

# MILITARY MIGHT VERSUS SOVEREIGN RIGHT: THE KIDNAPPING OF DR. HUMBERTO ALVAREZ-MACHAIN AND THE RESULTING FALLOUT\*

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*“The desire for revenge exerts ‘a kind of hydraulic pressure . . . before which even well settled principles of law will bend . . . .’”*<sup>1</sup>

## I. INTRODUCTION

On February 7, 1985, U.S. Drug Enforcement Agent (DEA) Enrique “Kiki” Camarena was kidnapped outside the U.S. Consulate in Guadalajara, Mexico.<sup>2</sup> Camarena was assigned to the region to combat drug trafficking and had successfully infiltrated the Guadalajara drug cartel.<sup>3</sup> In

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1. *United States v. Alvarez-Machain*, 504 U.S. 655, 687 (1992) (Stevens, J., dissenting) (quoting *Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes J., dissenting)).

2. *See Storm Arises over Camarena; U.S. Wants Harder Line Adopted*, *LATIN AM. WEEKLY REP.*, Mar. 8, 1985, at 10; Vincent J. Schodolski, *U.S. Presses Mexico to Find Agent*, *CHI. TRIB.*, Feb. 20, 1985, at 10.

3. *See Hispanic Agents Taking DEA to Court over Assignments*, *HOUS. CHRON.*, June 9, 1990, at A11.

return, the cartel tortured and eventually murdered him.<sup>4</sup> The traffickers, however, got more than they bargained for as Camarena's murder set the stage for what many consider a major shift in U.S. foreign policy<sup>5</sup> and domestic law—both of which would have far reaching consequences throughout the world. Motivated by an understandable thirst for revenge for the horrible murder of one of its own, the U.S. government, through the acts of the DEA, saw fit to violate the sovereignty and territorial integrity of its neighbor, Mexico, in order to secure custody over individuals suspected to have participated in Camarena's torture and murder.<sup>6</sup> This blatant disregard of one of the oldest principles of international law threatens the balance between law, order, and chaos and invites reciprocal actions against U.S. citizens.<sup>7</sup>

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4. See *United States v. Caro-Quintero*, 745 F. Supp. 599, 601–02 (C.D. Cal. 1990), *aff'd sub nom. United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd on other grounds*, 504 U.S. 655 (1992).

5. Many consider the June 21, 1989, legal opinion issued by the Office of Legal Counsel of the Department of Justice as having provided the basis for the actions taken against Dr. Alvarez-Machain and for the territorial violation of Mexico's sovereignty. See *infra* notes 15–17 and accompanying text. In his testimony before a House Judiciary Subcommittee, however, Abraham D. Sofaer, then the Legal Adviser for the U.S. Department of State, emphasized “that the policy of the United States regarding extraterritorial unconsented arrest has not changed.” *FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 101st Cong. 66 (1989) [hereinafter *Barr Hearings*] (statement of Abraham D. Sofaer). Alvarez-Machain was kidnapped on April 2, 1990, just five months after Mr. Sofaer made this statement. See *Alvarez-Machain v. United States*, 96 F.3d 1246, 1249 (9th Cir. 1996), *amended by* 107 F.3d 696 (9th Cir. 1996).

6. See *Alvarez-Machain*, 96 F.3d at 1249 (describing the DEA-coordinated kidnapping of Dr. Alvarez-Machain from his office in Guadalajara, Mexico).

7. The *Alvarez-Machain* case stands for the proposition that there is no role for international law in the decision-making process of the U.S. government if the effected outcome would not suit the interests of the United States. As a result of this incident, scholars and government officials alike need to rethink the proper place for national sovereignty in this age of regional integration because U.S. actions have jeopardized the working relationships between states, particularly in the Americas, and the sanctity of basic principles of international law. It has taken nearly 50 years for member states of the U.N. to begin to recognize the role of international law in preserving order. But recognition is not enough. For international law to have any substance, it must have teeth. There must be consequences that occur when the rule of law is broken. International law has probably seen the greatest change in the last half-century in the field of international humanitarian law and, in particular, the interplay between sovereignty and preservation of human rights. Now, sovereignty is no longer an absolute. The theme the “king can do no wrong” has become part of the past. Nations that violate human rights invite intervention by third parties. In essence a State waives its rights to sovereignty when it decides to forego certain concepts of international law. This present trend is a significant change from 1945 when the U.N. Charter was created. Article 2 states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . . .” U.N. CHARTER art. 2, para. 4. Article 2 goes further to prohibit the U.N. from intervening in “matters which are essentially within the domestic jurisdiction of any State . . . .” *Id.* para. 7. With interventions having occurred in Iraq, Haiti, Somalia, and the former Yugoslavia, there undoubtedly now exists a new norm. See, e.g., Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867, 867–68 (1992) (citing the Gulf War as evidence of new respect for international law and arguing that the emerging “new world order” is based on a “newfound

During the last decade, the United States has demonstrated its willingness and aggressiveness, sometimes through extraordinary means, to apprehend and punish foreign nationals accused of violating U.S. laws.<sup>8</sup> Most of these cases involved either enticing the suspect into international waters,<sup>9</sup> or onto U.S. territory,<sup>10</sup> or into a third party state where they were then forcibly abducted and brought into the United States.<sup>11</sup> Despite the fact that such conduct has occurred fairly consistently throughout the world in modern times,<sup>12</sup> it still remains a well-settled rule that such abductions violate some of the most basic tenets of international law.<sup>13</sup>

Notwithstanding the rule of law, the U.S. government has been no stranger to the abductions of other states' nationals.<sup>14</sup> Where the underly-

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respect for sweeping principles of international law" and an "increasing willingness to act abroad against individuals or private groups to enforce" domestic laws). Indeed, the United States has led the charge to craft this new norm. However, merely because sovereignty is no longer absolute in some respects does not mean that it has been entirely dismantled in others and must not be respected.

8. See, e.g., *United States v. Yunis*, 681 F. Supp. 909, 911–12 (D.D.C. 1988) (detailing Operation "Goldenrod," the U.S. government effort to apprehend Fawaz Yunis, the ringleader of a small band of terrorists who had hijacked and blown up a Royal Jordanian aircraft at the Beirut International Airport); John J. Fialka, *Custom Service's 'Stings' to Curtail Arms Sales Draw Blood (Its Own) as Cases Collapse in Court*, WALL ST. J., Mar. 18, 1994, at A12 (reporting on Operation "Exodus," an effort by the U.S. Customs Service to curtail the flow of illegal arms around the world by apprehending foreign businessmen suspected of arms dealing and detailing the protests lodged by several foreign governments as a result of these sting operations); Michael Isikoff, *U.S. Customs 'Sting' Nets Cypriot, Angers Bahamas*, WASH. POST, Feb. 5, 1993, at A2 (discussing another Customs Service sting where an alleged international criminal was arrested after being lured onto an airplane by Customs agents in the Bahamas).

9. See *Yunis*, 681 F. Supp. at 912 (luring Yunis into the Mediterranean sea).

10. See Fialka, *supra* note 8 (sending a Canadian businessman an airline ticket to the Bahamas and arresting him as he changed planes in New York).

11. See Isikoff, *supra* note 8 (apprehending the target of the sting operation in the Bahamas).

12. Probably the best known example is that of Israel's 1960 kidnapping of Nazi Dr. Joseph Mengele from his home in Argentina to stand trial in Israel for the atrocities committed at the Auschwitz death camp during World War II. See *Attorney Gen. v. Eichmann*, 36 INT'L L. REP. 18 (Isr. Dist. Ct. 1961), *aff'd*, *Attorney Gen. v. Eichmann*, 36 INT'L L. REP. 277 (Isr. Sup. Ct. 1962). Although Israel's actions violated international law, Argentina accepted Israel's apology and waived its opposition. See *Eichmann*, 36 I.L.R. at 70.

13. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 & cmt. c (1987) (noting that a state's law enforcement agencies may exercise their functions in the territory of another state only with the consent of that state and declaring that "international law requires that [the abductee] be returned" when the abduction is unauthorized); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 472–74 (1990) (arguing that state-sponsored abductions are violations of international law and international human rights law).

14. See, e.g., *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991) (Mexican citizen abducted by Mexican police officers allegedly hired by DEA); *Jaffe v. Smith*, 825 F.2d 304, 305 (11th Cir. 1987) (Canadian abducted by bounty hunters while jogging near his Canadian home and taken to Florida); *United States v. Lira*, 515 F.2d 68, 69–70 (2d Cir. 1975) (Chilean arrested in Chile by local police and ultimately arrested in the United States after being placed on a U.S. bound plane with DEA agents); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 63 (2d Cir. 1975) (Argentinean national under indictment in the United States for drug

ing crime was more of a “personal” matter to an agency of the United States—such as the murder of a DEA agent—there was little hesitation to allow principles of international law to fall by the wayside. The Bush Administration had tried to prepare quietly for the moment that extraterritorial law enforcement activities might be necessary to effect capture of an individual outside of the United States.

