UNITED STATES' SANCTIONED KIDNAPPINGS ABROAD: CAN THE UNITED STATES RESTORE INTERNATIONAL CONFIDENCE IN ITS EXTRADITION TREATIES?

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I. INTRODUCTION

In June of 1992, the United States Supreme Court handed down its decision in *United States v. Alvarez-Machain*,[1] creating an international controversy.[2] The primary thrust of the ruling was that although a defendant may not be prosecuted in violation of the terms of an extradition treaty,[3] a defendant brought before a court by means outside the terms of the treaty may be prosecuted.[4] The defendant, a Mexican national who was taken at gunpoint from his office in Guadalajara, Mexico and transported to the United States to face charges stemming from the brutal kidnapping and murder of Drug Enforcement Agency[5] undercover agent Enrique Camarena,[6] argued his abduction violated the Extradition Treaty between the United States and Mexico.[7] The district court found this argument persuasive and ordered his repatriation to Mexico.[8] The Ninth Circuit Court of Appeals affirmed the decision.[9] However, the Supreme Court found the U.S.-Mexico Extradition Treaty to be silent on the subject of forcible abductions.[10] Therefore, the Treaty does not proscribe forcible abductions between the United States and Mexico.[11] Since custody of the defendant in this case, Alvarez-Machain, was obtained by forcible abduction, the Treaty presented

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

2. *See infra* notes 17-19, 62-65 and accompanying text. Both Mexico and Canada disagreed with the Supreme Court decision. The United Nations and the Organization of American States supported the Mexican and Canadian positions.

3. *Alvarez-Machain*, 112 S. Ct. at 2189.

4. *Id.* at 2196-97.

5. Drug Enforcement Agency [hereinafter DEA].

6. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). Alvarez-Machain was one of several defendants in the case, including Rafael Caro-Quintero, a suspected Mexican drug lord. Alvarez-Machain's role in the kidnapping and murder was more akin to that of an accomplice. *Id. See also infra* notes 21-27 and accompanying text.

7. *Id.* at 601.

8. *Id.* at 614.

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

10. *Alvarez-Machain*, 112 S. Ct. at 2193.

11. *Id.* at 2195.

between the United States and Mexico.[11] Since custody of the defendant in this case, Alvarez-Machain, was obtained by forcible abduction, the Treaty presented no bar to his prosecution.[12] The Supreme Court decision reversing the Ninth Circuit and remanding the case for proceedings on the merits provoked widespread and immediate response.[13]

In Mexico, reaction to the decision was uniformly unfavorable.[14] The Mexican government had previously made its position clear by submitting an

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11. *Id.* at 2195.

12. *Id.* at 2197.

13. Newspaper headlines and law review articles appeared both praising and condemning the decision. *See, e.g., Supreme Court Rightly Passes the Ball*, Los Angeles Times, June 18, 1992, at B7; Linda Jacobson, *Court Decision Was Right, but U.S. Policy May Not Be*, Atlanta J. and Const., June 17, 1992, at A18; *Breaking Treaties: High Court Gives the Green Light to Border Raids*, Seattle Times, June 16, 1992, at A10; Herman Schwartz, *The Supreme Court's Insult to Law-Abiding Countries; Law: By Allowing the U.S. to Kidnap Foreign Citizens in Another Country, the Justices Make a Mockery of Much That We Preach*, Los Angeles Times, June 21, 1992, at M1; *A Victory for Lawlessness*, St. Louis Post-Dispatch, June 17, 1992, at 2B; *Frontier Justice, Big-Time*, Boston Globe, June 17, 1992, at 18; Malvina Halberstam, *International Kidnapping: In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 Am. J. Int'l. L. 736 (1992); Jonathan A. Bush, *How Did We Get Here? Foreign Abductions After Alvarez-Machain*, 45 Stan. L. Rev. 939 (1993). Other law review articles appeared before the Supreme Court decision, but addressed essentially the same issues. *See, e.g.*, Mitchell J. Matorin, *Unchaining the Law: The Legality of Extraterritorial Abduction in Lieu of Extradition*, 41 Duke L. J. 907 (1992); Jonathan Gentin, *Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on United States vs. Caro Quintero and the Inadequacy of the Ker-Frisbie Doctrine*, 40 Emory L.J. 1227 (1991). The articles condemning the decision argued that it was a violation of both international law and the Supremacy Clause of the U.S. Constitution. Those defending the decision primarily followed the reasoning expressed by Ms. Halberstam in her article when she said, "The point is not that the United States should engage in abductions in violation of international law, but that in this, as in other matters involving the conduct of foreign affairs, the decision has to be made by the executive and legislative branches of the government, not by the courts." Halberstam, *supra* at 743.

14. Tim Golden, *Mexicans Mollified Over Drug Ruling*, N. Y. Times, June 18, 1992, at A3; "Mexicans, for the most part, hesitated to defend Humberto Alvarez-Machain . . . . Yet as Dr. Alvarez's case passed through the courts, Mexican officials became alarmed that the Administration was claiming a right to kidnap him and others if extradition treaties did not specifically prohibit it. The Supreme Court endorsement of that claim set off angry protests here." *Id.*; David Clark Scott, *U.S. Court Ruling Provokes Heated Mexican Retort*, Christian Science Monitor, June 17, 1992, at 1. "A statement by the [Mexican] Foreign Ministry blasts the court decision as 'transgressing basic principles of international law and [ignoring] the extradition treaty as the only legitimate and legally recognized way to detain someone in a sovereign state.'" *Id.*

amicus curiae brief to the Court.[15] The Court acknowledged and then discarded Mexico's arguments.[16] Mexico reacted to the decision with more than verbal attempts at persuasion. It suspended cooperation with United States efforts to control illegal drug trafficking, banned all DEA activities in Mexico,[17] demanded that the Extradition Treaty between the two countries be renegotiated,[18] and requested that the United States surrender those persons responsible for the abduction.[19]

This Comment does not purport to pass judgment on the correctness of the Supreme Court's decision. Rather, the issue presented is whether a future controversy of this kind can be averted and, if so, how. Part I introduces the topic and presents the question. Part II gives a brief history of the facts and legal issues surrounding *United States v. Alvarez-Machain.* Part III presents Mexico's position regarding both the abduction and the Supreme Court decision. Part IV examines the Canadian reaction to the case and the reasons that Canada has a different motive for opposing the decision. Part V looks at the decision itself, and the basis for the majority opinion. Part VI discusses possible methods, suggested by other commentators, to prevent a reccurrence of the problems caused by *Alvarez-Machain.* Part VI also suggests that the simplest, least costly, and least time-consuming alternative may be for Congress to enact legislation overruling the judicial precedent which served as the basis for the decision and that the legislation "occupy the field."[20] Finally, this paper concludes that

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15. Brief for United Mexican States as Amicus Curiae in Support of Affirmance, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) (LEXIS, Genfed library, Brief file) [hereinafter Brief for Mexico].

16. *Alvarez-Machain,* 112 S. Ct. at 2196-97. "Respondent and his *amici* may be correct that respondent's abduction was 'shocking' and that it may be in violation of general international law principles. . . . We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico. . . . The fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States." *Id.* (citations omitted).

17. *See* Scott, *supra* note 14, at 1; Golden, *supra* note 14, at A3. Both newspaper articles referred to the ban on DEA activity. The Christian Science Monitor quoted the Mexican Foreign Ministry as saying the ban would last until "new criteria of cooperation can be determined which guarantee respect for our judicial order and safeguard our national sovereignty." Scott, *supra* note 14, at 1.

18. Golden, *supra* note 14, at A3.

19. *Alvarez-Machain,* 112 S. Ct. at 2196 n.16. The request that the United States surrender the parties responsible, though consistent with the Mexican reaction to the decision, was actually in response to the abduction itself and was acknowledged by the majority in its opinion. *Id.*

20. The term "occupy the field" has its roots in cases involving the federal government's power to regulate interstate and intrastate trade vis à vis the Commerce Clause of the U.S. Constitution, Article 1, § 8, particularly those cases in which state and federal regulations appear to conflict. In such cases the courts have held (by virtue of the Supremacy Clause) that state regulations are preempted by federal

problems relating to the *Alvarez-Machain* decision continue to linger and will continue to do so until such legislation is enacted and further concludes that the benefits of legislative override outweigh the disadvantages.

II. THE HISTORY OF ALVAREZ-MACHAIN

On February 7, 1985, DEA undercover agent Enrique Camarena-Salazar was kidnapped in Guadalajara, Mexico.[21] Camarena was working undercover, investigating the activities of reputed Mexican drug lord Rafael Caro-Quintero.[22] Approximately one month later, authorities found his mutilated and tortured body, along with that of his pilot, in an open field not far from Zamora, Mexico.[23] Authorities suspected the drug cartel discovered Camarena's identity,

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enactments. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Even in cases where there is no direct federal regulation with which a state regulation conflicts, courts have held that related federal regulations and assignments of authority were sufficient to preempt any state action. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). For a more complete discussion of federal commerce power, see Kenneth L. Hirsch, *Toward a New View of Federal Preemption*, 3 U. Ill. L. F. 515 (1972). In the context of this Comment, the term is used merely to suggest that Congress enact legislation declaring extradition treaties to be the sole means by which this country may gain custody of a criminal fugitive from the territory of another signatory nation, notwithstanding the existence of a contrary state statute or judicial decision.

21. Major newspapers carried accounts of the events surrounding Camarena's disappearance and the subsequent finding of his body one month later. Representative of the reports are David Hoffman, *Intense Border Searches Wind Down; U.S. Seeks Mexican Cooperation in Probe of Kidnapped DEA Agent*, Wash. Post, Feb. 23, 1985, at A14, and Richard J. Meislin, *U.S. Agent's Body Firmly Identified*, N.Y. Times, Mar. 8, 1985, at A3. The N.Y. Times story said, "The two men had been missing since being abducted in Guadalajara Feb. 7. Their bodies, wrapped in plastic bags, were found on a ranch 70 miles southeast of Guadalajara." *Id.*

22. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal 1990). Though many reports and accounts of the investigation and proceedings involved in Camarena's disappearance speculated that Camarena participated in such an investigation, the reports remained mere speculation until witnesses, including DEA Special Agent Hector Berrellez, head of the investigation into Camarena's murder, and DEA informant Antonio Garate-Bustamante, an "admitted" former advisor to Mexican drug lord Ernesto Fonseca-Carrillo, testified at an evidentiary hearing in the matter. From that testimony, the court made findings of fact regarding Camarena's murder: Camarena was kidnapped on February 7, 1985; his "mutilated" body was found one month later outside Guadalajara; and, pursuant to an investigation into the matter, twenty-two persons were indicted in connection with the crime, including Caro-Quintero and Alvarez-Machain. The motive for the killing, that Camarena's identity had been discovered and that he had been tortured to extract information from him, was a central element of the government's case. *Id.* at 602.

