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The Argument Against International Abduction of Criminal Defendants: An Introductory Note

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RECENT DEVELOPMENTS

THE ARGUMENT AGAINST INTERNATIONAL ABDUCTION OF CRIMINAL DEFENDANTS

AN INTRODUCTORY NOTE

Joel R. Paul*

On April 2, 1990, Dr. Humberto Alvarez-Machain, a Mexican gynecologist, was abducted by a group of armed men from his office in Guadalajara, Mexico. He was threatened with a gun, taken to a hideout and later flown by plane against his will to El Paso, Texas, where he was met by agents of the United States Drug Enforcement Agency ("DEA") who arrested him. He was later arraigned on charges related to the abduction, torture and murder in Mexico of a United States DEA agent, Enrique Camarena. The men responsible for the abduction of Dr. Alvarez-Machain have been indicted in Mexico for his abduction. At least seven of these men and their families have been given sanctuary in the United States, and the DEA has paid the abductors for turning Alvarez-Machain over to the DEA. The abductors continued to receive a total weekly stipend paid by the United States Government.

In response the Mexican Government has filed several written protests to the United States Department of State arguing that the abduction and arrest of Alvarez-Machain violated the United States - Mexico Extradition Treaty of 1980 and seeking the extradition of the kidnappers. The United States Government apparently has denied extradition.

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Although the United States Government initially denied any involvement in the abduction, the DEA agent responsible for the operation has testified that the DEA met with an informant who arranged the abduction in exchange for a promise that the DEA would pay a $50,000 reward plus expenses for delivering Alvarez-Machain to the United States authorities.

United States Federal District Judge Edward Rafeedie issued an opinion on August 10, 1990, declining jurisdiction over Alvarez-Machain, based on the violation of the Extradition Treaty by the United States, and ordering the United States to repatriate him.[1] Judge Rafeedie's order has been stayed by the Ninth Circuit pending an appeal brought by the United States to reverse the order.

The United States argues that the long-standing precedent of *Ker v. Illinois*,[2] should defeat Alvarez-Machain's defense that he was improperly brought into court by the Government's illegal action. The first important issue is whether *Ker* is controlling under the circumstances in this case. The second, if *Ker* does not bar the defense, involves the question whether the Court lacks jurisdiction of Alvarez-Machain because the United States allegedly denied him due process and violated both the Extradition Treaty and customary international law in orchestrating an abduction in the territory of another friendly state. I will discuss briefly the applicability of the *Ker* rule and the due process argument. I will not discuss the question of whether the abduction violated international law. That issue is addressed in brief by Professor Ruth Wedgwood of Yale Law School, filed in the Ninth Circuit on behalf of the Lawyers' Committee for Human Rights.

First, at a superficial glance, the facts in *Ker* seem sufficiently analogous for the case to be controlling. Ker was convicted in Illinois of larceny and embezzlement. The bank sent a Pinkerton agent to Peru with a request for extradition signed by the President. The Pinkerton agent did not bother to present the request for extradition, however. Instead, he forcibly seized Ker and brought him back to the United States to stand trial. After his conviction, Ker appealed to the Supreme Court arguing that he had been denied due process and that his seizure violated an extradition treaty with Peru. The Supreme Court dismissed both arguments. The Court held that "we do not think he is entitled to say that he should not be tried at all for the crime with which he is

1. United States v. Caro-Quintero, *et. al.*, 745 F. Supp. 599 (C.D. Cal. 1990).
2. Ker v. Illinois, 119 U.S. 436 (1886). *See generally*, RESTATEMENT ON FOREIGN RELATIONS LAW (Third) § 433 Com. b., RN 3.

charged in a regular indictment."[3] Moreover, the Court found that the treaty did not entitle him to a right to asylum in Peru.

