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The Seizure of Noreiga: A Challenge to the Ker-Frisbie Doctrine

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NOTES & COMMENTS

THE SEIZURE OF NORIEGA: A CHALLENGE TO THE *KER-FRISBIE* DOCTRINE

Kristin T. Landis*

INTRODUCTION

Although the United States has extradition treaties with many nations, the United States often chooses to circumvent these formal extradition processes to obtain jurisdiction over fugitives.[1] Government officials enter the country where a fugitive resides and forcibly abduct that individual, bringing him or her to the United States for trial.[2] United States courts accept this method of extradition[3] and the *Ker-Frisbie* Doctrine condones it as well.[4]

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1. Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 6-7 (1988). Extradition treaties often impose certain requirements on the requesting country that must be fulfilled before and individual is surrendered. *Id.* at 6. For example, many extradition treaties require that: (1) the crime charged exist in the penal codes of both nations; (2) the requesting country prove through sufficient evidence that the accused committed the crime; (3) the accused will not be tried twice for the same crime; (4) a country is not compelled to turn over its own nationals; and (5) countries do not have to surrender individuals accused of political offenses. *Id.*; *see also*, M. BASSIOUNI, INTERNATIONAL EXTRADITION 189 (1987) (describing the problems arising from extradition requirements).

2. *See infra* notes 12-18 and accompanying text (discussing kidnapping as an alternative to extradition); *see also* M. BASSIOUNI, *supra* note 1, at 189 (explaining the numerous irregular methods utilized by states to apprehend fugitives abroad).

3. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 433(2) comment b, c (1987) [hereinafter RESTATEMENT 3D] (describing the *Ker-Frisbie* Doctrine and noting that the majority of United States courts follow it); *see also infra* notes 18-25 and accompanying text (discussing acceptance by United States courts of the abduction method of obtaining jurisdiction).

4. *See infra* notes 23-43 and accompanying text (discussing the cases making up the *Ker-Frisbie* Doctrine and their evolution).

The *Ker-Frisbie* Doctrine allows the United States government to circumvent extradition treaties, purportedly in the interest of justice.[5] Since the inception of the *Ker-Frisbie* Doctrine, however, the degree of government misconduct has increased dramatically,[6] and courts have exhibited their tolerance for such activity.[7] Because of the potential for abuse and instances of actual misconduct, action is necessary to preserve the integrity of the United States legal system and principles of international law.[8]

In the fall of 1989, the United States seized and arrested Panamanian General Manuel Noriega.[9] The United States invasion of Panama in the Fall of 1989 effectuated his abduction.[10] The abduction of Noriega highlights the legal and ethical problems associated with the *Ker-Frisbie* Doctrine.[11]

This Comment analyzes the problems that arise from the application of the *Ker-Frisbie* Doctrine and suggests feasible alternatives. Part I traces the evolution of the *Ker-Frisbie* Doctrine and discusses exceptions that courts have developed to restrict its scope. Part II examines the arguments Noriega utilized in his attempt to convince the District Court of Florida that his seizure was beyond the realm of acceptable conduct under the *Ker-Frisbie* Doctrine. Part III argues that the District Court of Florida erred by failing to exercise its supervisory powers to divest itself of jurisdiction over Noriega and by invalidating the premise of the *Ker-Frisbie* Doctrine. Part IV suggests that the *Ker-Frisbie* Doctrine is inconsistent with the current trend of respecting international law principles and humanitarian rights, and therefore strict adherence to extradition procedures or enhanced judicial supervision of

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5. Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U.L.Q. 1205, 1205 (1986) [hereinafter Note, *International Kidnapping*].

6. *See also* RESTATEMENT 3D, *supra* note 3, at § 433 (2) comment c (1987) (exploring limitations on government misconduct that courts have tolerated); *infra* notes 64-77 and accompanying text (quantifying the growing trend of judicial tolerance of the actions of the United State government).

7. *See* M. BASSIOUNI, *supra* note 1, at 199, 212 (noting that abductions increased as a result of permissive court decisions). These decisions created a trend toward allowing the police to make their own arrangements, regardless of the requirements of the legal system and in complete avoidance of the judicial authorities. *Id.*

8. *See infra* notes 75-85 and accompanying text (discussing the abuse inherent in kidnapping activities and the potential international ramifications).

9. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 490 (1990).

10. *See infra* notes 86-100 and accompanying text (recounting the details of the invasion of Panama and subsequent abduction of Noriega).

11. Lowenfeld, *supra* note 9, at 491; *see also* Johnston, *U.S. Aide Hints at a Deal if the General Tells All*, N.Y. Times, Jan. 5, 1990, at A12 (speculating that Noriega's abduction would not cause any problems for his prosecution).

abduction activities should replace the *Ker-Frisbie* Doctrine. This Comment concludes that the United States must abandon the *Ker-Frisbie* Doctrine in order to conform to the growing demand for global respect of international law.

I. UNITED STATES ABDUCTION LAW

Extradition is the internationally accepted method of obtaining custody over individuals who are accused of crimes in one country but seek refuge in another.[12] The formal process of acquiring personal jurisdiction often frustrates United States law enforcement officials, however, because it requires an extradition treaty between the United States and the country harboring the accused.[13] United States officials also complain that achieving custody through extradition is frustrating because extradition is time-consuming, costly, complex, and often ineffective.[14] As a result, law enforcement officials increasingly use alternatives to extradition by treaty to gain jurisdiction over accused persons.[15] These alternatives include using United States officials to abduct the accused without the knowledge or authorization of the asylum state, or using officials of the asylum country to seize the accused for "informal surrender" to United States agents.[16] Although these methods cause inter-

12. Note, *International Kidnapping*, *supra* note 5, at 1206. The Treaty of Amity between the United States and Great Britain was the first extradition treaty the United States signed. *Id.* at 1206, citing n.7, Commerce and Navigation, 8 Stat. 116, T.S. No. 105 (November 19, 1794).

13. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936) (stating that an individual cannot be extradited absent an extradition treaty authorizing such action in the circumstances presented); *see also* Note, *International Kidnapping*, *supra* note 5, at 1206 (observing that nations authorize extradition only when required to do so under a mutual extradition treaty).

14. Note, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1294 (1990) [hereinafter Note, *Drug Diplomacy*]; *see also* Note, *International Kidnapping*, *supra* note 5, at 1206-09 (enumerating problems inherent to the formal political offense exception to the extradition process, allowing states to refuse to extradite individuals involved in crimes which are uniquely political in character).

15. M. BASSIOUNI, *supra* note 1, at 189.

16. *Id.* "[K]idnapping appears as an attractive, expedient alternative means" of bringing fugitives to justice, particularly terrorists. Note, *International Kidnapping*, *supra* note 5, at 1209.

national tension,[17] American courts frequently uphold personal jurisdiction where the United States government takes such action.[18]

A. THE *Ker-Frisbie* DOCTRINE AND ITS PROGENY

For over a century, United States federal courts have addressed the issue of whether to allow the prosecution of a criminal defendant who was forcibly abducted by United States officials or their foreign agents.[19] Despite varying circumstances of each of the cases considered,[20] the rule of *male captus bene detentus* governs virtually all of the decisions.[21] This rule dictates that criminal jurisdiction is not defeated because a court achieves *in personam* jurisdiction over the ac-

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17. *See e.g.*, United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990) (finding the court's jurisdiction invalid after Mexican officials protested that the abduction violated United States-Mexico extradition treaty); Jaffe v. Smith, 825 F.2d 304 (11th Cir. 1987) (involving a Canadian protest against the United States where United States citizens abducted a fugitive, but holding jurisdiction was valid due to non-participation of authorized United States agents). For a detailed discussion of the *Jaffe* case, *see* Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus: Sidney Jaffe: A Case in Point*, 28 CRIM. L.Q. 341, 341 (1986).

The United States is not the only country that abducts fugitives and risks international outrage. The most significant example is the abduction of Nazi war criminal Adolf Eichmann. Attorney General v. Eichmann, 36 I.L.R. 5 (Dist. Ct. of Jerusalem, Israel, 1961), *aff'd*, 36 I.L.R. 277 (S. Ct. of Israel 1962) (sitting as a Court of Criminal Appeal). Eichmann was kidnaped in Argentina, allegedly by Israeli government agents who returned him to Israel for prosecution. *Id.* In ruling that it had valid jurisdiction over Eichmann, the Israeli district court cited legal precedents of other nations, particularly the United States Supreme Court holding in Ker v. Illinois, 199 U.S. 436 (1886). *Eichmann*, 36 I.L.R. at 68-70; *see* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1108-09 (1974) [hereinafter Note, *Extraterritorial Jurisdiction*] (discussing the decision in *Eichmann*). Argentina, a member of the United Nations, waived its right to demand Eichmann's return and instead accepted Israel's formal apology. Lewis, *supra*, at 344.

