United States v. Alarez-Machain: Supreme Court Sanctions Governmentally Orchestrated Abductions as Means to Obtain Personal Jurisdiction

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UNITED STATES V. ALVAREZ-MACHAIN: SUPREME COURT SANCTIONS
GOVERNMENTALLY ORCHESTRATED ABDUCTIONS AS MEANS TO
OBTAIN PERSONAL JURISDICTION

In a government of laws, existence of government will be
imperilled [sic] if it fails to observe the law scrupulously... If the Government becomes a lawbreaker, it
breeds contempt for the law; it invites every man to be-
come a law unto himself; it invites anarchy To declare
that in the administration of criminal law the end justifies
the means — to declare that the Government may commit
crimes in order to secure the conviction of a private crimi-
nal — would bring terrible retribution. Against that perni-
cious doctrine this Court should resolutely set its face.¹

I. INTRODUCTION

On June 15, 1992, the United States Supreme Court held, 6-3,
that an extradition treaty between the United States and Mexico did
not bar the U.S. from abducting a Mexican citizen who was ac-
cused of participating in the murder of an American agent in Mex-
ico.² It further held that the abduction did not violate international

law and that Mexico’s formal objection to the abduction and the violation of its territorial integrity was immaterial. Therefore, the defendant was subject to the jurisdiction of American courts.

This Comment discusses the decision in light of pertinent policy considerations and existing precedent. Parts II and III discuss the background of the case and the Supreme Court opinions, respectively. Part IV analyzes the Court’s holding and considers the alternative methods of analysis available to the Court, specifically considering both domestic and international legal principles. Finally, this Comment concludes that in its zeal to win the war against drugs, the Court rashly chose its outcome without fully analyzing either applicable law or the ramifications of its decision, and, in the process, has alienated and destroyed the cooperation of several foreign nations.

II. BACKGROUND

A. Extradition Law Generally

Generally, extradition is a vehicle whereby nations may transfer alleged criminals between themselves via formal arrangements, in the case of extradition treaties, or informal ad hoc arrangements. Extradition serves as one of several mechanisms designed to protect the rights of the accused. Alternatives to extradition, such as exclusion, deportation and abduction, lack the procedural safeguards which extradition, especially under a treaty, provides. However, it is more accurate to view extradition as a matter of sovereignty and a means of fostering healthy foreign relations rather than an international device for the protection of human rights. This is so because, as a contract between nations, extradition treaties exist for the preservation of the sovereign rights of the countries and not the

3. Id.
4. After remand, Dr. Alvarez was acquitted by Judge Edward Rafeedie, the same judge who originally dismissed the case for lack of jurisdiction. Because Judge Rafeedie ordered acquittal on all charges instead of dismissal, Dr. Alvarez cannot be prosecuted again for the Camarena murder. Lou Cannon, U.S. Judge Acquits Mexican in DEA Agent’s ’85 Killing, WASH. POST, Dec. 15, 1992, at A1.
5. See infra notes 9-38 and accompanying text.
6. See infra notes 39-73 and accompanying text.
7. See infra notes 74-118 and accompanying text.
8. See infra notes 119-21 and accompanying text.
10. Id. at 4.
11. Id.
individual rights of their citizens.\textsuperscript{12}

Inextricably woven with extradition law are issues relating to situations where a government operates in a manner outside the scope of an extradition treaty. The law in the United States deals mainly with two subissues within this topic. In two cases decided the same day, the Supreme Court held that abduction by a private individual does not violate the terms of an extradition treaty\textsuperscript{13} and that a formally extradited defendant may only be tried for the crimes for which he was extradited.\textsuperscript{14}

In \textit{Ker v. Illinois}, the Governor of Illinois requested the Secretary of State to formally petition Peru for the extradition of Frederick Ker, an American citizen residing in Peru who was suspected of larceny and embezzlement.\textsuperscript{15} Pursuant to this request, the President of the United States issued a warrant and dispatched a private messenger to retrieve Ker from Peruvian authorities in compliance with the extradition treaty between the nations.\textsuperscript{16} However, without presenting documents to Peruvian officials or demanding the government's surrender of Ker, the messenger forcibly abducted Ker and brought him to the United States.\textsuperscript{17} In a unanimous opinion, the Supreme Court held Ker answerable in the Illinois court for his offense, reasoning that "Forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense."\textsuperscript{18}

On the other hand, the defendant in \textit{United States v. Rauscher} was accused of assaulting and inflicting cruel and unusual punishment upon a shipmate within the maritime jurisdiction of the United States.\textsuperscript{19} He was extradited from Great Britain on a charge of murder.\textsuperscript{20} Thus, the issue arose whether Rauscher could be tried for an offense different from the one for which he was extradited. The Supreme Court resolved that issue in favor of Rauscher, stating that the weight of authority and sound reasoning supported in-

\begin{itemize}
\item \textsuperscript{12} M. Cherif Bassiouni, \textit{Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition}, 7 VAND. J. TRANSNAT'L L. 25, 25 (1973).
\item \textsuperscript{13} \textit{Ker v. Illinois}, 119 U.S. 436 (1886).
\item \textsuperscript{14} \textit{United States v. Rauscher}, 119 U.S. 407 (1886).
\item \textsuperscript{15} \textit{Ker}, 119 U.S. at 438.
\item \textsuperscript{16} \textit{Id}.
\item \textsuperscript{17} \textit{Id}.
\item \textsuperscript{18} \textit{Id} at 444.
\item \textsuperscript{19} \textit{United States v. Rauscher}, 119 U.S. 407 at 409 (1886).
\item \textsuperscript{20} \textit{Id}.
\end{itemize}
terpreting the extradition treaty with Great Britain to contain an implied limitation prohibiting prosecution of an individual for an offense other than that for which he was extradited.21

B. United States v. Alvarez-Machain

On April 2, 1990, Humberto Alvarez-Machain, a Mexican obstetrician, was forcibly abducted at gunpoint from his office in Guadalajara, Mexico. He was then flown, via private plane, to El Paso, Texas, where he was arrested by Drug Enforcement Administration ("DEA") agents for his alleged participation in the kidnapping and murder of DEA special agent Enrique Camarena-Salazar and his pilot, a Mexican citizen.22