23. *Id.*

then kidnapped, tortured, and murdered him in retaliation for authorities' raids on their activities.[24]

The ensuing U.S. investigation of the murder implicated Dr. Humberto Alvarez-Machain, a Guadalajara obstetrician.[25] The U.S. government alleged that Alvarez-Machain administered drugs to Camarena, preventing him from passing out, prolonging his life, and permitting continued torture.[26] Some five years after the murder, on April 2, 1990, Dr. Alvarez-Machain was abducted at gunpoint by agents hired by the DEA and flown by private plane to El Paso, Texas, where he was promptly arrested by DEA officials.[27]

III. THE MEXICAN POSITION

The abduction of a Mexican citizen from Mexican territory by agents of the United States in order to have that citizen stand trial on criminal charges in the United States caused a considerable cry of protest from the Mexican government.[28] Because the abduction took place on Mexican soil, concerned a

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24. Michael Hedges, *Camarena Trial Begins; Mexico Reopens its Probe*, Wash. Times, May 16, 1990, at A5. "The motivation was drug smugglers' anger at devastating raids on marijuana plantations, [Assistant U.S. Attorney] Carlton said .... Testimony at the trial of three other men in 1988 showed that the 31-year-old agent was taken to a house where he was tortured and interrogated by drug lords before being slain...." *Id.*

25. *Caro-Quintero*, 745 F. Supp. at 602.

26. John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States vs. Alvarez-Machain*, 68 Notre Dame L. Rev. 723 (1993). "The DEA alleged that Dr. Alvarez-Machain gave Camarena injections to keep him alive while his abductors tortured and interrogated him. The men hired by the DEA seized Dr. Alvarez-Machain from his office in Guadalajara, forced him onto a private airplane, and flew him to El Paso, Texas, where DEA officials awaited him." *Id.* at 724.

27. *Id.*

28. Brief for Mexico, *supra* note 15. Formal notes of protest were sent by Mexico to the U.S. State Department in 1990, once on April 18, again on May 16, and twice on July 19. The first note requested information regarding any U.S. government involvement in the abduction. The remaining notes established Mexico's belief that the U.S. government was involved and, in fact, had orchestrated the abduction, as well as the Mexican belief that the abduction violated the sovereignty and laws of Mexico, the Extradition Treaty between the United States and Mexico, the Charters of both the United Nations (U.N.) and the Organization of American States (O.A.S.), and the norms and customs of international law. According to its amicus brief, Mexico protested to the U.N., the O.A.S., and the International Court of Justice (I.C.J.). It is unclear, however, whether the protests were intended to do anything more than place international pressure on the United States to release Alvarez-Machain because, in the past, the United States has been able to block U.N. or O.A.S. resolutions it considered

crime that allegedly took place in Mexico, involved a Mexican citizen, was conducted by agents of a foreign government, and did not have the consent or cooperation of the Mexican government, Mexico believed it to be an outrageous violation of the country's national sovereignty.[29] The Mexican government protested through diplomatic channels[30] and, when the case reached the Supreme Court, submitted an amicus curiae brief.[31] In that brief, Mexico quoted language from the charters of both the United Nations (U.N.)[32] and the Organization of American States (O.A.S.),[33] referred to other agreements between the United States and Mexico as persuasive authority for their interpretation of the Extradition Treaty,[34] and relied on several articles on international law,[35] as well as the Mexican Constitution[36] and the precepts of Mexican Law.[37]

The heart of the Mexican argument was that relations between sovereign nations must be governed by the customs of international law, not domestic law,

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unfavorable as well as deny the authority of international courts over the actions of the U.S. government. Specifically, the United States blocked U.N. Security Council resolutions regarding the U.S. invasion of Panama. Jim Joagland, *Sledgehammering an Ant,* Wash. Post, Jan. 4, 1990, at A23. Additionally, the United States denied the authority of the World Court concerning claims filed against the United States by Nicaragua. Harold G. Maier, *Appraisals of the ICJ's Decision:* Nicaragua v. United States (Merits), 81 Am. J. Int'l. L. 77 (1987). "In November 1984, the Court concluded that it retained jurisdiction over the claim filed by Nicaragua . . . [T]he United States filed with the Court a statement in which it suspended its acceptance of the Court's jurisdiction 'as to disputes with any Central American state.'" *Id.*

29. Brief for Mexico, *supra* note 15.

30. *Id.*; *see also supra* note 28.

31. *Id.*

32. Brief for Mexico, *supra* note 15, *citing* U.N. Charter art. 2, ¶ 4, and art. 102. The quoted language is discussed in detail *infra* Part III of this paper and at notes 40-43 and accompanying text.

33. Brief for Mexico, *supra* note 15, *citing* O.A.S. Charter art. 17, Apr. 30, 1948, U.S.T. 2394. *See infra* notes 40-43 and accompanying text.

34. Brief for Mexico, *supra* note 15, *citing* Treaty of Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, Dec. 9, 1987, art. 1(2), *reprinted in* 27 I.L.M. 443 (1988) (entered into force May 3, 1991) and Agreement between the United States of America and the United Mexican States on Cooperation in Combating Narcotics Trafficking and Drug Dependency, Feb. 23, 1989, *reprinted in* 29 I.L.M. 58 (1990) (entered into force July 30, 1990).

35. Brief for Mexico, *supra* note 15, *citing* Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought from, a Foreign Country by Force or Fraud, A Comparative Study,* 32 Ind. L. J. 427 (1957); Harvard Research in International Law, *Draft Convention on "Jurisdiction with Respect to Crime,"* 29 Am. J. Int'l. L. Supp. 435 (1935); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud,* 37 Minn. L. Rev. 91 (1953); and others.

36. Brief for Mexico, *supra* note 15, *citing* Constitución Politica de los Estados Unidos Mexicanos [Constitution] arts. 14, 16, 133.

37. Brief for Mexico, *supra* note 15, *citing* Ley de Extradicion Internacional, arts. 14, 16, Dec. 22, 1975.

and that the abduction violated those international customs.[38] The Mexican government placed great importance on the fact that both the United States and Mexico were signatory nations to several U.N. and O.A.S. agreements, including the charters of both organizations.[39] Mexico's amicus brief quoted language from the U.N. charter requiring that "[a]ll [m]embers shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . . ."[40] The quoted passage of the O.A.S. charter said, "the territory of a State is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another State, directly or indirectly, on any grounds whatever."[41] From Mexico's point of view, this language, particularly phrases such as "on any grounds whatsoever," clearly placed the DEA's actions in violation of international agreements signed by both nations.

The importance Mexico placed on the charters' language is more readily understood if it is also understood that, unlike U.S. law, Mexican law recognizes no difference between "self-executing treaties[42] and those that merely constitute a

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38. Brief for Mexico, *supra* note 15. The text of the amicus brief does not expressly discuss subordination of domestic law to international law. However, that argument may be easily inferred from passages such as the following from the brief's summary of argument: "The Treaty, like all international accords, must be interpreted against the background of relevant rules of international law applicable to the relations between the parties. . . . For a State to send its agents to another State to apprehend or abduct that State's nationals for trial elsewhere is incompatible with the established international legal order. . . . [T]he United States could exercise no police powers in the Mexican territory." *Id.* However, since the Supreme Court decided *Alvarez-Machain* based on the language of the Extradition Treaty alone, the authorities cited by Mexico and the preceding footnotes have limited relevance to the ultimate issue addressed in this Comment, in that they are useful primarily as a guide in understanding the Mexican position and any proposed remedies. Once the reasons for Mexico's opposition to the *Alvarez-Machain* decision are understood, the remaining text of the treatises, agreements, treaties, and charters becomes collateral to the central question.

39. Brief for Mexico, *supra* note 15.

40. Brief for Mexico, *supra* note 15, *citing* U.N. Charter art. 2, ¶ 4.

41. Brief for Mexico, *supra* note 15, *citing* O.A.S. Charter art. 17, Apr. 30, 1948, U.S.T. 2394.

42. Brief for Mexico at n. 9, *supra* note 15. The term "self-executing" when used to describe a treaty has been the subject of some controversy. Judge Rafeedie, the district court judge in *Caro-Quintero*, described a self-executing treaty as one which "must be enforced in federal court unless superseded by other federal law." United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990). He described the issue of a self-executing treaty as a "question distinct from whether a party has standing to enforce its terms." *Id.* at 607. However, in the Supreme Court's opinion in *Alvarez-Machain*, Chief Justice Rehnquist states, "The Extradition Treaty has the force of law, and if, as respondent asserts, 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.*" United States v. Alvarez-Machain, 112 S. Ct. 2188, 2195 (1992) (emphasis added). A critical element of the decisions of both the district

contract between States . . . ." [43] Any treaties entered into by the Mexican government automatically become the supreme law of the land in Mexico, conferring rights on individuals as well as governments.[44] From its arguments, it can be inferred that Mexico felt the charters of the U.N. and the O.A.S. should carry the force of treaties in the domestic law of the signatory nations, subordinating that law to charter mandates.[45]

The United States asserted that Mexico knew the Extradition Treaty was not binding on U.S. courts in cases of forced abduction where the abductors made no

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court and the court of appeals in the case was that Mexico had protested the abduction. Without that protest, the courts reasoned, Alvarez-Machain would have had no standing to assert a treaty violation as a defense because only nations, not individuals, are parties to a treaty and only an offended party, in this case Mexico, can assert a treaty violation in court. However, Mexico's protest, according to the courts, conferred derivative standing on Alvarez-Machain to assert treaty violation on its behalf. At the very least, the statements of the courts regarding standing and self-executing treaties indicates a degree of confusion among judges regarding the nature and relationship of the two concepts. This confusion is addressed in some depth by Carlos M. Vazquez in *Treaty-Based Rights and Remedies of Individuals,* 92 Colum. L. Rev. 1082 (1992). Vazquez asserts that "the notion has begun to take hold in the lower courts that a treaty that is not self-executing is not the law of the land." *Id.* at 1121. In other words, a treaty that does not possess a specific act of Congress making it self-executing is, by exclusion, not self-executing and, therefore, not binding on the courts. Vazquez argues that the courts have misconstrued the matter and that, by virtue of the Supremacy Clause of the U.S. Constitution, any duly signed and ratified treaty is automatically the supreme law of the land, superseding any and all case law and preceding statutes, and that only another superseding act of Congress can make it otherwise. Whether or not Vazquez is correct is a subject outside the scope of this Comment. The reality of the situation is that different interpretations exist in the courts and any solution, if there is one, to situations such as in *Alvarez-Machain* must take into account the varying points of view.

