incarcerated for extradition proceedings.[145]

The Court held that the United States had always interpreted extradition treaties to apply to its own citizens.[146] In examining the exact language of the treaty,[147] however, the Court found that the treaty was very specific in denying any obligation on the part of the United States to surrender its own citizens.[148] The Court stated that the terms of the treaty "must be fairly construed, but we cannot add to or detract from them."[149] The Court also found that discretionary power on the part of the Executive to surrender its citizens could not be implied from the treaty,[150] because in other treaties this power was specifically delineated.[151] Therefore, the defendants could not be surrendered to French authorities.[152] Not wishing to stray from its proper place in the balance of powers, the Court left the job of remedying this oversight in the treaty to Congress and the Executive.[153]

A more recent example of the Court's reluctance to broadly construe a treaty, and thereby stray from its appointed powers, is the 1985 decision of *Air France v. Saks*.[154] *Air France* involved the interpretation of Article 17 of the Warsaw Convention.[155] Valerie H. Saks, a passenger on an Air France flight from Paris to Los Angeles, claimed that pain in her ear during the flight and her subsequent loss of hearing were caused by "negligent maintenance and operation of the jetliner's pressurization system."[156] The airline's liability under Article 17 of the Warsaw

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140. *Id.*

141. 299 U.S. 5 (1936).

142. *Id.*

143. *Id.* at 6.

144. *Id.* (citing Extradition Treaty, Jan. 6, 1909, U.S.-Fra., T.S. No. 561).

145. *Id.* at 6.

146. *Id.* at 7 (citing Charlton v. Kelly, 229 U.S. 447, 468 (1913)).

147. " 'Article V. Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention.' " *Id.* at 7.

148. *Id.* at 10.

149. *Id.* at 11.

150. *Id.*

151. *Id.* at 12.

152. *Id.* at 13.

153. *Id.*

154. 470 U.S. 392 (1985).

155. *Id.* at 394 & n.1. (citing Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11).

156. *Id.* at 394.

Convention depended on a finding that an "accident" was the true cause of the injury.[157]

Once again, the Court looked to the treaty, the context of the provision,[158] and the treaty's governing language of French[159] for the meaning of "accident." The Court determined that "accident" meant the injury must have been caused by an "unexpected or unusual event"[160] and noted that this definition was consistent with the history of the Convention's negotiations, the parties' conduct, and precedent.[161] The Court stated that until the treaty signatories changed its terms, the treaty should not be construed to expand the words' meanings.[162] This case, therefore, demonstrates the Court's inclination to narrowly construe a treaty's terms.

IV. INSTANT CASE

A. The Majority Opinion[163]

Based upon the above discussed decisions, the Supreme Court reversed the appellate and district courts' holdings, which had found that the district court could not exercise jurisdiction over Machain and had ordered Machain's repatriation to Mexico.[164] The Court held that a criminal defendant abducted and brought to the United States from a country with which the United States has an extradition treaty does not thereby acquire a defense to federal jurisdiction.[165] By determining that the *Ker* doctrine applied to Machain's abduction, the majority found that this action did not violate the Extradition Treaty[166] between the United States and Mexico.[167] The Court decided that the treaty could not be interpreted as having an implied term which prohibits prosecution where the defendant is brought before the court by means other than those outlined in the treaty.[168]

The majority first found that it could address the violation of the Extradition Treaty by distinguishing Machain's case from that in *United States v. Rauscher*.[169] *Rauscher* dealt with the Webster-Ashburton Treaty of 1842,[170] which governed extraditions between the United States and Great Britain.[171] The *Rauscher* Court found that the doctrine of specialty, which prohibited the prosecution of a