On June 21, 1989, then Assistant Attorney General William P. Barr provided the “green light” for transborder abductions by concluding in a secret memorandum that U.S. law enforcement could legally conduct extraterritorial activities in pursuit of individuals who had allegedly violated U.S. laws, despite the fact that such activities might contravene international law and the domestic law of the host state.<sup>15</sup> The existence of the Barr Memorandum, as it soon became known, ultimately leaked to the press<sup>16</sup> and was the subject of harsh Congressional criticism.<sup>17</sup> Neverthe-

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trafficking forcibly removed from Bolivia after being lured there by DEA agents); *United States v. Toscanino*, 500 F.2d 267, 269–70 (2d Cir. 1974) (Italian citizen living in Uruguay lured to a meeting, knocked unconscious, taken to Uruguay-Brazil border, then flown to the United States); *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F. Supp. 1040, 1041–42 (S.D. Ill. 1988), *aff’d*, *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990) (defendant seized from his Honduran home by Honduran troops, driven by a U.S. Marshal to air base, and flown to United States to face drug charges).

15. See Authority of the Federal Bureau of Investigation to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 195 (1989) [hereinafter Barr Memorandum]. The memorandum reconsidered the conclusion of a 1980 opinion that the FBI lacked authority to apprehend and abduct a fugitive residing in a foreign state in contravention of international law. See *id.* (evaluating and rejecting Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543 (1980)). The Bush Administration believed it necessary to revisit the Carter Administration’s earlier legal analysis because of what it perceived as a growing threat, stating:

The United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. While targeting the United States and United States citizens, these criminal organizations frequently operate from foreign sanctuaries. Unfortunately, some foreign governments have failed to take effective steps to protect the United States from these predations, and some foreign governments actually act in complicity with these groups. Accordingly, the extraterritorial enforcement of United States laws is becoming increasingly important to the nation’s ability to protect its own vital national interests.

*Id.* at 198.

16. See Ronald J. Ostrow, *FBI Gets OK for Overseas Arrests*, L.A. TIMES, Oct. 13, 1989, at A1; Ruth Marcus, *FBI Told It Can Seize Fugitives Abroad*, WASH. POST, Oct. 14, 1989, at A15; see also Michael Isikoff, *U.S. ‘Power’ on Abductions Detailed*, WASH. POST, Aug. 14, 1991, at A14 (noting that the opinion had been at the “center of controversy” for nearly two years).

17. Congressman Don Edwards of California chided the FBI and Justice Department for issuing the legal opinion. During the hearing he stated

I just think it’s extraordinary that you would [condone extraterritorial abduction], especially at this time when we have these nations emerging into the sunshine of democracy; we want them to copy us as the beacon of democracy. And yet at the same time, we say that we’re going to thumb our nose at international law, when really, whenever the President makes that decision that it’s so serious—in my lifetime, we’ve had these situations where in the long run we lose terribly.

less, its conclusions paved the way for the DEA's actions of April 2, 1990, and the kidnapping of Dr. Humberto Alvarez-Machain.

This article details the reactions throughout the United States and the international community to the kidnapping of Dr. Alvarez-Machain and, more specifically, to the decision of the U.S. Supreme Court<sup>18</sup> sanctioning the act.<sup>19</sup> The premonition invoked by Justice Stevens that "most courts throughout the civilized world . . . will be deeply disturbed by the 'monstrous' decision the Court announces today" was soon to prove true.<sup>20</sup>

## II. FACTUAL BACKGROUND

As a result of the Camarena murder investigation, the United States indicted twenty-two persons who allegedly participated in some fashion.<sup>21</sup> Dr. Alvarez-Machain was among the indictees.<sup>22</sup> The government alleged Alvarez-Machain, a medical doctor, had "participated in the murder by

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*Barr Hearings*, *supra* note 5, at 63. The criticism was not unanimous. For example, Congressman James Sensenbrenner, Jr. Of Wisconsin, in his opening statement Stevens, remarked

that there appears to be an attempt to hamstring the efforts of the FBI in the apprehension of international terrorists abroad and returning them to justice in the United States.

If the Carter administration guidelines are continued in force, the only people who will take joy in that are the Muammar Qadhafis, the Manuel Ortegas, and the drug bosses of the Medellin drug cartel, and that is an accomplished fact.

*Id.* at 1. For a recent analysis of the Barr Memorandum, see Jeanne M. Woods, *Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests*, 14 B.U. INT'L L.J. 1 (1996); Mark S. Zaid, *Classified 1989 Justice Memorandum Opining President Has Authority to Disregard International Law in Favor of U.S. Extraterritorial Law Enforcement Activities Is Released to the Public*, INT'L LAW ENFORCEMENT REP., Feb. 1993, at 60.

18. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

19. An analysis of the judicial decisions leading up to and including the Supreme Court decision is beyond the scope of this article. This article explores the policy and reactionary concerns expressed in the wake of the acts discussed herein. For analysis of the prior decisions, see Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1993); Andrew L. Wilder, Recent Development, *The Supreme Court Decision in United States v. Alvarez-Machain*, 32 VA. J. INT'L L. 979 (1992); Jonathan A. Gluck, Note, *The Customary International Law of State-Sponsored International Abduction and United States Courts*, 44 DUKE L.J. 612 (1994); Patrick M. Haggan, Note, *Government Sponsored Extraterritorial Abductions in the New World Order: The Unclear Role of International Law in United States Courts and Foreign Policy*, 17 SUFFOLK TRANSNAT'L L. REV. 438 (1994); Leigh Ann Kennedy, Comment, *Jurisdiction in Violation of an Extradition Treaty: United States v. Alvarez-Machain*, 27 CREIGHTON L. REV. 1105 (1994); Michael Kristofco, Note, *United States v. Alvarez-Machain: International Abductions: The Court's Invitation for Reciprocal Action Against American Citizens*, 20 OHIO N.U. L. REV. 191 (1993); Aimee Lee, Comment, *United States v. Alvarez-Machain: The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT'L L.J. 126 (1993).

20. *Alvarez-Machain*, 504 U.S. at 687 (Stevens, J., dissenting).

21. See *United States v. Caro-Quintero*, 745 F. Supp. 599, 602 (C.D. Cal. 1990), *aff'd sub nom.* *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd on other grounds*, 504 U.S. 655 (1992).

22. See *id.*

prolonging Agent Camarena's life so that others could further torture and interrogate him."<sup>23</sup>

Initially, the DEA attempted to arrange for Alvarez-Machain's apprehension through irregular rendition.<sup>24</sup> Negotiations between Mexican police officials and the DEA centered around a possible exchange of Alvarez-Machain for a Mexican national residing in the United States who was wanted for embezzlement from Mexican politicians.<sup>25</sup> Despite a tentative agreement for the transfer to take place, the Mexican officials suddenly demanded an advance payment of \$50,000 in expenses to transport Alvarez-Machain to the United States.<sup>26</sup> When agents refused to "front" any money for the operation, the agreement seemingly terminated and no further negotiations occurred.<sup>27</sup>

The DEA found itself faced with a difficult decision. Utilization of the extradition treaty was disfavored because Mexico's track record of complying with previous U.S. requests for individuals allegedly connected to Camarena's murder was dismal.<sup>28</sup> In fact, Mexican law prohibits the extradition of its own nationals, except in extreme cases.<sup>29</sup> DEA agents, therefore, arranged with their local contacts to have Alvarez-Machain kidnapped in exchange for a \$50,000 reward, plus expenses.<sup>30</sup> Approval for the operation was received from the highest levels of the DEA and, presumably, from the Attorney General's Office.<sup>31</sup>

23. *Alvarez-Machain*, 504 U.S. at 657.

24. *See Caro-Quintero*, 745 F. Supp. at 602.

25. *See id.*

26. *See id.*

27. *See id.*

28. *See* 142 CONG. REC. H1204 (daily ed. Feb. 1, 1996) (statement of Rep. Miller) ("And despite our extradition treaty . . . , Mexico has never allowed the extradition of a single Mexican national, even though we are supposed to be close allies."); Jimmy Gurulé, *Don't Be a Party to One-Sided Extradition Treaty with Mexico*, HOUS. CHRON., June 26, 1994, at 4E (stating that Mexico has never extradited one of its nationals to the United States under the 1978 Extradition Treaty).