18. Note, *International Kidnapping*, *supra* note 5, at 1209.

19. *See* Findlay, *supra* note 1, at 46 (tracing the debate of the *Ker* case back to 1886).

20. *Compare* Matta-Ballesteros v. Henman, 896 F.2d 255, 256 (7th Cir.) *cert. denied* ___ U.S. ___, 111 S. Ct. 209 (1990) (holding jurisdiction valid where United States marshals severely beat and burned defendant with a stun gun during his abduction) *with* United States v. Rosenthal, 793 F.2d 1214, 1231-32 (11th Cir.), *reh'g denied*, 801 F.2d 378 (1986) (en banc), *cert. denied*, 480 U.S. 919 (1987) (holding jurisdiction proper where Colombian officials expelled the accused and made no claims of egregious conduct by United States officials).

21. *See* M. BASSIOUNI, *supra* note 1, at 201 (noting that Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519, *reh'g denied*, 343 U.S. 937 (1952) together hold that criminal jurisdiction is not impaired even though *in personam* jurisdiction is obtained through illegal methods); *Drug Diplomacy*, *supra* note 14, at 1296-97 (stating that courts have consistently held jurisdiction valid notwithstanding the irregularity of the abduction, except in the case of United States v. Toscanino); *see infra* notes 45-51 and accompanying text (discussing the Supreme Court's rationale in *Toscanino*).

cused in an illegal manner.[22] The Supreme Court adopted this rule in two landmark decisions, *Ker v. Illinois* (1886)[23] and *Frisbie v. Collins* (1952),[24] which together form the *Ker-Frisbie* Doctrine.[25]

In *Ker*, the defendant, indicted for larceny and embezzlement in Illinois, took refuge in Peru.[26] The Governor of Illinois then obtained a warrant requesting the extradition of the defendant.[27] Accordingly, the United States sent an agent to Peru and demanded that the Peruvian authorities surrender the defendant.[28] Rather than serving the warrant, however, the United States agent "forcibly" arrested Ker and returned him to the United States for trial.[29]

Ker claimed that his abduction violated the fourteenth amendment's guarantee of due process[30] as well as the United States-Peru extradition treaty.[31] The Supreme Court rejected Ker's arguments and allowed him to be prosecuted in Illinois.[32] In dicta, the Court elaborated by stating that extradition treaties are solely for the benefit of the con-

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22. Findlay, *supra* note 1, at 46.

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

24. 342 U.S. 519 (1952).

25. M. BASSIOUNI, *supra* note 1, at 201; *see also* Note, *Extraterritorial Jurisdiction*, *supra* note 17, at 1106 (noting that the United States federal courts of appeals adhere to the rule set out in *Frisbie* and *Ker* despite criticism of the *Ker-Frisbie* Doctrine); M. BASSIOUNI, *supra* note 1, at 205 n.49 (listing state and federal decisions following the *Ker-Frisbie* Doctrine).

26. *Ker*, 119 U.S. at 437-38.

27. *Id.* at 438.

28. *Id.*

29. *Id.*

30. U.S. CONST. amend. XIV.

31. *Ker*, 119 U.S. at 439. Ker also asserted that the extradition treaty between the United States and Peru afforded him a right of asylum in his Peruvian residence with regard to the crime committed in Illinois. *Id.* at 441. He claimed that his removal from Peru had to conform with the treaty provisions and that this right was one he could assert in a United States court because his kidnapping was unlawful and unauthorized. *Id.*

32. *Id.* at 444. The *Ker* Court stated that when the defendant is charged in a regular indictment, "mere irregularities" in the method by which the defendant was taken into custody and placed within the court's jurisdiction are not grounds for dismissal under the Fourteenth Amendment. *Id.* at 440. Regarding the alleged treaty violations, the Court stated that the extradition agreement did not entitle a party fleeing from a crime in the United States to foreign asylum. *Id.* at 442. Rather, the Court held that the treaty only regulates the manner by which a criminal is returned to the United States from an asylum country. *Id.* In the *Ker* case, the United States agent had received the necessary papers to procure extradition. *Id.* Because the papers were never presented in Peru, however, and no steps were taken in accordance with those papers, the agent's seizure of Ker and delivery to Illinois was not a violation of that treaty. *Id.* at 442-43.

