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When Rights Fall in a Forest . . The Ker-Frisbie Doctrine and American Judicial Countenance of Extraterritorial Abductions and Torture

H. Moss Crystle

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I. Introduction

On August 10, 1990 a federal judge in Los Angeles made a ruling which shocked the government and called into question significant aspects of current American executive policies. Judge Edward Rafeedie of the United States District Court for the Southern District of California held that the abduction[1] of a Mexican National by paid agents of the United States violated a valid extradition treaty between the United States and Mexico.[2] Judge Rafeedie also held that an objection by a foreign government to a violation of an extradition treaty between the United States and that foreign government precludes jurisdiction by American Courts. Invoking a seldom used exception to the one hundred year-old Ker-Frisbie doctrine, Judge Rafeedie ordered the Mexican National released.

The Ker-Frisbie doctrine is the American formulation of the Roman maxim 'male captus, bene detentus', which says that an illegal apprehension will not preclude the exercise of jurisdiction.[3] Though the sweeping judicial acceptance of irregular apprehensions of persons wanted for criminal prosecution tolerated by Ker-Frisbie has been long and roundly criticized,[4] the doctrine continues to be

1. Though some commentators describe this phenomenon as an "extralegal" abduction, because the act of the abduction inevitably violates the domestic law of the asylum state, this Comment will refer to the abduction of Dr. Alvarez and other criminal defendants as an illegal abduction. The terms "abduction" and "kidnapping" will be used interchangeably.

2. Under article 9(2) of the Treaty of Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656, if an extradition request is refused, "the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that the Party has jurisdiction over the offense."

3. *See* Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 45, (1973) for the argument that *male captus, bene detentus* is superceded by two higher maxims of Roman Law; *nunquam decurritur ad extraordinarium sed ubi deficit ordinarium* ("never resort to the extraordinary until the ordinary fails") and *ex injuria ius non oritur* ("no right can arise from the violation of law").

4. *See* Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued* 84 AM. J. INT'L L. 444, (1990); Williams, *Criminal Law — Jurisdiction — Illegal Arrest — Due Process Violation of International Law*, 53 CAN. BAR REV. 404 (1981), 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. 265 (1952)(hereinafter Garcia-Mora), Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*,

utilized in securing American jurisdiction over accused drug traffickers,[5] terrorists,[6] and an occasional Florida land salesman.[7]

This Comment reviews the theories of dismissal which were available to Judge Rafeedie and analyzes the theory he chose. To understand the Judge's reasoning, Part One relates the facts of the abduction of the Mexican National, Dr. Humberto Alvarez Machain. Part Two describes the history of the Ker-Frisbie doctrine and its exceptions, and evaluates them in light of the state-action analysis traditionally used in "domestic" American constitutional law. Part Three goes on to describe alternative theories, rejected by Judge Rafeedie, which more resolutely denounce international abductions and torture. The Comment observes that Judge Rafeedie's reasoning emphasized U.S. treaty obligations over international law and human rights. The Comment concludes by suggesting that the Ker-Frisbie doctrine has outlived its use and only serves to encourage circumvention of the very laws courts are bound to uphold.

II. The Abduction

On February 7, 1985, DEA agent Enrique "Kiki" Camarena was kidnapped in Mexico.[8] A month later his mutilated body was found sixty miles outside of Guadalajara.[9] Investigations suggested that Camarena had been killed in retaliation for exposing illegal importation of marijuana from Mexico to the United States.[10] A prominent Guadalajara physician, Dr. Humberto Alvarez Machain, was alleged to have administered drugs to Camarena to keep him alive during the torture and interrogation which preceded his death.[11] The United States wanted to prosecute Dr. Alvarez for his alleged complicity in the torture and murder of Agent Camarena.[12]

On April 2, 1990, Dr. Alvarez was kidnapped at gunpoint in his

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28 AM. J. INT'L L. 231, 238 (1934).

5. Juan Ramon Matta-Ballesteros, a citizen and resident of Honduras, under indictment on various narcotics charges in California and Arizona, was kidnapped in front of his home in Tegucigalpa, Honduras on April 5, 1988. Among other abuses, Matta alleged he had been shocked with electric devices repeatedly during his kidnapping and interrogation. Lowenfeld, *supra* note 4, at 447.

6. Fawaz Yunis, a Lebanese citizen wanted for the hijacking of a Jordanian airplane, was lured onto a yacht in the Mediterranean Sea, kidnapped, and transported to the United States. Yunis suffered a broken arm during the abduction. Lowenfeld, *supra* note 4, at 444-46.

7. Sidney Jaffee was wanted for unlawful land sales practices, as well as for failure to appear in court, and was seized on the street in front of his home in Canada by American bounty-hunters on September 23, 1981. *See* Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Male Captus, Bene Detentus? Sidney Jaffe: A Case in Point*, 28 CRIM. L.Q. 341, 353-56 (1985).

8. United States v. Caro-Quintero, 745 F.Supp 599, 602 (C.D. Cal. 1990).

9. *Id.* at 601-02.

10. *Id.* at 603 n.6.

11. Lowenfeld, *Kidnapping by Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712 (1990).

12. Chicago Tribune, Feb. 1, 1990, at 6, col.1.

office in Guadalajara by men displaying badges of the Federal Police of Mexico.[13] The next day, Dr. Alverez was delivered to DEA agents in Texas. At trial, Alvarez alleged that during his captivity he was beaten, drugged, and shocked on the soles of his feet with an electrical apparatus.[14] Although Alvarez had complained of chest pains to a physician in the United States, he did not mention any abusive treatment as a possible cause of those symptoms.[15] Judge Rafeedie, reasoning that a man trained in medicine would surely volunteer all relevant information to an attending physician, ultimately rejected Alvarez's allegations of mistreatment.[16]

Judge Rafeedie found that an informant had advised the DEA in December of 1989 that Mexican Federal Judicial Police (MFJP)[17] Comandante Jorge Castillo del Rey wanted to discuss a possible exchange of fugitives with the United States.[18] Castillo del Rey and another, unidentified, commandante met with DEA agents Berellez and Waters in Los Angeles on December 13, 1989.[19] The Mexican officials informed the DEA agents that they were working with the knowledge of the chief of the MFJP fugitive detail, and the Mexican Attorney General. They agreed that in return for the DEA's investigation of the immigration status of a Mexican National wanted for the theft of large sums of money, the MFJP would deliver Dr. Humberto Alvarez Machain to the DEA.[20] Four weeks later the MFJP asked for $50,000, in advance, to cover the cost of transporting Alvarez to the United States.[21] The DEA refused to front any money and the deal never materialized.[22]

Two months later the original informant contacted the DEA with the news that he and his associates were ready to deliver Alvarez. Changing its mind, the DEA promised to pay the $50,000, plus expenses, in exchange for the delivery of Dr. Alvarez to custody in the United States. This time however, the informant represented not the official Mexican Police, but a group of civilians, and current and ex-police officers.[23] Some of the kidnappers received money immedi-

