

“THE TREATY DOESN’T SAY WE CAN’T KIDNAP ANYONE”—GOVERNMENT SPONSORED KIDNAPPING AS A MEANS OF CIRCUMVENTING EXTRADITION TREATIES

The United States often secures individuals for prosecution from other countries through extradition treaty procedures.¹ Extradition generally occurs when one government requests another to surrender an individual accused or convicted of an offense that occurred within the requesting government’s territorial jurisdiction.² Other principles justify extraditing someone for an alleged crime committed outside of the requesting government’s jurisdiction or territory.³

1. The United States is party to approximately 104 extradition treaties and multilateral extradition arrangements that target specific offenses. *See generally* EXTRADITION LAWS AND TREATIES (I.I. Kavass & A. Sprudz, comp., 1979 & Supp. 1989) [hereinafter EXTRADITION TREATIES] (setting out the text of all extradition agreements to which the United States is a party).

2. *See* U.S. CONST., art. IV, § 2 (providing that states can extradite individuals charged with treason, a felony, or any other crime); 18 U.S.C. §§ 3181-95 (1988 & Supp. III 1991) (setting out federal law regarding state and international extradition). Extradition treaties often provide for the return of fugitives accused of committing a crime within the territorial jurisdiction of another government. *See* Christopher L. Blakesley, *A Conceptual Framework for Extradition and Jurisdiction Over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 688 (finding that territorial principles are the primary basis of jurisdiction in the United States). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 475 cmt. d (1987) [hereinafter RESTATEMENT] (stating that requesting nations can most easily satisfy judicial jurisdiction requirements when the fugitive commits the alleged crime in the requesting nation).

3. *See* Blakesley, *supra* note 2, at 701-02, 706-07, 713-19 (setting out various theo-

Most countries maintain that there is no duty to extradite absent a treaty or statute.⁴ When a country extradites an individual in the absence of a treaty, it does so based strictly upon principles of reciprocity and comity.⁵ International law does not generally address extradition issues.⁶ Moreover, under United States practice, one country can only demand that the United States deliver an alleged fugitive to the demanding country if both nations are party to an extradition treaty.⁷

ries behind so-called "extraterritorial" jurisdiction for extradition). Harvard international law researchers identified and delineated five types of extraterritorial jurisdiction policies in 1935. See Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935) [hereinafter Harvard Research]. These principles are: (1) territorial jurisdiction, which depends on the place where the individual committed the offense; (2) protective jurisdiction, which depends on whether the requesting country's national interest is injured; (3) national jurisdiction, which depends on the nationality of the offender; (4) universal jurisdiction, which depends on whether the offense is especially heinous and injurious to humanity and gives jurisdiction to any forum that has custody of the offender; and (5) passive personality jurisdiction, which depends on the nationality of the victim. *Id.* 480-592. See also Blakesley, *supra* note 2, at 687-719 (discussing each of these principles in detail). Experts continue to use these designations, although some choose to alter or merge some of the designations. *Id.* at 687 n.7.

4. See generally I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 23-34 (1971) (discussing the evolution of countries' legal duty to extradite); Andrew B. Campbell, Note, *The Ker-Frisbie Doctrine: A Jurisdictional Weapon in the War on Drugs*, 23 VAND. J. TRANSNAT'L L. 385, 399-400 (1990) (noting the competing views regarding extradition). Most nations believe either that nations have an inherent legal duty to comply with extradition requests or that state sovereignty, absent other obligations, dictates that nations need not extradite individuals to another country. *Id.* at 399. The United States adheres to the latter view. *Id.* at 400.

5. See SHEARER, *supra* note 4, at 25-27. This view extends to both common and civil law countries. *Id.* at 25. To date, only a few South American countries have found a legal duty to extradite in the absence of a treaty. *Id.* at 26. Nonetheless, most governments consider cooperation in extradition proceedings no more than a polite gesture of mutual regard. See 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 319 (2d rev. ed. 1987).

6. See RESTATEMENT, *supra* note 2, § 475 cmt. a (noting that international law does not customarily require extradition). See also 1 BASSIOUNI, *supra* note 5, at 319. ("States are . . . under no clear international obligation or duty to surrender a fugitive from justice . . ."). For the most part, international law only creates duties to extradite for certain international crimes such as war crimes and crimes against humanity. *Id.* at 320.

7. See *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886). See also *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) (espousing for the first time the rule that the United States had no obligation to extradite unless it was party to a treaty with the requesting country).