Apparently, the DEA attempted to obtain jurisdiction over Dr. Alvarez through informal negotiations with Mexican officials prior to resorting to abduction of the doctor.23 These informal discussions commenced in December 1989, when Mexican Federal Judicial Police Commandante Jorge Castillo del Rey contacted known DEA informant Antonio Garate-Bustamante seeking to exchange Dr. Alvarez for an alleged Mexican thief residing in the United States.24 Castillo met with DEA special agents Hector Berrellez and Bill Waters and agreed that Dr. Alvarez would be delivered to the United States in exchange for an immigration investigation of the alleged thief, hopefully leading to his deportation.25 However, the agreement broke down in January when Mexican officials requested Dr. Alvarez’s transportation expenses in advance and the DEA declined the request.26 Near the end of that month, Castillo requested a second meeting with the DEA agents.27 However, Berrellez ultimately declined to attend in light of perceived Mexican-American tensions based on a televised mini-series regarding Camarena’s murder.28

During this time, the United States government never attempted formal extradition proceedings. Instead, Berrellez instructed Garate

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21. Id. at 429-30.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id. at 602-03.
to relate to his Mexican contacts that the DEA would pay a reward of $50,000 plus expenses for the apprehension of Dr. Alvarez.  

Berrellez testified in the district court that he had received authorization to make such an offer from officials in both Los Angeles and Washington, D.C., including the DEA's deputy director and the United States Attorney General's office. Dr. Alvarez was clearly abducted pursuant to the DEA's offer. In fact, subsequent to the abduction, the DEA made a partial reward payment of $20,000 to Dr. Alvarez's captors and evacuated seven of the kidnappers and their families to the United States. Thus, despite the fact that the DEA agents may not have personally participated in Dr. Alvarez's abduction, it is undisputed that they were responsible for it.

On April 18, 1990, slightly more than two weeks after Dr. Alvarez's abduction, the Embassy of Mexico sent a "diplomatic note" to the United States Department of State requesting an explanation regarding the extent of the American government's participation in the abduction. The Mexican Embassy also advised the United States government that if "it [was] proven that [the abduction was] performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking [would] be endangered . . . ." The Embassy sent its second diplomatic note on May 16, 1990, notifying the State Department that the Mexican government deemed Dr. Alvarez's abduction to be in violation of the Treaty between the two nations and demanding his repatriation. Mexico also represented that Dr. Alvarez would be prosecuted pursuant to the terms of the Treaty and punished, if appropriate, for his alleged participation in the Camarena murder. A third diplomatic note was sent from the Embassy on July 19, 1990, which requested United States officials to arrest and extradite Berrellez and Waters to Mexico for prosecution of crimes.

29. Id. at 603.
30. Id.
31. Id. As of the district court hearing date, the DEA continued to pay expenses for these persons in an amount equal to approximately $6,000 per week.
32. Id. at 604.
34. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 (1992) (Stevens, J., dissenting). The Treaty provides that the requested nation may extradite an accused or submit the case to its own criminal justice system for prosecution. Extradition Treaty, 31 U.S.T. at 5055. In keeping with this arrangement, Mexico has already prosecuted several individuals involved in the murder. Alvarez-Machain, 112 S. Ct. at 2197 n.2 (Stevens, J., dissenting).
relating to Dr. Alvarez’s abduction.35

Following his abduction, Dr. Alvarez was indicted on kidnapping, murder and conspiracy charges. He subsequently moved to dismiss the indictment, inter alia, on the ground that the court lacked jurisdiction over him because he was abducted in violation of the Treaty between Mexico and the United States.36 Based on this argument, the district court dismissed the charges against Dr. Alvarez and ordered that he be repatriated to Mexico;37 the Court of Appeals for the Ninth Circuit affirmed the decision.38

III. THE SUPREME COURT OPINIONS

A. The Majority Opinion

In a majority opinion authored by Chief Justice Rehnquist, the United States Supreme Court reversed the lower courts, holding that a government-authorized forcible abduction did not afford Dr. Alvarez a defense to the criminal jurisdiction of an American court.39 The majority commenced its analysis by presenting analogous precedent without specifically discussing its applicability to the case at bar.40 The aforementioned decisions in Ker and Rauscher were central to the Court’s analysis.

Because Dr. Alvarez contended that his prosecution, like Rauscher’s, violated the implied terms of the Treaty, while the government argued that Rauscher stands as an exception to jurisdiction only in cases where the Treaty has been invoked, the Court set forth a purported analysis to resolve the issue of whether the Ker rule should be applied. The majority asserted that the primary inquiry was whether Dr. Alvarez’s abduction violated the Treaty; if it did, the Ker rule would be applied and Dr. Alvarez would be subject to American jurisdiction.41 As the majority noted, “The

36. Id. at 601.
37. Id.
40. Id. at 2191-93 (discussing United States v. Rauscher, 119 U.S. 407 (1886), which held that an individual brought within American jurisdiction through a formal extradition proceeding may only be tried for the offenses for which he was extradited; Ker v. Illinois, 119 U.S. 436 (1886), which held abduction by a private party is no defense to American jurisdiction; and Frisbie v. Collins, 342 U.S. 519 (1952), which held abduction in Illinois by Michigan law enforcement officers was not a defense to jurisdiction).
41. Id. at 2193.
Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs.\textsuperscript{42} Therefore, in order to determine whether the abduction violated the Treaty in the first instance, the majority considered its language, the history of negotiations, and principles of international law generally.