13. Caro-Quintero, 745 F.Supp. at 603.
14. *Id.*
15. *Id.* at 604.
16. *Id.* at 605. For a discussion of the difficulty of proving allegations of torture and mistreatment in international kidnapping cases, see, Lowenfeld, *supra* note 4, at 470, 489. Toscanino, whose case fostered the shocking to the conscience exception, himself could not prove torture. Professor Lowenfeld points out that this was not surprising as Toscanino was blindfolded at all relevant times. In the absence of third-party witnesses, torture by electric shocks is very hard to prove as such devices seldom leave any physical evidence.
17. The MFJP enjoys powers and performs functions similar to the F.B.I.
18. United States v. Caro-Quintero, 745 F. Supp. 599, 602 (C.D. Cal. 1990).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 603.

ately, were then granted entry to the United States, and are currently being supported, along with their families, at a cost of $6,000 per week.[24] Other of the kidnappers have been apprehended by the Mexican Police and now face trial in Mexico on charges of kidnapping.[25] The Mexican Government currently seeks extradition of not only the Mexican kidnappers, but the DEA agents who offered the money for delivery of Dr. Alvarez.[26] The incident has generated substantial tension in Mexican-American relations.[27] Mexico has suggested that it may respond in kind, and send its own agents into the United States to apprehend persons wanted for crimes in Mexico.[28]

Judge Rafeedie considered four theories submitted as bases for Dr. Alvarez's motion to dismiss the prosecution against him: 1) that Alvarez was deprived of due process of law;[29] 2) that Alvarez's presence in the court was obtained in violation of an existing treaty between the United States and Mexico;[30] 3) that Alvarez's presence was obtained in violation of the terms of the Charters of the United Nations and The Organization of American States;[31] and, 4) that the court should dismiss the action as an exercise of its supervisory power.[32] The Government relied on the Ker-Frisbie doctrine to rebut all these theories.

Ultimately, Judge Rafeedie dismissed the case based upon a finding that paid agents of the United States had violated a valid extradition treaty in force between the United States and Mexico. It was the first time that the violation of an extradition treaty exception has been applied to the Ker-Frisbie doctrine in over sixty years. Dr. Alvarez remains in jail without bond, awaiting the outcome of the Government's appeal.

III. The Ker-Frisbie Doctrine

A. The Standing of Non-Resident Aliens to Raise Exceptions to the Ker-Frisbie Doctrine in United States Courts

For over one-hundred years, the Ker-Frisbie doctrine has been successfully invoked to uphold jurisdiction where criminal defend-

24. Lowenfeld, *supra* note 11, at 714.

25. Rohter, *Mexico Arrests Six in Abduction Case*, The New York Times, Apr. 29, 1990, sec.1, pt.1, at 9, col. 1.

26. Reuters, May 26, 1990, AM cycle.

27. The Washington Times, May 22, 1990, at A3, col.2. Substantial tension has been generated between the United States and other Latin American Nations as well. See, Debusmann, *Latin Americans View U.S. Drug Agents with Increased Suspicion*, Reuters, May 20, 1990, BC Cycle.

28. The Washington Post, June 30, 1990, at A25, col. 6.

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

30. *Id.* at 609.

31. *Id.* at 614.

32. *Id.* at 615.

ants have been illegally brought before courts. The Supreme Court first addressed this question of government-sanctioned kidnapping in 1886, in *Ker v. Illinois*.[33] Ker was wanted in Illinois for embezzling money from a Chicago bank.[34] The bank discovered that Ker was living in Peru, obtained the necessary extradition papers,[35] and hired a Pinkerton agent to accept Ker from the Peruvian Government and transport him back to Chicago. But Chilean forces occupied Lima at that time, and the Peruvian Government was in exile. Formal extradition proceedings were therefore difficult and the Pinkerton agent "without presenting [the papers] to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him . . ."[36]

Ker objected to his prosecution in the United States on the ground that his right to due process had been violated by the illegal arrest. While the United States Supreme Court conceded that Ker had been kidnapped,[37] it held that the purpose of due process lay in fair trials, and that an illegal abduction would not preclude jurisdiction so long as the indictment was proper and a fair trial ensued.[38] Sixty-six years later, in *Frisbie v. Collins*, Ker was reaffirmed as due process claims were again limited to the constitutionally guaranteed right to a fair trial.[39] Frisbie had been illegally apprehended in Illinois by Michigan law enforcement officials. The Court cited Ker as authority for the proposition that the means of apprehension do not invalidate the ends of prosecution, extended the principle to illegal arrests within the United States, and enunciated the Ker-Frisbie Rule.

The same day it decided *Ker*, the Court decided *United States v. Rauscher*.[40] Rauscher had been extradited from Great Britain on charges of murder, but was tried instead on a lesser offense. In *Rauscher* the Court enunciated the concept of specialty to support its dismissal of Rauscher's case. Specialty holds that if an extradition treaty is in force and is used to return an alleged criminal to a demanding state, and the demanding state tries that person for an offense other than that for which he was extradited, then that is a violation of the treaty and jurisdiction is thereby precluded.[41] Specialty is invokable by citizens and need not be raised by a govern-

33. Ker v. Illinois, 119 U.S. 436 (1886).
34. *Id.* at 438.
35. The extradition papers were in accord with the treaty then in force between the U.S. and Peru, Sept. 12, 1870, 18 Stat. 719, 10 Bevans 1052 (entered into force July 27, 1884).
36. Ker, 119 U.S. at 438.
37. *Id.* at 439.
38. *Id.* at 440.
39. Frisbie v. Collins, 342 U.S. 519, (1952).
40. United States v. Rauscher, 119 U.S. 407, (1886).
41. *Id.* at 430.

ment.[42] Although extradition treaties were present in both Rauscher and Ker, only Rauscher was found to have standing to invoke a treaty violation as a defense to prosecution. Edwin Dickinson, a respected commentator, analyzing *Rauscher* fifty years after the decision, wrote:

> While it is conceded that the individual, as such, has no right of asylum in the foreign state, his objection to the jurisdiction serves as a foil to remind the court of the nation's international obligation. Although his claim to exemption from further prosecution may be without moral foundation, the individual is permitted to make an issue of the right of the state from which he was surrendered to have the extradition treaty respected.[43]

Conversely, in Ker the Court held that a citizen may not invoke an extradition treaty to preclude jurisdiction where an illegal abduction was not made under the pretenses of that treaty. The Court said that "[t]he right of the government of Peru to give a party in Ker's condition an asylum in that country is quite a different thing from the right in him to demand and insist upon such an asylum."[44] While not enunciating the principle, the language suggests that Peru had a right to object to Ker's abduction, if it had chosen to do so. The Ker Court did not specifically consider whether an objection by an asylum state to an illegal abduction carried out in derogation of an existing extradition treaty would invest the abductee with the right to invoke the treaty and preclude subsequent prosecution in the United States. Thus, though Rauscher had standing as a "foil" to remind the government of its treaty obligations, Ker did not.