29. Chapter 1, Article 14 of the Mexican Law of International Extradition does not permit extradition of a Mexican national absent exceptional circumstances. *See* "Ley de Extradición Internacional," D.O., 29 de diciembre de 1975 ("Ningún mexicano podrá ser entregado a un Estado extranjero sino en casos excepcionales a juicio del Ejecutivo."). Article 9 of the United States-Mexico Extradition Treaty expressly provides that "[n]either 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." Extradition Treaty, May 4, 1978, U.S.-Mex., art. 9, para. 1, 31 U.S.T. 5059, 5065.

30. *See Caro-Quintero*, 745 F. Supp. at 603. The District Court concluded that DEA agents were responsible for Alvarez-Machain's abduction, although they were not personally involved in it. *See id.* at 609. The DEA eventually paid \$20,000 to the abductors and continued to provide them \$6,000 per week. *See id.* at 603-04. Additionally, seven of the abductors and their families were evacuated to the United States. *See id.* at 603.

31. *See id.* at 603. A DEA agent testified that "the abduction and the final terms of the abduction had been approved by the DEA in Washington, D.C., and [the agent] believed that the United States Attorney General's Office had also been consulted." *Id.*

On April 2, 1990, five or six armed men abducted Dr. Alvarez-Machain from his office in Guadalajara, Mexico.<sup>32</sup> He was taken to a house in Guadalajara, where he was allegedly subjected to electric shocks through the soles of his shoes and injected with a sedative.<sup>33</sup> Later, he was flown to El Paso, Texas, where he was arrested by federal agents.<sup>34</sup>

### III. THE LEGAL DECISIONS INVOLVING ALVAREZ-MACHAIN

#### A. *District Court Decision*

The district court considered Dr. Alvarez-Machain's motion to dismiss the pending charges on the basis of "outrageous government conduct and for lack of personal jurisdiction."<sup>35</sup> The court rejected the defendant's arguments on outrageous government conduct.<sup>36</sup> The court held, however, that it "lack[ed] jurisdiction to try this defendant."<sup>37</sup> Because the court agreed that the unilateral actions of the United States to secure custody of Dr. Alvarez-Machain were in violation of the existing Extradition Treaty,<sup>38</sup> the United States was "ordered to return him to the territory of Mexico."<sup>39</sup>

#### B. *Court of Appeals Decision*

In a terse opinion, the Ninth Circuit Court of Appeals affirmed the district court's dismissal of the indictment.<sup>40</sup> The court relied upon its earlier decision in *United States v. Verdugo-Urquidez*,<sup>41</sup> which it cited for the propositions

that the forcible abduction of a Mexican national from Mexico by agents of the United States without the consent or acquiescence of the Mexican government violates the 1980 Extradition Treaty between the United States and Mexico . . . . [T]hat the protest of the Mexican government in letters to the district court that Verdugo's abduction violated the 1980 treaty provided standing for Verdugo to assert rights under the Treaty in United States courts . . . [and] that the proper remedy for such a viola-

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32. *See id.*

33. *See id.*

34. *See id.*

35. *Id.* at 601.

36. *See id.*

37. *Id.*

38. *See id.*

39. *Id.* at 614.

40. *See United States v. Alvarez-Machain*, 946 F.2d 1466, 1466 (9th Cir. 1991), *rev'd on other grounds*, 504 U.S. 655 (1992).

41. 939 F.2d 1341 (9th Cir. 1991).

tion of the 1980 Extradition Treaty is repatriation of the Mexican national seized by United States agents.<sup>42</sup>

The *Verdugo* holding applied *a fortiori* to Alvarez-Machain.<sup>43</sup> As a result, the indictment was ordered dismissed.<sup>44</sup>

### C. *The Supreme Court*

On June 15, 1992, in a 6-3 decision, the Supreme Court of the United States held that Alvarez-Machain's forcible abduction from Mexico did not "prohibit his trial in a court in the United States for violations of the criminal laws of the United States."<sup>45</sup> The majority focused on the question of whether the abduction violated the Extradition Treaty between the United States and Mexico.<sup>46</sup> If it did not, then the Court's long-standing rule in *Ker v. Illinois*<sup>47</sup> would apply and the Court need not inquire as to how the defendant came before it.<sup>48</sup>

The Court reasoned that "[t]he Treaty says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs."<sup>49</sup> Because of this, no violation of the Treaty had taken place.<sup>50</sup> Under this rationale, "the decision of whether [Alvarez-Machain] should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch."<sup>51</sup> Consequently, the case was ordered remanded for Alvarez-Machain to be tried for his alleged participation in the murder of Agent Camarena.<sup>52</sup>

42. *Alvarez-Machain*, 946 F.2d at 1466 (citations omitted).

43. *See id.*

44. *See id.* at 1467.

45. *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

46. *See id.* at 662.

47. 119 U.S. 436 (1886). *Ker* involved the forcible abduction of an American national by a private bounty hunter from Peru. *See id.* at 438. Despite the existence of an extradition treaty and a proper warrant for Ker's arrest in hand, the bounty hunter chose to kidnap Ker and return him to the United States. *See id.* The Court held "that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court." *Id.* at 444.

48. *See Alvarez-Machain*, 504 U.S. at 662.

49. *Id.* at 663.

50. *See id.* at 665 (noting that the "history of negotiation and practice under the Treaty" failed to prove that abductions were violations of the Treaty).

51. *Id.* at 669.

52. *See id.* at 670. Upon remand to the District Court, Alvarez-Machain was acquitted by the court and released on December 14, 1992. *See Mexico Doctor Acquitted in DEA Agent's Murder*, HOUS. CHRON., Dec. 15, 1992, at A14. In an unpublished opinion, Judge Edward Rafeedie chastised the government saying, "there is no proof that [Alvarez-Machain] participated in the kidnapping of Camarena or that he even knew about it." *United States v. Alvarez-Machain*, No. CR-87-422-(G)-ER (C.D. Cal. Dec. 14, 1992), reprinted in 2 LIMITS TO NATIONAL JURISDICTION: DOCUMENTS AND JUDICIAL RESOLUTIONS ON THE ALVAREZ MACHAIN CASE 161, 182 (Secretaria de Relaciones Exteriores ed., 1993) [hereinafter 2 LIMITS]

Justice Stevens wrote a blistering dissent and characterized the majority's conclusion as nothing less than "monstrous."<sup>53</sup> Criticizing the government's claim that the Extradition Treaty's failure to specifically prohibit forcible abductions somehow sanctions such conduct,<sup>54</sup> Justice Stevens pronounced that this interpretation would transform the Treaty's provisions into "little more than verbiage" and utterly frustrate the intent of the Treaty.<sup>55</sup> Justice Stevens explained that the government's argument would, therefore, equally permit the United States to "torture or simply to execute a person rather than to attempt extradition . . . because they, too, were not explicitly prohibited by the Treaty."<sup>56</sup>

#### IV. THE REACTIONS TO ALVAREZ-MACHAIN

The adverse reactions to the majority decision came swiftly from around the globe—just as Justice Stevens had forewarned.<sup>57</sup> These reactions, however, were likely of little surprise to officials in the U.S. government. Several countries had previously expressed concerns, in the wake of the public discussions of the Barr Memorandum, that "somehow a new law had been passed, or a new authority had been given to the FBI to engage in extraterritorial arrest without consent."<sup>58</sup> The U.S. government gave assurances to foreign countries that there "will be no change in our practice and our policy of coordinating with them and getting their approval for all law enforcement activities that would occur within their territory on behalf of the FBI."<sup>59</sup> Apparently, no one gave assurance concerning the DEA and its activities.

Below is a sampling of the reactions throughout the international community and the United States.

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(copy on file with the *Houston Journal of International Law*); see also David Clark Scott, *Mexico Hails Acquittal in US Murder Case*, CHRISTIAN SCI. MONITOR, Dec. 16, 1992, at A14 (discussing Mexican reaction to the acquittal).

53. See *Alvarez-Machain*, 504 U.S. at 687 (Stevens, J. dissenting).

54. See *id.* at 674–75.

55. *Id.* at 673.

56. *Id.* at 674.

57. See *id.* at 687 ("[M]ost courts throughout the civilized world . . . will be deeply disturbed by the 'monstrous' decision the Court announces today.")

58. *Barr Hearings*, *supra* note 5, at 66 (statement of Abraham D. Sofaer). Oliver "Buck" Revell, Associate Deputy Director of the FBI, further testified that several countries had contacted the Bureau's representatives abroad to express their concern that "we were going to mount up like the Lone Ranger and go out and start seizing fugitives all over the world . . ." *Id.* at 67 (statement of Oliver B. Revell).

59. *Id.* at 67 (statement of Oliver B. Revell).