43. Brief for Mexico, *supra* note 15. The "contract between States" phrase highlights an interesting difference between the United States and Mexico in each country's interpretation of how treaties affect individuals. Article II, § 2, cl.2 of the United States Constitution grants the President the power to make treaties with the advise and consent of the U.S. Senate. Article 133 of the Mexican Constitution confers similar powers on the Mexican President. The Constitutions of both countries contain clauses which make valid treaties the supreme law of the land. Neither Constitution mentions the rights of individuals under those treaties. However, a large difference exists between the two countries' interpretation of what an individual's rights are under international treaties. U.S. common law has traditionally considered treaties to be more or less contracts between nations in which individuals have no vested rights unless specifically conferred by the government through official protest or otherwise. *See supra* note 38. Mexico has a different point of view. "A treaty that has been approved by the Mexican Senate and proclaimed by the President forms part of the municipal law of Mexico and confers personal rights on individuals that are enforceable in Mexican courts." Brief for Mexico, *supra* note 15.

44. Brief for Mexico, *supra* note 15.

45. *See supra* notes 35 and 38.

pretense of using the Extradition Treaty as a means of gaining custody.[46] Despite these assertions, Mexico found support for its position in both U.S. case law and the past actions of U.S. officials.[47]

In an early Supreme Court case, *The Schooner Exchange v. McFaddon,* Chief Justice John Marshall spoke with force of the inviolability of territorial integrity.[48] Later, in an oft-cited decision, *The Paquete Habana,*[49] the Court held that Cuban fishing vessels seized by the naval blockade of Havana during the Spanish-American War were taken in violation of international law.[50] According to the Court, the vessels were seized illegally and, because the vessels had already been sold at auction, the proceeds from the sale were ordered returned to the owners with costs.[51]

Regarding the past actions of government officials, Mexico cited an 1887 incident in which then Secretary of State T.F. Bayard intervened in the case of a Mexican fugitive apprehended in the United States by Mexican police with the help of Texas law enforcement officers. Bayard asserted that the fugitive's return to Mexico was "obtained not in accordance with, but in fraud of existing

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46. Brief for United States, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712). "As early as 1906, the United States informed the government of Mexico that it did not regard the forcible abduction of a defendant from Mexico as a ground for the defendant to avoid a criminal trial in this country . . . ." *Id.*

47. Brief for Mexico, *supra* note 15.

48. 11 U.S. (7 Cranch) 116, 136 (1812). "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction." *Id.*

49. 175 U.S. 677 (1900). LEXIS' Shepard service lists in excess of one hundred cases and thirty-three law review articles citing the decision. Though occasionally distinguished, the case is still good law.

50. 175 U.S. at 708. After reviewing the history of international law in this area, the Court said:

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law . . . that coast fishing vessels . . . are exempt from capture as a prize of war.

Id.

51. *Id.* at 714. "[I]t is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare . . . that the capture was unlawful . . . [and it is ordered that] the proceeds of the sale of the vessel . . . be restored to the claimant, with damages and costs." *Id.*

treaties."[52] Moreover, a previous Secretary of State, James Blaine, sent a letter in 1881 to the Governor of Texas stating:

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily *abduct* from the territory of one party a person charged with crime for trial within the jurisdiction of the other.[53]

Mexico pointed to these cases and letters as evidence that the United States was aware of and subscribed to the theory that the U. S.-Mexico Extradition Treaty is the only acceptable means for gaining custody of a fugitive in Mexico's territory.[54] Moreover, Mexico was particularly galled that, during the negotiation process, the United States apparently made no mention of any power to abduct fugitives outside the Extradition Treaty, while Mexico had made clear its prohibition against extraditing its own nationals.[55] That the United States now

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52. Brief for Mexico, *supra* note 15, and Brief for Respondent, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) *available in* LEXIS, Genfed library, Brief file [hereinafter Brief for the Respondent], *citing* Letter of Secretary of State T.F. Bayard to Thomas Manning (February 26, 1887) *in* Diplomatic Instructions of the Department of State 1801-1906 (National Archives Microfilm Publication M77, Roll 117). It is also interesting to note that the letter from Secretary Bayard and the decision in *The Paquete Habana* both occurred after the Supreme Court decision in Ker v. Illinois, 119 U.S. 436 (1886), the precedent upon which the Court based its decision in *Alvarez-Machain. See infra* note 112.

53. Brief for Mexico, *supra* note 15, and Brief for the Respondent, *supra* note 52 (emphasis added) *quoting* Letter of Secretary of State James Blaine to O.R. Roberts, Governor of Texas (May 3,1881) *in* Domestic Letters of the Department of State, 1784-1906 (National Archives Microfilm Publication M40, Roll 93).

54. Brief for Mexico, *supra* note 15. "That the United States regarded the extradition treaty as the exclusive means by which Mexico could secure a person from the United States was . . . made clear by Secretary of State Bayard . . . ." *Id.* Mexico also pointed to the language of the 1987 Treaty of Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, *supra* note 34, which expressly stated that one nation was not empowered to "undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations." Brief for Mexico, *supra* note 15.

55. Brief for Mexico, *supra* note 15. "The United States does not, and cannot, point to any source that would support its thesis — a thesis that it announces here for the first time. Had the United States at any time insisted on such a reservation to the treaty, its extradition relations with Mexico would have ended." *Id.* "During the negotiation of Art. 9, the Mexican negotiators expressly informed the United States negotiators of the restraints that Mexican laws impose on the President with respect to the extradition of Mexican nationals. Consequently, the parties included a second paragraph . . . to assure that Mexicans whose extradition was denied solely on the basis of nationality would be prosecuted by Mexico." *Id.* The paragraph to which Mexico referred said "Neither contracting Party shall be bound to deliver up its own

claimed a reserved power of abduction was viewed by Mexico as an insult both to the Treaty and to Mexican law.[56]

Mexico was not alone in its condemnation of the abduction.[57] Other concerned parties also submitted briefs to the Supreme Court supporting the Mexican position.[58] These briefs offered additional authorities, including United States case law and statutes, which appeared contrary to the Supreme Court's ultimate decision.[59] The Court was not persuaded; it felt that this was a narrow

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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." *Id.* (emphasis added). The restraints to which Mexico referred flow from a combination of the Mexican Constitution and Ley de Extradicion Internacional. Article 14 of the Mexican Constitution states, "No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act." Brief for Mexico, *supra* note 15; *see supra* note 36. Article 14 of the Ley de Extradicion provides, "No Mexican shall be extradited to a foreign state except in exceptional cases in the discretion of the Executive." Brief for Mexico, *supra* note 15; *see supra* note 37. Mexico claimed that these clauses placed what amounted to a prohibition against extraditing Mexican nationals on the government. Brief for Mexico, *supra* note 15. Mexico also claimed the United States accepted this interpretation, pointing to then President Carter's address to the U.S. Senate in the advise and consent process:

> Article 9 deals with the extradition of nationals. . . . It grants the executive the discretionary power to extradite its own nationals. If extradition is denied on the basis of nationality, the requested Party undertakes to submit the case to *its* competent authorities for the purpose of prosecution . . . This article thus takes into account the law of Mexico prohibiting the extradition of its nationals but allowing for their prosecution in Mexico for offenses committed abroad.

Id. citing Extradition Treaty with the United Mexican States, 96th Cong., 1st Sess. Vi (1979) (Letter of Submittal by Secretary of State Cyrus Vance) (emphasis added).

56. Brief for Mexico, *supra* note 15. "The United States' Brief makes light of the Mexican government's discharge of its domestic legal order when it complains that "to date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty." *Id.*

57. *See supra* note 13.

58. Some of the briefs included: Brief of the Association of the Bar of the City of New York as Amicus Curiae in Support of Respondent, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712); Brief Amicus Curiae of Americas Watch in Support of Respondent, *Alvarez-Machain*, (No. 91-712) [hereinafter Brief of Americas Watch]; Brief of Amicus Curiae Minnesota Lawyers International Human Rights Committee in Support of Respondent, *Alvarez-Machain*, (No. 91-712) [hereinafter Brief of Minnesota Lawyers]; Brief of the Government of Canada as Amicus Curiae in Support of Respondent, *Alvarez-Machain*, (No. 91-712) [hereinafter Brief for Canada].

59. The Brief of Minnesota Lawyers, *supra* note 58, quoted the Mansfield Amendment to the Foreign Assistance Act of 1961, 22 U.S.C. § 2291(c), which

issue to be decided in light of the express language of the Treaty itself, not the prescriptions of international law.[60] In effect, Mexico was arguing apples while the Court was deciding oranges.

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states, "Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts." *Id.* The brief also looked to the Senate Foreign Relations Committee's report on the amendment for legislative intent. The report said, "It is the Committee's intent that 'police action,' as used in this provision, is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and actions involving the arrest of foreign nationals — whether unilaterally (acting on their own) or as members of teams involving agents or officials of other foreign governments." *Id.* (quoting Senate Comm. on Foreign Relations, Internal Security Assistance and Arms Expert Control Act, Report on S. 2662, Rep. No. 605, 94th Cong., 2d Sess. 55 (1976)). Since the District Court found as fact the involvement of U.S. government agents in the abduction of Alvarez-Machain, it would seem that the agents' actions were illegal under this provision. United States v. Alvarez-Machain, 946 F.2d 1466, 1467 (9th Cir. 1991) (per curiam), *rev'd*, 112 S.Ct. 2188 (1992).

The Brief of Americas Watch, *supra* note 58, cited § 701 of the Restatement (Third) Foreign Relations Law for the proposition that "[i]t is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent . . . . [I]ts law enforcement officers cannot arrest him . . . [without] that state's consent." Because Mexico did not consent, the abduction would appear to be contrary to the Restatement; *see supra* note 28 and accompanying text.