Recent legislation alters this policy. In 1990, Congress enacted a law which permits the Secretary of State to surrender a United States citizen to a foreign country requesting extradition, even though the relevant treaty or convention does not obligate the

In the United States, treaties are the supreme law of the land.⁸ Extradition treaties are self-executing and are as binding as legislation.⁹ One does not need statutory authority to arrest a fugitive if he or she meets the terms of the appropriate treaty.¹⁰ In addition, many constitutional restrictions, such as the due process clauses,¹¹ do not apply to international extraditions regulated by treaty.¹² Moreover, many commentators maintain that the countries do not have to follow specific treaty procedures when the countries impliedly agree to informal delivery of fugitives.¹³

The recently decided case, *United States v. Alvarez-Machain*,¹⁴ how-

United States to do so if the requesting country is complying with other treaty or convention requirements. See International Narcotics Control Act of 1990, Pub. L. No. 101-623, § 11, 104 Stat. 3350, 3356 (1990) (codified at 18 U.S.C. § 3196 (Supp. III 1991)).

8. U.S. CONST., art. VI, cl. 2.

9. *In re Metzger*, 46 U.S. (5 How.) 176, 188-89 (1847). United States extradition procedures vary and depend on the governing treaty. See generally EXTRADITION TREATIES, *supra* note 1 (compiling extradition treaties to which the United States is a party).

10. *Metzger*, 46 U.S. at 188.

11. See U.S. CONST. amends. V & XIV.

12. The "social compact" theory rests on basic principles of contract and considers the Constitution to be binding on the government and "the people" by mutual obligation. See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (finding that the term "the people" "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"). The phrase "the people" generally implies protection for citizens of the United States or individuals who have developed ties to the United States, and not to aliens outside United States territory. For example, *Verdugo-Urquidez* held that Fourth Amendment protections for "the people" against unlawful search and seizure do not apply to government actions against aliens outside the United States territory. *Id.* at 265. Moreover, the Fifth Amendment, which applies to "persons," does not give rights to extraterritorial aliens. See *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950); *United States v. Kraiselburd*, 786 F.2d 1395, 1398 (9th Cir. 1986), *cert. denied*, 479 U.S. 990 (1986).

As a result of the foregoing, the United States may enter a treaty which applies to crimes already committed. See, e.g., *Markham v. Pitchess*, 605 F.2d 436, 437-38 (9th Cir. 1979), *cert. denied*, 447 U.S. 904 (1980). Generally, as long as a treaty is in effect, the United States can demand extradition. *Id.* It is immaterial that the crime occurred before the extradition treaty became effective. *Id.*

13. See RESTATEMENT, *supra* note 2, § 432 & cmt. (explaining that a state may prosecute if the state from which the individual was abducted does not protest); 1 BASSTOUNI, *supra* note 5, at 630 (noting that where parties to a treaty fail to abide by the treaty procedures and still extradite an individual, that person does not have standing to object because he was not a party to the treaty).

14. 112 S. Ct. 2188 (1992).

ever, calls into question the effectiveness of extradition treaties. In *Alvarez-Machain*, the Supreme Court determined that the United States government could seize a foreign national from Mexico without following the procedures outlined in the United States-Mexico extradition treaty.¹⁵

This Recent Development discusses the past, present and future of United States extradition treaties in light of the *Alvarez-Machain* decision. Part I traces the history of jurisdictional issues that have arisen in the context of extradition treaties.¹⁶ In addition, Part I notes the limited role international law plays in determining a court's jurisdiction over individuals.¹⁷ Part II analyzes the recent Supreme Court decision in *Alvarez-Machain*, which minimizes the role of an extradition treaty when the United States chooses to circumvent the treaty's extradition procedures.¹⁸ Finally, Part III discusses how this decision impacts present and future conduct of the United States and other countries in the area of extradition and calls on United States officials to maintain the integrity of the extradition treaties to which they agreed.¹⁹

I. EXTRADITION TREATIES' LIMITING EFFECT ON COURTS' JURISDICTION

Prior to *Alvarez-Machain*, the Supreme Court never addressed the specific issue of whether the United States government could forcibly abduct an individual in alleged violation of extradition treaty requirements.²⁰ In 1886, however, the Court established the doctrine of specialty which holds that when a person is brought before a court

15. *Id.* at 2193-94.

16. *See infra* notes 20-37 and accompanying text.

17. *See infra* notes 38-43 and accompanying text.

18. *See infra* notes 44-75 and accompanying text.

19. *See infra* notes 76-104 and accompanying text.