One rationale used in harmonizing Ker and Rauscher is that a violation of an extradition treaty may only occur when the treaty is utilized.[45] That rationale has been used in recent years to maintain jurisdiction where an apprehension has violated an extradition treaty but the offended nation has not objected.[46] According to the rationale, the fact of an extradition treaty's existence, accompanied by evidence of its violation is not enough to divest a court of jurisdiction. If the offended sovereign does not object, the offended citizen has no standing to object.[47] In *United States v. Reed*,[48] the court rejected

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42. United States v. Caro-Quintero, 745 F.Supp. 599, 613 (C.D. Cal. 1990).

43. Dickinson, *supra* note 4, at 232, *quoted in* Lewis, *supra* note 4, at 348.

44. Ker v. Illinois, 119 U.S. 436, 445 (1886).

45. Lewis, *supra* note 7, at 348. Ms. Lewis writes: "This distinction is not capable of rational justification and smacks of sophistry." *But see*, United States v. Najohn, 785 F. 2d 1420 (9th Cir. 1986) *cert. denied*, 479 U.S. 1009 (1986).

46. *See* United States v. Valot, F.2d 308, 310 (9th Cir. 1980); Stevenson v. United States, 381 F.2d 142, 144 (9th Cir. 1967).

47. United States v. Caro-Quintero 745 F. Supp. 599, 608. (C.D. Cal. 1990). While recognizing a split in the jurisdictions over the question of standing of non-resident aliens to raise due process claims in United States courts, Judge Rafeedie held that it is for the offended

Reed's attempt to invoke an extradition treaty between the U.S. and the Bahamas. The court found that "absent protest or objection by the offended sovereign, Reed has no standing to raise violation of international law as an issue."[49]

B. The Toscanino Exception to the Ker-Frisbie Doctrine

Independent of an objecting asylum state, individual standing to raise objections to a criminal prosecution where a defendant's presence has been obtained through an illegal abduction is only available where outrageous governmental conduct has occurred. In *United States v. Toscanino*,[50] the United States Court of Appeals for the Second Circuit limited the Ker-Frisbie doctrine to situations where kidnappings are not "shocking to the conscience." The undeniably shocking quality of Toscanino lay not only in the length and severity of the alleged torture and interrogation of Toscanino by paid agents of the U.S. government, but also in the presence of U.S. officials during some of the torture and interrogations.[51]

It is an unfortunately narrow and indefinite exception. Cases following *Toscanino* found tortured defendants to be triable, so long as there was no official U.S. involvement. As Judge Rafeedie formulated it, the rationale has been that protections of the Bill of Rights apply only to State action. Foreign governments are thus in a position analogous to private parties, whose independent activities are not circumscribed by the Fourth Amendment.[52]

Courts have stayed the course of Ker-Frisbie through somewhat rocky waters. In *United States v. Lara*,[53] the defendant was blindfolded, beaten, strapped nude to a box-spring, tortured with electric shocks, and questioned by Chilean police about the whereabouts of an alleged co-conspirator. Because Toscanino was based on shocking governmental conduct, it was not found to be applicable. Because the Court of Appeals found no evidence that representatives of the United States participated in or acquiesced to the alleged torture,

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state and not the offended individual to object to a kidnapping which violates an extradition treaty.

48. United States v. Reed, 639 F.2d 896 (2d Cir. 1981).

49. *Id.* at 902.

50. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) *reh'g denied*, 504 F.2d 1380 (1974).

51. Lowenfeld, *supra* note 4 at 467. Toscanino, a citizen of Italy residing in Uruguay, was abducted there and "was brought to Brasilia where he was interrogated and tortured for 17 days in the presence and with the participation of the U.S. Bureau of Narcotics. [He] was given nourishment intravenously in just the amount needed to keep him alive; and so on . . . with details of fingers pinched with metal pliers, alcohol flushed into his eyes and nose, and electrodes attached to his earlobes, toes and genitals."

52. *See* Tribe, AMERICAN CONSTITUTIONAL LAW, sec. 18-1, at 1688-89 (2d ed. 1988).

53. United States V. Lira, 515 F.2d 68 (2d Cir. 1975) *cert. denied*, 432 U.S. 847 (1975).

jurisdiction was held to be proper.[54] Though the U.S. had set the events in motion by requesting Lara's apprehension and delivery, the court did not charge the brutal conduct to the U.S. Government.[55]

Jurisdiction has also been upheld where the U.S. Government has been found to have been involved in an illegal abduction, but there have been no allegations of torture. In *United States ex rel Lujan v. Gengler*,[56] the Second Circuit held that application of the "shocking to the conscience" exception which had been enunciated in Toscanino was limited to "shocking governmental conduct."[57] Mere governmental kidnapping, without allegations of torture, was not considered shocking to the conscience. Various other United States-initiated kidnappings have produced allegations of torture. The Toscanino "shocking to the conscience" exception has been so narrowly construed, however, that no defendant since has been afforded its protection against torture.[58]

Judge Rafeedie rejected Dr. Alvarez's attempt to invoke violation of due process under the *Toscanino* exception.[59] Even if taken as true, Judge Rafeedie held that Dr. Alvarez's allegations of mistreatment did not rise to the level of barbarism necessary to invoke *Toscanino*.[60]

C. The Disparate Constitutional Visions of the Ker-Frisbie Doctrine and the Toscanino Exception

The due process arguments advanced by the defense concerning Dr. Alvarez's attempt to invoke the Toscanino exception, and the government's arguments against its application, represent different conceptions of the United States Constitution. Relying on the Ker-Frisbie doctrine, the Government denied that Alvarez had standing to invoke constitutional due process claims based upon the misconduct of paid U.S. agents. The defense contended that Alvarez did have standing because the Constitution limits acts of the Government and its agents to objectively constitutional conduct.

It may be said that the Government's position is a contractarian analysis of the United States Constitution, and that the position of

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54. *Id.* at 70.

55. *Id.* at 71, The court said, "since our government has no control over the foreign police, extension of the *Toscanino* doctrine would serve no purpose."

56. United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) *cert. denied*, 421 U.S. 1001 (1975).

57. *Id.* at 66.

58. In a recent case, Juan Ramon Matta-Ballesteros alleged he had been kidnapped at gunpoint, severely beaten, and burned by electric devices before arriving in the United States. Mr. Matta was denied any protection afforded by the Toscanino doctrine. Matta-Ballesteros *ex rel.* Stolar v. Henman, 896 F.2d 255, 261 (7th Cir. 1990).