157. *Id.* at 396.
158. *Id.* at 397-98.
159. *Id.* at 397.
160. *Id.* at 400.
161. *Id.* at 400-04.
162. *Id.* at 406.
163. Chief Justice Rehnquist wrote the majority opinion in which Justices White, Scalia, Kennedy, Souter, and Thomas joined. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992).
164. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991); United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).
165. *Alvarez-Machain*, 112 S. Ct. at 2190.
166. Extradition Treaty, *supra* note 71, at 5059.
167. *Alvarez-Machain*, 112 S. Ct. at 2197.
168. *Id.* at 2196-97.
169. 119 U.S. 407 (1886).
170. Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-G.B., art. 5, 8 Stat. 572, 576.
171. *Alvarez-Machain*, 112 S. Ct. at 2191.

defendant for crimes other than those for which the defendant was extradited, was intended as part of the extradition treaty between the two countries.[172] The *Alvarez-Machain* Court distinguished *Rauscher* from this case in that the defendant in *Rauscher* was before the Court based on an extradition treaty, not a forcible abduction.[173]

The Court found a basis for jurisdiction over a forcibly kidnapped person[174] in *Ker v. Illinois*[175] and *Frisbie v. Collins*.[176] The defendant in *Ker* was forcibly abducted from Peru by a messenger hired by the United States government.[177] The *Ker* Court determined that the defendant could properly stand trial because no treaty was invoked to obtain Ker.[178] The *Alvarez-Machain* Court noted that in *Frisbie* the Court stated that it had never varied from *Ker's* rule that a forcible abduction does not impair the Court's power to try a defendant if the person is given a fair trial.[179] Based on this precedent, the *Alvarez-Machain* Court stated that it first had to determine whether Machain's abduction violated the Extradition Treaty between the United States and Mexico.[180] If the Extradition Treaty was indeed violated, then the Court could not exercise jurisdiction over the defendant.[181] However, if the Court determined that the Extradition Treaty was not breached, then based on *Ker*, the "court need not inquire as to how [the defendant] came before it."[182]

Chief Justice Rehnquist, writing for the Court, stated that the first place to look in construing a treaty was the terms of the treaty itself.[183] The Court found that the Treaty was not meant to mandate automatic application of extradition procedures

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172. *Id.*

173. *Id.* at 2191-92.

174. *Id.* at 2192-93.

175. 119 U.S. 436 (1886).

176. 342 U.S. 519 (1952).

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

178. *Id.* at 443.

179. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2192 (1992) (quoting Frisbie v. Collins, 342 U.S. 519, 522 (1952)).

180. *Id.* at 2193.

181. *Id.*

182. *Id.*

183. *Id.*

to the listed extraditable offenses.[184] Instead, the articles of the Treaty ensured that the Treaty applied to all extradition proceedings, regardless of the time when the crime was committed.[185] Rather than limiting the method of obtaining persons for trial only to extradition, the Court stated that extradition treaties are only designed to cover certain circumstances which follow established procedures.[186]

Furthermore, the history and course of dealing with Mexico showed that Mexico was aware of the *Ker* doctrine as early as 1906.[187] The Court emphasized that despite Mexico's knowledge of this practice, the current version of the Treaty contained nothing that would limit the power of the *Ker* doctrine.[188]

Finally, the Court determined that a term implying the prohibition of prosecuting a person brought before the Court by means outside the Extradition Treaty could not be read into the document.[189] Rejecting Machain's reliance on standards of international law,[190] the Court observed that none of the respondent's cited authority dealt with extradition treaties.[191] The Court stated that "to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice."[192]

The Court concluded that whether Machain should be repatriated to Mexico was an issue for the Executive Branch to resolve.[193] The Extradition Treaty was not violated, and, based on the Court's reading of *Ker*, Machain was pronounced

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184. *Id.* at 2194. Article 22(1) of the Extradition Treaty states that "[t]his Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force." Extradition Treaty, *supra* note 71, at 5073-74.

Article 2, Extraditable Offenses, reads as follows:

1. Extradition shall take place, subject to this Treaty, for wilful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2. If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. Extradition shall also be granted for wilful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. Subject to the conditions established in paragraphs 1, 2, and 3, extradition shall also be granted:

a) For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b) When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

Extradition Treaty, *supra* note 71, at 5062-63.

The Appendix to the Extradition Treaty lists murder as an extraditable offense. Extradition Treaty, *supra* note 71, at 5076.

185. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992).

186. *Id.* at 2193-94.

187. *Id.* & n.11.

188. *Id.* at 2194.

189. *Id.* at 2195-96.

190. *Id.* at 2195 (citing *Draft Convention on Jurisdiction with Respect to Crime, Harvard Research in International Law*, 29 AM. J. INT'L L. 439, 442 (Supp. 1935)).

191. *Id.*

192. *Id.* at 2196.

193. *Id.*

eligible to stand trial in the United States' court system for violations of this nation's laws.[194]

B. The Dissenting Opinion[195]

The dissent agreed with the lower courts and would have repatriated Machain.[196] The dissent distinguished Machain's situation from the incidents in *Ker* and *Frisbie* by classifying the kidnapping as a violation of the Extradition Treaty.[197] Justice Stevens also distinguished *Ker*, in that Machain's abduction did not involve a bounty hunter, and *Frisbie*, in that it did not involve an American fugitive seeking asylum in one state after having committed a crime in another.[198]

The dissent found the Extradition Treaty to be a "comprehensive document"[199] for the purpose of furthering cooperation in fighting crime and assisting in extradition.[200] Reading the Treaty to permit forcible governmental abduction would "transform [the Treaty's] provisions into little more than verbiage."[201] The dissent questioned the value of the Extradition Treaty's protections[202] to the wanted individual if the requesting state could simply resort to abduction as a means to obtain the person.[203]

Criticizing the Court for basing its opinion on an omission, the dissent argued that the majority viewed the Treaty as an "optional" method of procuring fugitives.[204] Furthermore, the dissent observed that under this reasoning, countries negotiating extradition treaties may have covertly reserved the right to kidnap in

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194. *Id.* at 2197. On December 14, 1992, Judge Rafeedie of the Federal District Court of the Central District of California ordered the release of Machain, citing lack of evidence. *Judge Says U.S. Was Told It Held Wrong Doctor in Agent's Killing*, N.Y. TIMES, Dec. 17, 1992, at A27. Dr. Machain returned to Mexico City on Tuesday, December 15, 1992, and proclaimed his innocence. *Id.* Judge Rafeedie's decision does not, however, affect the Supreme Court's opinion in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), because the Court's decision turned on jurisdiction and whether there was a treaty violation, not Machain's guilt or innocence. Jim Newton, *Judge Orders Camarena Case Defendant Freed*, L.A. TIMES, Dec. 15, 1992, at A1.

On December 21, 1992, another defendant in the Camarena murder, Ruben Zuno Arce, the brother-in-law of the former Mexican President Luis Echeverria, was convicted on charges of conspiracy, kidnapping, and committing violent crimes in aid of racketeering. *Man Is Convicted in Drug Agent's Torture Death*, N.Y. TIMES, Dec. 22, 1992, at A9. Arce faces a maximum sentence of life imprisonment. *Id.*

On July 9, 1993, Alvarez-Machain sued Federal Drug Enforcement officials, asking for relief in excess of twenty million dollars in damages for kidnapping, torture, and false imprisonment. *Drug Agency Is Sued over the Kidnapping of a Mexican Doctor*, N.Y. TIMES, July 10, 1993, at 26.

195. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 (1992). Justice Stevens was joined by Justices Blackmun and O'Connor in dissent. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 2198.

200. *Id.*

201. *Id.*

202. *Id.* The dissent pointed to the following sections of the Extradition Treaty: sufficiency of evidence (art.3), military and political offenses (art. 5), not granting extradition when the person has already been tried for the crime (art. 6), the expiration of the statute of limitations (art. 7), and withholding extradition when the requesting state practices the death penalty (art. 8). *Id.*

203. *Id.* at 2198-99.