Cases cited in Brief of Minnesota Lawyers, *supra* note 58, included: Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987), in which the U.S. government intervened in an abduction case involving a Canadian citizen, discussed *infra* notes 76-81 and accompanying text; and United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), a case in which an exception to the *Ker-Frisbie* doctrine, the doctrine that formed the basis of the Supreme Court decision, was found; *see infra* notes 112-118 and accompanying text. The exception in *Toscanino* was for situations in which the government committed a "deliberate, unnecessary, and unreasonable invasion of the accused's constitutional rights." *Toscanino*, 500 F.2d at 275. There the conduct included allegations that U.S. agents participated in the torture of a captured suspect. Though these were lower court rulings which were not binding on the Supreme Court, they were offered to persuade the Court that review of extradition treaties is not prohibited by the separation of powers doctrine. "Simply put, this Court is competent to read and interpret extradition treaties and the exercise of that constitutional power does not involve any issue of separation of powers or potential to 'embarrass' coordinate branches of government." Brief of Minnesota Lawyers, *supra* note 58. The separation of powers doctrine figured into the majority opinion in *Alvarez-Machain*; *see infra* note 102.

60. *Alvarez-Machain*, 112 S. Ct. at 2193. The majority expressly limits the scope of the decision at several points throughout the opinion. "Mexico has protested the abduction of respondent through diplomatic notes, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch." *Id.* at 2196 (citation omitted). "Neither the Treaty's language nor the history of negotiations and practice under it supports the

IV. THE CANADIAN POSITION

As *Alvarez-Machain* made its way through the U.S. court system, it attracted a great deal of international attention.[61] With the exception of Mexico, no nation was more interested in the outcome than Canada.[62] Although Canada enjoyed a history of cooperation with the United States in extraditing fugitives, the Canadian government feared a Supreme Court decision sanctioning abductions would significantly alter the construction given the U.S.-Canada Extradition Treaty in other U.S. courts.[63] The significance stemmed from the volume of extradition requests between the two countries and the ease with which the border between the two countries could be crossed.[64] Although a decision against Alvarez-Machain could lead to an increase of federally sponsored abductions, Canada's real fear was that such a decision would give to state and local law enforcement agencies in the United States, who elect, for whatever reason, to use self-help in securing fugitives instead of carefully negotiated procedures, an official stamp of approval from the country's highest court.[65]

An examination of the language of the U.S.-Canada Extradition Treaty gives real meaning to the Canadian fears. Compare, for example, the pertinent clauses from both the Canadian and the Mexican Extradition Treaties. Article 17 of the U.S.-Canada Treaty states:

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proposition that it prohibits abductions *outside of its terms.* The Treaty *says* nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs." *Id.* at 2189 (emphasis added). "In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *Id.* at 2193.

61. *See supra* notes 13-14, 21 and accompanying text.

62. Aside from being the United States' two closest neighbors, Mexico and Canada were the only two foreign nations to submit amicus curiae briefs in the matter.

63. Brief for Canada, *supra* note 58. "Because this case affects the construction of all of petitioner's [United States'] extradition treaties, it raises doubt concerning the correctness of Canada's perception of the mutually agreed upon manifest scope and purpose of the Treaty." *Id.*

64. *Id.* "Canada and the United States enjoy an undefended border more than 3000 miles in length. The ease with which this border may be crossed accounts for the fact that approximately 50% of all American requests for extradition are made to Canada. In 1991, the United States made 74 requests for extradition to Canada and Canada made 47 requests to the United States. Many of these requests emanate from state and local authorities." *Id.*

65. *Id.* "The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the specter not only of federal, but more likely of official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow, or unavailable, in violation of Canada's territorial integrity." *Id.*

> If both contracting parties have jurisdiction to prosecute the person for the offense for which extradition is sought, the executive authority of the requested State . . . shall decide whether to extradite the person or to submit the case to its competent authorities for the purpose of prosecution. In making its decision, the requested State shall consider all relevant factors, including but not limited to:
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> . . .
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> (iii) the nationality of the victim or the intended victim;[66]

Similarly, the U.S.-Mexico Treaty says:

> 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.[67]

Both of these treaties give the requested State the discretion to extradite its own nationals or to prosecute them domestically. Neither treaty requires a State to extradite them.[68] Neither contains language specifically banning abductions.[69] If the only basis for interpretation by the U.S. Supreme Court is the language of

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66. Brief for Canada, *supra* note 58, *citing* Treaty of Extradition, Dec. 3, 1971, U.S.-Can., art. 17, 27 U.S.T. 985.

67. Brief for Mexico, *supra* note 15, *citing* Extradition Treaty Between the United States of America and the United Mexican States with Appendix, May 4, 1978, U.S.-Mex., art. 9, 31 U.S.T. 5059, T.I.A.S. No. 9656.

68. It is important to note that here, only the language of the treaties themselves is being examined, not the construction given the treaties by the individual signatory nations. This is the approach taken by the Supreme Court in *Alvarez-Machain.* Also, *see supra* note 60, *infra* notes 139-140 and accompanying text. If the Court were to have considered the constructions given the treaties by the Parties as controlling, the Court's decision would have, most certainly, gone the other way. *See, e.g.*, Brief for Canada, *supra* note 58, and Brief for Mexico, *supra* note 15. Also important to note is that, unlike Canada, Mexico is prevented by its domestic law from extraditing its nationals, *see supra* note 55. Mexico claimed that the United States was aware of this prohibition, and that the second paragraph of Article 9 was included to address the concerns of each Party regarding the prohibition. *Id.* However, neither treaty expressly states that extradition is the only method of obtaining custody of fugitives from that country's territory.

69. Michael J. Glennon, *State Sponsored Abduction: A Comment on United States v. Alvarez-Machain,* 86 Am. J. Int'l. L. 746, 747 (1992). "[The Canadian] Treaty, like all other extradition treaties to which the United States is a party, contains no terms proscribing abduction." *Id.*

the treaties themselves, Canada and Mexico are similarly situated.[70] Canada clearly found this to be a disturbing possibility.[71]

Prior to *Alvarez-Machain,* Canada worried little that transborder abductions would be sanctioned by the U.S. government.[72] The history of relations between the two nations confirmed the cooperative nature of the two governments' attitudes.[73] Diplomatic notes sent to the U.S. State Department by Canada reiterate that Canada believed that extradition was the only acceptable means of obtaining custody of fugitives from the territory of a foreign country.[74] Even when transborder abductions occurred, the governments of the two countries demonstrated a willingness to respect one another's laws and sovereignty.[75]

The recent case of *Jaffe v. Smith*[76] provides an example of both Canada's fear of local self-help and the federal response Canada believes appropriate. In 1980,

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70. *Id.*

71. *See supra* note 65.

72. Brief for Canada, *supra* note 58.

> Canada has a long tradition of international cooperation through extradition treaties with the United States beginning with the Jay Treaty of November 19, 1794 between Great Britain and the United States. Since 1842, rendition has been governed by a series of agreements of which the extant Treaty came into force on March 12, 1976.

Id. (citation omitted).

73. *Id.* "In dealing with one another, Canada and the United States have traditionally subscribed to the principle that — in the face of a protest — an official transborder abduction must result in repatriation." *Id.*

74. *Id.* The Canadian brief refers to two separate notes sent to the State Department, one dated October of 1982, Canadian Embassy Note No. 542, October 13, 1982, and the other dated April of 1991, Department of External Affairs Note No. JLAC-0734, April 24, 1991. The 1991 note said, "The Extradition Treaty, along with the relevant multilateral conventions, if any, established the only means under which to obtain the return of fugitive offenders." *Id.*

75. *Id.* The Canadian brief mentions several cases of abductions from the United States to Canada:

> Other cases, all involving official abductions from United States territory to Canada, and a subsequent repatriation and staying of a criminal proceeding following United States protests, were: *Grogan* (1841) . . . *O'Higgins, Unlawful Seizure and Irregular Extradition,* 36 British Yearbook of Int'l L. 279, 294 (1960); *the Convict Case* (1876) . . . and *The Unidentified Youth Case* (1892) . . . .

Id.

76. 825 F.2d 304 (11th Cir. 1987). The Canadian brief also mentions *The Anderson Case* (1974) which is less of a court case than a border incident. In it, a man crossing the United States-Canada border at Bellingham, WA was recognized by U.S. officials as a U.S. army deserter. The deserter, Anderson, ran back across the border into Canadian territory but was pursued and captured by the U.S. officials and returned

Jaffe, a Canadian citizen, was arrested in Florida in connection with fraudulent real estate deals.[77] After being released on bond, Jaffe returned to Canada and failed to appear at either his pretrial hearing or his trial.[78] Warrants were issued for his arrest and the issuing judge ordered the state of Florida to begin extradition proceedings.[79] The company securing Jaffe's bond, now in danger of being forfeit, sent private agents to capture and return Jaffe to Florida.[80] The agents kidnapped Jaffe outside his home in Toronto, Canada and returned him to the United States.[81] Jaffe was convicted in state court, but the importance of his case to Canada was not Jaffe's guilt or innocence, but the attention paid the case by the U.S. government.

After Jaffe's abduction, the Canadian government sent a number of diplomatic notes to the United States protesting the bond company's action.[82] In

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to the United States. Canada officially protested and Anderson was returned to Canadian soil within six days.

77. Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987).

78. *Id.*

79. *Id.* The initial extradition requests were denied by the judge because of form. The State made no other requests. *Id.*

80. *Id.*

81. *Id.* Over time, *Jaffe* became procedurally more complex. Jaffe was acquitted of the failure to appear charge for the pretrial but convicted of failure to appear at trial and of fraudulent land sales. He appealed the conviction on the grounds that the court lacked jurisdiction because of the manner in which he was brought before it. While incarcerated and awaiting appeal, Jaffe also commenced a federal habeas corpus action alleging the illegality of his imprisonment by virtue of violation of the U.S.-Canada Extradition Treaty. Initially, the federal action was dismissed for failure to exhaust state remedies. In the interim between dismissal and appeal, the Florida Court of Appeals reversed Jaffe's conviction on the land deals but affirmed the conviction for failure to appear. Jaffe's state remedies then *were* exhausted, and the order dismissing the federal action was vacated. While Jaffe was in jail for his failure to appear conviction, the State of Florida filed a new charge of organized fraud stemming from the same land sales transactions. Pending appeal of the habeas corpus action (and following the letter from Secretary Schultz, *see infra* note 83), Jaffe was released from custody and allowed to again post bail, this time on the fraud charges. He again went to Canada. This time he was not returned to Florida. Because Jaffe is technically still a fugitive from justice in the state of Florida the federal courts to this point have declined jurisdiction of his case. "A party in contempt is . . . not entitled to a hearing or a trial of his cause out of which the contempt arose until he purges himself of the contempt." Jaffe v. Snow, 610 So. 2d 482, 487 (Fla. Dist. Ct. App. 1992). An interesting side note to this ruling is that it arose out of an attempt by Jaffe to enforce a Canadian court's award of monetary damages from the original bond company stemming from the company's abduction of Jaffe. Among other things, the Jaffes charged loss of consortium. The federal court also declined to enforce the Canadian judgment. *Id.*

82. Brief for Canada, *supra* note 58. "In some fifteen diplomatic notes dating from 1981 to 1986, the Canadian government alleged that the abductors had acted pursuant to a plan promoted by officials of the State of Florida and under color of authority of that state and demanded Jaffe's return . . . ." *Id.*

response, Secretary of State George Schultz sent a letter to the Florida Department of Corrections, requesting Jaffe's release.[83] Florida released Jaffe and he returned to Canada.[84]

The intervention by the federal government and the letter from Secretary Schultz, along with the history of U.S.-Canada relations, demonstrated, according to Canada, that the federal government believed the Extradition Treaty to be the only acceptable means of obtaining custody of fugitives.[85] However, the fact that Jaffe was tried at all, especially in light of the Canadian belief that the abduction plan was fostered by the State of Florida,[86] was evidence that the individual states do not necessarily follow federal policy.