On closer examination, however, there are key facts which distinguish *Ker* from *Alvarez-Machain*. Unlike Ker, who was a United States citizen, Alvarez-Machain was seized from his country of citizenship. More importantly, the Government of Mexico has objected through diplomatic notes on an official level that the abduction violated Mexico's rights under the Extradition Treaty. By contrast, Peru, which was occupied at the time by Chilean troops, never objected to Ker's seizure. Indeed, the very notion of Peruvian sovereignty was in doubt in light of the fact that the Peruvian capital was occupied and the few remaining Peruvian Government officials had fled to the mountains. Under those historical circumstances, there is even doubt as to whether the Extradition Treaty remained in effect between the United States and Peru. Finally, Ker's seizure was executed by a privately employed Pinkerton agent, whereas the DEA has acknowledged that it arranged for the abduction of Alvarez-Machain and that it has rewarded, and in fact, continues to protect his abductors. Thus, there are strong arguments that *Ker* is distinguishable.

Perhaps the best reason for rejecting *Ker* as controlling in this case is that the *Ker* opinion reflected a late-nineteenth-century understanding of international law. States, not private persons, were the exclusive subjects of international law. Thus, the Court would not permit Ker to assert an individual right to asylum under a treaty — a right to remain in Peru even where the Peruvian government did not care to protest his removal. Today, courts are much more apt to recognize that a treaty can confer on individuals certain legal rights that may be cognizable in a court.[4]

Other developments in domestic law have also cast doubt on the vitality of *Ker*. The whole due process revolution expanding procedural rights is reflected in judicial efforts to trim back on *Ker*. For example, in *United States v. Toscanino*,[5] the Second Circuit held that the rule in *Ker*

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3. *Id.* at 440.

4. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 462 (1990). *See generally*, Lowenfeld, *Kidnaping by Government Order: A Follow-Up*, 84 AM. J. INT'L L. 712 (1990) [hereinafter Lowenfeld, *Kidnaping*]. The critical shift of focus from states to individuals as subjects of international law is one of the most revolutionary legal developments of our time. *See generally*, Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1 (1982).

5. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). *See generally* Comment, *United States v. Toscanino*, 88 HARV. L. REV. 813 (1975).

> cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. . . . [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct.[6]

The government misconduct alleged by Toscanino included being kidnapped in Montevideo, Uruguay, knocked unconscious, bound, blindfolded, held without food or water, interrogated and tortured with the participation of an employee of the United States Bureau of Narcotics over a period of seventeen days.

After *Toscanino* United States courts tried to apply a "shock-the-conscience" exception to the *Ker* rule.[7] Thus, if the government's misconduct was so egregious as to "shock the conscience," the *Ker* rule would not apply, and the defendant could raise the defense against jurisdiction. Experience has shown that the *Toscanino* exception is not an effective prophylactic to government-sponsored kidnapping and the mistreatment which may accompany irregular methods. The failure of this exception is neatly summarized by one authority: "There are no nice abductions."[8] The facts in *Alvarez-Machain* are further evidence that allowing a court to exercise jurisdiction over a nonresident alien improperly brought before the court sanctions official involvement in abduction and bribery in violation of both principles of due process as well as basic tenets of international human rights.

Second, if *Ker* is either distinguished or reversed, the question becomes whether the Government's action in this case in fact violated either due process under the United States Constitution or international law, as evidenced by the Extradition Treaty with Mexico or by customary international law.

In the following amicus curiae brief for the Lawyers Committee for Human Rights, Professor Ruth Wedgwood argues convincingly that the United States Government's involvement in the abduction of Alvarez-Machain violated both the Extradition Treaty and customary international law. Her arguments need no repeating here. Her brief does not raise the alternative argument that the United States Government violated due process. Without presupposing the views of the Lawyers'

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6. *Toscanino*, 500 F.2d at 275.

7. *See* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (applying *Toscanino* only where the defendant could prove "torture, brutality or similar outrageous conduct").