20. *See Alvarez-Machain*, 112 S. Ct. at 2191 (noting that the issue before Court was one of first impression). During the Prohibition, however, the Court twice addressed issues arising from the seizure of illegal liquor which parties allegedly possessed in violation of a treaty between the United States and Great Britain. *See Cook v. United States*, 288 U.S. 102 (1933); *Ford v. United States*, 273 U.S. 593 (1927). The treaty permitted British passenger ships to carry liquor in United States waters on the condition that the ships remain one hour away from United States shores. *See Convention for Prevention of Smuggling of Intoxicating Liquors*, Jan. 23, 1924, U.S. - Gr. Brit., art. II, § 3, 43 Stat. 1761, 1762. In *Cook*, the Court held that a United States seizure that violated the treaty precluded any convictions based on the seizure because the seizure provisions of the treaty were exclusive. 288 U.S. at 121. In *Ford*, the Court found the seizure valid

pursuant to an extradition treaty, he or she may only be tried for the crime which led to extradition.²¹

That same year the Court determined that extradition treaties do not negate federal or state courts jurisdiction over people kidnapped and brought back to the United States by private individuals.²² In *Ker v. Illinois*,²³ the U.S. Secretary of State²⁴ dispatched a Pinkerton agent to Peru with the necessary papers requesting that the Peruvian government extradite Ker²⁵ pursuant to an extradition treaty between Peru and the United States.²⁶ The agent never presented the papers to Peruvian authorities.²⁷ Instead, the agent independently chose to forcibly kidnap Ker and bring him back to the United States.²⁸

The Court dismissed Ker's argument that the United States could only retrieve him pursuant to the United States-Peru extradition treaty.²⁹ The Court determined that the United States did not call the treaty into operation³⁰ because the government was not involved in the

because the defendants failed to raise the issue of invalidity at the proper stage of the proceedings. 273 U.S. at 606.

21. *United States v. Rauscher*, 119 U.S. 407, 430 (1886). See also *United States v. Caro-Quintero*, 745 F. Supp. 599, 607 (C.D. Cal. 1990).

22. *Ker v. Illinois*, 119 U.S. 436, 443 (1886). Some commentators argue that *Ker* stands for the broader proposition that a forcible abduction, whether sponsored by federal or state government, never negates a court's jurisdiction over an individual. See, e.g., Mitchell J. Matorin, Note, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 DUKE L.J. 907, 909-12 (1992) (stating that *Ker* "established that the means by which a person comes within the jurisdiction of the court has no effect on the court's power to try him").

23. 119 U.S. 436 (1886).

24. The governor of Illinois petitioned the United States Secretary of State to seek Ker's extradition from Peru. *Id.* at 438.

25. Ker fled to Peru after an Illinois state court tried and convicted him of larceny. *Id.* at 437.

26. *Id.* at 439. To review the treaty discussed in *Ker*, see Treaty on Extradition, Jul. 27, 1874, U.S.-Peru, 18 Stat. 719.

27. The opinion does not explain why the agent did not apprehend Ker according to treaty procedures. Commentators theorize that the agent kidnapped Ker because there were not any designated authorities in Peru to which the agent could present the extradition papers because of the recent revolution in Peru. See, e.g., John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1451 (1988) (noting that *Ker* is distinguishable from an ordinary extradition case because the agent seized Ker following a Peruvian revolution which left the courts and civil government in a state of disfunction).

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

29. *Id.* at 442-43.

30. *Id.* at 443.

decision to kidnap Ker.³¹ Because the agent did not rely on the treaty to make the arrest, Ker could not stand on the argument that he was improperly brought before United States authorities pursuant to the treaty requirements.³² In such a case, the Court found the extradition treaty inapplicable, and a court therefore could try the individual for whatever crimes the prosecutor brings against the defendant.³³

Decades later, the Court expressly reaffirmed the *Ker* doctrine in *Frisbie v. Collins*,³⁴ a case involving interstate extradition. In *Frisbie*, Michigan officers forcibly abducted Collins in Chicago and took him to Michigan where he was tried and convicted of murder.³⁵ Pursuant to a writ of habeas corpus, the Court held that a forcible abduction and transfer from one state to another does not violate the Due Process Clause of the Fourteenth Amendment.³⁶ The Court reiterated the rule that the manner in which the individual is brought before the court does not negate the court's jurisdiction.³⁷

Customary international law is similar to the *Ker-Frisbie* doctrine in that it seldom serves as a means for denying courts jurisdiction when individuals are extradited by means not specified in a treaty.³⁸ Pres-

31. The Court noted that the kidnapping occurred without any pretense of authority pursuant to the extradition treaty or from the United States government. *Id.*

32. *Id.* The Court also rejected Ker's argument that the manner of his extradition violated due process. *Id.* The Court stated that irregularities in the manner in which authorities bring someone into custody do not entitle that person to escape trial as long as that person is indicted properly. *Id.* The Court's holding on this issue is consistent with the prevailing practice of refusing to apply the Fourth Amendment in pretrial situations. See, e.g., 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, 1231 (1991).

33. *Ker*, 119 U.S. at 443.

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

35. *Id.* at 520.

36. *Id.* at 522. Collins also argued that the officers violated the Federal Kidnapping Act, 18 U.S.C. § 1201 (1948). *Frisbie*, 342 U.S. at 520. The Court determined that the officers probably did violate the Federal Kidnapping Act, but decided that Congress did not intend to prohibit states from prosecuting individuals who were brought before their courts improperly. *Id.* at 522-23. The Court reasoned that immunity from state prosecution was not a remedy under the Act. *Id.*

37. The *Ker-Frisbie* doctrine is the American equivalent of the Roman maxim "male captus, bene detentus," which provides that jurisdiction survives despite illegal apprehension. See 1 BASSIOUNI, *supra* note 5, at 201, 213.