Considering the length of the U.S.-Canada border,[87]the fact that Canada borders some fifteen different states,[88]and the ease of border crossing,[89] Canada's concern about state and local governments or agencies is well founded. For Canada, the implications of *Alvarez-Machain* extend well beyond the facts of the case.[90] A ruling in favor of Alvarez-Machain gives the force of national law to Canadian Treaty expectations. A ruling against Alvarez-Machain lessens federal ability to require local authorities to respect international sovereignty.

IV. THE SUPREME COURT DECISION IN ALVAREZ-MACHAIN

Since the Supreme Court is primarily a court of appellate jurisdiction,[91] any discussion of its decisions must necessarily include a discussion of the lower

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83. Brief for Canada, *supra* note 58, *quoting* Statement of Secretary Schultz, June 22, 1983: "As no good reason appears why the Extradition Treaty was not utilized to secure Mr. Jaffe's return, it is perfectly understandable that the Government of Canada is outraged by his alleged kidnapping, which Canada considers a violation of the treaty and of international law, as well as an affront to its sovereignty."

84. Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987).

85. Brief for Canada, *supra* note 58.

86. *See supra* note 82.

87. *See supra* note 64.

88. The border states include Washington, Idaho, Montana, North Dakota, Minnesota, Wisconsin, Michigan, New York, Vermont, New Hampshire, Maine, and Ohio and Pennsylvania (which are separated from Canadian soil only by Lake Erie). All-New Hammond World Atlas, 1993.

89. *See supra* note 64.

90. *See supra* note 65.

91. U.S. Const. art. III, § 2, cl. 2. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

court rulings forming the basis of appeal. In *Alvarez-Machain,* violation of an extradition treaty was the dispositive issue before both the district court[92] and the court of appeals, but both courts examined broad questions involving the application of international law.[93]

Procedurally, attorneys representing Alvarez-Machain in district court moved to have charges dismissed pursuant to the Extradition Treaty between the United States and Mexico.[94] The motion claimed the manner in which Alvarez-Machain was brought before the court was a per se violation of the Extradition Treaty, denying the U. S. courts personal jurisdiction. They also claimed the appropriate remedy for violation was Dr. Alvarez-Machain's repatriation to Mexico.[95] The District Court found this argument persuasive, dismissed the indictment, and ordered the defendant released.[96] After being affirmed by the Ninth Circuit Court

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92. United States v. Caro-Quintero, 745 F. Supp. 599, 614 (C.D. Cal. 1990).

93. United States v. Alvarez-Machain, 946 F.2d 1466, 1466-67 (9th Cir. 1991) (per curiam), *rev'd,* 112 S.Ct. 2188 (1992).

94. *Caro-Quintero,* 745 F. Supp. at 601 (1990). Alvarez-Machain also argued violations of due process under the Fifth Amendment to the U.S. Constitution, violation of the charters of both the United Nations and the Organization of American States, and that his release should be granted pursuant to the court's supervisory powers. *Id.* Since treaty violation was the central issue on appeal, this Comment concerns itself primarily with that aspect of the case. Alvarez-Machain was not the first defendant in the case to assert this defense. Another defendant, Rene Verdugo-Urquidez also claimed the United States violated the Extradition Treaty. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *rev'd sub nom.* Alvarez-Machain, 112 S. Ct. 2188 (1992). Actually treaty violation was the second defense asserted by Verdugo. Originally Verdugo asserted violation of his Fourth Amendment rights. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). While investigating the case, U.S. government agents illegally searched Verdugo's house in Mexico, seizing evidence. Verdugo sought to have the evidence suppressed on Fourth Amendment grounds. The case reached the Supreme Court where the majority held that an illegal search conducted outside the United States did not implicate the Fourth Amendment rights of an alien national. *Verdugo,* 494 U.S. 259. Because he was forcibly brought to the United States (in a manner similar to Alvarez-Machain), Verdugo again appealed, this time on the theory of Extradition Treaty violation. *Verdugo* reached the Ninth Circuit Court of Appeals before *Alvarez-Machain.* That court's decision in Verdugo's favor formed the basis for its opinion in *Alvarez-Machain.* The Supreme Court disposed of both *Verdugo* and *Alvarez-Machain* at the same time. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

95. *Caro-Quintero,* 745 F. Supp. at 614.

96. *Id.* It should be noted that, unlike Alvarez-Machain's claim, Verdugo's treaty violation claim was rejected in the District Court and the case proceeded on the merits, finding the defendant guilty. *Verdugo,* 939 F.2d at 1343. In their motion for dismissal, attorneys for Alvarez-Machain, distinguished *Verdugo* in that Verdugo's abductors were actually officials of the Mexican Federal Judicial Police acting in their official capacity in cooperation with the DEA, while Alvarez-Machain's abductors were acting outside any official capacity and as paid agents of the DEA. The contradictory rulings in the two cases, rendered by the same district court judge, were

of Appeals,[97] the case reached the Supreme Court. The Supreme Court, however, reversed the lower courts' rulings and ordered proceedings on the merits.[98] On remand, the charges were again dismissed, this time for lack of evidence.[99] Alvarez-Machain eventually returned to Mexico, but the tensions created by the Supreme Court decision continue.[100]

In examining the Supreme Court decision, it is important to understand the restrictions that faced the Court, primarily because the restrictions were self-imposed. *Alvarez-Machain* was a case of first impression.[101] The submitted

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explained by the Ninth Circuit in its *Verdugo* opinion: "Subsequently, in a case presenting the identical issue and arising out of the same underlying criminal occurrences, the same district judge, Judge Rafeedie, conducted further legal research on his own, and reached the opposite conclusion." *Verdugo*, 939 F.2d at 1343 n.1.

97. *Verdugo*, 939 F.2d at 1341.

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

99. Bush, *supra* note 13, at 941 n.9. At the end of the prosecution's case, the trial judge concluded that the U.S. government had engaged in "wild speculation." The Immigration and Naturalization Service attempted to further detain Dr. Alvarez-Machain, but ultimately he was repatriated to Mexico. *Id.*

100. *See supra* notes 13 and 14. The newspaper headlines are indicative of the reaction to the decision. In addition, Dr. Alvarez-Machain recently filed a twenty million dollar civil lawsuit against the U.S. government. *See, e.g., Kidnapped Mexican Doctor Sues U.S. Drug Agency Officials*, Chi. Trib., July 10, 1993, at 13; *Doctor Kidnapped by DEA Files $20-Million Claim*, Los Angeles Times, July 10, 1993, at A21.

101. *Alvarez-Machain*, 112 S. Ct. at 2191. "Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty, and proceedings against a defendant brought before a court by means of a forcible abduction." *Id.* The Court was, therefore, free to decide the case on its own merits. That the Court elected to disregard the implications of international law and examine only the language of the treaty itself and the history of its application, was a voluntary restraint. That the Court should so restrain itself is not surprising in light of some of its recent decisions in various areas of law. In Webster v. Reproductive Health Services, 492 U.S. 490 (1989), the Court deferred to the power of an individual state to enact statutes regulating the health and safety of its citizens, declining to hold unconstitutional a Missouri statute regulating the performance of abortions. In South Dakota v. Dole, 483 U.S. 203 (1987), the Court upheld Congress' power to withhold federal funds from the States under Art. I, § 8 of the U.S. Constitution. In Dames & Moore v. Regan, 453 U.S. 654 (1981), the Court deferred to the power of the President in conducting foreign affairs. Each of these decisions considered the doctrine of separation of powers. Each of the opinions was authored by Chief Justice Rehnquist, the author of the opinion in *Alvarez-Machain.* The refusal of the Court in *Alvarez-Machain* to consider broad questions of international law is consistent with recent decisions. In answer to Alvarez-Machain's arguments, Chief Justice Rehnquist wrote "the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch." *Alvarez-Machain*, 112 S. Ct. at 2196. In other words, the Court did not decide what the government *should* do, only what it *could* do under the terms of the Treaty.

briefs discussed broad issues of international law.[102] As in the lower courts, the dispositive issue was treaty violation,[103] but unlike the lower courts, the Supreme Court chose an even more restrictive approach, relying almost exclusively on the plain language of the Treaty itself.[104] In order to better understand this approach, a discussion of the decision should begin at the district court level.

A. The District Court Decision

When *Alvarez-Machain* was argued in the federal district court, Judge Edward Rafeedie, the trial judge, found that the attorneys' briefs submitted in the case offered little help in resolving what he deemed to be the major issues.[105] Judge Rafeedie, therefore, undertook independently to research the case.[106] The result was a thorough opinion that explained the issues and the legal basis of the decisions on each.

The defendant argued that the charges against him should be dismissed because, first, the United States engaged in outrageous government conduct which denied him due process of law[107] and second, the abduction violated the

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102. *See supra* notes 15, 16, 38, 43, 55, 58, 59, 68 and accompanying text.

103. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2190 (1992). "The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Id.*

104. *See supra* note 60.

105. United States v. Caro-Quintero, 745 F. Supp. 599, 601 n.2 (C.D. Cal. 1990). "These briefs have provided the Court with little assistance toward resolving the issues raised by defendant's motion." *Id.*

106. United States v. Alvarez-Machain, 946 F.2d. 1466, 1466 n.1 (9th Cir. 1991) (per curiam), *rev'd*, 112 S.Ct. 2188 (1992).