A. *Reactions of Foreign Governments*1. *Mexico*

Mexico repeatedly protested the abduction of Alvarez-Machain.<sup>60</sup> Its three diplomatic notes of protest went unanswered by the United States.<sup>61</sup> When the case went to the Supreme Court, Mexico filed its own amicus brief urging the Court to release Alvarez-Machain.<sup>62</sup>

Following the Supreme Court's decision, Mexico was outraged. Mexico immediately suspended cooperation with the United States in the fight against drug trafficking in angry protest to the Supreme Court's decision.<sup>63</sup> The Mexican Foreign Minister held a press conference in which he announced that:

- (1) Mexico repudiates as invalid and illegal the decision of the Supreme Court.
- (2) Mexico will consider as a criminal act any attempt by foreign persons or governments to apprehend in Mexican territory any person suspected of a crime.
- (3) Mexico demands the return of Alvarez-Machain.
- (4) Mexico declares that the only legal means for moving persons from one nation to face trial in another are treaties and mechanisms of extradition established under international law.
- (5) Foreign law enforcement officials of any country who operate in Mexican territory will be asked to observe updated rules that the Government of Mexico will establish.<sup>64</sup>

Despite Mexico's posturing on the drug cooperation issue, bilateral efforts were reinitiated within days.<sup>65</sup>

60. See Brief for the United Mexican States as *Amicus Curiae* in Support of Affirmance at 3, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712), reprinted in 31 I.L.M. 934, 938 (1992).

61. See *id.* at 3-4, 31 I.L.M. at 938-39. Mexico sent its first diplomatic note on April 18, 1990, requesting an official report on the role of the United States in the abduction. See *id.* at 3, 31 I.L.M. at 938. Two more diplomatic notes were sent from the Embassy of Mexico to the U.S. Department of State: one on May 16, 1990, and the other on July 19, 1990. See *id.* at 3-4, 31 I.L.M. at 938-39. The July 19 note requested the provisional arrest and extradition of the DEA agent and Mexican national allegedly involved in the abduction. See *id.* at 4, 31 I.L.M. at 939.

62. See *id.* at 1, 31 I.L.M. at 937.

63. See Marjorie Miller, *Mexico Attacks Ruling; Halts Drug War Role*, L.A. TIMES, June 16, 1992, at A1.

64. *Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 102d Cong. 118 (1992) (prepared statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State) [hereinafter *Kidnapping Hearings*].

65. See Sharon LaFraniere, *Baker Offers Reassurances After Court Kidnap Ruling*, WASH. POST, June 17, 1992, at A2 (discussing diplomatic measures taken by the Bush administration to renew cooperation in the war on drugs).

In response to Mexico's understandable outrage, "President Bush sent a letter to President Salinas of Mexico, assuring him that the U.S. government would 'neither conduct, encourage nor condone' transborder abductions from Mexico."<sup>66</sup> The two governments agreed to review the Extradition Treaty and avoid any possible repetitions of the events leading up to the *Alvarez-Machain* decision.<sup>67</sup> Secretary of State James Baker also exchanged letters with Mexican Foreign Secretary Solana "recognizing that transborder abductions by so-called 'bounty hunters' and other private individuals will be considered extraditable offenses by both nations."<sup>68</sup> President-elect Clinton later indicated that his administration would not approve abduction operations when he publicly questioned the Supreme Court's ruling in the *Alvarez-Machain* case.<sup>69</sup>

Upon the insistence of Mexico, the United States agreed to negotiate a separate treaty specifically pertaining to transborder abductions between the two countries.<sup>70</sup> The Treaty to Prohibit Transborder Abductions, which was signed by both countries on November 23, 1994, imposes obligations on the two nations separate from those contained in the Mexican-U.S. Extradition Treaty and is not intended to be a supplemental document.<sup>71</sup> Most importantly to Mexico, the remedy for a violation of the Treaty is repatriation of the abductee.<sup>72</sup>

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66. David O. Stewart, *The Price of Vengeance: U.S. Feels Heat for Ruling that Permits Government Kidnapping*, 78 A.B.A. J. 50, 52 (1992).

67. See Neil A. Lewis, *U.S. Tries to Quiet Storm Abroad over High Court's Right-to-Kidnap Ruling*, N.Y. TIMES, June 17, 1992, at A8.

68. *Kidnapping Hearings*, *supra* note 64, at 119-20.

69. See *Clinton, High Court Differ on Abduction*, L.A. TIMES, Dec. 16, 1992, at A32 (stating that the ruling goes "way too far" and "is too broad a policy for our country to have"); see also Jim Newton, *Clinton Urged to Ban Foreigners' Abductions*, L.A. TIMES, Jan. 7, 1993, at B3 (detailing a letter from Alvarez Machain's attorneys to President Clinton asking him to "adopt an entirely new approach" to the problem of abductions). The Clinton opposition did not last long. A paragraph of a June 21, 1995, Presidential Decision Directive (PDD-39) was inadvertently disclosed to the public in February, 1997, that reaffirmed U.S. policy on forceful abductions. See *U.S. Will Take Terrorists by Force*, Associated Press, Feb. 4, 1997, available in 1997 WL 4854819. Referring to a state that was harboring a terrorist sought by the United States, the directive states that "[r]eturn of suspects by force may be effected without the cooperation of the host government." *Id.*

70. See *Easing Border Tensions*, SACRAMENTO BEE, Nov. 30, 1994, at B6, available in 1994 WL 9053986 (discussing a newly-signed extradition treaty between Mexico and the United States that explicitly prohibits cross-border abductions). A similar treaty has apparently also been drafted with Canada which, along with Mexico, will be the only two countries signing treaties on transborder abductions. See Telephone Interview with U.S. Government Official (June 1, 1996).

71. The text of the Treaty will be published in a forthcoming revision of ABBELL & RISTAU, 5 *International Judicial Assistance (Criminal)* (1997 ed.). As of the writing of this article, neither the Mexican nor American legislatures have ratified the proposed Treaty. Mexican officials have privately indicated that they are less than optimistic that the Treaty will be ratified anytime soon by the U.S. Congress. Given some of the strong Republican opposition to prohibitions on transborder abductions, it may not be until a Democratic Congress resumes power again that the Treaty is ratified in the United States.

72. Furthermore, the Treaty contains specific language that no private rights exist emanating from the Treaty or violations therefrom. *Alvarez-Machain*, in fact, is currently seeking

## 2. Argentina

The Foreign Minister of Argentina, Guido Di Tella, said that if any kidnapping was carried out on Argentine soil, "it will be a shocking and extremely serious step."<sup>73</sup> Justice Minister Leon Arslanian called the decision "an historic regression in criminal law."<sup>74</sup> And President Carlos Menem "described the 'erroneous' decision as a 'horror.'"<sup>75</sup>

## 3. Bolivia

Several high-ranking Bolivian officials issued statements condemning the decision.<sup>76</sup> On June 16, 1992, Foreign Ministry official Armando Loaiza stated the decision represents the United States forcing its will over international law.<sup>77</sup> General Oscar Vargas, the armed forces commander-in-chief, said that Bolivia "will not permit incursions of foreign forces."<sup>78</sup> Vice-president Luis Ossio opined that the *Alvarez-Machain* decision is a "clear violation of international law and an 'illogical and unilateral' measure."<sup>79</sup>

Bolivia also considered suspending all further cooperation with the DEA unless certain guarantees of respect for national sovereignty were provided.<sup>80</sup> Bolivian Foreign Minister Ronald MacLean called for a redefining of the DEA's activities.<sup>81</sup> On June 18, 1992, President Jaime Paz Zamora said he was "concerned as a citizen of the planet" by the possible ramifications of the U.S. Supreme Court's decision.<sup>82</sup> Bolivia immediately set out to renegotiate its extradition treaty with the United States.<sup>83</sup>

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damages against the United States for their actions against him. *See Alvarez-Machain v. United States*, 96 F.3d 1246, 1249 (9th Cir. 1996), *amended by* 107 F.3d 696 (9th Cir. 1996) (detailing Alvarez-Machain's claims against the U.S. government for constitutional violations, statutory violations of the Federal Tort Claims Act and the Torture Victim Protection Act, kidnapping, torture, cruel and inhuman treatment or punishment, assault and battery, false imprisonment, intentional infliction of emotional distress, false arrest, negligent employment of public agents, and negligent infliction of emotional distress).

73. Lewis, *supra* note 67.

74. *Reaction to U.S. Supreme Court Decision Endorsing Right to Kidnap Foreigners for Prosecution in U.S.*, NOTISUR, June 30, 1992, available in 1992 WL 2410586 [hereinafter *International Reaction*].

75. *Id.*

76. *See id.*

77. *See id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. *See id.*

82. *Id.*

83. *See Nations Denounce High Court Ruling*, ST. LOUIS POST-DISPATCH, June 17, 1992, at 13A, available in 1992 WL 3538026.