59. United States v. Caro-Quintero, 745 F. Supp. 599, 606 (C.D. Cal. 1990).

60. *Id.* at 605.

the defense is an organic scheme.[61] The government's position is that the Constitution is a social contract between the government and the citizenry. This contractarian view terms the Constitution "a compact between the people of the United States and its government, creating enforceable rights and duties running between each of the parties."[62] Thus, constitutional rights pertain exclusively to "We, the People." In this view limitations placed upon governmental action in the United States do not extend when the government acts abroad and upon non-citizens of the United States.[63]

The organic view believes that the Constitution, having created the branches of government, thereby limits their operation to objectively constitutional terms. In this view government officials are bound by constitutional standards of conduct whenever and wherever they operate in the name of the government.[64] "The extra-territorial reach [of the Bill of Rights] is coextensive with the protections they guarantee within U.S. territory. Thus the fourth and fifth amendments curb the search, seizure, and interrogation powers of U.S. officials abroad, even where the object of that protection is not a U.S. citizen."[65] In contrast to the contractarian view, which protects only Americans, and foreigners located within the territorial jurisdiction of the United States, the organic view "potentially entitles anyone injured by United States officials - American or alien - to Constitutional redress."[66]

There is some Supreme Court support for an organic vision of

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61. These terms are adapted from Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672 (1989), which argues that both organic and contractarian views provide unconvincing standards for the extraterritorial appplicability of the Constitution. The note suggests that the judiciary nonetheless should in some way oversee conduct of American officials abroad.

62. INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY 43 (Fourth Sokol Colloquium, R. Lillich ed. 1981). Professor Stephan of the University of Virginia School of Law believes that the executive should be free to engage in irregular (unconstitutional) conduct abroad when it is deemed necessary to protect U.S. interests. Professor Stephan argues further that such conduct abroad will not infect domestic government behavior. However, Professor Rochow points out that Elkins v. United States, 364 U.S. 206, (1960), discusses the "frustration of state policy which occurs when a federal court admits evidence lawlessly obtained by state agents." She suggests that "tolerance in a federal forum infects state agent behavior in the state context as well," noting that otherwise, there would be no frustration of state policy. Rochow, Book Review, 6 B.C. INT'L & C. L. REV. 637, 642 (1983).

63. Wong Wing v. United States, 163 U.S. 228, 238 (1896) "[A]ll persons within the United States are entitled to the protection afforded by the fifth and sixth amendments." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1888) ("The Fourteenth Amendment . . . is not confined to the protection of citizens . . . [Its] provisons are universal in their application to all persons within the territorial jurisdiction of the United States.)"

64. Saltzberg, *The Reach of the Bill of Rights beyond the Terra Firma of the United States*, 20 VA. J. INT'L. L. 741 (1980).

65. *Id.* at 747. The organic perspective has been criticized as an overly expansive view of the Constitution and having the effect of creating "a virtual free-floating source of law". See, Note, *supra* note 62, at 1672.

66. *Id.* at 1675.

the Constitution. In *Balzac v. Porto Rico*,[67] the Court said that "the Constitution of the United States is in force wherever and whenever the sovereign power of that government is exerted."[68] Courts in *Reid v. Covert*,[69] and *Best v. United States*,[70] both reasoned that the United States is bound by the Bill of Rights wherever it acts.[71] *Toscanino*, as well, though traditionally seen as an affirmation of due process standards, may be seen to have been based upon an organic view of the Constitution as Toscanino was an Italian citizen residing in Argentina and would have had no claim to Constitutional protection under a strict contractarian analysis.

On the other hand, the Supreme Court most recently held in *U.S. v. Verdugo-Urquidez*,[72] that evidence seized by U.S. officials in violation of the Fourth Amendment may be admitted into evidence if the seizure is made abroad. Chief Justice Rehnquist, writing for the majority in a 5-4 decision, used contractarian language to hold that "the people protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[73] Although both contractarian and organic perspectives have been endorsed by the Court, in the context of extraterritorial abductions of non-resident aliens by the United States or its agents, the current Court may not be expected to respect due process claims.[74] In light of *Verdugo-Urquidez*, the future of any due-process based Toscanino exceptions is doubtful. If "shocking to the conscience" exceptions to U.S.-sponsored kidnapping are to survive, an organic constitutional vision must control future cases.[75]

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67. Balzac v. People of Porto Rico, 258 U.S. 298 (1922).

68. *See, e.g.* Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) ("All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.") (quoting United States v. Lee, 106 U.S. 196, 218 (1882).

69. Reid v. Covert, 354 U.S. 1 (1956).

70. Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950).

71. *See*, United States v. Birdsell, 346 F.2d 775 (5th Cir. 1965), where the court acknowledged organic constitutional reasoning but found it inapplicable to action by foreign sovereigns in their own countries.

72. United States v. Verdugo Urquidez, 110 S.Ct. 1056 (1990).

73. *Id.* at 1061. One might wonder what sort of non-resident alien connections with the United States will suffice in future cases to limit official U.S. conduct. For example, would Mick Jagger, if his home in England were to be searched by U.S. officials, be afforded Fourth Amendment protection? He does regular business within our borders and is revered by millions of Americans. The logical outcome of the "national community" standard for rightholders will inevitably be that non-resident aliens of means may be afforded Constitutional protection, while less wealthy and less well-traveled non-resident aliens will not.

74. It is interesting to ponder, in light of *Verdugo Urquidez*, whether the *Toscanino* exception is still good law. If Fourth Amendment defenses are not invokeable by non-resident aliens, it is doubtful that Fifth Amendment due process defenses will be available.

75. Courts use the doctrine of supervisory power to justify their intervention in cases which are "shocking to the conscience." See discussion *infra*, notes 107, 129-41.

D. The Violation of an Extradition Treaty Exception to the Ker-Frisbie Doctrine

Judge Rafeedie found the Ker-Frisbie doctrine inapplicable to Dr. Alvarez because Mexico had satisfactorily objected to the U.S. Government's violation of the extradition treaty.[76] Indeed, in connection with the appeal which is pending at this writing, the Government of Mexico has submitted a formal letter protesting the abduction to the court. In the letter the Mexican Consul General asks the Court of Appeals to uphold Judge Rafeedie's decision since to overrule it would serve to encourage other illegal abductions.[77]

The violation of an extradition treaty exception to the Ker-Frisbie doctrine has its roots in *Rauscher*, where deviations from the bill of extradition, protested by England, frustrated the Government's request for jurisdiction in U.S. courts and caused the Supreme Court to enunciate the doctrine of specialty. Judge Rafeedie explained in his opinion that Dr. Alvarez enjoyed a derivative standing because Mexico had protested by rights held under the extradition treaty.[78]