38. See Michael R. Pontoni, Comment, *Authority of the United States to Extraterritorially Apprehend and Lawfully Prosecute International Drug Traffickers and Other Fugitives*, 21 CAL. W. INT'L L.J. 215, 234 (1990) ("There is a widely held conviction or 'custom' among nations that no state shall prosecute or punish any person who has

ently, many international conventions³⁹ contain duties to extradite or prosecute for international crimes.⁴⁰ The duty to extradite, however, is not clear when the crime is a non-international crime because most nations require treaties or national legislation, or both.⁴¹ Yet, others believe that when one country impinges on another country's sovereignty, the intruding country is violating customary international law.⁴² While United States courts try to avoid violating customary international law as much as possible, federal sovereignty outweighs the general body of international law when enforcing law within the territory of the United States.⁴³

II. *UNITED STATES V. ALVAREZ-MACHAIN*

In *United States v. Alvarez-Machain*,⁴⁴ the Supreme Court held that federal courts had jurisdiction to try a Mexican national forcibly kidnapped from Mexico and brought to the United States on behalf of the federal government.⁴⁵ The Court held that although the United States did not follow the treaty procedures as defined in the United States-Mexico extradition document, officials did not have to repatriate the foreign national to Mexico, but could try him before a United States

been brought within its territory by measures in violation of international law without first obtaining the consent of the state whose rights have been violated.”)

39. An international convention is an agreement between nations or states which is similar to, but usually less formal or binding than, a treaty. BLACK'S LAW DICTIONARY 331 (6th ed. 1990). See 1 BASSIOUNI, *supra* note 5, at 13-22 for an extensive list of international conventions that contain duties to extradite under international criminal law.

40. International crimes include war, genocide, apartheid, torture, slavery, piracy, aircraft hijacking, terrorism, drug trafficking, and bribery. See 1 BASSIOUNI, *supra* note 5, at 13-22 for a list of conventions regarding these and other crimes.

41. *Id.* at 23.

42. Customary international law is the result of general and consistent practices that nations follow due to a sense of legal obligation. RESTATEMENT, *supra* note 2, § 102(2).

43. See, e.g., *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985) (“While international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual states.”). The Nuremberg tribunal noted that international law accommodates principles of national sovereignty. *Id.* at 1427. Even though international law is universal, states need not enforce it, especially when it conflicts with a state's procedural legal rules. *Id.* Further, if the United States enforced all international laws without exception, its sovereignty would be subsumed by international law. See Pontoni, *supra* note 38, at 235.

44. 112 S. Ct. 2188 (1992).

45. *Id.* at 2190.

court.⁴⁶

The *Alvarez-Machain* abduction was the result of an extensive five year investigation by the federal Drug Enforcement Agency (DEA).⁴⁷ The DEA intended to expose and convict associates of a Guadalajara drug cartel responsible for torturing and murdering DEA Special Agent Enrique Camarena-Salazar.⁴⁸ The DEA believed that Alvarez-Machain, a medical doctor, abetted Camarena's murder by extending Camarena's life during his interrogation and torture.⁴⁹ The DEA instigated Alvarez-Machain's kidnapping from his medical office in Guadalajara, Mexico,⁵⁰ whereupon the Mexican government officially protested the kidnapping.⁵¹

Although DEA agents did not personally kidnap Alvarez-Machain,⁵² the district court concluded that the government was responsible.⁵³ The Court of Appeals affirmed the district court's conclusion.⁵⁴ Although the Supreme Court's majority avoided an express factual affirmation of the government's involvement in this kidnapping because of its technical holding, the Court implied as much when com-

46. *Id.* at 2194.

47. Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 161 (1991).

48. *Id.* at 160-61. In retaliation for a major raid instigated by Camarena, the cartel abducted Camarena from Guadalajara and interrogated, tortured, and murdered him. *Id.* See also Richard J. Meislin, *U.S. Agent's Body Firmly Identified*, N.Y. TIMES, Mar. 8, 1985, at A3 (describing the details of Camarena's death); *Trial Opens in Death of Tortured Drug Agent*, N.Y. TIMES, July 31, 1988, § 1, at 25 (reporting on the first day of the trial of Camarena's alleged murderers).

49. *Alvarez-Machain*, 112 S. Ct. at 2190. Dr. Alvarez-Machain provided medical services to members and associates of the drug cartel. See Abramovsky, *supra* note 47, at 166 n.71 (recounting this fact from informant's statement).