#### 4. *Brazil*

On June 18, 1992, Foreign Minister Celso Lafer condemned the decision as contrary to the Charter of the Organization of American States and stated that violation of Mexico's territorial sovereignty "appears clear" in the *Alvarez-Machain* case.<sup>84</sup> Justice Minister Celio Borja stated the decision violated the "fundamental principle of international society and of limiting the jurisdiction of nation-states to respective territories."<sup>85</sup>

#### 5. *Canada*

The Canadian government, no stranger to abduction disputes with the United States,<sup>86</sup> took the unusual step of filing an *amicus curiae* brief in support of Mexico's position before the Supreme Court.<sup>87</sup> In its brief, Canada related the findings of a survey it conducted of the views of Australia, Austria, Finland, Germany, Great Britain, the Netherlands, Norway, New Zealand, Sweden, and Switzerland.<sup>88</sup> Each State "indicated that they would regard such an abduction as a violation of their sovereignty and would protest."<sup>89</sup> Several countries, including Finland, Germany, Great Britain, and the Netherlands stated they would demand the return of the abducted person.<sup>90</sup> Austria, Finland, the Netherlands, Norway, Sweden and Switzerland also indicated that if an abducted person were brought to their territory, they "would consider that the abducted person should be returned" to the asylum state.<sup>91</sup>

Following the Supreme Court's decision—and the rejection of the Canadian arguments—the Canadian Minister of External Affairs informed the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of

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84. *International Reaction*, *supra* note 74.

85. *Id.*

86. *See Barr Hearings*, *supra* note 5, at 32–33 (prepared statement of Abraham D. Sofaer, Legal Advisor, U.S. Department of State) (referencing several unconsented seizures between the United States and Canada); C.V. Cole, *Extradition Treaties Abound but Unlawful Seizures Continue*, INT'L PERSPECTIVES, Mar.-Apr. 1975, at 40–41 (describing "a number of cases" in which individuals were seized in Canada and the United States without use of extradition procedures).

87. Brief of the Government of Canada as *Amicus Curiae* in Support of Respondent, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (No. 91-712), *reprinted in* 31 I.L.M. 919.

88. *See id.* at 8, 31 I.L.M. at 925.

89. *Id.*

90. *See id.*

91. *Id.* "As a State Department spokesperson acknowledged following the decision, 'Many governments have expressed outrage that the United States believes it has the right to decide unilaterally to enter their territory and abduct one of their nationals.'" Stewart, *supra* note 66, at 50.

the Canadian-U.S. Extradition Treaty.<sup>92</sup> This position was reiterated in a diplomatic note to the U.S. State Department on June 23, 1992.<sup>93</sup>

#### 6. *Chile*

On June 16, 1992, Foreign Minister Enrique Silva Cimma said the Chilean government “simply does not accept [the U.S. Supreme Court decision].”<sup>94</sup> Both the Senate president Gabriel Valdes and the Socialist Party leader Marcelo Schilling publicly condemned the decision.<sup>95</sup> In a ruling announced after the *Alvarez-Machain* decision, two justices of the Chilean Supreme Court justified their dissenting opinions opposing extradition of a suspect to the United States because the United States violates its extradition treaties with other countries.<sup>96</sup>

#### 7. *China*

On December 14, 1992, the Department for Latin American Affairs of the Chinese Ministry of Foreign Affairs issued the following statement: “The Chinese Government supports the fair position adopted by the Mexican Government in this case. The Chinese Government has always sustained that relations among States must be based on equality and that every country must respect the sovereignty of others and the general principles of International Law.”<sup>97</sup>

#### 8. *Colombia*

The government of Colombia declared on June 17, 1992, that it “emphatically rejects the United States’ Supreme Court decision in the case United States against Alvarez-Machain . . . .”<sup>98</sup> Although the decision was recognized as having taken issue with a specific treaty between the United States and Mexico, Colombia believed that “its substance threatens the legal stability of [all] public treaties.”<sup>99</sup>

The Colombian government added that “[i]f the kidnapping of a [Colombian] national, in order to proceed to judge him abroad, would ever

92. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 809 (2d ed. 1995). The spokesman for Canada’s Ministry of External Affairs said that “any attempt to abduct someone from Canadian territory is a criminal act.” Lewis, *supra* note 67.

93. See Telegram from the Canadian Ministry to the Department of State of the United States (June 23, 1992), reprinted in 2 *LIMITS*, *supra* note 52, at 75–76.

94. *International Reaction*, *supra* note 74 (alteration in original).

95. See *id.*

96. See Stewart, *supra* note 66, at 52.

97. Transmission from the Department for Latin American Affairs of the Chinese Ministry of Foreign Affairs to the Mexican Embassy (Dec. 14, 1992), reprinted in 2 *LIMITS*, *supra* note 52, at 77.

98. Statement of the Government of Colombia (June 17, 1992), reprinted in 2 *LIMITS*, *supra* note 52, at 79 [hereinafter Colombian Statement].

99. CARTER & TRIMBLE, *supra* note 92, at 808–09; Stewart, *supra* note 66, at 50.

take place, the excellent relations that traditionally have been held among the governments of Columbia and the United States could be seriously affected.”<sup>100</sup> Justice Minister Fernando Carrillo stated that the decision is inconsistent with the “years of struggle for consolidation” of international law in areas regarding “sovereignty, equality of nation-states, self-determination, and non-interference.”<sup>101</sup> According to the Colombian daily newspaper *La Prensa*, certain anonymous military officers warned the *Alvarez-Machain* decision could serve to justify potential abduction of rebels who have targeted U.S. companies for sabotage and who have kidnapped U.S. nationals.<sup>102</sup>

### 9. Costa Rica

The Costa Rican Supreme Court issued a strong rebuke to the *Alvarez-Machain* decision in its Session of Plenary Court on June 25, 1992.<sup>103</sup> In part, it stated:

Legaliz[ing] abduction by other States’ officials to bring the abducted before the courts of such country, is not only contrary to modern times, but is against the ideals it forged upon the principles of respect to freedom and human dignity, is against the ideals of independence of that nation, and infringes its highest principles and those of the rest of nations, that have the natural right to protect its inhabitants and to judge them according to due process, same that has been so strongly developed by that Court.

....

In this manner this Court respectfully petitions the Executive and Legislative Powers of the United States of America, to legislate as rapidly as it may be possible, rules deemed necessary to guarantee all individuals and all nations of the world, that acts such as those [committed] will never be conducted again.<sup>104</sup>

The Court’s sharp denunciation of the decision did not stop with vocal opposition. Apparently still not satisfied with the response of the U.S. government, on January 12, 1993, the Costa Rican Supreme Court invalidated the Costa Rican-U.S. Extradition Treaty.<sup>105</sup> Jose Enrique Castro

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100. Colombian Statement, *supra* note 98, at 80 (second alteration in original).

101. *International Reaction*, *supra* note 74.

102. *See id.*

103. *See* Resolution of the Supreme Court of Justice No. 91-712 (June 25, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 81–82.

104. *Id.*

105. *See Costa Rica Kills Extradition to U.S.*, S.F. EXAMINER, Jan. 15, 1993, at A20, available in 1993 WL 8559246. As of the writing of this article the United States and Costa Rica were still without a valid extradition treaty.

Marin, a Costa Rican assistant attorney general, said “[a]s a result of the Supreme Court decision, we cannot apply this treaty . . . .”<sup>106</sup>

#### 10. *Cuba*

The official Communist newspaper, *Granma*, published an editorial on June 16, 1992, opining “[t]he U.S. has no right at all—nor has anyone outside its frontiers granted it the right—to impose its gun law, its law of the Wild West, its law of the jungle, its lynch law, on other countries.”<sup>107</sup>

The Cuban government also issued a statement on June 29, 1992, which reads in part:

The decision of the highest North-American court, now controlled by ultraconservatives and racists, defines its character as an instrument of the imperialist policy and proves evident the falsehood of the pretended independence of the Judicial Power in that country.

The Government of the Republic of Cuba reaffirms that national sovereignty is inviolable and that it can not be questioned, nor belittled by false decisions of foreign tribunals and that no state, powerful as it may be, has any authority whatsoever to ignore the rules of law and to act as if it owned the world.<sup>108</sup>

#### 11. *Denmark*

Denmark’s Ministry of Justice condemned the abduction and the Supreme Court decision on June 17, 1992, and added that “any attempt of kidnapping in Danish territory, carried out by United States’ authorities, would be a violation of International Law and of the Danish Criminal Code.”<sup>109</sup>

#### 12. *Ecuador*

The Ministry of Foreign Affairs issued a press release stating that it considers that the United States’ Supreme Court decision in the “Alvarez-Machain” case is positively illegal, because it attempts against fundamental rules of International Law, and violates the principles of sovereign equality of the States, and non-intervention in internal affairs, contained in the Charter of the

106. Peter Hecht & Denny Walsh, *Kidnap of Mexican Doctor Now Hurts U.S.*, SACRAMENTO BEE, Apr. 21, 1994, at A1, available in 1994 WL 5266737. “This has affected the validity of the law. There needs to be a new one.” *Id.*

107. *International Reaction*, *supra* note 74.