The violation of an extradition treaty exception is based upon Article VI of the United States Constitution which states that "treaties are the supreme law of the land."[79] Consequently, "a treaty must be accorded priority when it is in conflict with the aims of government".[80] While not all treaties enjoy that status, those which are self-executing do.[81] Other treaties, considered executory (requiring implementing legislation by Congress), are not accorded such status and may not be invoked to preclude jurisdiction.[82] Extradition treaties are deemed self-executing by their very nature and are binding without implementing legislation.[83]

Judge Rafeedie cited *Ford v. United States*,[84] *Cook v. United States*,[85] and *United States v. Ferris*[86] as authority for his holding that where a violation of an extradition treaty of the United States is involved Ker-Frisbie is inapplicable.[87] Both Ford and Cook dealt with the United States' obligation to respect search and seizure provisions of treaties treating the status of English ships off American

76. United States v. Caro-Quintero, 745 F.Supp. 599, 606, (C.D. Cal. 1990).
77. The Los Angeles Times, Nov. 14, 1990, at B3, col. 5.
78. Caro-Quintero, 745 F.Supp. at 608.
79. U.S. CONST, art. VI, cl. 2.
80. Caro-Quintero, 745 F.Supp. at 607-08.
81. *Id.* at 606-07.
82. *Id.* at 606-07.
83. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE, Ch. 2, § 4.1, at 71-72, § 4.2, at 74 (2d ed. 1987).
84. Ford v. United States, 273 U.S. 593 (1927).
85. Cook v. United States, 288 U.S. 102 (1933).
86. United States v. Ferris, 19 F.2d 925 (N.D. Cal. 1927).
87. United States v. Caro-Quintero, 745 F.Supp. 599, 606-07 (C.D. Cal. 1990).

territorial waters. In response to increased smuggling of liquor into the United States during Prohibition, England and the United States had agreed to extend U.S. jurisdiction beyond normal territorial water limits. Searches of English ships however were limited to specific instances and specific procedures. Because of U.S. violation of those procedures and England's objections, Cook and Ford were allowed derivative standing to protest the illegal searches and seizures in each of their cases even though Ker had stood for forty years.

Judge Rafeedie also cited *Toscanino*, which based its holding on due process standards, but which also mentioned the fact that Argentina had protested the kidnapping under right of a valid treaty. Due process standards were not found to be implicated in Dr. Alvarez's abduction because the alleged torture involved did not rise to the level of *Toscanino*, and thus was excusable. However, because Alvarez's abduction by "paid agents of the United States"[88] violated an extradition treaty, and Mexico had adequately objected, the Ker-Frisbie doctrine was not applied and jurisdiction was declined.[89]

E. Modern State Action Analysis and the Ker-Frisbie Doctrine

A determination of whether state action has occurred is essential to an application of either the Toscanino or the violation of an extradition treaty exception to the Ker-Frisbie doctrine. Whether a valid Constitutional defense may be made to an illegal abduction which violates a valid extradition treaty depends not only upon an objection by the asylum state, but also upon whether the conduct in question is found to have been state action. A finding of state action is also essential to successful invocation of Toscanino due process exceptions. Given the importance of a finding of state action to any Ker-Frisbie case, and the well-developed state action analysis used in other "state-actor" situations, the state action analysis used in *Ker* seems antiquated and inadequate. In *Ker*, though the U.S. government had provided extradition papers and thereby legally authorized a Pinkerton agent to extradite Ker to the United States, it was not considered to be a state action when the agent used illegal means to gain custody. Rather, the Court said that since the Pinkerton agent kept the extradition papers "in his pocket", the abduction was not carried out under the existing extradition treaty, and the treaty was not violated.[90] The Government takes this position in its appeal of Judge Rafeedie's ruling.[91]

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88. *Id.* at 609.
89. *Id.* at 614.
90. Ker v. Illinois, 119 U.S. at 443 (1886).
91. Government's Brief at 11, United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

Applying the facts of *Ker* to modern standards, it is clear that the Pinkerton agent today would be considered an agent of the United States. He was sent as a messenger of the United States and was thereby vested with legal authority for the proposed extradition.[92] The U.S. Navy assisted in the abduction by transporting Ker away from Peru.[93] Though the United States itself did not employ the Pinkerton agent, it is clear that the bank paid him to extradite Ker under color of law.

Judge Rafeedie ruled that because the DEA induced the illegal abduction through the offer to pay for the delivery of Dr. Alvarez, gave the go ahead for the abduction, and paid a reward upon completion of the abduction, the United States could be charged with the acts of the abductors.[94] Judge Rafeedie's finding of state action, though not surprising by modern standards, is more expansive than the notion of state action used in *Ker*.

The modern rule, as stated in Dr. Alvarez's case, is that where the state, through its agents, incited, encouraged or induced private individuals to undertake such actions with a view to benefit from their outcome, the state is responsible.[95] Ker would seem to meet this test, because the Pinkerton agent quite obviously benefitted from the outcome of his actions, as did the bank. Thus, if modern state action analyses were applied to the facts of *Ker*, the result would be different.

The state action analysis of Ker leaves open wide avenues for courts to countenance illegal abductions of non-resident aliens. Is it possible to imagine a private corporation hiring mercenaries to abduct people for criminal prosecution in the United States and that the United States would then lend them a battleship to transport the defendants?[96] It is an unlikely scenario perhaps, but the Ker-Frisbie doctrine would allow it. Should the political climate make it profitable for corporations and the executive to endorse such practices in the name of the war on drugs, or the war on terrorism, because of the narrow definition of state action used in the Ker-Frisbie doctrine, U.S. courts would have to exercise jurisdiction.

State action analysis has been more fully developed in domestic

92. Lowenfeld, *supra* note 4 at 461.

93. *Id.* at 461.

94. United States v. Caro-Quintero, 745 F.Supp. 599, 608. (C.D. Cal. 1990).

95. *Id.* Judge Rafeedie cited Bassiouni's treatise (supra note 3) and United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 985 (1975) (state responsibility attaches for barbarities inflicted by persons who can be characterized as paid agents of the United States).

96. If such a scenario were possible, the $50,000 abduction fee in Dr. Alvarez's case would not deter large companies from engaging in abductions. The publicity would be priceless. "Exxon, doing more to clean up our hemisphere." This scenario has not yet occurred, but it is interesting to ponder whether the United States' government would grant an extradition request by an offended nation in such a case.

case-law. Paid government informants have often been found to be state actors.[97] "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."[98] If this standard is applied to extraterritorial abductions, a state action result is clear. In *Adickes v. S.H. Kress & Co.*, the Supreme Court said, "Where state officials or private persons acting consciously with state support participate in the interference with the exercise of federal rights, the interference assumes a far graver cast than it otherwise would have, and the authority of the State is brought into conflict with the authority of the Constitution."[99]

Adickes was a civil rights case and the federal rights in that passage clearly refer to Constitutional rights. Yet, Mexico has rights through an extradition treaty, which is part of the federal law. Thus, Mexico has legally cognizable rights which have been interfered with by persons knowingly acting with state support. The analogy serves to buttress the reasoning of Judge Rafeedie's ruling.