First, 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.\textsuperscript{43}

Dr. Alvarez proposed an interpretation of Article 9 which, in essence, stated that Article 9 embodies the only means by which a nation may prosecute a foreign national. He submitted that the nations agreed to the following arrangement: if one country wishes to prosecute a national of the other country, the former may request extradition; pursuant to such a request, the latter may either extradite the individual or refer the case for prosecution within its own judicial system.\textsuperscript{44} In other words, through the Treaty, each nation preserved its right to choose whether its residents should be tried in its own courts or those of the requesting nation.\textsuperscript{45} Dr. Alvarez argued that the preservation of this right would be rendered meaningless if each nation were free to kidnap the other's residents.\textsuperscript{46}

In response, the majority concluded that "Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 2193-94.
\textsuperscript{44} Id. at 2194.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
prosecution."\textsuperscript{47} Despite its plain conclusion, however, the majority's underlying rationale is not at all clear. It asserted that in the absence of extradition treaties, nations are under no obligation to surrender their residents; therefore, extradition treaties exist "to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."\textsuperscript{48} From this, the majority then inferred that the Treaty merely established the procedures to be followed when the Treaty is invoked.\textsuperscript{49} Thus, since the United States chose to abduct Dr. Alvarez, rather than invoking the Treaty, the United States was not bound by any obligations that the Treaty set forth. In sum, our most learned jurists asserted that it is permissible for the United States to abduct a foreign national for purposes of prosecution because the Treaty does not expressly prohibit abductions. Furthermore, the Justices based their conclusion that the Treaty does not prohibit abductions on the fact that the Treaty does not impose obligations on the nations unless it is actually invoked.

The circuitous logic underlying this phase of the opinion is so flawed that intelligent response is nearly impossible; it does, however, raise some important questions. For example, if abductions are permissible, what kind of mutual obligations have been imposed on the nations? What purpose do extradition treaties serve if they do not exist to prohibit violations of territorial limits or to establish mutual request and surrender practice and procedure? And, why would a nation risk proceeding under the Treaty and being denied surrender of an accused when it is free to proceed at will so long as it never attempts formal extradition?

In addition, the rationale that underlies the majority's aforementioned conclusion — that extradition treaties exist only to impose mutual obligations which would otherwise be lacking — seems to be a rationale which Dr. Alvarez or the dissent would be more comfortable asserting. The existence of mutual obligations and specific formal procedures seems to lead to a conclusion contrary to that of the majority, i.e., that the Treaty exists to impose ob-

\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} In response to a similar argument attempting to harmonize the holdings of \textit{Ker} and \textit{Rauscher}, Clare Lewis stated, "This distinction is not capable of rational justification and smacks of sophistry." Clare E. Lewis, \textit{Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Male Captus, Bene Detentus? Sidney Jaffe; A Case in Point}, 28 CRIM. L.Q. 341, 348 (1985). That comment is equally applicable here.
litigations and standards of conduct for the nations in all situations rather than only upon invocation of the Treaty.

After discussing the specific language of Article 9 of the Treaty, the majority examined the history of negotiations and practice under the Treaty and concluded that it too failed to demonstrate that abductions are prohibited under the Treaty. Chief Justice Rehnquist concluded that Mexico was made aware of the Ker doctrine in 1906 when a similar incident involving a Mexican national took place. Furthermore, he reasoned that since scholars had propounded language in model legislation in the 1930's which would have prohibited abductions, Mexico was put on notice that such language would be necessary to achieve such a result.

Finally, the majority examined international law to determine whether, regardless of its conclusion regarding the explicit terms of the Treaty, a prohibition relating to abduction should be implied according to general international legal principles. Dr. Alvarez contended that the Treaty must be interpreted in light of general principles of international law and "that international abductions are 'so clearly prohibited in international law' that there was no reason to include such a clause in the Treaty itself." However, he conceded that the violated nation's protest was vital to this analysis because sources of international law, such as the United Nations Charter and the Charter of the Organization of American States, are not self-executing, and an individual's right under the Treaty is derivative of the nation's right. In other words, since nations are free to voluntarily surrender individuals in the absence of the invo-

51. Id.
52. Id. It is questionable whether this Court would have found even the language in the scholarly draft sufficient to prohibit abductions. The draft stated:

In exercising jurisdiction under this Convention, 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 or States whose rights have been violated by such measures.

Advisory Committee of the Research in International Law, Draft Convention on Jurisdiction with Respect to Crime Article 16 in Harvard Research in International Law, 29 Am. J. Int'l L. 442 (Supp. 1935). Because the majority did not think that the United States' actions with respect to Dr. Alvarez violated international law, one wonders whether this language would have been sufficient to protect him and similarly situated individuals, as the majority asserted.
54. Id. at 2195 (citation omitted).
55. Id.
cation of a Treaty, "formal protest . . . ensures that the 'offended' nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution."^56

The majority rejected this argument based in part on Dr. Alvarez's reliance on Mexico's protest. It stated:

The Extradition Treaty has the force of law, and if . . . it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation . . . .

More fundamentally, the difficulty with the support [Dr. Alvarez] garners from international law is that none of it relates to the practice of nations in relation to extradition treaties . . . . In the instant case, [Dr. Alvarez] would imply terms in the extradition treaty from the practice of nations with regards to international law more generally. [Dr. Alvarez] would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not "exercise its police power in the territory of another state." There are many actions which could be taken by a nation that 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.^57

With that, the third consideration of the purported analysis, the Court once again reached a conclusion favoring the application of the Ker doctrine, without fully analyzing the rationale or precedent underlying its conclusion. For example, the majority failed to address precisely why it rejected as inconsistent Dr. Alvarez's contention that, in light of Mexico's formal protest, his abduction violated the Treaty. On the contrary, several international scholars indicate that any rights under extradition treaties belong to the contracting nation and not the offended individual; therefore, Mexico's objection was quite relevant. Furthermore, the majority failed to explain why general international law principles, albeit not specific to extradition treaties, should not apply to international

^56. Id.
^57. Id. at 2195-96.
kidnappings. Instead, the majority just glibly concluded,

[Dr. Alvarez] . . . may be correct that [his] abduction was “shocking,” and that it may be in violation of general international law principles . . . . However, [Dr. Alvarez’s] abduction was not in violation of the Extradition Treaty . . . .

To those who respect well-reasoned legal analyses, baseless conclusions such as this are disappointing at best.