tracting states and are not individually enforceable by the defendant attempting to strip the court of jurisdiction.[33]

Frisbie v. Collins reaffirmed the *Ker* decision sixty-six years later.[34] In *Frisbie*, the defendant, who was residing in Chicago, was allegedly kidnaped by Michigan officers, handcuffed, "blackjacked," and taken to Michigan to stand trial for murder.[35] Following his conviction, the defendant filed a habeas corpus petition, claiming that the conviction was a nullity because his abduction violated both the due process clause of the fourteenth amendment and the Federal Kidnapping Act.[36] In a forceful opinion rejecting the defendant's claim, Justice Black, speaking for a unanimous Court, restated the rule that the forcible abduction of a fugitive will not invalidate a court's jurisdiction over that individual.[37] Justice Black found no compelling reason to overrule existing case law and no constitutional provision that required a court to allow a guilty individual to escape justice merely because he was brought into the jurisdiction against his will.[38]

Thus, under the *Ker-Frisbie* Doctrine, a constitutionally fair trial satisfies the constitutional right to due process, and the government's ability to seize suspects out of the country is not limited, even when the abduction offends international law.[39] Although numerous members of the legal profession criticize the *Ker-Frisbie* Doctrine,[40] a series of unwavering decisions of United States federal[41]

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33. *Id.* at 443. *But see*, Lowenfeld, *supra* note 9, at 462-64 (claiming the extradition ruling in *Ker* was wrong because on the same day in United States v. Rauscher, 119 U.S. 407, 407 (1886), the Court concluded that individuals *could* invoke the protections of the Webster-Ashburton Treaty of 1842).

34. 342 U.S. 519, 522 (1952).

35. *Id.* at 520.

36. *Id.* The Court in *Frisbie* held that the Federal Kidnapping Act, 18 U.S.C. § 1201 (1988), did not bar a state from trying persons who United States agents forcibly brought within its jurisdiction. *Id.* at 523.

37. *Id.* at 522.

38. *Id.*

39. M. BASSIOUNI, *supra* note 1, at 201.

40. *See e.g.*, *id.* at 190 (stating that abductions erode international law); Note, *Drug Diplomacy*, *supra* note 14, at 1298 (noting that critics assert that the *Ker-Frisbie* Doctrine violates due process rights and abrogates international human rights, which have greatly expanded since these decisions).

41. *See, e.g.*, *Matta-Ballesteros*, 896 F.2d at 256 (involving abduction and torture of defendant from Honduras by United States marshals with the cooperation of Honduran special troops); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986) (addressing the abduction of a defendant by United States officials after his expulsion by Colombian officials); United States v. Darby, 744 F.2d 1508 (11th Cir.) *reh'g denied* 749 F.2d 733 (1984)(en banc) *cert. denied sub nom*, Yamanis v. United States, 471 U.S. 1100 (1985) (examining the alleged kidnapping of the defendant from Honduras by American officials); United States v. Fielding, 645 F.2d 719 (9th Cir. 1981) (examining an American official's kidnapping of a defendant from Peru); United States

and state[42] courts perpetuates the Doctrine's principles. Such persuasive and consistent precedent provides the government great incentive to utilize regularly the practice of abduction.[43]

B. EXCEPTIONS TO THE *Ker-Frisbie* DOCTRINE

Since the development of the *Ker-Frisbie* Doctrine, only one court has attempted to monitor government behavior in international kidnapping for the purpose of obtaining jurisdiction in a criminal prosecution.[44] In *United States v. Toscanino*,[45] the Second Circuit held that the government cannot exploit the fruits of its own illegal conduct.[46] The court stated that jurisdiction over a fugitive is invalid where it was obtained from government actions which deliberately, unnecessarily, and unreasonably invaded a person's constitutional rights.[47]