107. *Caro-Quintero*, 745 F. Supp. at 601. "Dr. Machain argues that this Court lacks jurisdiction over him because his abduction denies him due process of law as guaranteed by the fifth amendment." *Id.* at 604. Judge Rafeedie noted that the *Ker-Frisbie* doctrine, *see infra* note 112, "established the long standing rule of law that a forcible abduction does not offend due process and does not require that a court dismiss an indictment for the loss of jurisdiction on those grounds." *Id.* However Judge Rafeedie also noted that "the Second and Ninth Circuits have recognized an exception to the *Ker-Frisbie* Doctrine. The Second Circuit requires a court to divest itself of jurisdiction over the defendant where the defendant establishes governmental conduct 'of the most shocking and outrageous kind,'" *citing* United States *ex rel* Lujan v. Gengler, 510 F.2d. 62, 65-66 (2d. Cir. 1975) *cert. denied*, 421 U.S. 1001 (1975), *id.* at 605. In the case of Alvarez-Machain, the court found that the government's conduct did not meet the standard to warrant an exception. "While the Court finds that Dr. Machain's abductors were paid agents of the United States, Dr. Machain's allegations

Extradition Treaty between the U.S. and Mexico which took effect January 25, 1980.[108] The district court denied the defendant's due process claim,[109] but held the abduction did in fact violate the Extradition Treaty.[110]

In denying the due process claim, Judge Rafeedie examined the *Ker-Frisbie* doctrine.[111] In *Ker*, the defendant, a fugitive U.S. citizen, was kidnapped in Peru by a Pinkerton detective and brought back to Illinois to face criminal charges.[112] The defendant claimed a violation of both his due process rights[113] and the Extradition Treaty with Peru.[114] The Supreme Court in *Ker* flatly rejected the due process claim.[115] With regard to the treaty claim, the Court said, "We think it very clear, therefore, that, in invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the

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of mistreatment, even if taken as true, do not constitute acts of such barbarism as to warrant dismissal of the indictment . . . . " *Id.*

108. *Caro-Quintero*, 745 F. Supp. at 606.

109. *Id.*

110. *Id.* at 614.

111. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2192 (1992). The *Ker-Frisbie* doctrine was the foundation upon which the Supreme Court majority ultimately based its opinion. The doctrine gets its name from two cases which uphold the court's jurisdiction over a defendant regardless of the manner by which custody of the defendant is obtained, Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952).

112. Ker v. Illinois, 119 U.S. 436 (1886). The Pinkerton detective had all of the necessary extradition papers in his possession. However, Peru's capital was occupied at the time by hostile forces of the Chilean army. The detective elected to forego extradition and kidnap the defendant. *Id.*

113. *Id.* at 439.

114. *Id.* at 441.

115. *Id.* at 440. "The 'due process of law' here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled." *Id.*

United States, he has failed to establish the existence of any such right."[116] Ker's conviction was upheld.[117]

Frisbie presented a slightly different problem.[118] While *Ker* implied that government involvement in the abduction might have changed the outcome of the case,[119] *Frisbie* extended the doctrine to include some forms of government involvement, at least domestically.[120] In *Frisbie,* the defendant, Shirley Collins, was being held in a Michigan state penitentiary after having been convicted in a state criminal proceeding.[121] Collins filed a federal habeas corpus action, alleging that his imprisonment was obtained in violation of the Federal Kidnapping Act.[122] Here, the abduction was carried out in Illinois by Michigan police officers.[123] Writing for a majority of the Supreme Court, Justice Black reaffirmed the rule of *Ker,* holding that the manner in which Collins was brought before the court presented no bar to his prosecution, even in light of the Federal Kidnapping Act.[124]

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116. *Id.* at 443. Here again the notion arises that a treaty is a contract between nations and does not confer rights upon individuals. *See supra* note 43 and accompanying text. A hint of the kind of plain meaning approach used by Chief Justice Rehnquist in *Alvarez-Machain* is also visible in the *Ker* opinion. Compare, for example, the following excerpts from the *Ker* opinion and Chief Justice Rehnquist's opinion in *Alvarez-Machain.* "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled . . . ." Ker v. Illinois, 119 U.S. 436, 442 (1886). "The Treaty says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs." United States v. Alvarez-Machain, 112 S. Ct. 2188, 2189 (1992). The examination of the express language (or lack thereof) contained in the treaty is the same in both cases. *See also supra* note 60.

117. *Ker,* 119 U.S. at 445.

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

119. *Ker,* 119 U.S. at 443. "[I]t was a clear case of kidnapping within the dominions of Peru, without any pretense of authority under the treaty or from the government of the United States." *Id.*

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

121. *Id.* at 519-20.

122. *Id.* at 520. Federal Kidnapping Act, 47 Stat. 326, (current version at 18 U.S.C. § 1201).

123. Frisbie v. Collins, 342 U.S. 519, 520 (1952). While Collins was living in Chicago, Michigan officers "forcibly seized, handcuffed, blackjacked, and took him back to Michigan." The court took judicial notice of the fact that in order to do this, Michigan officers must necessarily cross state lines. *Id.*

124. *Id.* at 522-23. "This Court has never departed from the rule announced in [Ker v. Illinois], that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" The Court reasoned that a contrary decision would require the implication of a term into the Kidnapping Act, an action the Court was unwilling to take. "This [The Federal Kidnapping Act] prescribes in some detail the severe sanctions Congress

On the strength of these two decisions, Judge Rafeedie found that, all the procedural safeguards due Alvarez-Machain had been provided and, therefore, the requirements of due process had been satisfied.[125] But within the context of the Extradition Treaty, the abduction of Alvarez-Machain presented the judge with a more difficult problem.

Judge Rafeedie began his analysis by concluding that treaties are, by definition, the supreme law of the land.[126] Therefore, a treaty violation would deny U.S. courts jurisdiction over the defendant.[127] If the United States were found to have violated the Extradition Treaty with Mexico, the court would have no jurisdiction to try Alvarez-Machain. After examining the facts of *Ker* and the case at bar, Judge Rafeedie found the case of Alvarez-Machain to be sufficiently distinguishable so as to constitute such a violation.[128] In dismissing the government's argument that the abduction did not constitute a treaty violation, Judge Rafeedie said:

> The government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for

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wanted it to have . . . . We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers." *Id.* The facts of *Frisbie* differed somewhat from *Ker* in that *Frisbie* involved interstate, not international, abductions and the alleged violation of a federal domestic statute, not an international treaty. However, the Court apparently felt the two situations were sufficiently analogous to allow the application of the *Ker* rule.

125. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990). *See also supra* note 107.

126. *Id.* at 606.

127. *Id.* at 614. "Under international law, a state that has violated an international obligation to another state is required to terminate the violation and make reparation to the offended state." *Id.* (citation omitted).

128. *Id.* at 606. "The [*Ker*] doctrine has no application to violations of federal treaty law." *Id.* "The United States is responsible for the actions of its paid agents, and a unilateral abduction by the United States when combined with an official protest from the government of Mexico constitutes a violation of the extradition treaty between these two sovereigns." *Id.* at 609. In deciding that *Ker* was not applicable to cases of treaty violation, Judge Rafeedie relied on several U.S. Supreme Court cases, all of which affirmed that rule, including: Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1933); and United States v. Rauscher, 119 U.S. 407 (1886) (decided the same day as *Ker*). Judge Rafeedie considered United States v. Toscanino, 500 F.2d 267 (2d. Cir. 1974) and United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927). In holding that the abduction did in fact violate the treaty, the judge looked to authority concerning international law including the charters of the U.N. and the O.A.S. *See supra* notes 38-39, and M. Bassiouni, International Extradition: United States Law & Practice 71-72, 74 (2d ed. 1987). On standing, Judge Rafeedie said, "Accordingly, Dr. Machain has derivative standing to invoke [the Treaty's] rights. The legality of Dr. Machain's abduction is therefore squarely before the court." *Caro-Quintero*, 745 F. Supp. at 608-609. *See also supra* note 42.

> which the individual was extradited (the doctrine of specialty), but not when a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is absurd.[129]

Dr. Machain was ordered released and repatriated.

B. The Decision of the Court of Appeals

When *Alvarez-Machain* came before the Ninth Circuit, it was the second time that court addressed the issue of extraterritorial abduction.[130] In a two page opinion, that relied heavily on its previous ruling in *Verdugo*, the Court upheld Judge Rafeedie's decision.[131] However, the Court noted a distinction between *Verdugo* and *Alvarez-Machain*, a distinction that worked in Alvarez-Machain's favor. The Court considered important the fact that the Mexico officially protested the abduction to the United States.[132] As Judge Rafeedie previously noted, such a protest would satisfy the notion of standing,[133] but especially important to the Ninth Circuit, an official Mexican protest would also eliminate the basis for dissent previously used by Judge Browning in *Verdugo*.[134] Thus,

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129. *Caro-Quintero*, 745 F. Supp. at 610.

130. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir.) (per curiam), *rev'd*, 112 S.Ct. 2188 (1992) and United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *rev'd sub nom.* Alvarez-Machain, 112 S.Ct. 2188 (1992). *Alvarez-Machain* was decided on October 18, 1991. *Verdugo* was decided July 22, 1991. *See also supra* note 94.

131. *Alvarez-Machain*, 946 F.2d 1466. In *Verdugo*, the Court of Appeals held that if the extradition treaty had been violated jurisdiction would be improper. However, the facts of *Verdugo* were insufficient to determine the extent of U.S. government involvement in the case. The case was sent back to the district court for evidentiary hearings on the matter. In *Alvarez-Machain*, the appeals court found that "[i]n this case, the requisite findings of United States involvement in the abduction have already been made." *Alvarez-Machain*, 946 F.2d at 1467.

132. *Id.* "An additional distinction between this case and *Verdugo* is that in this case the Mexican government has made several specific formal diplomatic protests to the United States government." *Id.*

133. *See supra* note 42.