B. The Dissenting Opinion

Whereas the majority presented an outcome determinative opinion in an attempt to blindly adhere to distinguishable precedent, the dissent, on the other hand, offered a sensible and logical analysis in regard to resolution of whether Dr. Alvarez’s abduction violated international law. The dissenting opinion, authored by Justice Stevens, initially stated that it was “difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance — the stated goals of the Treaty.” This statement is indicative of the tone of the entire opinion.

Focusing on the underlying policy rationales for prohibiting abduction of foreign nationals and responding to the majority’s “mutual obligations” argument, the dissent stated:

Extradition treaties prevent international conflict by providing agreed-upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty . . . . [Extradition] treaties further the purpose of international law, which is “designed to protect the sovereignty and territorial integrity of states, and to restrict impermissible state conduct.”

The object of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual delivery of fugitives, but why they do prohibit state-sponsored abductions.

It further noted, highlighting the illogic of the majority’s position:

It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions

58. Id. at 2196-97 (citations omitted).
59. Id. at 2198 n.4 (Stevens, J., dissenting).
60. Id. (citations omitted).
in the territory of the other Nation. Relying on that omission, the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process. If the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty. That, however, is a highly improbable interpretation of a consensual agreement, which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.61

Obviously, the scenario depicted by the dissent was an exercise in extremism, however, it effectively demonstrated the absurdity of the majority’s analysis.

In addition, as the dissent noted, the majority’s method of analysis — relying on the omission of a prohibition against abductions — was specifically rejected by the Court in Rauscher, a case upon which the majority relied.62 Although the Treaty at issue in that case did not explicitly limit the jurisdiction of the acquiring nation after extradition, the Court held that Rauscher could not be tried for a different offense.63 The dissent in the case at bar therefore concluded that the “Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation’s power to prosecute . . . .”64 The dissent further noted that although the holding in Rauscher was supported by precedent, the weightier support was derived from “the consensus of international opinion that condemns one Nation’s violation of the territorial integrity of a friendly neighbor.”65 Finally, Justice Stevens concluded:

In the Rauscher case, the legal background that supported the decision to imply a covenant not to prosecute for an

61. Id. at 2199.
62. Id. at 2199 n.10.
64. Alvarez-Machain, 112 S. Ct. at 2201 (Stevens, J., dissenting).
65. Id.
offense different from that for which extradition had been
granted was far less clear than the rule against invading the
territorial integrity of a treaty partner that supports
Mexico's position in this case. If Rauscher was correctly
decided — and I am convinced that it was — its rationale
clearly dictates a comparable result in this case.\textsuperscript{66}

Citing a case which condemned the United States for seizing a
foreign ship in a foreign port, the dissent commented that it "is
shocking that a party to an extradition treaty might believe that it
has secretly reserved the right to make seizures of citizens in the
other party's territory."\textsuperscript{67} In Justice Story's own words, in regard
to the captured ship, to seize vessels for revenue collection purpos-
es beyond the jurisdiction of American ports or the open seas over
which all nations exercise common sovereignty "would [be] a
usurpation of exclusive sovereignty on the ocean, and an exercise
of an universal right of search, a right which has never yet been
acknowledged by other nations, and would be resisted by none
with more pertinacity that by the American."\textsuperscript{68} From this state-
ment, made over a century and a half ago, flows the same idea of
reciprocity of which the dissent speaks. The United States should
not be permitted to kidnap a foreign national if it is not willing to
extend the same right to other nations. And, it is probably safe to
assume that the government, and the American people, would not
tolerate such outrage.

Justice Story's opinion in \textit{The Apollon} also signifies how deep-
ly rooted international law is on this point. Specifically, the dissent
in the case at bar cites several sources in addition to \textit{The Apollon}
to demonstrate the pervasiveness of the prohibition against violating
another nation's sovereign rights. For example, one leading treatise
states:

\begin{quote}
A State must not perform acts of sovereignty in the territo-
ry of another State.
\end{quote}

\begin{quote}
\ldots
\end{quote}

\begin{quote}
It is \ldots a breach of International Law for a State to send
its agents to the territory of another State to apprehend
persons accused of having committed a crime. Apart from
\end{quote}

\textsuperscript{66} \textit{Id.} at 2202-03.
\textsuperscript{67} \textit{Id.} at 2201 (citing \textit{The Apollon}, 9 Wheat. 362 (1824)).
\textsuperscript{68} \textit{The Apollon}, 9 Wheat. at 371-72.
other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended.\textsuperscript{69}

Thus, international law is well-settled that abduction of foreign nationals is prohibited.

Moreover, as the dissent noted, permitting state sanctioned abductions would render the Treaty meaningless, or in the words of Justice Stevens, would “transform [it] into little more than verbiage.”\textsuperscript{70} For example, the dissent noted that several provisions would be purposeless if the requesting country could bypass all procedure and merely kidnap the individual and that, moreover, such provisions only make sense within a context of mutual compliance and reciprocal obligations.\textsuperscript{71}

Finally, the dissent noted that even absent the aforementioned rationales for not divesting American courts of jurisdiction over Dr. Alvarez, the majority failed to distinguish \textit{Ker} and thus, a “critical flaw pervade[d] the Court’s entire opinion.”\textsuperscript{72} The dissent commented that the majority “fail[ed] to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law, and . . . also constitutes a breach of our treaty obligations.”\textsuperscript{73} The dissent then criticized the majority’s characterization of the issue to be decided, claiming that its framing of the issue was the issue decided in \textit{Ker} but was not the issue

\textsuperscript{69} 1 OPFENHEIM’S \textit{INTERNATIONAL LAW} 295 n.1 (H. Lauterpacht 8th ed. 1955), as cited in \textit{Alvarez-Machain}, 112 S. Ct. at 2202 (Stevens, J., dissenting). \textit{See also \textit{RESTATEMENT OF FOREIGN RELATIONS} § 432, Comment C, as cited in \textit{Alvarez-Machain}, 112 S. Ct. at 2202 (Stevens, J., dissenting) (“If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned”); Louis Henkin, \textit{A Decent Respect to the Opinions of Mankind}, 25 J. MARSHALL L. REV. 215, 231 (1992), as cited in 112 S. Ct. at 2202 (Stevens, J., dissenting) (“When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is blatant violation of the territorial integrity of another state; it eviscerates . . . extradition . . . .”).