108. *Cuba Rejects USA Conduct that Violates International Law*, GRANMA, June 29, 1992, reprinted in 2 LIMITS, *supra* note 52, at 84–85.

109. JYLLANDAS POSTEN, June 17, 1992, reprinted in 2 LIMITS, *supra* note 52, at 87.

United Nations and in the one of the Organization of American States.<sup>110</sup>

### 13. Guatemala

During the Forty-Seventh Session of the meetings of the U.N. General Assembly on September 29, 1992, the Guatemalan Minister of Foreign Affairs remarked that "it is peremptory that [the] international community rejects any claim of a State to extraterritorially apply its laws."<sup>111</sup>

### 14. Honduras

On June 17, 1992, the Ministry of Foreign Affairs stressed that "[i]t is also an international rule that a State may not invoke provisions of its internal law, either administrative or judicial as a justification of its failure to perform a treaty."<sup>112</sup>

### 15. Iran

Not satisfied with merely condemning the decision by parliamentary resolution or statement, the government of Iran passed a draft law giving the president of Iran "the right to arrest anywhere Americans who take action against Iranian citizens or property anywhere in the world and bring them to Iran for trial."<sup>113</sup> Islamic law, of course, would be applied by the Iranian courts.<sup>114</sup> The legislation indicated that it "aims at preserving the prestige and territorial integrity of the Islamic Republic, safeguarding the lives and properties of Iranian nationals abroad and defending the interests of the Islamic Republic."<sup>115</sup>

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110. Press Release of the Ministry of Foreign Affairs of Ecuador No. 134 (June 19, 1992), reprinted in 2 LIMITS, *supra* note 52, at 89.

111. Statement of the Minister of Foreign Affairs of Guatemala (Sept. 29, 1992), reprinted in 2 LIMITS, *supra* note 52, at 91.

112. Statement of the Ministry of Foreign Affairs of Honduras (June 17, 1992), reprinted in 2 LIMITS, *supra* note 52, at 93. In fact, the Honduran legislature adopted a policy of imposing up to twenty years in jail for any Honduran who aided the DEA in kidnappings. See *Up to 20 Years in Jail Proposed for Hondurans Who Aid DEA Kidnappings*, NOTIMEX FED. NEWS SERV., Aug. 2, 1992, available in 1992 WL 2408527.

113. CARTER & TRIMBLE, *supra* note 92, at 812.

114. See *id.*

115. *Id.* The Iranian representatives who introduced the bill indicated that their law would remain in force so long as the U.S. law remained the same. Ostensibly, the Iranian law is still on the books although no known prosecutions have been commenced under its authority. The Iranian law did not pass unnoticed in the U.S. government. Senator Daniel Patrick Moynihan (D-NY) introduced Senate Resolution 319, in part because of the Iranian legislation. See 138 CONG. REC. S8535 (daily ed. June 18, 1992); see also *infra* note 145 (containing text of Resolution 319).

### 16. *Jamaica*

The decision was criticized by the Jamaican Minister of Security and Justice as being based on the principle “might makes right.”<sup>116</sup> The ruling was “an atrocity that would disturb the world.”<sup>117</sup> The United States should come “back to its senses.”<sup>118</sup>

### 17. *Malaysia*

Prime Minister Mahathir Bin Mohamad delivered a scathing rebuke against the United States stating:

recent history most surely convince[s] us that a unipolar world is every bit as threatening as a bipolar world. . . .

We see soldiers invading a weak country to capture the head of government and bring him back for trial under the laws of the invader. We see a citizen being kidnapped in his own country by authorities of another country, sanctioned by the kidnapper’s court. We see the extraterritorial application of the laws of the strong over the weak.<sup>119</sup>

### 18. *Nicaragua*

The Nicaraguan government claimed that “the ruling allows the United States government to ‘solve a crime with a crime.’”<sup>120</sup>

### 19. *Peru*

Peruvian President Alberto Fujimori refused to officially comment on the decision “until more details are known.”<sup>121</sup> However, Lima Superior Justice Court president Lino Roncallo stated that the decision constitutes an “attack on the sovereignty of foreign countries.”<sup>122</sup>

### 20. *Spain*

The president of Spain publicly criticized the decision as “erroneous.”<sup>123</sup>

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116. CARTER & TRIMBLE, *supra* note 92, at 809.

117. *Id.*

118. *Id.*

119. Prime Minister Mahathir Bin Mohamad, Statement at the Non-Aligned Movement Summit in Jakarta (Oct. 1, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 97.

120. Hernan De J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833, 835–36 (1993).

121. *International Reaction*, *supra* note 74.

122. *Id.*

123. CARTER & TRIMBLE, *supra* note 92, at 809.

### 21. *Switzerland*

The Swiss Justice Ministry spokesman, Juerg Kistler, expressed disfavor with the Supreme Court's ruling by stating: "Imagine where it would lead if every country would do that. You would have anarchy."<sup>124</sup>

### 22. *Uruguay*

The Uruguayan Senate voted unanimously on June 18, 1992, to condemn the decision on the grounds that the ruling contravenes international law and infringes on territorial integrity.<sup>125</sup> Additionally, on June 30, 1992, the lower house of the Uruguayan Parliament voted that the decision demonstrates "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties."<sup>126</sup>

### 23. *Venezuela*

Deputy Paciano Padron, head of the foreign relations legislative commission, stated on June 16, 1992, that the commission had requested President Carlos Andres Perez revise the U.S.-Venezuelan extradition treaty.<sup>127</sup> Venezuelan Supreme Court president Gonzalo Rodriguez Corro criticized the *Alvarez-Machain* decision as "arbitrary and a serious precedent."<sup>128</sup> The president of the Venezuelan Judges Association went further, calling the ruling a "violation of human rights."<sup>129</sup>

The following statement, in part, was issued by the Venezuelan government on June 22, 1992:

The [Ministry of Foreign Affairs] calls the attention upon the serious potential disturbance of peace and international security found in the resolution of the United States' Supreme Court, by confirming precedents that can offer to this and to other States the excuse to enter the sovereign territories of one or another, in search of persons sought by its own justice organs.<sup>130</sup>

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124. LaFraniere, *supra* note 65.

125. *See International Reaction*, *supra* note 74.

126. CARTER & TRIMBLE, *supra* note 92, at 808.

127. *See International Reaction*, *supra* note 74.

128. *Id.*

129. *Id.*

130. Declaration of the Ministry of Foreign Affairs of Venezuela (June 22, 1992), *reprinted in 2 LIMITS*, *supra* note 52, at 100.

B. *Reactions of International Organizations*

1. *American Juridical Committee, Organization of American States*

On July 2, 1992, the governments of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay requested that the Inter-American Juridical Committee issue an advisory opinion on the Supreme Court's decision.<sup>131</sup> The Permanent Council of the OAS referred the matter to the Committee via petition on July 15, 1992.<sup>132</sup>

The Committee issued its opinion on August 15, 1992, and found, by a vote of nine in favor and one abstention (the one being that of the U.S. judge):

[I]t cannot be disputed or is not in doubt that the abduction in question was a serious violation of public international law . . . . [T]he United States of America is responsible for the conduct of the DEA in this case since, in full knowledge of it, that government has abstained from reversing that action.<sup>133</sup>

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131. Letter from the OAS Representatives of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay to Ambassador Julio Londoño, President of the Permanent Council of the Organization of American States (July 2, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 9–10. The Ibero-American countries expressed their concern that any judicial decision that did not recognize the complete respect of the exclusive exercise of state sovereignty over their own territory was “highly troublesome” and violated international law and the U.N. Charter. *See* Joint Statement of the Second Ibero-American Conference of Heads of State and Government (July 24, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 53–54 (declaring its intent to ask the U.N. General Assembly to seek ICJ review). On November 13, 1992, the U.N. representatives of 21 countries notified the U.N. Secretary General to include their request for an ICJ advisory opinion on the next agenda of the General Assembly and seek review by the Sixth Committee (Legal Questions) of the General Assembly. *See* Letter from the Permanent U.N. Representatives of Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela to the Secretary-General of the U.N. (Nov. 13, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 55–59. The Sixth Committee, on November 25, 1992, recommended that the General Assembly continue consideration of the matter into its next session. *See* U.N. GAOR 6th Comm., 47th Sess., 38th mtg. ¶ 7, U.N. Doc. A/C.6/47/L.18 (1992).

132. *See* Petition from the Permanent Council of the Organization of American States to the Inter-American Juridical Committee (July 15, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 25.