204. *Id.* at 2199.

times when that practice is accomplished more easily than movement through the legal process of extradition.[205]

The dissent relied on *Rauscher* and concepts of international law to interpret the Extradition Treaty.[206] The *Rauscher* Court had determined that the 1842 treaty between the United States and Great Britain represented the only way the United States could gain jurisdiction over a person within British territory.[207] Furthermore, the *Rauscher* Court determined that despite the absence of language specifically outlining the doctrine of specialty, the doctrine could be incorporated into the 1842 treaty.[208] Justice Stevens emphasized that the logic of incorporating the doctrine of specialty into the treaty in *Rauscher* was not as clear as the rule against violating a treaty partner's territorial integrity, as in this case.[209] The dissent reviewed treatises,[210] the Restatement of Foreign Relations,[211] and selected treaties,[212] and observed that "the consensus of international opinion . . . condemns one Nation's violation of the territorial integrity of a friendly neighbor."[213]

The dissent termed the "critical flaw pervad[ing] the Court's entire opinion"[214] as the failure to distinguish between the behavior of private citizens, which does not breach treaty obligations, and conduct sanctioned by the Executive Branch, which does.[215] Justice Stevens viewed the government-sponsored kidnapping of Machain as a "flagrant violation of international law"[216] and a breach of the Treaty.[217] Employing the reasoning of *Cook v. United States*,[218] the dissent concluded that because the government acted beyond the authority granted by the Extradition Treaty with Mexico, the kidnapping of Machain could not be ratified by a fair proceeding in the courts.[219]

The dissent concluded that even though there was reason to believe the defendant Machain had participated in the brutal slaying of Camarena, the courts should avoid involvement in the Executive Branch's "desire for revenge."[220] Instead, the

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205. *Id.* at 2201 & n.21.

206. *Id.* at 2200-03.

207. *Id.* at 2200.

208. *Id.* & n.17.

209. *Id.* at 2202.

210. The dissent referenced 1 OPPENHEIM'S INTERNATIONAL LAW 295, 295 & n.1. (H. Lauterpacht ed., 8th ed. 1955). *Id.*

211. The dissent cited to the RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 432 & cmt. c (1987). *Alvarez-Machain*, 112 S. Ct. at 2202-03 n.25.

212. The dissent noted the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, and the United Nations Charter, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153. *Alvarez-Machain*, 112 S. Ct. at 2201 & n.20.

213. *Alvarez-Machain*, 112 S. Ct. at 2201.

214. *Id.* at 2203.

215. *Id.*

216. *Id.*

217. *Id.*

218. 288 U.S. 102 (1933) (voiding an attempt by the government to ratify an illegal seizure by proper proceedings in court).

219. *Alvarez-Machain*, 112 S. Ct. at 2204 (quoting *Cook*, 288 U.S. at 121-22).

220. *Id.* at 2205.

dissent stated that the Court should administer justice blindly and be mindful that its decisions influence courts around the world.[221]

V. ANALYSIS

Basing its decision on the *Ker* doctrine, the Court took a formal or "interpretivist" approach[222] to dealing with the problem of Machain's kidnapping. By viewing the case in this manner, the Court was able to find that Machain's abduction did not divest the judicial system of its jurisdiction over him and the crimes he allegedly committed.[223] Judicial "activists" or "noninterpretivists" probably are not pleased with the result in this case. Conversely, "interpretivist" or "originalist" constitutional scholars likely will find cause for relief in this decision. With the rise of judicial activism in the past forty years[224] and the emergence of the Court as a powerful agent for social change,[225] it seems only logical that the activist Court would seize the opportunity to venture into the foreign policy arena to condemn the DEA's actions in this case. However, interpretivists, or those Justices taking a formal approach to the law, carried the day.

The differing originalist and activist approaches to interpreting the law are demonstrated by the majority and dissenting opinions in *Alvarez-Machain.* The opinions reach their opposite conclusions because they are based on differing premises. In the majority's view, because the Extradition Treaty did not expressly prohibit abductions, the protections of the treaty were never triggered.[226] Furthermore, the existence of the *Ker* doctrine, granting to a court legitimate jurisdiction over an abducted individual, provided the Court with the necessary jurisdiction

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221. *Id.* at 2205-06. The dissent noted that the American doctrine giving jurisdiction to courts over a kidnapped defendant, the *Ker* doctrine, had been referenced, but not followed in S. v. Ebrahim, 1991 S. Afr. L. Rep. 553, 556-59 (1991). *Alvarez-Machain*, 112 S. Ct. at 2206 & n.36.