\textsuperscript{70} \textit{Alvarez-Machain}, 112 S. Ct. at 2198 (Stevens, J., dissenting).

\textsuperscript{71} \textit{Id.} (citing provisions requiring sufficient evidence to grant extradition; for withholding extradition for political or military offenses, where the person has already been tried, or when the statute of limitations has elapsed; and granting discretion to refuse extradition of an individual facing the death penalty).

\textsuperscript{72} \textit{Id.} at 2203.

\textsuperscript{73} \textit{Id.}
that the Court had before it in the case at bar.

IV. ANALYSIS

The Court had several other means of analysis available to it, most of which compel the conclusion that the courts should not retain jurisdiction of Dr. Alvarez. As demonstrated by Ker, both American and other courts have been reluctant, even loathe, to accept a concept of jurisdiction-divesting. However, all the pre-

74. The Ker doctrine is this country’s formulation of the Roman maxim “male captus, bene detentus,” or, “an illegal apprehension will not preclude the exercise of jurisdiction.” H. Moss Crystle, Comment, When Rights Fall in a Forest . . . The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abduction and Torture, 9 DICK. J. INT’L L. 387, 387 (1991). On the other hand, at least one scholar has argued that this maxim is superseded by two higher Roman maxims, “nunquam decurritur ad extraordinarium sed ubi deficit ordinarium” (“never resort to the extraordinary until the ordinary fails”) and “ex injuria ius non oritur” (“no right can arise from a violation of the law”). Id. at 387 n.3 (citing Bassiouni, supra note 12, at 45).

For other American sources rejecting the jurisdiction divesting concept, see Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886); Matta-Ballesteros ex rel. Stolar v. Henman, 896 F.2d 255 (7th Cir. 1990); United States v. Reed, 639 F.2d 896 (2d Cir. 1981); United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975). But as is evident from these sources, the bar against divestiture is not absolute. See Charles D. Siegel, Individual Rights Under Self-Executing Extradition Treaties — Dr. Alvarez-Machain’s Case, LOY. L.A. INT’L & COMP. L.J. 765, 766 (stating that while many cases have held that “informal” means of removing suspects from other nations did not violate the applicable extradition treaties, the courts’ rationale has “focused on the fact that the asylum state either affirmatively assisted in the removal . . . or acquiesced in the removal by failing to protest”). Obviously, Mexico’s protest is what distinguishes Dr. Alvarez’s case from all the others.

For foreign support of a nondivestiture concept, see GILBERT, supra note 9, at 185-94. The most notorious case involving international abduction was that of Adolf Eichmann. Israel v. Eichmann, 36 I.L.R. 5 (1961). Eichmann was a German Nazi official who was a principal character in the extermination of millions of European Jews during World War II. III ENCYCLOPAEDIA BRITANNICA MICROPEDIA 812 (1977). He was abducted from Argentina and taken to Israel in a clear violation of Argentina’s territorial sovereignty. Unlike Alvarez-Machain, there was a dispute over Israel’s participation in the abduction. According to one legal scholar, if Israeli agents did participate in the kidnapping, its “liability” could be settled by surrendering the kidnappers to Argentina for trial or by financial compensation to Argentina. GILBERT, supra note 9, at 184-85. Absent Argentina’s willingness to accept such settlement terms, Gilbert asserts that Argentina could also have demanded the repatriation of Eichmann to preserve the “sanctity of the extradition process.” Id. at 185. If, as Gilbert contends, international law requires return of the abducted party upon demand by the offended nation, then the United States’ refusal to surrender Dr. Alvarez upon Mexico’s request constituted a violation of international law.

It should be noted, however, that in his war crimes trial it was held that Eichmann had no standing to individually assert his rights under the treaty. Eichmann alleged that the trial court had no jurisdiction because Israel had violated the fundamental rights of Argentina by his abduction. Id. However, the Court held that Eichmann had no standing
vious cases have seemed to indicate a willingness to divest jurisdic-
tion under some circumstances.\textsuperscript{75}

A. Domestic Law

1. The Violation of Law Exception
   
   a. The Extradition Treaty

   Even the Supreme Court in its opinion acknowledged that a
violation of the Treaty between Mexico and the United States
would divest the courts of its jurisdiction over Dr. Alvarez. The
exception to jurisdiction when there has been a violation of an ex-
tradition treaty has its roots in\textit{ Rauscher}, discussed earlier in this
Comment.\textsuperscript{76} It is based on Article IV of the United States Con-
stitution which states, “all Treaties made under the Authority of the
United States, shall be the supreme Law of the Land . . . .”\textsuperscript{77} In
actuality, only self-executing treaties, or treaties which do not re-
quire implementing legislation, are binding federal laws which must
be enforced unless superseded by other federal law.\textsuperscript{78} The district
court held, and the Supreme Court did not refute, that
“[e]xtradition treaties by their nature are deemed self-executing”
and, as such, are to be accorded supreme status.\textsuperscript{79} Therefore, an
to raise this argument and, according to Anglo-American precedent, the manner in which
the individual came before the Court was irrelevant. Of course, this merely demonstrates
the international significance of Mexico’s objection in\textit{ Alvarez-Machain}.

While acknowledging the existence of authority which rejects divestiture of jurisdic-
tion, several theorists are clearly dismayed by its perseverance. For example, Gilbert
states, “The result, that, regardless of the method by which the fugitive is brought before
the court, his trial will be valid, seems prejudicial to good international relations and
world public order.”\textit{ Id. See also Crystle, supra at 388 (the “doctrine has outlived its use
and only serves to encourage circumvention of the very laws courts are bound to up-
hold”).