50. For an extensive discussion regarding the elusive facts surrounding the Alvarez-Machain kidnapping, see Abramovsky, *supra* note 47, at 165-70.

51. 112 S. Ct. at 2196. Others accused of Camarena's murder were also extradited from various countries, none in compliance with extradition treaties. However, the other countries were more cooperative; and, unlike Mexico, none of the other countries protested. See generally Abramovsky, *supra* note 47, at 161-65 for a discussion of the other extradition actions, indictments, and trials relating to the Camarena murder.

52. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992). Through Mexican contacts, DEA officials offered a reward and expenses in return for Alvarez-Machain. *Id.*

53. *Id.* at 609.

54. *United States v. Alvarez-Machain*, 946 F.2d 1466, 1467 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

paring the present case to established precedent.⁵⁵

The Court refused to invalidate the United States' jurisdiction over Alvarez-Machain.⁵⁶ Despite the United States government's participation in the abduction of a foreign national from his own country,⁵⁷ the existence of an extradition treaty between the United States and Mexico,⁵⁸ and Mexico's protest regarding the kidnapping,⁵⁹ the Court held that the treaty did not expressly prohibit government sponsored kidnappings that occurred without the approval of the "asylum" country.⁶⁰ As a result, the treaty did not apply, and the Court could implement the *Ker-Frisbie* doctrine.⁶¹ Therefore, the government's circumvention of the extradition treaty was immaterial in determining whether a federal court has jurisdiction.⁶²

In determining that the United States-Mexico extradition requirements did not apply to the United States in the *Alvarez-Machain* situation, the Court reviewed the terms of the treaty,⁶³ its historical context,⁶⁴ and the impact of international law on the treaty's scope.⁶⁵ The United States and Mexico outlined their extradition policies with

55. See *Alvarez-Machain*, 112 S. Ct. at 2193. The dissent clearly stated that the kidnapping was nothing more than one country abducting the citizen of another country. *Id.* at 2197 (Stevens, J., dissenting).

56. *Id.* at 2197.

57. See *supra* notes 52-55 and accompanying text for a discussion of the circumstances surrounding Alvarez-Machain's kidnapping.

58. See *infra* note 67 for the full text of the relevant provisions of the United States-Mexico extradition treaty.

59. The Court of Appeals deemed the official protest from Mexico essential to verify that the "offended" nation actually objected to the abduction and did not tacitly consent to the abduction as "informal." 112 S. Ct. at 2195. The Supreme Court held that Mexico's objection to the kidnapping was immaterial to the determination of whether a United States court must enforce extradition treaty procedures that the United States government never invoked. *Id.* The Court also found that it would have to enforce the extradition treaty on behalf of the abducted individual, regardless of whether the other nation objected to the kidnapping, if the treaty applied with the force of law. *Id.*

60. *Id.* at 2197.

61. *Id.* at 2193.

62. See *id.* at 2199 (Stevens, J., dissenting) (noting that the Court's decision effectively sanctioned kidnapping as an optional method for obtaining jurisdiction over accused offenders).

63. See *infra* notes 66-72 and accompanying text.

64. See *infra* notes 73-74 and accompanying text.

65. See *infra* note 75 and accompanying text.

one another in a 1978 treaty.⁶⁶ In particular, Article 9 of the treaty states that each country's executive shall determine whether or not to extradite its own nationals to the requesting party.⁶⁷ If the executive refuses to extradite the individual, he shall submit the case to the authorities in his own country.⁶⁸

Respondent Alvarez-Machain argued that because the United States did not invoke the treaty and allow the Mexican authorities to decide whether or not to extradite him to the United States, federal courts did not have jurisdiction over him.⁶⁹ Respondent argued that if the United States simply chooses to forego the treaty rules, the treaty is meaningless.⁷⁰ The Court agreed with the government and determined that extradition treaties only exist to define mutual obligations to deliver individuals in certain circumstances.⁷¹ In effect, if the United States does not use the diplomatic channels set out in the treaty for extradition purposes, the treaty restrictions do not apply.⁷²

The Court bolstered its decision by stating that Mexico was aware of the United States' practice of abducting individuals.⁷³ Thus, if Mexico wanted to stop the United States from abducting individuals without

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

67. Specifically, Article 9 of the Treaty provides that:

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.

Id. at 5065.

68. *Id.*

69. *See* Alvarez-Machain, 112 U.S. at 2193-94.

70. *Id.* at 2194.

71. *Id.*

72. *See id.* at 2194-96.