Notwithstanding modern state action analysis, police and officials of other nations have not been found to constitute "paid agents of the United States" for purposes of such analysis.[100] However, when torture occurs at the hands of foreign officials acting at the behest of American officials, the analysis shifts to one of joint venture i.e., did American officials participate enough for the action to constitute a joint venture?[101] If a joint venture is found, then absent significant torture, the question becomes whether the offended sovereign has made a formal objection to the illegal abduction.[102] Only

97. *See, e.g.*, United States v. Cella, 568 F.2d 1266, 1282 (9th Cir. 1978); Matje v. Leis, 571 F.Supp. 918, 927 (S.D. Ohio 1983). More recent case law suggests that analysis of paid informants' actions may become more complex. "For example, it is surely relevant whether the informant is paid a salary to infiltrate an organization full-time, or whether the informant receives periodic payments in return for discrete acts performed." Ghandi v. Police Department of Detroit, 823 F.2d 959, 964, n.5, (6th Cir. 1987). Note that such an analysis is totally inconsistent with the reasoning employed in applications of modern criminal conspiracy statutes.

98. United States v. Price, 383 U.S. 787, 794 (1966).

99. Adickes v. S.H. Kress & Company 252 F. Supp. 140 (1966). See also, Monroe v. Pape, 365 U.S. 167, 238 (1961) (opinion of Frankfurter, J.).

100. See United States v. Jordan, 1 M.J. 334, 438 (C.M.A. 1976) (holding that any American participation at all makes a search a joint venture); United States v. Lira, 515 F.2d 68 (2d Cir. 1975) *cert. denied*, 423 U.S. 847 (1975) (finding that Chilean police were not acting as agents of the United States and that United States representatives were unaware of an alleged twenty-day period of torture and interrogation of Lira).

101. *See* U.S. v. Mount, 757 F.2d 1315, 1320, n.1 (D.C. Cir. 1985) (Bork, J, arguing that the shock the conscience standard should be inapplicable where conduct is entirely attributable to foreign officials).

102. *See* United States *ex. rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975) (Bolivian police, paid by the United States, but not acting in their official capacity, and no objection by Bolivia). United States v. Toro, 840 F.2d 1221 (5th Cir. 1988). (Defendant, neither American nor Panamanian, could not challenge District Court's jurisdiction, though his presence was secured in derogation of an existing extradition treaty between Panama and the United States, where neither party to the treaty objected to the abduction.)

where such an objection is made must courts decline to exercise jurisdiction over the abducted person.[103]

In justifying judicial acceptance of unconstitutional behavior by foreign officials in cases before American courts, some judges have turned to the analogous, though discredited, silver platter doctrine. The doctrine was developed to allow federal prosecutions of criminal matters to use evidence obtained by state officials not constrained by the exclusionary rule and then handed over 'on a silver platter' to federal prosecutors who were subject to imposition of the exclusionary rule. The doctrine was found to frustrate the purpose of the fourth amendment and was discredited in *Elkins v. United States* in 1960.[104] The discreditation of a doctrine so directly analogous to the Ker-Frisbie rule undermines the already questionable validity of reliance upon narrow joint venture constructions which discount U.S. complicity in illegal abductions initiated, but not "participated" in, by U.S. officials.[105]

It would not be unprecedented to extend domestic state action analysis standards to extraterritorial abductions. The court which articulated the *Toscanino* exception took express notice of relevant developments in U.S. criminal jurisprudence. In *Rochin v. California*,[106] the Supreme Court found that the forcible pumping of a defendant's stomach in the pursuit of evidence was shocking to the conscience; and so laid the foundation for the Second Circuit's ground-breaking exception to the Ker-Frisbie rule.

IV. Alternative Theories of Dismissal: Violations of International Law and Human Rights

While the contractarian view of the Constitution sees the prob-

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103. *See* United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (defendant's claim of treaty violation held invalid where neither Panama nor Venezuela objected); United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (no violation of extradition treaty where Bahamian Government did not protest abduction of defendant); United States v. Sobell, 244 F.2d 520 (2d Cir. 1957), *cert. denied*, 355 U.S. 873 (1957) (Second Circuit ruling that Mexican Security Police's delivery of defendant to DEA agents was a deportation and not chargeable to the DEA).

104. Elkins v. United States, 364 U.S. 206 (1960).

105. *Cf.* Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1419 (1989). Professor Sullivan argues that a key insight of American constitutional law is preventing government from doing indirectly that which it may not do directly. A short passage does well to illustrate her point: "When government is forbidden to provide a benefit for reasons extraneous to any pressure on the beneficiary's rights, no unconstitutional conditions arise. For example, government may not give away cash bounties or early prison release to those who volunteer to eliminate suspected but untried enemies of the people. The reason has nothing to do with the hitman's rights; it is rather that due process bars the government from taking life summarily." *Id.*

106. Rochin v. California, 342 U.S. 165, 172-73 (1952). "We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.*

lem of illegal extraterritorial state action from the perspective of the right-holder[107] and the organic view focuses only on the conduct of the Government and its agents, international law may be said to embody both perspectives. On the one hand, International Law is made by, among, and for the benefit of nations. On the other, treaties and declarations of the United Nations and various other international bodies do purport to create universal human rights in individuals.[108] Judge Rafeedie acknowledged the existence of several international instruments designed to protect human rights, but refused to apply them to Dr. Alvarez's case.

Significant progress has been made in establishing international norms for state treatment of persons. Many of those norms are applicable to an illegal abduction. Because physical abuse and arbitrary detention are inherent in forcible abductions,[109] such abductions usually violate internationally recognized rights to personal liberty and freedom from arbitrary detention. The International Covenant on Civil and Political Rights states that "[e]veryone has the right to liberty and security of person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[110] Not surprisingly, the Human Rights Committee which implements the International Covenant has ruled that forcible abduction for prosecution constitutes "arbitrary arrest and detention."

Arbitrary arrest and detention are also prohibited by the Universal Declaration of Human Rights,[111] and the American Convention on Human Rights.[112] When an illegal abduction occurs, a right to personal integrity is also violated.[113] The American Convention on Human Rights states: "[e]very person has the right to have his physical, mental, and moral integrity respected" and is protected against "cruel inhuman, or degrading punishment or treatment."[114] The In-

107. *See* Quigley, *Government Vigilantes at Large: The Danger to Human Rights from Kidnapping of Suspected Terrorists*, 10 HUM. RTS. Q. 193 (1988).

108. As of this writing the U.S. still occupies Kuwait and portions of Southern Iraq. It has been extremely saddening and ironic to hear the U.S. government speak of violations of human rights in Iraq and Kuwait as justification for a military offensive while that same government denies the application of international human rights instruments in its own courts.