75. \textit{See}, e.g., United States v. Reed, 639 F.2d 896, 902 (2d Cir. 1981) (“absent protest
or objection by the offended sovereign, Reed has no standing to raise violation of interna-
tional law as an issue”); United States v. Postal, 589 F.2d 862, 873 (5th Cir. 1979) (stat-
ing, in response to the defense’s argument that court had no jurisdiction due to violation
of the Convention on High Seas and the Convention on the Territorial and Contiguous
Zone, “defendant may not ordinarily assert the illegality of his obtention to defeat the
court’s jurisdiction over him . . . where the illegality results from a breach of internation-
al law not codified in a treaty.”)

76. \textit{See supra} notes 20-23 and accompanying text.

77. U.S. CONST. art. IV, cl. 2.


2188 (1992) (citing M.\textit{ Cherif Bassiouni, INTERNATIONAL EXTRADITION, UNITED STATES
LAW AND PRACTICE} 189 n.1 (2d rev. ed. 1987)). \textit{But see Siegel, supra note 76, at 773


abduction in violation of an extradition treaty would divest the courts of jurisdiction. Unfortunately, the Court determined, whether or not correctly, that Dr. Alvarez's abduction did not violate the terms of the applicable treaty.

b. The Constitution

Whether international kidnapping by government agents to obtain jurisdiction violates the Constitution of the United States raises two distinct issues. First, one must determine whether the Constitution protected the rights of Dr. Alvarez, a noncitizen. Second, one must determine whether abduction is actually a violation of due process.

The Constitution can be interpreted from two different viewpoints. A contractual view posits that the Constitution is a contract between the United States government and its citizenry, or "a compact between the people of the United States and its government, creating enforceable rights and duties running between each of the parties." Under this view the protections accorded to "We, the people" in the Constitution and the corresponding limitations on governmental action do not extend to non-citizens, and thus would not afford protection to Dr. Alvarez.

On the other hand, an "organic" view of the document interprets the Constitution, having created the three branches of government, as existing to limit the branches' operations within generally constitutionally accepted limits. Under this view, government actors are bound by the Constitution and its limits whenever the act within the scope of their governmental employment — whether within or beyond the bounds of the United States. "In contrast to the contractarian view, which protects only Americans, and foreigners located within the territorial jurisdiction of the United States, the organic view 'potentially entitles anyone injured by United States officials — American or alien — to Constitutional redress.'" However, while there is some Supreme Court support for the organic interpretation of the Constitution, the Court re-

(footnotes and citations included for clarity and context.)
ently held in *United States v. Verdugo-Urquidez*\(^8^5\) that evidence seized pursuant to an illegal search may be admitted if obtained abroad, signifying the Court's adherence to the contractual view. Thus, without an organic vision of the Constitution, Dr. Alvarez and similarly situated individuals have no standing to assert due process violations committed during their apprehension.

Even assuming that a noncitizen had standing to assert a due process challenge to the jurisdiction of an American court, he or she would still have to demonstrate that abduction is a due process violation. The *Ker* doctrine established that forcible abduction of aliens abroad does not violate due process.\(^8^6\) In dismissing *Ker*'s constitutional argument, the Court held that *Ker*'s due process guarantees were fulfilled by the adequacy of the trial proceedings.\(^8^7\) However, in *United States v. Toscanino*,\(^8^8\) the court "asserted that due process extended to the pretrial conduct of law enforcement authorities [and] suggested that the principles underlying exclusionary rule cases\(^9^9\) ... deterrence of official misconduct and preservation of judicial integrity — should apply not only to evidence, but also to persons."\(^9^0\) As discussed below, however, *Toscanino* was an extreme case and neither its rule nor its rationale has been applied since. In short, the *Ker* reasoning still applies. Clearly, the Supreme Court has determined that a jurisdiction-divesting exclusionary rule and the application of due process protections in the pre-trial context "conflicts with a societal need to convict the guilty."\(^9^1\)

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\(^8^5\) 494 U.S. 259 (1990).

\(^8^6\) *Ker v. Illinois*, 119 U.S. 436 (1886).

\(^8^7\) *Id.* at 440 ("The 'due process of law' here guaranteed is complied with when the party is regularly indicted by a proper grand jury ... 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.").

\(^8^8\) 500 F.2d 267 (2d Cir. 1974). *See also infra* notes 99-105 and accompanying text.

\(^8^9\) The exclusionary rule was created in *Weeks v. United States*, 232 U.S. 383 (1914), as a remedy to Fourth Amendment violations. It prohibits the introduction of evidence gathered as a result of an illegal search and in connection therewith.


\(^9^1\) *Id.* at 1243.
c. International Law Generally

Unlike a defendant who is abducted in contravention of an extradition treaty or the Constitution, current authority, although not popular opinion, indicates that an accused who is apprehended in breach of international law may still be tried.\textsuperscript{92} International law is a somewhat amorphous body of law made by the nations as a community. However, it is perfectly clear and has been the consistent position of this Comment that extraterritorial governmentally-sanctioned abductions violate customary international law.\textsuperscript{93} For example, one author has stated, "In any case of abduction, there is a violation of personal liberty, of the right to be detained under legal authority, of the right of emigration, of the right to remain in a state until expelled, and of the right to seek asylum."\textsuperscript{94} In the case of international abduction, not only have the aforementioned rights of the individual been injured, but the territorial sovereignty of the nation from which the individual was kidnapped have also been violated. However:

\[
\text{[I]he fact that a country violates customary international law by abducting a person from another country does not assist the captive once she is within the jurisdiction of the abducting country. With limited exceptions, ... customary international law historically focused on governing states' actions among themselves and did not concentrate on regulating their behavior toward individuals within their jurisdiction. Customary international law has rarely been thought to give individuals private rights of action.}\textsuperscript{95}
\]

The rationale underlying this argument is that international law exists to govern by and between the states and this cannot be invoked to remedy transgressions against individuals.\textsuperscript{96} Therefore, it can be easily be argued that, with an objection from the offended nation, a violation of international law should serve to except jurisdiction of an abducted individual. The point being that, as the

\textsuperscript{92} Gilbert, \textit{supra} note 9, at 194.
\textsuperscript{93} See \textit{supra} notes 62-71 and accompanying text for the dissent's discussion of general principles of international law.
\textsuperscript{95} Siegel, \textit{supra} note 76, at 780.
\textsuperscript{96} Id.
nation's territorial sovereignty was violated, it has the right to demand reparation for any harm that flowed from that violation. In this case, the reparation would be repatriation of the abducted individual.