73. The Court referred to a congressional reprint of a 1906 correspondence between Robert Bacon, then the U.S. Secretary of State, and Balbino Davalos, a Mexican Chargé d'Affaires, regarding the 1905 abduction of Antonio Martinez, a Mexican national. *See PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES*, H.R. DOC. NO. 1, 59th Cong., 2d Sess., 870, 1121-22 (1906). Mexico protested Martinez's abduction and the United States' disregard of the then-current extradition procedures. *Id.* The Secretary of State responded that, in light of *Ker*, the extradition was proper and Martinez's trial in the United States would proceed. *Id.* *See supra* notes 22-33 and accompanying text for a thorough discussion of the *Ker* decision.

treaty sanction, it would have specifically addressed the issue in the 1978 Treaty.⁷⁴ Finally, the Court determined that the extradition treaty's purpose was too specific to embody both the broad condemnation of international abduction and the broad principle of international law that one government should not exercise its police powers in another's territory.⁷⁵

III. EVALUATION

Application of the *Ker-Frisbie* doctrine when the federal government abducts a national from a party to an extradition treaty with the United States can set a dangerous precedent. Many of the extradition agreements to which the United States is a party give the contracting parties an option as to whether to extradite their own nationals.⁷⁶ Indeed, the Mexican government predicts that the decision in favor of the United States government in the *Alvarez-Machain* case will encourage other illegal abductions.⁷⁷ Canada emphasized its concern that the decision will encourage American states to kidnap wanted individuals

74. 112 S. Ct. at 2194. The Court referred to jurisdictional language proposed by a 1935 Harvard-sponsored research group. See Harvard Research, *supra* note 3, at 442 (suggesting that states could not prosecute foreign nationals for violations of international criminal law without the consent of the interested government).

Justice Stevens strongly disagreed with the majority and asserted that the Court's reliance on the fact that the treaty did not expressly forbid kidnapping implied a construction that the parties secretly reserved the right to self-help whenever they so choose. *Alvarez-Machain*, 112 S. Ct. at 2199 (Stevens, J., dissenting). To make his point, Justice Stevens noted that the Court's decision effectively added a new clause to Article 9 of the United States-Mexico extradition treaty which reads: "Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other." *Id.* n.11 (Stevens, J., dissenting).

75. *Alvarez-Machain*, 112 S. Ct. at 2194-96. According to the Court, the extradition treaty between the United States and Mexico is simply too narrow in scope to infer an overall prohibition against the United States entering Mexico. *Id.* Furthermore, the treaty does not define instances when such a prohibition is appropriate. *Id.* The Court noted that there are many occasions, such as wartime, when one country "invades" another country but the invasion would not violate the terms of an extradition treaty. *Id.* at 2196. But see *id.* at 2199 (Stevens, J., dissenting) (asserting that the majority stands on a "highly improbable" interpretation of the treaty; the more plausible interpretation prohibits each country from ignoring the territorial integrity of the other in extradition cases, not all situations).

76. See, e.g., Treaty on Extradition, Mar. 3, 1978, U.S.-Japan, art. 5, 31 U.S.T. 892, 897 (stating that the requested party is not required to extradite its own nationals); Treaty on Extradition, June 9, 1977, U.S.-Nor., art. 4, § 1, 31 U.S.T. 5619, 5624 (stating that the executive of each country has discretion to give up its own nationals).

77. See Laurie Becklund, *Mexico Takes Protest of Kidnapping to U.S. Court*, L.A.

from other countries.⁷⁸ Local officials' actions may be even more dangerous simply because of the untold number of local police departments that may decide to follow suit without any federal control over the situations.⁷⁹

In addition to the possible growth of United States sponsored kidnappings, other countries may look to *Alvarez-Machain* if they anticipate difficulties in extraditing United States citizens.⁸⁰ Just as the United States did not allow the Mexican government to apply its own laws in lieu of United States laws to Dr. Alvarez-Machain,⁸¹ a Mexican national, other countries may follow suit and do the same.⁸² Foreign countries may kidnap and judge United States citizens in their country without an initial United States review to determine whether the individual should be extradited or tried by a United States court.⁸³

Yet, some commentators contend that *Alvarez-Machain's* holding is appropriate in light of the ongoing drug problem in the United

TIMES, Nov. 14, 1990, at B3 (citing a formal letter to the Ninth Circuit Court of Appeals from the Mexican Consul General).

78. See Marcia Coyle & Marianne Lavelle, *Kidnapping Okay*, NAT'L L.J., June 29, 1992, at 5 (reporting on Canada's concerns as expressed in its amicus brief to the Supreme Court).

79. *Id.*

80. See, e.g., Abramovsky, *supra* note 47, at 201.

81. Pursuant to the terms of the United States-Mexico extradition treaty, if the Mexican government decides not to extradite a Mexican citizen, it must prosecute the case in Mexico, provided it has jurisdiction over the offense. U.S.-Mex. Treaty, *supra* note 66, at 5065. In practice, however, Mexico only extradites its citizens in unusual circumstances. Abramovsky, *supra* note 47, at 206-07 n.271 (citing A.B.A. Sec. Crim. Jus., *Developments in Mexican-U.S. Law Enforcement Cooperation: What the Practitioner Needs to Know* 41 (B. Zagaris ed. 1990)). See also Matorin, *supra* note 22, at 907 n.2 (citing 132 CONG. REC. 11,462 (1986) (statement of Sen. Hawkins)).