222. The formal versus functional approach, or interpretivism versus noninterpretivism approach, to applying the Constitution and laws has been the subject of numerous articles. *See generally*, Raoul Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986) [hereinafter Berger]; Lino A. Graglia, *"Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789 (1987) [hereinafter Graglia]; Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107 (1989); Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177 (1988). Originalists or interpretivists contend that the Constitution means what the Founders intended – the "original intention." Berger, *supra*, at 2. However, nonoriginalists or noninterpretivists, "insist that judges are free to interpret the Constitution in light of what is 'good and just' and the like." Berger, *supra*, at 2.

223. *Alvarez-Machain*, 112 S. Ct. at 2197.

224. Graglia, *supra* note 222, at 790. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954).

225. Graglia, *supra* note 222, at 790.

226. *Alvarez-Machain*, 112 S. Ct. at 2194.

for Machain's criminal case.[227] Although Machain's situation did not fit the *Ker* model perfectly,[228] his abduction was sufficiently similar to satisfy the Court.[229]

Indeed, the cases on which the Court relied also seem to follow this originalist approach to law and treaties. *Frisbie v. Collins*[230] reaffirmed the *Ker* holding and emphasized that a fair trial ensures due process protections.[231] The *Valentine*[232] and *Air France*[233] Courts also employed a formal analysis in interpreting treaties. In *Valentine*, the Court found that if the terms were not in the treaty, they could not be implied.[234] The Court declined to add to or substract from the treaty's meaning.[235] Furthermore, in *Air France* the Court refused to expand a term's meaning, especially after looking at the drafters' intent and the original language of the treaty.[236] Likewise, the *Factor*[237] Court found that a treaty's meaning should be taken at the face value of its terms.[238]

The *Rauscher*[239] decision presented the most daunting obstacle for the majority. Although influenced by the *Rauscher* precedent, the Court managed to distinguish the incorporation of the specialty doctrine into the treaty in *Rauscher* from Machain's argument implying a prohibition against abductions in the Extradition Treaty.[240] Machain relied on the spirit of the Extradition Treaty and the general principles of international law *not* relating to extradition treaties for his support.[241] The majority, however, pointed out that the *Rauscher* Court looked primarily to then-existing case law to incorporate the specialty principle into the Webster-Ashburton Treaty.[242] The *Alvarez-Machain* Court followed the *Rauscher* example by demonstrating a reluctance to look outside American common law precedent

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227. *Id.* at 2197.

228. The *Ker* principle has been expanded to include three types of cases: (1) the original case of forcible abduction by United States agents of another country's citizens or American citizens; (2) cases where the fugitive was arrested by the asylum country's authorities and turned over to United States agents while still in the territory of the asylum country; and (3) instances where private citizens abducted the fugitive on foreign soil without the knowledge of the United States. Manuel R. Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Compartive* [sic] *Study*, 32 IND. L.J. 427, 431-34 (1957).

It has been stated that there are three main exceptions to the *Ker* doctrine: (1) United States v. Rauscher, 119 U.S. 407 (1886) (illustrating the specialty principle); (2) Cook v. United States, 288 U.S. 102 (1932) (imposing limits on jurisdiction through treaty provisions); and (3) United States v. Toscanino, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974) (providing an exception when United States officials engage in "shocking conduct" during the defendant's abduction). Kathryn Selleck, Note, *Jurisdiction After International Kidnapping: A Comparative Study*, 8 B.C. INT'L & COMP. L. REV. 237, 240-46 (1985).

229. *Alvarez-Machain*, 112 S. Ct. at 2197.

230. 342 U.S. 519 (1952).

231. *Id.* at 522.

232. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936).

233. Air France v. Saks, 470 U.S. 392 (1985).

234. *Valentine*, 299 U.S. at 10.

235. *Id.* at 11.

236. *Air France*, 470 U.S. at 392.