8. Lowenfeld, *Kidnaping*, *supra* note 4, at 716.

Committee for Human Rights or Professor Wedgwood's argument, I will comment briefly on the due process question.

With increasing frequency, the United States Government is engaged abroad in activities that would not withstand constitutional scrutiny if undertaken within the borders of the United States. Two such recent examples are the search and seizure of Panamanian General Manuel Noriega's private effects in Panama without a judicial warrant and the censorship of, and restrictions imposed upon, United States and foreign media operating in Saudi Arabia during the Gulf War. In both cases, the United States Government had strong arguments supporting its activities in the name of national security. Irrespective of whatever merit such national security claims may have, the United States Government could not have justified the same actions in the United States under the rubric of national security. Imagine, for example, the public outcry if the President had informed the major American networks during the Gulf War that they must present all copy to government censors before broadcasting material in order to protect national security.

It is unclear when or how the Constitution limits the activities of the United States Government abroad. Last year, in an opinion that seemed to give a green light to American activities in Panama, a plurality of the Supreme Court held that the fourth amendment warrant requirement does not apply to illegal searches and seizures by United States agents of property that is owned by a nonresident alien outside the United States.[9] Writing for the majority Chief Justice Rehnquist acknowledged that portions of the Constitution may protect nonresident aliens from the consequences of United States Government action abroad. For example, the Chief Justice recognized that the fifth amendment could apply at least to some cases involving nonresident aliens.[10] Nevertheless, the Chief Justice struggled to distinguish the scope of the fourth amendment, which provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,"[11] from the fifth amendment's guarantees that "no person" should be required to testify against himself.[12] Contrasting the fifth amendment's protection of "persons" with the second, fourth, ninth, and tenth amendment protection of the rights of "the people," the Chief Justice wrote that "the

9. United States v. Verdugo-Urquidez, ___ U.S. ___, 110 S. Ct. 1056 (1990).
10. *Verdugo-Urquidez*, ___ U.S. at ___, 110 S. Ct. at 1060.
11. U.S. CONST. amend. IV.
12. U.S. CONST. amend. V.

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."[13]

The Court reached this conclusion with little reference to historical record or precedent; rather, the Court discerned this distinction merely from the plain meaning of the words. In defending the logic of this linguistic distinction, the Court seemed to narrow the extraterritorial application of even the fifth amendment. The Court opined that the reason the fifth amendment's privilege against self-incrimination protects nonresident aliens is that the violation of the right occurs when the incriminating statement is introduced at trial in the United States.[14] By contrast the fourth amendment right against an illegal search or seizure is violated at the time of the search or seizure, according to the Chief Justice.[15] Thus, it appears that the Constitution never literally applies abroad, but merely restrains some — but not all — of the evidence that can be introduced into an American court.[16]

Doubt is cast on Chief Justice Rehnquist's assumption that the Constitution does not limit the United States Government abroad by the Supreme Court's opinion in *Reid v. Covert*.[17] There the Court considered the extraterritorial effect of the due process clause as it applied to the court-martial of two civilian widows of American soldiers serving abroad.[18] The women were convicted of murdering their husbands on United States bases overseas. The women argued that they had been denied due process. The Court held that the fifth amendment's due pro-

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13. *Verdugo-Urquidez*, ___ U.S. at ___, 110 S. Ct. at 1061.
14. *Id.* at 1060.
15. *Id.*
16. Rehnquist seemed to be addressing the recently concluded U.S. invasion of Panama, when he added at the conclusion of his opinion:

> For better or for worse, we live in a world of nation-states in which our Government must be able to "functio[n] effectively in the company of sovereign nations." *Perez v. Brownell*, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

Id. at 1066. Hence, the significance of Professor Wedgwood's brief is in part to distinguish the Court's opinion in *Verdugo-Urquidez* by showing that here the Mexican Government's invocation of the Extradition Treaty provides precisely the limitation that the Court found lacking in *Verdugo-Urquidez*.
17. 354 U.S. 1 (1957).
18. *Id.* at 5.

cess right to trial by jury applied to United States persons abroad. Writing for a plurality, Justice Black articulated a vision of the Constitution that is quite different from Chief Justice Rehnquist's: "The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution."[19]

Justice Black believed that the Constitution does not merely protect the rights of Americans within the United States. Rather, it limits the power of the Government to intrude on the rights of private persons everywhere. The United States Government has only those powers provided by the Constitution, and such powers certainly do not include arbitrary arrest or abduction.