82. Other countries that do not have an extradition treaty with the United States will be able to justify the application of "extradition" policies to United States citizens by referring to the *Alvarez-Machain* decision. See Abramovsky, *supra* note 47, at 151-52. Iran, a country with which the United States has had a strained relationship, legalized extraterritorial arrests of Americans in 1989. See Richard A. Serrano, *Iranian Newspaper Wants Capt. Rogers Held, Tried*, L.A. TIMES, Nov. 2, 1989, at B2 (noting the passage of a law by the Iranian Parliament permitting such arrests).

83. Ruth Wedgwood, *A Dangerous Precedent*, NAT'L L.J., July 6, 1992, at 15. For example, India may want to abduct Warren Anderson, the CEO of Union Carbide Corporation, for the 1984 chemical accident that occurred at Union Carbide's plant in Bhopal, India, which killed and injured thousands of Indian citizens. *Id.* Prior to *Alvarez-Machain*, United States citizens were reasonably certain that no other country could take them from the United States unless that country submitted an extradition request and a United States judge believed that the charges set out in the request met American standards for criminal liability. *Id.*

States.⁸⁴ They maintain that the United States must be able to obtain custody over nonresidents who export drugs into the country.⁸⁵ The process that allows other countries to choose to prosecute their own nationals is not always effective.⁸⁶ For example, the law of prosecution in Mexico, coupled with the slowness of the Mexican process, can prove very disappointing to United States officials.⁸⁷

With regard to the drug wars, this decision will impact the trial of General Manuel Noriega. In 1989, United States troops invaded Panama and captured Noriega.⁸⁸ The United States did not use formal extradition proceedings.⁸⁹ One of the purposes for the invasion was to have Noriega stand trial in the United States for drug trafficking.⁹⁰ *Alvarez-Machain* eliminates many arguments that Noriega might make regarding the court's jurisdiction over him as a result of the extradition treaty between the United States and Panama.⁹¹

In addition to the exigencies of the drug wars, the federal courts may not be the proper place to determine foreign policy issues. One commentator notes that extradition is a foreign policy issue that should be dealt with by the political branches of the United States government, not by the courts.⁹² The President presides over foreign policy because the nation's foreign policy is most effective when stated through one voice.⁹³ When a court decision goes beyond the boundaries of a treaty, a court comes perilously close to setting foreign policy.⁹⁴ Per one com-

84. See, e.g., Campbell, *supra* note 4, at 392 (finding that "[t]he problem of drug trafficking and drug use is apparent to people of the United States").

85. *Id.* at 392-98.

86. See, e.g., Abramovsky, *supra* note 47, at 206-07 n.271 (citing A.B.A. Sec. Crim. Jus., *Developments in Mexican-U.S. Law Enforcement Cooperation: What the Practitioner Needs to Know* 47 (B. Zagaris ed. 1990)).

87. See *id.*

88. On December 20, 1989, approximately 24,000 troops invaded and took control of the Republic of Panama and installed the elected government of President Guillermo Endara. Andrew Rosenthal, *U.S. Troops Gain Wide Control in Panama; New Leaders Put in but Noriega Gets Away*, N.Y. TIMES, Dec. 21, 1989, at A1, A8.

89. Campbell, *supra* note 4, at 391.

90. See *id.* at 390-91.

91. See Treaty on Extradition, May 25, 1904, U.S.-Pan., arts. III-V, 34 Stat. 2851, 2853-55 (outlining the manner for requisitioning fugitives and stating that neither of the contracting parties is required to deliver up its own citizens).

92. See Charles L. Hobson, *The Treaty Was Not Violated*, NAT'L L.J., July 6, 1992, at 15.

93. *Id.*

94. *Id.*

mentator, this is why the court properly dismissed international law considerations in construing the treaty.⁹⁵

Yet, for the very reason that the President is the acting voice of the United States in foreign affairs, the Court should consider the fact that the President spoke for America when he agreed to the United States-Mexico extradition treaty.⁹⁶ The *Alvarez-Machain* decision eviscerates the treaty.⁹⁷ The language of the treaty belies the Court's holding that the governments did not intend for the treaty to apply to the entire subject of extradition between the two countries.⁹⁸ Logic dictates that neither country would agree to the treaty if it did not believe that the other government would have to abide by the treaty guidelines.⁹⁹

Finally, some assert that the Court should use its supervisory power in situations such as the abduction of a foreign national.¹⁰⁰ A federal court has the discretion to use its supervisory power to slow police conduct that may not be unconstitutional but is improper.¹⁰¹ The

95. See *id.* (stating that the international law cited in the *Alvarez-Machain* opinion is no more than a group of policy preferences which the federal courts must subrogate to the mandates of the elected branches).