109. See, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). For a discussion of *Filartiga*, see, James Paul George, *Defining Filartiga: Characterizing International Torture Claims in United States Courts*, 3 DICK. J. INT'L L. 1 (1984).

110. International Covenant on Civil and Political Rights, art. 9(1), adopted Dec. 19, 1966, entered into effect Mar. 23, 1976, [hereinafter, Covenant]. The United States and China are the only major powers which have not signed this document.

111. Universal Declaration of Human Rights, article 9, signed Dec. 1948, U.N.G.A. Res. 217A. (III), U.N. Doc. A/810 (1948), [hereinafter, Declaration].

112. American Convention on Human Rights, article 7, signed Nov. 22 1969, entered into force July 18, 1978, OAS Treaty Series No. 36, at 1, OAS Official Records OEA/Ser. L/V/II. 23 Doc. 21 Rev. 6 (1979), [hereinafter, Convention].

113. Convention, *supra* note 113, article 5.

114. *Id.*

ternational Covenant on Civil and Political Rights prohibits "cruel, inhuman or degrading treatment or punishment."[115] It further provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[116] Extraterritorial abductions are simply not consistent with basic conceptions of human rights which have come to be almost universally recognized.

> In any case of abduction, there is violation of personal liberty, of the right to be detained under legal authority, of the right of emigration, of the right to remain in a state until expelled, and of the right to seek asylum. Personal integrity is usually violated because of the force typically required to subdue and transport an abductee. The right to prompt review of the lawfulness of the detention is usually violated because of the time needed to transport the abductee.[117]

In United States courts, legal arguments relying on human rights have not been widely accepted. The objection which usually arises to claims brought, or defenses raised, which are based on international human rights is that such rights come from treaties which are executory and which do not become law until implemented by the legislature.

Because he dismissed the case against Dr. Alvarez on grounds that his abduction violated the extradition treaty between the United States and Mexico, Judge Rafeedie did not find it necessary to reach the issue of whether the Charter of the United Nations and the Charter of American States were violated by Alvarez's abduction.[118] He noted however, "that while the United States' participation in the abduction of Dr. [Alvarez] would appear to violate these international instruments, the weight of the authority indicates that these international instruments are not self-executing and therefore are not enforceable in federal courts absent implementing legislation."[119]

The distinction between executory and self-executing treaties is not well established in international or United States' law. "The issue is often framed in terms of whether the treaty provisions are sufficiently clear and definite so as to be judicially enforceable."[120] In United States courts, international human rights accords are viewed

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115. Covenant, *supra* note 111, article 7.
116. Covenant, *supra* note 111, article 10.
117. Quigley, *supra* note 108, at 205.
118. United States v. Caro-Quintero, 745 F.Supp. 599, 614. (C.D. Cal. 1990).
119. *Id.*
120. *See* Feinrider, *Extraterritorial Abductions: Developing International Standards*, 14 AKRON L. REV. 27, 45 n. 121, (1980). *See e.g.*, Sei Fujii v. California, 38 Cal.2d 718, 242 P.2d 617 (1952). Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

as executory, and their provisions do not create any rights in persons.[121] Some courts, however, have found that international law which rises to the level of customary law may be enforced in federal courts.[122] Customary international law is part of federal common law.[123]

The executive branch of the government of the United States has, in the past, recognized the validity of human rights. In 1979, the United States Department of State went on record as considering certain human rights instruments binding as customary international law, apart from any treaty obligations:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. This consensus is reflected in a growing body of international law: The Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and other international and regional human rights agreements. There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.[124]

Nonetheless, U.S. courts have not often resolved the issue of jurisdiction in cases involving extraterritorial abductions from the standpoint of the infringed rights of the kidnapped.[125] Despite the importance which human rights have had in formulating U.S. foreign policy,[126] and the significant impact which 'American Constitutionalism' has had on international human rights standards,[127] human rights play increasingly smaller roles in American

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121. *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). The Government cites these cases on page 16 of its appeal.

122. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980). Judge Rafeedie noted in his opinion that the Ninth Circuit has rejected *Filartiga* inasmuch as it purports to create individual rights in U.S. courts based upon "principles of international law." United States v. Caro-Quintero, 745 F.Supp. 599, 615 (C.D. Cal. 1990).

123. La Pacquete Habana, 175 U.S. 677, 700 (1900). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." *Id.*

124. *See* U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 (1980).

125. Quigley, *supra* note 108, at 196. "Courts hearing an abductee's challenge to jurisdiction in the country that conducted the forcible abduction have addressed the question as one of possible violation of the rights of the asylum states and have typically upheld jurisdiction." *Id.* Professor Quigley argues that the question should be addressed as one of violation of human rights of the abductee, and that courts should decline jurisdiction.

126. *See*, Orentichler, *Bearing Witness: The Art and Science of Human Rights Fact-Finding*, 3 HARV. H. RTS. J. 83, 86-92 (1990).

127. See generally, Lillich, *The United States Constitution and Human Rights*, 3 HARV. H. RTS. J. 53, 54-61 (1990).

jurisprudence.[128]

V. Judicial Supervisory Power Over the Executive

Judicial supervisory power is implicated where governmental conduct is unlawful, because the "law must not make itself an accomplice in willful disobedience of the law."[129] The doctrine of supervisory power allows the judiciary to monitor and restrain unconstitutional conduct of other branches of government. "The purposes underlying use of supervisory powers are threefold: to implement a remedy for the violation of recognized rights, to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury, and finally, as a remedy designed to deter illegal conduct."[130] The latter two of those purposes would be directly served by an exercise of supervisory power in Dr. Alvarez's case. Since Mexico wants Alvarez back in Mexico, the first purpose would also be served, whether under the rights of Alvarez, or of Mexico.

Judge Rafeedie took note that Dr. Alvarez was "but one of three defendants named in this indictment to be brought before this court by forcible abduction from his homeland."[131] He then reminded the executive that fifteen years ago in Lara, Judge Oakes had warned that

> [W]e can reach a time when, in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case not as a matter of constitutional law but in the exercise of our supervisory power . . . To my mind the Government in its laudable interest in stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interest of the greater good and preserving respect for the law.[132]

Judge Rafeedie did not find it necessary to reach the question of whether supervisory power would be proper in Alvarez's case.[133] In-

128. *Id.* at 61-79.

129. United States v. Caro-Quintero, 745 F.Supp. 599, 615 (C.D. Cal. 1990).

130. United States v. Hastings, 461 U.S. 499, 504-05 (1983). The doctrine is sometimes referred to as the McNabb Rule, as it was formulated in McNabb v. United States, 318 U.S. 332 (1943). *See also*, Elkins v. United States, 364 U.S. 206, 80 (1960), and United States v. Payner, 447 U.S. 727 (1980).