If the Ninth Circuit agrees that the Government's abduction of Alvarez-Machain violated due process and international law, it will strengthen both constitutional and international limitations on what the United States Government can do abroad, and it will reaffirm the priority that our system of justice places on individual liberties. In Professor Wedgwood's elegant language, "it is the glory of the United States and its system of justice that we proceed by principle rather than expedience. The short-run temptation to obtain and punish a particular defendant should not be allowed to endanger the liberty of all."[20]

In one of his last dissents on the Court, Justice Brennan warned that the majority in *Verdugo-Urquidez* had ignored "basic notions of mutuality," such that "[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute and punish them."[21] He added that "[m]utuality also serves to inculcate the values of law and order. By respecting the rights of foreign nationals we encourage other nations to respect the rights of our own citizens."[22]

Justice Brennan's appeal to international comity in the context of a criminal prosecution might strike some observers as novel.[23] The comity doctrine has been applied in the United States for example to enforce arbitration clauses (that otherwise would be prohibited by United

19. *Id.* at 6 (citation omitted).

20. Wedgwood, *Amicus Curiae Brief Filed by The Lawyers Committee for Human Rights in United States v. Humberto Alvarez-Machain*, 6 AM. U.J. INT'L L. & POL'Y 537 (1991).

21. *Verdugo-Urquidez*, ___ U.S. at ___, 110 S. Ct. at 1071.

22. *Id.*

23. International comity is the general principle that the courts of the United States will respect the laws of other countries and enforce foreign judgments except where there is a conflict with fundamental United States public policy. *See generally* Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

States antitrust and securities law) in transactions involving foreign parties[24] or to limit the reach of antitrust laws to foreign conduct.[25] American courts have shown a willingness to take comity seriously when what is at stake is the freedom to do business. Yet, when American forces or agents ignore the territorial sovereignty of another state, seize property abroad without a warrant, and even abduct foreign nationals, the courts do not seem disturbed that comity may be offended. The judicial aversion to the risk of offending a foreign sovereign seems inversely proportional to the actual risk; the greater the offense the less our courts seem willing to act to protect the principle of sovereign equality that underlies the comity doctrine.

Professor Wedgwood's argument is an attempt to reassert the value of mutuality in the context of our conduct toward foreign sovereigns. Her appeal is as timely as it is important.

24. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

25. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985).

Editor's Note

While this article was pending publication, a panel of the Ninth Circuit addressed similar issues in involving another Mexican national who was apprehended in Mexico for the murder of DEA Special Agent Camarena.[1] *In United States v. Verdugo-Urguidez, the Ninth Circuit held that if the United States authorized or sponsored the abduction of a Mexican national from Mexico, and Mexico subsequently objected under the United States - Mexico Extradition Treaty, the United States courts would have no personal jurisdiction over that defendant. The Ninth Circuit remanded the case to the district court for evidentiary hearings on the question whether the United States authorized or sponsored the abduction and to receive any further communications from the Government of Mexico before ruling on the defendant's motion to dismiss. The United States has petitioned for a rehearing by the Ninth Circuit en banc.*

Thus, at present the Ninth Circuit retains appellate jurisdiction over both the Verdugo-Urquidez and Alvarez-Machain appeals. The Ninth Circuit's opinion in Verdugo-Urquidez relies on the arguments raised by Professor Wedgwood in the brief that follows.

1. *1991 U.S. App. LEXIS 15568.*