237. Factor v. Laubenheimer, 290 U.S. 276 (1933).

238. *Id.* at 293.

239. United States v. Rauscher, 119 U.S. 407 (1886).

240. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195-96 (1992).

241. *Id.* at 2194-96.

242. *Id.* at 2191.

and by refusing to follow international law.[243] The Court further distinguished this case from *Rauscher* by noting that the defendant, Rauscher, was before the Court by way of the operation of an extradition treaty,[244] whereas Machain did not come into the country through the Treaty's extradition proceedings.[245]

By contrast, the dissent took a functional, more flexible approach to Machain's case. Foremost, the activist dissent based its opinion on a totally different premise than that of the majority: the Extradition Treaty between the United States and Mexico[246] embodied the only methods by which a fugitive could be brought before American courts.[247] Working from this premise, it is relatively easy to see how the dissent could read various protections into the Extradition Treaty.[248]

Based on *Rauscher*, the dissent read the Extradition Treaty as an all-encompassing extradition document.[249] The dissent argued that incorporating the specialty doctrine into the Webster-Ashburton Treaty greatly manipulated the then-existing law in comparison to implying that the Extradition Treaty prohibits abductions.[250] The dissent also found that international law would condemn this action.[251] In actuality, however, the dissent may have had a more compelling reason to look to international law for vindication of its position: the *Ker* doctrine was an overwhelming precedent against the dissent's viewpoint.

The strongest precedent in the dissent's favor, which the majority did not address, was *Cook v. United States*.[252] *Cook* held that an action taken illegally by the government could not be remedied by a later legitimate government action.[253] Therefore, *Cook* implied that it would be impossible for an American court to obtain proper jurisdiction over an illegally procured Machain. Because the majority did not agree that the Extradition Treaty listed the only ways that persons could be obtained legally, *Cook* had no effect on the majority's argument.

The differing originalist and activist approaches to the concept of separation of powers also influenced the outcome of this decision in yet another respect. The majority clearly stated that Machain's repatriation was a decision for which the Executive Branch was better suited.[254] The Court took a narrow view of the issue presented by the case, stating that although the decision might be " 'shocking' "[255] and "in violation of general international law principles,"[256] its sole task was to

243. *Id.* at 2194-97.
244. *Id.* at 2191-92.
245. *Id.* at 2190.
246. Extradition Treaty, *supra* note 71, at 5059.
247. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2198 (1992) (Stevens, J., dissenting).
248. *Id.*
249. *Id.* at 2200-03.
250. *Id.* at 2202.
251. *Id.*
252. 288 U.S. 102 (1933).
253. *Id.* at 121-22.
254. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992).
255. *Id.* (citing Tr. of Oral Arg. at 40).
256. *Id.*

decide whether the abduction violated the Extradition Treaty.[257] Conversely, the dissent took a broader view of the effect of the Court's pronouncement by warning of the message it would send to other tribunals around the world.[258] Keeping with a flexible approach to law, the dissent clearly had no qualms about venturing into the foreign policy arena in a case where it felt such action was warranted.[259]

Admittedly controversial, the decision the Court reached in *Alvarez-Machain* is a sound one. The Court demonstrated a seldom-seen quality of judicial restraint by not forging into the President's foreign policy territory[260] and the President and Congress's treaty-making domain.[261] The Framers created a delicately balanced form of government which did not intend for an unelected group of nine justices with life tenure to make our country's foreign policy decisions.[262] As Chief Justice Marshall observed, "[t]he difference between the departments undoubtedly is, that the legislature *makes*, the executive *executes*, and the judiciary *construes* the law."[263] Clearly, the judiciary was not meant to make the law, but rather to "interpret and apply it."[264]

With the idea of the separation of powers in mind, the majority was consistent with established precedent in this area of the law, resisting the temptation to act as " 'knight[s]-errant, roaming at will in pursuit of [its] own ideal of beauty or of goodness.' "[265] As discussed above, the cases on which the majority relied approached treaty interpretation from a formal perspective.[266] These cases mandated that the Court look to the exact language and source of the treaties to interpret their meanings. In the present case, the majority looked strictly to the Extradition Treaty itself and common law for guidance in making its decision.