133. Legal Opinion of the Inter-American Juridical Committee on the Decision of the Supreme Court of the United States of America, (Aug. 15, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 32. The question before the Committee was “confined to examining the decision of the United States Supreme Court from the standpoint of its conformity with public international law.” *Id.* at 31. The committee found the *Alvarez-Machain* decision violated international law for the following reasons:

- a) By upholding the jurisdiction of United States courts to try the Mexican citizen, Humberto Alvarez Machain, forcibly abducted from his country of origin, the United States is ignoring its obligation to return him to the country from whose jurisdiction he was abducted.
- b) By maintaining that it is free to try persons abducted by the action of its government in the territory of another state, unless this is expressly prohibited by a treaty

## 2. *Caribbean Community (CARICOM)*

The states of the Caribbean Community issued a statement on July 2, 1992, “emphatically reject[ing] the notion that any State may seek to enforce its domestic law by means of abduction of persons from the territory of another sovereign state with the intention to bring them within its jurisdiction in order to stand trial on criminal charges.”<sup>134</sup>

## 3. *Group of Rio*

The Group of Rio published a statement on June 16, 1992, that rejected “any interpretation that pretends to give recognition to the possibility of extraterritorial application of laws of one country in another.”<sup>135</sup>

## C. *Reactions Within the United States*

Harsh criticisms of the kidnapping of Alvarez-Machain and of the Supreme Court’s decision were not limited to those coming from outside the United States. Many American international scholars,<sup>136</sup> newspaper

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in effect between the United States and the country in question, the United States is ignoring a fundamental principle of International Law which is respect for the territorial sovereignty of states.

- c) By interpreting the United States/Mexico Extradition Treaty to the effect that it is not an impediment to the abduction of persons, the United States fails to consider the precept by which treaties must be interpreted in conformity with their purpose and aim and in relation to the applicable rules and principles of international law.

*Id.* at 33–34. With respect to the lone abstention by the U.S. judge, Dr. Seymour J. Rubin, it must be noted that Dr. Rubin’s vote was based on his belief that the Committee lacked jurisdiction to issue an opinion on this matter and did not reflect his view of the merits of the decision. *See* Explanation of Vote by Doctor Seymour J. Rubin (Aug. 15, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 47. Indeed, Dr. Rubin stated on the record that he believed that the acts “committed by agents of the United States Drug Enforcement Administration were a clear violation of International Law.” *Id.*

134. Statement Issued by the Heads of Government of the Caribbean Community (July 2, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 13.

135. Statement of the Permanent Mechanism of Dialogue and Political Concordance-Group of Rio-on the Recent Ruling of the Supreme Court of the United States of America (June 16, 1992), *reprinted in* 2 LIMITS, *supra* note 52, at 17.

136. *See, e.g.*, Louis Henkin, *Notes from the President: Will the Supreme Court Fail International Law?*, ASIL NEWSL., Aug.-Sept. 1992, at 1, *reprinted in* 2 LIMITS, *supra* note 52, at 106 (“Extradition treaties apart, kidnapping someone from another country is a clear, established, undoubted violation of international law.”); David J. Scheffer, *Sanctity of Law Stops at the Border*, L.A. TIMES, June 17, 1992, at B7 (arguing that the Rehnquist decision “has stripped the [U.S.-Mexico Extradition Treaty] of all meaning” and that the “court’s tortured reasoning would verge on the comical if it were not so devastating to this country’s reputation as the citadel of law”); *see also* Resolution of the American Bar Association Adopted by the House of Delegates (Feb. 8–9, 1993), *reprinted in* 2 LIMITS, *supra* note 52, at 109 (“[F]ederal, state and domestic territorial authorities dealing with rendition of individuals from foreign territories, by extradition or otherwise, shall fully respect international law.”).

editorial boards,<sup>137</sup> and legislators<sup>138</sup> warned of the deleterious consequences that could occur due to the flagrant disregard of international law demonstrated by the United States.

The U.S. government, of course, attempted to distance itself from the potential magnitude of the Supreme Court's decision. Indeed, a statement by Assistant Attorney General William Barr, applauding the ruling, was considered to be so inflammatory that Press Secretary Marlin Fitzwater immediately issued a statement reiterating U.S. respect for international rules of law.<sup>139</sup> The Court's decision ostensibly granting of a "green light" for future transborder abductions without host State consent was becoming a political issue.<sup>140</sup> The White House issued a public statement reaffirming that:

the United States strongly believes in fostering respect for international rules of law, including, in particular the principles of respect for territorial integrity and sovereign equality of states. U.S. policy is to cooperate with foreign states in achieving law enforcement objectives. Neither the arrest of Alvarez-Machain, nor the . . . Supreme Court decision reflects any change in this policy.<sup>141</sup>

On July 7, 1992, Congressman Leon Panetta introduced the International Kidnapping and Extradition Treaty Enforcement Act of 1992 in the house<sup>142</sup> seeking specifically to bar prosecution of persons forcibly abducted by U.S. agents from foreign states where an extradition treaty is

137. See, e.g., *Comity, Not Kidnapping*, WASH. POST, June 16, 1992, at A20 (warning that the executive branch must abandon these tactics or risk putting Americans in danger); *Jeopardizing Relations with Mexico: High Court Ruling Justifies Dangerous 'Snatch' Technique in Notorious Camarena Case*, L.A. TIMES, June 16, 1992, at B6 (labeling the ruling "troubling" and observing that it "could spill over onto other extradition treaties"); *Pandora's Box: Supreme Court Ruling on Kidnapping Out of Bounds*, HOUS. CHRON., June 16, 1992, at A18 (arguing that the Supreme Court's opinion opens the "truly frightening possibility" that Americans could become increasingly subject to extraterritorial abductions).

138. See 138 CONG. REC. H4699 (daily ed. June 16, 1992) (statement of Rep. Kolbe) (calling on the U.S. government to do "everything in its power to ensure that our antidrug effort with Mexico does not suffer as a result of the Supreme Court's action").

139. See Alfred Paul LeBlanc, Jr., Note, *United States v. Alvarez-Machain and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1415 n.15 (1993).

140. In fact, the political fallout prompted the Justice Department to issue a memorandum to all U.S. Attorneys concerning "Extraordinary Renditions and United States v. Alvarez-Machain." See Notice of Other Recent Documents: U.S. Department of Justice Memo on United States v. Alvarez-Machain, Aug. 12, 1993, 32 I.L.M. 277. The memorandum "requested that they inform their staff that 'the Alvarez-Machain decision does not constitute a "green light" for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the laws of foreign states, international law, or coordination with the Department of Justice.'" *Id.*

141. *Kidnapping Hearings*, *supra* note 64, at 115 (prepared statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State) (alteration in original).

142. See 138 CONG. REC. H6019 (daily ed. July 7, 1992).

in place.<sup>143</sup> The legislation was intended to restore “our respect for other nations’ sovereignty.”<sup>144</sup>

Efforts were initiated within the Senate to legislatively repair the perceived damage arising from the *Alvarez-Machain* case.<sup>145</sup> In particular, Senators Moynihan, Pell, and Simon introduced a bill on September 18, 1992, to prohibit direct arrest and abductions by U.S. agents from other nations.<sup>146</sup> Representative Henry Gonzales introduced similar legislation in the House<sup>147</sup> stating that there was a “clear need for corrective legislation

143. *See id.*

144. *Id.* The Bill provided in pertinent part:

(a) IN GENERAL.—A person who is forcibly abducted from a foreign place which has in effect an extradition treaty with the United States—

- (1) by the agents of a governmental authority in the United States for the purposes of a criminal prosecution; and
- (2) in violation of the norms of international law;

shall not be subject to prosecution by any governmental authority in the United States.

(b) FOREIGN GOVERNMENTAL CONSENT.—An abduction is not, for the purposes of this section, a violation of the norms of international law if the government of the foreign place consents to that abduction, but such consent may not be implied by the absence of a prohibition on such abductions in a treaty regarding extradition.

*Id.*

145. *See* 138 CONG. REC. S8535 (daily ed. June 18, 1992). Senator Moynihan and Senator Pell introduced Senate Resolution 319 which resolved that:

- (1) Anyone who attempts to kidnap a person in the United States for the purpose of bringing that person to trial abroad should be deemed to have committed a crime in the United States and dealt with accordingly;
- (2) The United States should vigorously pursue drug traffickers and any person involved in the murder of United States Drug Enforcement Agency officials through the existing international legal framework, including extradition treaties; and,
- (3) United States officials should refrain from committing the crime of kidnapping which weakens international cooperation against crime, encourages the abduction of American citizens and subverts respect for the rule of law.