131. United States v. Caro-Quintero, 745 F.Supp. 599, 615 (C.D. Cal. 1990).

132. *Id.* The United States, in its appeal to Judge Rafeedie's order, suggests that the court would be resolving issues committed to the executive if it were to exercise its supervisory power in this case. Government's Brief at 38, United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). This mischaracterizes what is essentially a criminal procedure issue. The same issue (outrageous government conduct toward criminal suspects) was dealt with in *Rochin*, where police brutality in forcibly pumping the stomach of a suspect in order to obtain evidence caused the court to dismiss the case.

133. Caro-Quintero, 745 F.Supp. at 615.

deed, courts are reluctant to exercise supervisory power, and must do so with "a view towards balancing the interests involved."[134] However, warnings to the executive branch concerning its conduct in kidnapping criminal defendants are not unprecedented. The court in *Lujan* issued a frank message to the executive branch when it severely narrowed the Toscanino shocking to the conscience exception:

> [T]he controls which otherwise exist to prevent illegal abductions—the financial cost of the operation, the possibility of alienating other nations, and the risk that the kidnappers would be prosecuted in a foreign territory for their offense—suggest that the likelihood of numerous violations is not real. If this assumption should, in the future, prove to be ill-founded, our conclusion can be reconsidered.[135]

The government argues in its appeal that as the instant case is a foreign policy matter, and has been reserved by the Constitution for the Executive to resolve, the court overstepped its bounds in even considering the possibility of exercising supervisory power.[136] Its appeal cites *Baker v. Carr*,[137] where the Court recognized that cases which turn on political questions are inappropriate for the judiciary to decide.

> Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the Executive or Legislature; but many such questions uniquely demand single-voiced statement of the Government's views.[138]

Such a statement might seem to resolve the issue of a Court's exercise of supervisory power in Dr. Alvarez's case. However, later in Carr the Court specifically distinguished between cases which turn on political questions and cases which are merely political. "The doctrine of which we treat is one of 'political questions' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some actions denominated 'political' exceed constitutional authority."[139] Thus, had Judge Rafeedie chosen to exercise supervisory power, the propriety of his decision would have depended upon whether actions attributable to the Government in Dr. Alvarez's case exceeded constitutional authority.

Ample authority supports the exercise of supervisory power in

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134. United States v. Hastings, 461 U.S. 499 (1983).

135. United States ex re Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1983). Dr. Alvarez's case suggests that these assumptions were in fact unfounded.

136. Government's Brief at 38, United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

137. Baker v. Carr, 369 U.S. 186 (1962); cited in Government's Brief on Appeal, p. 42.

138. Baker v. Carr, 369 U.S. 186, 211 (1962).

139. *Id.* at 217.

Dr. Alvarez's case. Six years after it decided Ker and *Rauscher*, the Supreme Court said that

> [w]ithout the clear authority of a law of Congress, the executive can never, by determining a so-called political question, or by construing an act of Congress or a treaty, conclude the rights of persons or property, under the protection of the Constitution and the laws of the United States, or [preclude] the courts of the United States, in a determination of these rights.[140]

As recently as 1983 the Supreme Court said that, "in the exercise of its supervisory powers, a federal court may, within limits, formulate procedural rules not specifically required by the Constitution or Congress."[141] Courts clearly have the power to monitor and limit the conduct of the executive. It would be unfortunate if the judiciary were to duck the questionable validity of the Ker-Frisbie doctrine by using the political question doctrine to allow the executive to determine what is, or is not, subject to judicial review.

The most likely course of the current Supreme Court would seem to be the contractarian analysis applied in *Verdugo-Urquidez*. Such an analysis would not only preclude Dr. Alvarez and others from asserting due process claims, it would foreclose any discussion of a supervisory role for the judiciary in the extra-national "apprehension" of criminal suspects. This would effectively unfetter the power of the executive to conduct a world-wide war on drugs, or any other subjective threat to national security, without respect for sovereign powers, international agreements, or objective constitutional standards of governmental conduct. A vast and dark "forest" would be created, completely insulated from the constitutional standards which normally constrain American state action.

VI. Conclusion

Justice Brandeis wrote in 1928, that

> [d]ecency, security and liberty alike demand that government officials be subjected to the same rules of conduct that are commands to the citizen. 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 that in the administration of the criminal law the end justifies the

140. *In re* Cooper, 143 U.S. 472, 499-500 (1892).
141. United States v. Hastings, 461 U.S. 499, 505 (1983).

> 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.[142]

The Ker-Frisbie doctrine is based upon antiquated and disingenous standards of state action analysis. The blind eye it turns to government-sponsored abuses abroad is contemptuous for the human rights of foreign nationals and the sovereignty of other nations. Its application degrades the judiciary and may endanger a separation of powers which has already been made tenuous by the malleable "political question" doctrine.

The government's attempt to justify its intrusions and crimes in Mexico and other nations as technically legal does not support its laudable efforts elsewhere to make respect for international human rights universal among modern states. As incredibly dominant as American military force has proven to be in the Persian Gulf, so must the judiciary take incredible care in its vigilance of the principles by which we apply our force.

The wars on drugs and terrorism have obviated established principles of constitutional law, and the judiciary, with a few significant exceptions, has given its blessing. Any act will ultimately affect the actor as well as the acted-upon, whatever the identity of the suspect/victim. As courts become familiar with the legal rationale for accepting criminal suspects who have been brutalized by state agents abroad, they are liable to import those rationales to cases which occur at home. The constitution and the spirit of the nation will both suffer sadly. A quote from Sir Thomas Moore is singularly apposite to this discussion: "This country's planted thick with laws from coast to coast — man's laws, not God's — and if you cut them down . . . do you really think you could stand upright in the winds that would blow?"[143]

The suggestion by the government in this case that "political questions" such as Dr. Alvarez's are not proper for the courts to consider is frightening. If the judiciary is not able to check governmental conduct abroad, the executive will cease to consider means and focus merely on ends. In the case of Dr. Humberto Alvarez Machain, the government's zeal to bring to justice those responsible for the murder of agent Camarena has had the ironic effect of flouting the rule of law for which he died. It has frustrated the cooperation between nations that Camarena worked to foster. The most prudent course would seem to be the consistent path which respects the

142. Olmstead v. United States, 277 U.S. 438, 484-85 (1928).

143. R. Bolt, *A Man For All Seasons*, Act I, in THREE PLAYS 147 (L. Heineman, ed. 1967).

rule of law of sovereign nations, the agreements which have been crafted between nations, and the principles by which the state has been traditionally bound as the government and the law have developed in this country.

It is sincerely hoped that the Ker-Frisbie doctrine will be excepted in Dr. Alvarez's case, if not because of concern for international human rights, or for maintaining constitutional governmental conduct abroad, then at least because of the treaty obligations which were the basis of Judge Rafeedie's courageous and circumspect decision.

H. Moss Crystle