134. *Verdugo*, 939 F.2d at 1364. Judge Browning felt that the record was insufficient to permit the Court to reach a conclusion. "In my opinion, [the issue of derivative standing for Verdugo] should be remanded to the district court for initial consideration." *Id.* In *Alvarez-Machain*, the district judge had already made all of the necessary findings of fact.

when *Alvarez-Machain* went before the Supreme Court, it carried with it a unanimous Appeals Court decision.[135]

C. The Supreme Court Decision

The Supreme Court opinion, authored by Chief Justice Rehnquist, focused on the language of the U. S.-Mexico Treaty.[136] The opinion referred to several clauses and articles to which, interestingly enough, the respondent also made reference, particularly article nine.[137] However, while the respondent and his amici argued that the Treaty should be read in light of prevailing international law,[138] the Court chose to examine the words themselves.[139] The Court's decision to do this effectively had two direct results: (1) it removed the respondent's main arguments from consideration[140] and, (2) it allowed the Court

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135. United States v. Alvarez-Machain, 946 F.2d. 1466 (9th Cir.) (per curiam), *rev'd*, 112 S.Ct. 2188 (1992) "[T]he facts of this case would also satisfy the concerns set forth in Judge Browning's separate opinion in *Verdugo*." *Id. See also supra* note 132.

136. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193 (1992). "If we conclude that the Treaty does prohibit respondent's abduction, the rule in *Ker* applies, and the court need not inquire as to how the respondent came before it. In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning." *Id.*

137. *Id.* at 2194; Brief for Respondent, *supra* note 52 at n.2. Article nine of the Mexican Treaty specifically deals with the issue of extradition of nationals. *See also supra* notes 54-56 and accompanying text.

138. Brief for Mexico, *supra* note 15. *See also supra* note 38.

139. *Alvarez-Machain*, 112 S. Ct. at 2194. "More broadly, respondent reasons . . . that all the processes and restrictions on the obligation to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnapping . . . in a manner not contemplated by the Treaty. We do not read the Treaty in such a fashion. Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country . . . ." *Id.* (citation omitted).

140. Brief for Respondent, *supra* note 52 at n.18. Respondent's most basic argument is:

> [T]reaties must be interpreted in light of relevant rules of public international law. In this case, that interpretive mandate means that the presumption must be that extraterritorial abductions are illegal unless they are specifically authorized, not that they are presumptively authorized unless explicitly prohibited. Given this customary law backdrop to the Treaty, there was no reason for Mexico to insist on a specific treaty provision explicitly prohibiting the United States from abducting Mexican nationals from Mexican territory.

Id.

to remain consistent in its recent approach to the respective roles of the different branches of government regarding the operation of the separation of powers doctrine.[141]

Alvarez-Machain sought to overcome the lack of express language banning abductions in the Treaty by suggesting the Court imply such a term into it, citing *United States v. Rauscher* as authority.[142] Again, the Court rejected the argument saying:

> In *Rauscher*, the implication of a doctrine of specialty into the terms of the Webster-Ashburton Treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits

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However, in response to this general argument, the Court said, "This [the central theme of respondent's authorization argument] misses the mark, however, for the Government's argument is not that the Treaty authorizes the abduction of respondent; but that the Treaty does not prohibit the abduction." United States v. Alvarez-Machain, 112 S. Ct. 2188, 2194 n.11. By characterizing respondent's argument as missing the point, the Court, in effect, dismissed it.

141. *Alvarez-Machain*, 112 S. Ct. at 2191; *see supra* note 101. The Chief Justice's deferral to the Executive Branch also implicates the political question doctrine as explained in Baker v. Carr, 369 U.S. 186 (1962). In that case, Justice Brennan announced a test to determine whether a case presents a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

The Constitution empowers the President and the Executive Branch "with the Advice and Consent of the Senate, to make Treaties . . . ." U.S. Const. art. II, §2, cl.2. The Court and then Associate Justice Rehnquist considered the political question doctrine with respect to treaties in Goldwater v. Carter, 444 U.S. 996 (1978). While Chief Justice Rehnquist does not expressly state any one reason for his deferral to the Executive Branch in *Alvarez-Machain*, either of these two doctrines would appear to be sufficient reason for the deferral and consistent with his past opinions.

142. United States v. Rauscher, 119 U.S. 407 (1886). In discussing *Rauscher*, Alvarez-Machain asserted that "[i]f the government's proposed requirements of explicit prohibitions and explicit remedies were accepted, [*Rauscher*] would be overruled." Brief for Respondent, *supra* note 52.

> obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it.[143]

Having declined to go beyond the language of the Extradition Treaty to imply a term and finding that the language says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs,[144] the Court found the Extradition Treaty no bar to prosecution. The decision of the Ninth Circuit Court of Appeals was reversed.[145]

Unlike the Ninth Circuit, however, the Supreme Court decision was not unanimous.[146] In fact, no criticism of the majority opinion is more scathing than the dissent filed by Justice Stevens. Justice Stevens disparaged the majority's reasoning, stating that *Alvarez-Machain*

> does not involve an ordinary abduction by a private kidnaper, or bounty hunter, as in *Ker v. Illinois*; nor does it involve the apprehension of an American fugitive who committed a crime in one State and sought asylum in another, as in *Frisbie v. Collins*. Rather, it involves this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty.[147]

According to Justice Stevens, this alone was sufficient to distinguish *Alvarez-Machain* from the *Ker-Frisbie* line of cases. However, Justice Stevens also claimed that a refusal to imply a term prohibiting abductions into the Treaty was inconsistent with other Supreme Court decisions, including *Rauscher*.[148] Justice Stevens continued this line of reasoning to the extreme, concluding that perhaps torture and even murder would be viable options under the majority decision.[149]

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143. *Alvarez-Machain*, 112 S. Ct. at 2196.

144. *Id.* at 2193.

145. *Id.* at 2197.

146. *Id.* Justice Stevens filed a dissenting opinion joined by Justice Blackmun and Justice O'Connor.

147. *Id.* (citations omitted).

148. *Id.* at 2198 n.4. Justice Stevens quoted language from the Court's decision in Air France v. Saks, 470 U.S. 392 (1985), which stated that a court has the "responsibility to give the specific words of a treaty a meaning consistent with the shared expectations of the contracting parties." He also said, "It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance — the stated goals of the [Mexican] Treaty." *Id.*

149. *Id.* at 2199. "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

Finally, Justice Stevens concluded his dissent with a quote from Justice Brandeis' dissent in *Olmstead v. United States*:[150]

> In a Government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare 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 criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[151]

This is an unusually harsh view of the majority opinion. A more sympathetic reading of the opinion might be that if the Treaty was intended to prevent governmentally sponsored abductions and by its terms does not, then it is a bad treaty. The responsibility for rectifying a flawed treaty, according to the majority, rests with the Executive Branch, not with the courts.[152] The majority opinion could be construed as an appeal to the Executive Branch to take action to correct the flaw. Unfortunately, this view is not shared by the United States' two closest neighbors, Mexico and Canada.[153]

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would be equally available because they, too, were not explicitly prohibited by the Treaty." *Id.*

150. Olmstead v. United States, 277 U.S. 438 (1928).

151. *Id.*

152. This interpretation of the majority opinion would be consistent with the separation of powers and political question approach and is discussed *supra* at notes 99 and 139.

153. While the Supreme Court decision may be viewed sympathetically, documents that have recently been made public lend support to the view that the U.S. government may have had more sinister motives. Michael Isikoff, *U.S. Power on Abductions Detailed; Controversial Justice Dept. Memo Asserts Authority to Act Overseas*, Wash. Post, Aug. 14, 1991, at A14. Isikoff revealed the contents of a 1989 Office of Legal Counsel opinion, authored by then Assistant Attorney General William Barr, stating that in response to the threat of international terrorism and narcotics trafficking the President and the Attorney General have the power to authorize law enforcement actions in foreign countries, even if the actions violate international treaties. Isikoff also asserted that the opinion was relied upon by the Bush administration in its invasion of Panama. The opinion, according to Isikoff, calls "erroneous" a 1980 opinion written by then Assistant Attorney General John Harmon which concluded that FBI agents had no authority to apprehend fugitives in a foreign country without the consent of the government of that foreign country. Interestingly, the U.S. government attempted to keep the opinion secret, claiming that its release would harm the government's position in then pending cases, including the case against General Manuel Norriega, by giving the defense lawyers ideas about possible weaknesses in

VI. PROPOSED SOLUTIONS

The international relations of the United States with Canada and Mexico are at an important stage.[154] A decision such as *Alvarez-Machain* could have a far-reaching impact on these relations, an impact well beyond the facts of the case.[155] Mexico intimated that U.S.-Mexico cooperative efforts could be endangered.[156] Canada, reminding the United States that "[a]pproximately half of

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the government's arguments. The Justice Department negotiated a limited release of the opinion in response to a threatened subpoena from the House Judiciary Committee. *Id.*

154. One of the primary reasons for this importance is the recent vote in Congress on the North American Free Trade Agreement (NAFTA). The Act was passed and signed into law, but much work remains before it is fully implemented. The closeness of the vote indicates that there are still significant portions of the population of the United States opposed to many of the agreement's provisions. There is fear that NAFTA will result in the loss of American jobs. Helen Dewar, *Senate Gives the Nod to Free Trade Agreement*, Chi. Sun-Times, Nov. 21, 1993, at 33. Media coverage of the uprising in southern Mexico, linking it to NAFTA, indicates opposition may extend well beyond the U.S. borders. *Peasant Uprising Kills 65 in Mexico; Revolt Timed to Coincide with NAFTA*, Chi. Trib., Jan. 3, 1994, at 1. While the implications of NAFTA are beyond the scope of this Comment, commentators generally agree that the stakes are high. Al Neuharth, the founder of USA Today, has said, "If the USA gets NAFTA going now, we can lead the way in forging that American [trading] bloc. If we do not, our business interests ultimately will take a beating. From Europe. Or Asia. Or both." Al Neuharth, *If We Nip NAFTA, Europe, Asia Win*, USA Today, May 28, 1993, at A13. Representative Lee Hamilton, Chairman of the House Committee on Foreign Affairs said, "Perhaps most damaging, rejecting the agreement would lessen America's international influence. It would signal a retreat from our commitment to basic principles of free trade and the value of competition and undermine U.S. trade-negotiating credibility. What foreign government would be confident that it would be rewarded for taking painful steps to address U.S. trade demands? Such a defeat would reduce President Clinton's stature and limit his ability to conduct U.S. foreign policy." Lee H. Hamilton, *NAFTA: Whose Interests Would be Served? U.S. Economy, Foreign Policy Will Benefit*, Chi. Trib., Aug. 19, 1993, at 23. Representative Hamilton recognized the interdependence of foreign relations and domestic law and policy. *Id.* While it has been said that "it is considered unlikely that the trial [of Alvarez-Machain] could undermine NAFTA," it has also been said that the trial comes "at a time when the United States is changing administrations and the North American Free Trade Agreement (NAFTA) remains unsigned." Lou Cannon, *Two Camarena Defendants Go on Trial; Mexico Protests Prosecution of Physician "Kidnapped" in Guadalajara*, Wash. Post, Dec. 3, 1992, at A3. Clearly the connection between the two events has been publicly drawn.