*Id.*

146. *See* 138 CONG. REC. S14,123–24 (daily ed. Sept. 18, 1992). The bill would have amended Section 481(c)(1) of the Foreign Assistance Act of 1961 to read as follows:

(1) Prohibition on direct arrest and abduction—

- (a) Notwithstanding any other provision of law, no officer, agent or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action; and
- (b) Notwithstanding any other provision of law, no officer, agent or employee of the United States government may authorize, carry out or assist, directly or indirectly, the abduction of any person within the territory of any foreign state exercising effective sovereignty over such territory without the express consent of the state.

*Id.* at S14,124.

147. *See* 139 CONG. REC. H8430 (daily ed. Oct. 22, 1993) (statement of Rep. Gonzales).

since the executive branch acted in this unlawful manner and the judicial branch sanctioned it.”<sup>148</sup>

Neither bill was enacted. As a result, the Barr Memorandum and the Supreme Court decision still remain good law today.

#### V. *ALVAREZ-MACHAIN* AND THE DANGERS IT PRESENTS TO AMERICAN CITIZENS

In considering the ramifications of the *Alvarez-Machain* decision, one must separate the legal consequences from the policy implications. Though the Supreme Court’s legal analysis was widely condemned as flawed, the law surrounding the decision, as in most cases, is subject to interpretation. More threatening than the repercussions stemming from the legal analysis is the precedent established by the United States that transborder abductions conducted without host state consent can, in some circumstances, be warranted. Once such conduct is sanctioned by the United States, it may not be too long before it is repeated by another country, perhaps against a U.S. citizen.<sup>149</sup>

Consider the following hypothetical:

As the night turns into morning, four heavy-set men burst into Aramco’s corporate headquarters in Houston, Texas, and point an AK-47 at the head of Aramco’s CEO. “Do as you’re told and nobody will get hurt,” they explain, and they deposit him in the

148. *Id.*

149. See 138 CONG. REC. S14124–25 (daily ed. Sept. 18, 1992) (statement of Sen. Simon) (“If the United States can kidnap a citizen from another country for trial in our courts, what is to prevent other nations from kidnapping our citizens to be tried and punished abroad?”). Judge Sofaer, while testifying about the Barr Memorandum, described other implications that may flow from U.S. conduct of nonconsensual arrests in a foreign territory, including death of the agent or other American operative, apprehension and punishment of our agents who would lack immunity from criminal or civil actions for violations of local laws, extradition requests for our agents, the possibility of civil actions against the U.S. government in foreign courts, and an adverse impact on bilateral relations between the United States and the host country. See *Barr Hearings*, *supra* note 5, at 25. Judge Sofaer, in fact, was proved right. Most of these scenarios materialized in the aftermath of the *Alvarez-Machain* case. Relations were temporarily, and still to some degree, strained between the United States and Mexico. *Alvarez-Machain* filed a \$20 million dollar civil action against the United States and several of the agents who abducted him. See *Drug Agency Is Sued over the Kidnapping of a Mexican Doctor*, N.Y. TIMES, July 10, 1993, § 1, at 26. The action was dismissed by the district court, in part, because the Fifth Amendment was held not to apply extraterritorially and the Torture Victim Protection Act was held to not apply retroactively to acts occurring before 1992. See *Alvarez-Machain v. United States*, 96 F.3d 1246, 1251–52 (9th Cir. 1996), *amended by* 107 F.3d 696 (9th Cir. 1996). On appeal, the Ninth Circuit affirmed the lower court’s holding on the Fifth Amendment issue, noting that the due process issue was precluded by findings in the earlier criminal proceeding. See *id.* at 1252. The Ninth Circuit reversed the lower court on the Torture Victim Protection Act issue, however, holding that the TVPA’s application to events occurring before its enactment did not constitute retroactive application. See *id.* The court reasoned that “[t]he [TVPA] does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law.” *Id.*

back of a waiting automobile. The captive is informed that he is under indictment for complicity in plundering of natural resources from the Rumaila oil fields in violation of the sovereignty of Iraq. The four abductors tie the astonished CEO up and beat him about the head and body with blunt instruments. They smuggle him into Iran with the acquiescence of Iranian authorities, and with their assistance he is placed under arrest by Iraqi law enforcement agents. Finally, they bring him before a court in Baghdad, where he is accorded all the due process rights to which he is entitled under Iraqi criminal law and promptly sentenced to prison. The U.S. State Department adamantly protests his apprehension and capture as a violation of U.S. sovereignty and territorial integrity, but the Iraqis respond with nothing less than unqualified scorn. Meanwhile, a U.S. citizen finds himself alone in the vagaries of the Iraqi criminal justice system.<sup>150</sup>

Such a scenario should not be considered too far fetched, particularly given the actual reaction of the government of Iran specifically authorizing its law enforcement agents to arrest Americans anywhere in the world for perceived violations of Iranian law.<sup>151</sup> Nevertheless, the U.S. actions have established a dangerous precedent from which it may not be possible to retreat.<sup>152</sup>

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

151. See *supra* notes 113–115 and accompanying text.

152. As Senator Moynihan stated:

[T]here are terrorists the world over prepared to see Americans killed, and we have legitimated the proposition that a foreign government can send agents into this country or find agents in this country which will take Americans out of the jurisdiction, leave them defenseless in foreign lands, and they will say to us, "You did it, and we are doing it. What is the difference?"

138 CONG. REC. S8537 (daily ed. June 18, 1992) (statement of Sen. Moynihan). This was not a novel concern for the U.S. government. Seven years before the *Alvarez-Machain* decision, Judge Sofaer discussed the very issue before a Senate Subcommittee hearing on extraterritorial abductions. Resisting the notion that such conduct was acceptable, he stated:

Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ?

. . . .

. . . [H]ow would we feel if some foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, or Kentucky, or Utah, or someplace else, because we refused through the normal channels of international, legal communications, to extradite that individual?

*Bills to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong. 63 (1985) (statement of Abraham D. Sofaer, Legal Adviser to the Department of State).

## VI. CONCLUSION

The outrage expressed by the international community following the Supreme Court's decisions demonstrates that the "no abduction without consent" concept is well-established and still in force and that the United States' failure to repatriate Alvarez-Machain following Mexico's repeated demands did not serve to create a revision or exception to the rule. The extent to which the ramifications of the abduction itself and the decision of the Supreme Court will harm U.S. interests in the long run is still unclear. Should the United States refrain from ever conducting another transborder abduction without consent, it may never have to look back and reconsider whether its original reactions were worth the consequences. In the short term, however, it is clear that whatever benefits the Bush Administration saw by conducting the transborder abduction of Alvarez-Machain, those benefits were certainly not realized. As a matter of law, and particularly as a matter of policy, the basis for conducting the abduction left much to be desired, as did the end result of acquittal.

Although the Clinton Administration has assured Mexico and other nations that it is not U.S. policy to embark upon transborder abductions, the decision of the Supreme Court and the Barr Memorandum remains unaffected and in place, ready to be utilized again by an administration that chooses to do so.<sup>153</sup> Until an executive order or legislative enactment states otherwise, no nation's citizen is safe from the grasp of the United States.<sup>154</sup>

An early American scholar and patriot, Thomas Paine, once said that an "avidity to punish is always dangerous to liberty" because it leads men "to stretch, to misinterpret, and to misapply even the best of laws."<sup>155</sup> To counter that tendency, Paine reminds us "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."<sup>156</sup>

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153. In fact, Alan J. Kreczko, then Deputy Legal Adviser at the U.S. Department of State, and now General Counsel for the National Security Council in the Clinton Administration, informed the House Judiciary Subcommittee on Civil and Constitutional Rights that the United States was "not prepared categorically to rule out unilateral action. It is not inconceivable that in certain extreme cases . . . the President might decide that such an abduction is necessary and appropriate as a matter of the exercise of our right of self-defense." *Kidnapping Hearings*, *supra* note 64, at 115-16 (prepared statement of Alan J. Kreczko, Deputy Legal Adviser, U.S. Department of State). In fact, this already appears to be the case as the Clinton Administration has reinforced U.S. authority and willingness to conduct "snatch and grab" operations. *See U.S. Will Take Terrorists by Force*, *supra* note 69, available in 1997 WL 4854819.

154. *See Woods*, *supra* note 17, at 8 (stating that the Barr Opinion remains the legal position of the U.S. executive branch). Referring to the Barr Memorandum, which essentially was adopted by the Supreme Court, one commentator voiced concern that so long as it is not unequivocally overruled it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 10 (quoting *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)).

155. 2 THE COMPLETE WRITINGS OF THOMAS PAINE 588 (Philip S. Foner ed., 1945).

156. *Id.* Justice Brandeis expressed a similar concern in 1928 when he opined:

Two hundred years after Paine voiced his concern, it remains a warning of which the United States should be wary.

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Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

*Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).