2. Outrageous Governmental Conduct: The Toscanino Exception

Under the current status of the law, the only occasion upon which an individual has standing to challenge jurisdiction to a criminal prosecution where his or her presence has been obtained by abduction is where "outrageous governmental conduct" has occurred. Although many readers may find abduction in and of itself to be an "outrageous" way for a government to conduct itself, the parameters of this exception are considerably more narrow. "Mere governmental kidnapping, without allegations of torture, [is] not considered shocking to the conscience;" therefore, it is not an exception to jurisdiction.

The exception was defined in United States v. Toscanino. And, unfortunately, its protection has not been afforded to a defendant since. Toscanino, an Italian citizen, was kidnapped from his home in Uruguay and tortured for seventeen days in Brazil before being brought to the United States, where he was charged with conspiracy to import narcotics. He alleged that, with the orchestration and cooperation of the United States government, he was bound and blindfolded, denied food, water and communication, tortured, beaten and interrogated. 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 his earlobes, toes and genitals. Jarring jolts of electricity were shot throughout his body..."

In the case at bar, the district court rejected Dr. Alvarez's claim of torture and therefore, he was not afforded the protection of the rule set forth in Toscanino. Despite the district court's disbelief at the doctor's allegations, the Supreme Court missed its

97. Crystle, supra note 76, at 393.
98. Id. at 394.
99. 500 F.2d 267 (2d Cir. 1974).
100. Crystle, supra note 76, at 394.
101. Toscanino, 500 F.2d at 268-69.
102. Id. at 270.
103. Id.
opportunity to expand the exception to include conduct which society finds, or should find, unacceptable and "shocking" regardless of the extent of extreme physical abuse.

3. Distinguishing Ker v. Illinois

First, despite any holding to contrary, there is no doubt that abduction is illegal. Thus, by concluding that Dr. Alvarez's abduction did not violate the terms of the Treaty, the high Court sanctioned illegality. This violates the rule set forth in Ker as well as public policy. Despite any dicta indicating a contrary position, the rule that Ker established can be characterized as follows: when an alleged criminal is found within the jurisdiction of the States that wished to try him, then he is liable to answer for such crime “unless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court.”

As noted above, the doctor's abduction should have been held to violate the Treaty, a “law of this country” and, at the very least was violative of international law. Thus, by the very language of Ker itself, its rule should not have been applied. Moreover, Ker can be distinguished on several other grounds.

The majority purported to establish a two phase analysis, first determining whether the abduction violated the Treaty and then applying the rule of Ker. In reality, this purported two step process was combined into single analysis and will be treated thus for the remainder of this Comment. The majority treated Ker as setting forth a blanket rule stating simply that the fact of abduction, without regard for whom the abductor was, does not divest the United States of jurisdiction of an alleged criminal. However, as all good law students know, a legal rule is only as good as the facts underlying it. Therefore, the rule which Ker actually set forth was that the mere fact of abduction by a private citizen did not divest American courts of jurisdiction of an American citizen who allegedly committed a crime within the United States. In the case at bar, however, the United States government orchestrated the abduction, the accused was a foreign citizen and the alleged crime was

104. See M. Chérief Bassiouni, International Extradition and World Public Order 123 (1974); Gilbert, supra, note 9, at 8 (“the manifest illegality of abduction”) and 189 (“Abduction is so obviously illegal”); L.A. Shearer, Extradition in International Law 72 (1971) (“Abduction is such a manifestly extra-legal act, and in practice so hazardous and uncertain, that it is unworthy of consideration as an alternative method to extradition in securing custody of the offender”).

committed on foreign soil. Thus, a foreign country, Mexico, in this case, also had jurisdiction over the matter.

Furthermore, in *Ker*, the government made a good faith effort to comply with the terms of the Treaty. It was not responsible for the acts of a private messenger acting outside the scope of his agency arrangement. Criminal jurisdiction cannot be divested because of a tort committed by a civilian acting without government authority. On the other hand, when the government participates in, even organizes, the abduction of a foreign national, the policy underlying divestiture of jurisdiction is quite different.

Moreover, in the case of *Ker*, Peru did not object to his abduction and therefore, the issue was whether Ker, as an individual, had a positive right as a third party beneficiary to the contract between the nations. The *Ker* Court held that an individual may not invoke a treaty to preclude jurisdiction when jurisdiction was not obtained under the treaty in the first instance. The Court stated that “[t]he right of the government of Peru to give a party in Ker’s condition an asylum in that country is quite a different thing from the right in him to demand and insist upon such asylum.”\(^{106}\) This language suggests that Peru had the right to object to the Court’s jurisdiction and that such an objection would require the return of Ker to Peru.\(^{107}\) Unlike Peru, however, Mexico did object to Dr. Alvarez’s abduction and the jurisdiction of the American courts. Therefore Dr. Alvarez did not need to rely on any affirmative rights he alone might have under the Treaty. This distinction between the cases is material and was not adequately addressed by the majority.

Despite the abundance of distinguishing facts, the majority failed to explain why it so readily applied the “rule” in *Ker* without consideration. The dissent speculated, and this author agrees, that the pressure of presenting a tough-on-crime stance strongly influenced the outcome of the Court’s decision and led to cutting corners in its legal analysis. The dissent stated, “there is reason to believe that [Dr. Alvarez] participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive’s intense interest in punishing [Dr. Alvarez] in our courts.”\(^{108}\) However, as the dissent also correctly noted,
that underlying motivation

provides no justification for disregarding the Rule of Law that the Court has a duty to uphold. That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes should not influence the Court’s interpretation. Indeed, the desire for revenge exerts “a kind of hydraulic pressure... before which even well settled principles of law will bend,” but it is precisely at such moments that [the Court] should remember and be guided by [its] duty “to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it.”