155. *See supra* notes 17, 65, 101, 149, 151, 152 and accompanying text.

156. Brief for Mexico, *supra* note 15 at n.1. Referring to the diplomatic notes of protest sent by Mexico to the United States in the aftermath of the abduction, Mexico said, "If it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered." *Id.*

all American requests for extradition are made to Canada,"[157] said that "[i]n the long run, [a decision against Alvarez-Machain] would breed suspicion and lack of cooperation in the enforcement of criminal laws."[158] In light of the possible consequences, what then is the answer? Several possibilities have been proposed.

The first answer is simply to renegotiate the Extradition Treaty between the United States and Mexico.[159] In June of 1993 the United States and Mexico announced that such negotiations had begun.[160] However, two problems are inherent in this solution. First, renegotiating the Treaty with Mexico does nothing to allay Canadian fears.[161] The Supreme Court looked to the language of the Treaty in making its decision in *Alvarez-Machain*.[162] The terms of the Canadian Treaty are similar in language to the Mexican Treaty.[163] Renegotiating the Mexican Treaty, therefore, does nothing to prevent a future Canadian problem. Second, one of the concessions being sought by the U.S. negotiators in the talks with Mexico is a relaxation of the Mexican rule against extraditing nationals.[164] Since Mexico's rule is statutory in nature,[165] any relaxation of that rule would require a revision of Mexican law, possibly with constitutional overtones.[166] While such a result may be possible to achieve, it would be difficult because the United States necessarily exercises less control over the actions of a foreign government than it does over its own.[167]

If renegotiating a single treaty is viewed as too restrictive to be of much use in general international relations, a second possibility might be to renegotiate all U.S. extradition treaties. Certainly this method would address the concerns of all

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157. Brief for Canada, *supra* note 58.

158. *Id.*

159. Such an approach can be inferred from the Mexican Foreign Ministry statement as quoted by David Clark Scott, *supra* note 14. *See also supra* note 17.

160. *U.S., Mexico Agree to Ban Abductions*, The Plain Dealer (Cleveland), June 22, 1993, at A4; *U.S., Mexico to Seek Ban on Abduction of Suspects; Justice: Operations Like DEA's 1990 Seizure of Doctor in Mexico Would Be Outlawed; Negotiations Remain*, Los Angeles Times, June 22, 1993, at A1; *U.S. and Mexico Plan Talks on Extradition; End to Abduction of Criminal Suspects Sought*, Wash. Post, June 22, 1993, at A15. The Post story stated that negotiations were begun at Mexico's request and that Mexico hoped the issue would be resolved by the end of summer of 1993. *Id.*

161. *See supra* note 65.

162. *See supra* note 60, 68, 136, 139 and accompanying text.

163. *See supra* notes 66, 67, 69 and accompanying text.

164. *U.S. and Mexico Plan Talks on Extradition; End to Abduction of Criminal Suspects Sought*, *supra* note 160.

165. *See supra* notes 36, 37, and 55.

166. *Id.*

167. Such a change in Mexican law must necessarily include the Mexican legislature and judiciary as well as the executive branch of the Mexican government. Since Mexico publicly announced its hope that the problem would be solved by summer's end, a scant three months away from the announcement, *see supra* note 156, it must be considered that Mexico did not fully understand the nature of the requested concession or did not take the U.S. request seriously.

the nations with whom the United States currently extradites fugitives. However, since the United States currently has extradition treaties with one hundred and fourteen countries,[168] renegotiating each of those can hardly be considered the least costly or least time consuming alternative.

A third suggestion is that Congress might enact legislation prohibiting the government from conducting extraterritorial abductions under any circumstances, absent consent from the nation in whose territory the abduction takes place: in effect, a total ban on abductions.[169] This solution, while preventing a reoccurrence of the situation in *Alvarez-Machain,* would also remove the power of the President to act under circumstances where the act is not currently prohibited by international law.[170] Moreover, the total removal of abductions as an alternative may encourage the government to engage in even more serious behavior, such as assassination.[171]

Finally, it has been suggested that the problem can be solved by a legislative overruling the *Ker-Frisbie* doctrine.[172] In fact, the Court acknowledged that such an action would be preferable to judicial action.[173] Such an approach would also

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168. Jaqueline A. Weisman *Extraordinary Rendition: A One-Way Ticket to the U.S. . . . Or Is It?* 41 Cath. U. L. Rev. 149, 149 n.9 (1992).

169. Glennon, *supra* note 69, at 752. Glennon also suggests that Congress might enact a limited ban, "leaving the law silent with respect to situations not covered but specifying circumstances in which the President is precluded by law from proceeding without prior statutory approval." *Id.*

170. The majority opinion in *Alvarez-Machain* recognizes situations in which international law is no bar to one country exercising its authority in another country.

> Respondent would have us find that the Treaty acts as a prohibition against 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 be seriously contended that an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations.

United States v. Alvarez-Machain, 112 S. Ct. 2188, 2196 (1992). In addition, other situations are recognized in which an abduction would not be a violation of international law, such as the abduction of terrorists. Halberstam, *supra* note 13, at 736 n.5.

171. Glennon, *supra* note 69, at 754. "Arguably, however, an absolute ban against abduction could encourage more egregious means of self-help, including assassination." *Id.*

172. *Id.* at 752.

173. Frisbie v. Collins, 342 U.S. 519 (1952). "We think the [Federal Kidnapping] Act cannot be fairly construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot." *Id.*

be consistent with the separation of powers doctrine that seems to be a recurring element of the Court's recent opinions.[174]

Professor Michael J. Glennon suggests that a statute reflecting the language of provisions of the Harvard Research in International Law[175] might be effective in accomplishing this goal.[176] That language is, in part, as follows:

> 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.[177]

The advantage of this type of statute is that it addresses the practicalities of the real world. First, it would remove the confusion surrounding the notions of self-executing versus non self-executing treaties.[178] By enacting a domestic federal statute codifying international law in this area,[179] Congress can make the statute binding on the courts and render irrelevant the issue of whether or not treaty is accompanied by enabling legislation.

Second, such a statute would remove from consideration the issue of standing.[180] By placing the restriction against prosecuting individuals on the

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174. *Alvarez-Machain*, 112 S. Ct. at 2191. *See also supra* note 101.

175. Harvard Research in International Law, Draft Convention on "Jurisdiction with Respect to Crime," 29 Am. J. Int'l. L. Supp. 435 (1935). *See supra* note 35.

176. Glennon, *supra* note 69, at 752.

177. *Id.* (quoting Harvard Research in International Law, Draft Convention on "Jurisdiction with Respect to Crime," *supra* note 175, art. 16).

178. For a more complete discussion of the confusion over self-executing treaties and its presence in the U.S. court system, see Vazquez *supra* note 42.

179. *See, e.g.*, briefs for the amici curiae, *supra* notes 58-59. These briefs thoroughly explain the concerns of the international community and of scholars of international law.

180. Standing, like the doctrine of self-execution, has been the object of some confusion. *See* Vazquez, *supra* note 42. Moreover, it has been the object of shifting Supreme Court positions. Although with regard to treaties, the standard in the United States has been that the treaty is a contract between nations in which individuals have no inherent rights. *See supra* note 43 and accompanying text. However, in other areas of law, the concept has changed according to the make-up of the Court. Major revisions in the concept of standing were executed by the Warren Court in the 1960s and 1970s. Flast v. Cohen, 392 U.S. 83 (1968), granted standing where there was a "logical nexus between the status asserted and the claim sought to be adjudicated." *Flast*, 392 U.S. at 102. The trend toward liberalizing the concept of standing probably reached its zenith in 1972 when Justice Douglas, in his dissent in Sierra Club v. Morton, 405 U.S. 727 (1972), sided with the Sierra Club. The Sierra Club sought to block development of the Mineral King Valley in California on behalf of the environment. The case gave rise to the now famous article *Should Trees Have*

government, the issue of whether an individual can invoke the treaty as a defense is moot. The matter is one of domestic law, not international treaty.[181]

However, unless language is added that makes the statute applicable only to those countries with whom the United States has an extradition treaty, or creates an exception for those circumstances under which international law condones self-help, problems will remain.[182] Still, the benefits of such a statute arguably outweigh the disadvantages.[183]

VII. CONCLUSION

Although *Alvarez-Machain* was ultimately dismissed and the defendant repatriated to Mexico, the problems the case exemplified still linger. U.S. sanctioned abductions inside the borders of the United States' closest neighbors have not been banned by judicial action. Treaty renegotiations (even if successful) address only one nation at a time and do little to allay the apprehensions of those countries taking no part in them. International confidence in the United States' extradition treaties can therefore be best restored by Congressional action imposing restrictions on the courts' power to try defendants

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Standing?, 45 S. Cal. L. Rev. 450 (1972). Since 1972 the Court has backed away from the liberal trend of the 1960's. *Flast* has been discredited (see Valley Forge Christian College v. Americans for Separation of Church & State Inc., 454 U.S. 464 (1982)), but the point that the issue of standing is subject to change according to the social climate of the times is still valid.

181. In *Alvarez-Machain*, although the issue of standing was argued, the courts held that the official protest of Mexico to the abduction conferred derivative standing on the defendant. By making the matter one of restriction on government action, the question of standing does not arise. *See* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir.) (per curiam), *rev'd*, 112 S.Ct. 2188 (1992).

182. *See supra* note 166.

183. Glennon, *supra* note 69, at 754. Glennon argues that while abduction may be permissible in certain situations under Article 51 of the U.N. Charter:

> It would be extremely difficult, however, to draft statutory language under these circumstances with sufficient precision to avoid the possibility of abuse. That, for example, is why § 2(c) of the War Powers Resolution makes no reference to the President's power to introduce the armed forces into hostilities or imminent hostilities to rescue endangered U.S. nationals abroad. Though many of the House and Senate conferees were sympathetic to the approach of the Senate passed bill (which recognized a limited rescue authority), they were concerned about creating an exception that, in the end, would swallow up the general prohibition. Having participated in that frustrating effort twenty years ago, I doubt that a parallel effort in the context of terrorist abduction would be any easier.

Id.

whose presence has been wrongfully obtained. Such legislation would eliminate the problems caused by the doctrines of self-execution and standing and need not restrict the President's power to react to situations regarding national security.