96. President Jimmy Carter ratified the extradition treaty with Mexico on December 13, 1979. U.S.-Mex. Treaty, *supra* note 66, at 5059.

97. See *Alvarez-Machain*, 112 S. Ct. at 2198-99 (Stevens, J., dissenting).

98. *Id.* (Stevens, J., dissenting). The preamble of the treaty states that its overall purpose is to promote cooperation among the two countries in their fight against crime. See U.S.-Mex. Treaty, *supra* note 66, at 5061. The Treaty then describes the parties' obligations regarding the listed extraditable offenses committed inside and outside the territory of the requesting party. *Id.* at 5061-63. It lists special rules for political offenses, capital punishment, and extradition of nationals. *Id.* at 5063-65. And the treaty provides procedural and evidentiary requirements for extradition. *Id.* at 5066-70. All of this combines to cover the full scope of situations encountered in extraditions. See 112 S. Ct. at 2199 (Stevens, J., dissenting).

99. See 112 S. Ct. at 2199 (Stevens, J., dissenting); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1349-51 (9th Cir. 1991) (asserting that the treaty provisions are meaningless if a signatory government does not always have to comply with their terms), *vacated*, 112 S. Ct. 2986 (1992). Article 9 of the Treaty specifically states that each country's executive has the discretion to determine whether to extradite its own citizens. U.S.-Mex. Treaty, *supra* note 66, at 5065. If the United States government, a party to the treaty, is free to kidnap those individuals it desires, the Article 9 discretion disappears. See 112 S. Ct. at 2200 (Stevens, J., dissenting) (citing *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1351 (9th Cir. 1991)).

100. *Gentin*, *supra* note 32, at 1246-47.

101. See, e.g., *United States v. Hasting*, 461 U.S. 499, 505 (1983). The Court has a threefold purpose underlying the use of its supervisory powers: "to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *Id.* at 505 (citations omitted).

Court's supervisory power keeps the court from becoming a "partner in crime" with the government.¹⁰² In the last few decades, however, Supreme Court decisions have curtailed the use of the supervisory powers doctrine,¹⁰³ although a few lower federal courts have indicated a willingness to revive it and use their supervisory power in extradition kidnapping cases.¹⁰⁴

IV. CONCLUSION

As a result of the *Alvarez-Machain* decision, the United States can "properly" ignore extradition treaties with other countries if it so chooses. Apparently, the only circumstances in which the treaty applies are when the government chooses to invoke its procedures. This approach is based on a "since it didn't say we can't, we can" mentality. Even though the United States may have a treaty with another country, abducted defendants can only object to their seizure as against the terms of a relevant extradition treaty if the United States government initially chooses to invoke the extradition treaty procedures.¹⁰⁵ Unless a country that is a party to a treaty with the United States has a better means of finding or obtaining certain exiles, there are no short term reasons why the United States would not simply enter the exile country and bring the target individual back to the States.

Despite the government's policy that favors apprehending individuals who commit crimes against the United States, it must maintain the integrity of the treaties it enters.¹⁰⁶ The United States should not for-

102. Gentin, *supra* note 32, at 1247.

103. Initially, in *McNabb v. United States*, 318 U.S. 332, 340-41 (1943), the Court reserved the power to transcend constitutional limits when contrary holdings would jeopardize judicial integrity. Subsequently, however, the Court has espoused a re-trenchment of sorts. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (citing *United States v. Mechanik*, 475 U.S. 66, 71-72 (1986), and *United States v. Hasting*, 461 U.S. 499, 506 (1983)) (requiring egregious governmental conduct that substantially prejudices a defendant before a federal court can invoke its supervisory power). See Gentin, *supra* note 32, at 1248-52 for a detailed discussion of the current state of the supervisory power doctrine.

104. See, e.g., *United States v. Noriega*, 746 F. Supp. 1506, 1535-41 (S.D. Fla. 1990) (suggesting that the court is willing to use its supervisory power if governmental impropriety is equated to shocking or pervasive misconduct). See also Gentin, *supra* note 32, at 1251-52.

105. *Alvarez-Machain*, 112 S. Ct. at 2196-97.

106. See *id.* at 2208 n.37 (Stevens, J., dissenting) ("Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law.") (citing *United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974)).

get the purpose of an extradition treaty: to promote cooperation among countries in the fight against crime.¹⁰⁷ Where the government agrees to allow another country to decline extraditing its own nationals, it should honor that agreement. If it does not now respect the letter of the agreement and the country it is dealing with, the United States can expect no more when the tables are turned.

*Stephanie A. Ré**

107. The preamble to the 1978 United States-Mexico extradition treaty states the two governments' desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extraditions." U.S.-Mex. Treaty, *supra* note 66, at 5061.

* J.D. 1993, Washington University.