4. Judicial Supervisory Power

In addition to the aforementioned avenues of analysis the Court had before it, it also could have chosen to exercise its judicial supervisory power to declare the government’s actions illegal. This power permits the judiciary to monitor and prohibit illegal conduct by the executive and legislative branches of government. The doctrine exists to provide a remedy for the violation of established rights and to preserve judicial integrity by ensuring procedural fairness as well as deterring illegal conduct. Certainly, in the case at bar, preservation of judicial integrity and deterrence of clearly illegal conduct would have been served by an exercise of this power. However, the Court did not even entertain this alternative as it found nothing wrong with the government’s conduct. In fact, fifteen years ago, Judge Oakes warned that repeated use by the government of abduction as a means of obtaining jurisdiction in the “war against drugs” would

109. Id. (citations omitted).
110. While this option was rejected by the district and circuit courts, it may have been so simply because it was unnecessary as those courts had already ruled in the doctor’s favor.
111. Crystle, supra note 76, at 405. Technically, the supervisory power of the Supreme Court is characterized as its supervision over the federal courts in the administration of criminal justice. McNabb v. United States, 318 U.S. 332, 340 (1943). It manifests itself in the establishment of standards and procedures in criminal cases. Id. at 340-41. In this case, the supervisory power could have been utilized by providing a rule of decision to the federal courts that they should not retain jurisdiction over individuals obtained by abduction.
112. Crystle, supra note 76, at 405.
be “inviting” exercise of the supervisory power “in the interests of the greater good and of preserving respect for the law.”113

C. International Policy

Extradition treaties exist to foster relations between nations and provide a systematic procedure for the surrender and transportation of fugitives. By sanctioning the circumvention of extradition treaties through extralegal means, the Court affected international stability and subverted international process and procedure.114 By entering into a treaty arrangement, both Mexico and the United States gained the ability to obtain alleged criminals who are found in the other nation at the limited discretion of the surrendering government.115 In exchange, both nations agreed to abide by certain formal procedures.116 In the absence of the Treaty, the nations would be forced to rely on the unbridled discretion of the other nation in withholding fugitives.117 They would also be subject to constant covert actions such as the one at issue in the case at hand. However, in gaining a systematic and predictable means of extradition and freedom from the recurring territorial violations of

113. United States v. Lira, 515 F.2d 68,73 (2d Cir.) (Oakes, J., concurring) ("[W]e may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power under McNabb v. United States") cert. denied, 432 U.S. 847 (1975).

114. See BASSIOUNI, supra note 106, at 123.

From a foreign policy standpoint, the assertion that extradition treaties exist for the purpose of enhancing international relations and avoiding conflict has been supported by negative inference by the fallout from the Court’s decision. In a “firestorm of diplomatic criticism,” several foreign governments have expressed outrage at the United States’ belief that it may unilaterally choose to violate a nation’s sovereign borders and abduct one of that nation’s citizens. Among these: 1) the foreign minister of Mexico dubbed the ruling invalid and stated that Mexico considers abduction a criminal act; 2) the Canadian Minister of External Affairs reported to the Canadian parliament that abduction by the United States of a Canadian citizen would be deemed a criminal act; 3) the Colombian government called the decision a threat to the legal stability of treaties; 4) the lower house of Uruguay’s parliament adopted a resolution stating that the ruling demonstrated “a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties”; 5) the Minister of Security and Justice of Jamaica denounced the holding as “an atrocity that would disturb the world”; 6) The presidents of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay issued a joint declaration asking for a review of the decision by the Inter-American Judicial Committee of the Organization of American States. David O. Stewart, The Price of Vengeance — U.S. Feels Heat for Ruling that Permits Government Kidnapping, 78 A.B.A. J. 30, 50 (Nov. 1992).

115. Siegel, supra note 76, at 797.

116. Id.

117. Id.
the other nation searching for suspects, it should be held that in exchange the nations gave rights to the each other's nationals. As one practitioner observed, "If by giving up [a certain measure of its] freedom of action, the United States gave certain rights to Mexican nationals, it seems a relatively small price to pay for the ability to extradite fugitives in a systematic way."\(^{118}\)

V  CONCLUSION

In critiquing the district court decision in this case, one commentator, predicting the bleak outlook for an affirmation of the lower court decision, stated that application of an analysis which would preclude Dr. Alvarez and other similarly situated individuals from asserting due process claims and foreclose the possibility of a "supervisory role for the judiciary in the extra-national "apprehension" of criminal suspects would effectively un fetter the power of the executive to conduct a world-wide war on drugs, or any other subjective threat to national security, without respect for sovereign powers, international agreements, or objective constitutional standards of governmental conduct."\(^{119}\) He further predicted that "[a] vast and dark 'forest' would be created, completely insulated from the constitutional standards which normally constrain American state action."\(^{120}\)

Now that the Court has in fact created this "forest", individuals worldwide must live in fear of American vigilantism, without being afforded the protection of either the laws of their own nations or the laws of the United States. Moreover, American citizens must be concerned about whether courts are liable to extend the rationales regarding the acceptance of the violation of basic human rights to domestic criminal cases. They should also ask themselves whether foreign countries might follow this nation's lead and fail to follow formal extradition procedures when dealing with the possible prosecution of American citizens. Finally, in its zeal to "win" the war against drugs, this Court has potentially destroyed any international cooperation between the United States and South American nations in waging that fight, creating an atmosphere of antagonism and hostility by signalling to others that the U.S. government will do as it pleases without regard for the law or contrac-

\(^{118}\) Id.

\(^{119}\) Crystle, supra note 76, at 407.

\(^{120}\) Id.
tual arrangements. Thus, with its poorly reasoned and not wholly supported opinion, the Supreme Court has turned upside down years of growing international cooperation in an increasingly world community.

HALLE FINE TERRION