Considering, however, the shocking result reached by following the dictates of precedent, the validity of the precedent must be questioned. Should the Nineteenth Century *Ker* doctrine have been followed by a Court at the threshold of the Twenty-First century? *Ker* hails from a time when the United States was still settling the Wild West, when this country would not have encountered severe international protests for actions such as the kidnapping of Machain. Furthermore,

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257. *Id.* at 2193.

258. *Id.* at 2205-06.

259. One commentator has suggested that cases involving treaties do not present political questions. Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 241 (1934). Dickinson argues that the judiciary is fully able to decide matters of international law where a treaty has clearly been broken or violated. *Id.* at 244. This commentator, however, believes that in international affairs, a nation must speak with one voice, that of the Executive. *Id.* However, it is clear that this principle cannot be followed when "the executive invokes its own courts to convict . . . in a case which turns upon the meaning of a treaty text or of a principle of international law." *Id.*

260. U.S. CONST. art. II, § 2, cl. 1, 2.

261. U.S. CONST. art. II, § 2, cl. 2.

262. *See generally*, Graglia, *supra* note 222.

263. Berger, *supra* note 222, at 9 & n.69 (emphasis added) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825)).

264. Berger, *supra* note 222, at 9 & n.66 (quoting 2 J. WILSON, WORKS 502 (R. McCloskey ed. 1967)).

265. Berger, *supra* note 222, at 13 & n.107 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).

266. *See supra* notes 230-45 and accompanying text.

Machain's case did not fit the *Ker* model in that Machain is a Mexican citizen and the illegal act of which he was accused occurred in Mexican territory.[267] Ker, by contrast, was an American citizen who was involved in illegal activities here in the United States.[268] Although this difference alone would seem to be dispositive, the *Frisbie*[269] case adds the rule that a trial which conforms to the tenets of due process satisfies the Constitution, notwithstanding the methods by which the defendant's presence was obtained.[270] Once again, though, it is not within the Court's grant of power to step into the foreign policy arena to change a treaty, in spite of a skewed result.

Perhaps, with this decision, the Court desired to give the Executive Branch a hand in its fight against the illegal drug trade. No doubt a bold, clear message was sent to drug traffickers that their national boundaries no longer protect them from prosecution in the United States. Before this decision, by statute, the United States could seek to enforce laws against those who had committed illegal acts outside American borders that had harmful effects within the United States.[271] This decision by the Court has now made the DEA even more powerful. Kidnapping, long an accepted practice in dealing with pirates,[272] is presently a Court-sanctioned method of apprehending drug traffickers.

It seems that the *Ker* doctrine may have been revived at precisely the right time. With the latest resurgence of terrorist activities in the United States, namely the World Trade Center bombing on February 26, 1993,[273] and the random killings outside the C.I.A. headquarters on January 25, 1993,[274] the reinvigorated *Ker* doctrine gives authorities a green light to apprehend terrorist suspects in whatever country they may seek asylum. Both of these recent incidents would fit the *Ker* model with near perfection: the crimes were committed on American soil, and the perpetrators may have fled the country.[275]

What price, however, did the United States pay for the privilege of prosecuting Machain? The United States' reputation as the leader of the free world may be

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

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

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

270. *Id.* at 522.

271. Jennifer L. Gray, Note, *International Kidnapping and the Constitutional Rights of the Kidnapped*, 44 RUTGERS L. REV. 165, 165 & n.1. (1991) (referring to 21 U.S.C. § 959(c) (1988) and 21 U.S.C. §§ 846, 963 (1988)).

272. *See* Andrew K. Fletcher, Note, *Pirates and Smugglers: An Analysis of the Use of Abductions to Bring Drug Traffickers to Trial*, 32 VA. J. INT'L L. 233 (1991).

273. Douglas Jehl, *Explosion at the Twin Towers: Car Bombs; A Tool of Foreign Terror, Little Known in the U.S.*, N.Y. TIMES, Feb. 27, 1993, at A24.

274. B. Drummond Ayres, Jr., *Gunman Kills Two Near C.I.A. Entrance*, N.Y. TIMES, Jan. 26, 1993, at A14.

275. The suspect in the shootings outside the C.I.A. headquarters, Mir Aimal Kansi, is believed to have fled to his native Pakistan. Reuters, *Pakistanis Hunt a Suspect Wanted in U.S.*, N.Y. TIMES, June 17, 1993, at A12.

Four suspects in the World Trade Center bombing were captured and scheduled to undergo trial in the fall of 1993. Richard Bernstein, *As Bomb Trial Nears, Strategies Emerge*, N.Y. TIMES, Sept. 12, 1993, at A45. Another suspect will be tried separately. *Id.* It is believed that two other suspects have fled the country. *Id.* The Clinton Administration has offered millions of dollars in reward for information leading to the capture of these two suspects, who reportedly are hiding in Iraq. *Reward to Be Offered for 2d Fugitive in Bombing*, N.Y. TIMES, Sept. 11, 1993, at 25. One of the suspects believed to be in Iraq is an American citizen. *Id.*

significantly tainted. Countries with which the United States currently maintains treaties may question the validity of the agreements. Nations which normally negotiate freely with this country on issues from trade to extradition may not feel that they can trust the United States to negotiate in good faith. Most likely, our Central and South American neighbors will see themselves as the most vulnerable due to their close proximity to the United States and the DEA's presence in these areas.

International reaction to this decision was swift and condemning. Canada's Minister of External Affairs stated that "any attempt by the United States to kidnap a Canadian would be regarded as a criminal act."[276] Latin American countries overwhelmingly decried the decision, with Uruguay's lower house of parliament stressing that the decision showed " 'a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties.' "[277]

Mexico reacted immediately to the decision, saying that it would no longer take aid from the United States in the countries' joint fight against drug trafficking.[278] Mexico also decided to suspend DEA activities in Mexican territory, but has since reversed its position.[279] The *Alvarez-Machain* decision also came at a critical stage in the North American Free-Trade Agreement talks.[280]

Then-President Bush quickly sent a letter to the President of Mexico, Carlos Salinas de Gortari, assuring him that the American government would " 'neither conduct, encourage nor condone' " abductions across the Mexican border.[281] In President Salinas's January 8, 1993, meeting with then President-elect Bill Clinton, the *Alvarez-Machain* decision remained a delicate topic.[282] As a result of the talks, Clinton promised to respect Mexico's sovereignty, while Salinas stated that the two leaders had "the will to be friends and to respect [each other's] principles, mainly that of sovereignty and self-determination."[283] The Clinton Administration has since pledged that it will not engage in cross-border kidnappings while the United States and Mexico conduct negotiations on an agreement banning the practice.[284]

VI. CONCLUSION

Although *Alvarez-Machain* provides an added boost of power to the United States' war effort against the invasion of drugs onto American soil and in apprehending terrorists, it runs counter to prevailing international law precepts

276. David O. Stewart, *The Price of Vengeance*, A.B.A. J., Nov. 1992, at 50.
277. *Id.*
278. Damian Fraser, *Mexico to Reject U.S. Aid for Drug Fight*, FIN. TIMES, July 28, 1992, at 4.
279. *Id.*
280. *Id.*
281. David O. Stewart, *The Price of Vengeance*, A.B.A. J., Nov. 1992, at 52.
282. *Clinton Meets with Mexican President*, CLARION-LEDGER (Jackson, Miss.), Jan. 9, 1993, at 4A.
283. *Id.*
284. Steven A. Holmes, *U.S. Gives Mexico Abduction Pledge*, N.Y. TIMES, June 22, 1993, at A11.

respecting the sovereignty of nations. The decision, however, avoids over-zealous judicial activism by remaining consistent with precedent and the idea of the separation of powers. The power to change the results of the decision has now been rightfully placed in the Executive Branch's hands with its treaty-making ability.