In *Toscanino*, the United States charged the defendant and four other individuals with conspiracy to import narcotics into the United States.[48] On appeal from his conviction, Toscanino argued that prior judicial proceedings were invalid because United States agents illegally secured his physical presence before the court.[49] Toscanino alleged that the United States agents kidnaped him from Uruguay, knocked him unconscious, tortured him incessantly, deprived him of nourishment for lengthy periods, drugged him, and finally brought him to the United States for trial approximately three weeks later.[50] The Supreme Court invalidated the lower court's jurisdiction stating that the rules articulated in *Ker* and *Frisbie* could not be reconciled with subsequent Su-

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v. Lara, 539 F.2d 495 (5th Cir. 1976) (involving abduction of defendant from Panama by United States officials working with Panamanian agents); *see also* M. BASSIOUNI, *supra* note 1, at 205 n.49 (finding that U.S. courts generally adhere to the *Ker-Frisbie* Doctrine and presenting a list of cases in which the federal courts assumed jurisdiction over abducted defendants).

42. M. BASSIOUNI, *supra* note 1, at 205 n.49 (listing state cases that followed the *Ker-Frisbie* Doctrine).

43. *See* Note, *Drug Diplomacy*, *supra* note 14, at 1294-95 (referring to a 1989 legal opinion issued by Assistant Attorney General William Barr allowing the FBI to kidnap alleged criminals outside the United States without that country's authorization, which reversed a 1980 legal opinion of the Carter Administration).

44. Findlay, *supra* note 1, at 48.

45. 500 F.2d 267 (1974).

46. *Id.* at 272.

47. *Id.* at 275.

48. *Id.* at 268-69.

49. *Id.* at 269.

50. *Id.* at 269-70.

preme Court decisions expanding due process to protect an accused from pretrial illegality.[51]

Soon after *Toscanino*, the Second Circuit limited that case's holding by reconciling the divergent decision with *Ker-Frisbie*. In *United States ex rel. Lujan v. Gengler*[52] the defendant was charged with conspiracy to import and distribute a large quantity of heroin.[53] An individual cooperating with United States authorities allegedly lured Lujan, a pilot residing in Argentina, into Bolivia.[54] Upon his arrival, Bolivian police took Lujan into custody[55] and prohibited him from communicating with an attorney, his family, and the Argentine embassy.[56] Bolivian officials never formally charged the defendant, and the United States did not initiate extradition proceedings.[57] Instead, United States officials forcibly transported Lujan to New York.[58] Relying on the decision in *Toscanino*, the defendant filed a writ of habeas corpus, claiming that his abduction was a violation of due process, and thus, jurisdiction was improper.[59]

Narrowing the applicability of *Toscanino*, the Second Circuit held that where the defendant does not state that he was subjected to "torture, terror, or custodial interrogation," there is no violation of due process.[60] Additionally, the court stated that the defendant lacked standing to assert an international law violation because neither the Bolivian nor Argentine governments protested the abduction.[61]

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51. *Id.* at 275; *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 659-60 (1961) (interpreting the due process clause to require the application of the exclusionary rule in state prosecutions); Rochin v. California, 342 U.S. 165, 179 (1952) (broadening the interpretation of due process to invalidate a decision relying on evidence obtained through police brutality); Wong Sun v. United States, 371 U.S. 471, 471 (1963) (holding that evidence obtained through an unlawful arrest is not admissible).

52. 510 F.2d 62 (2d Cir.), cert. *denied* 421 U.S. 1001 (1975).

53. *Id.* at 63.

54. *Id.*

55. *Id.*

56. *Id.* The Bolivian police acted as paid United States agents in the apprehension of Lujan. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 62.

60. *Id.* at 66.

61. *Id.* at 66-67. In *Ker*, the Court held that an individual could not assert treaty violations because only nations have rights under the treaty. *Ker*, 119 U.S. at 442-43. In contrast, on the same day that *Ker* was decided, the Court held that a defendant had standing to raise a treaty violation where he had been tried for an offense other than that for which he was extradited. United States v. Rauscher, 119 U.S. 407, 409 (1886). Although *Ker* is distinguishable from *Rausher* in that the Court in *Rauscher* never applied the extradition treaty, critics believe that the majority in *Rauscher* held that individuals could invoke rights under extraditon treaties. Lowenfeld, *supra* note 9, at 463-64.

In both *Lujan*[62] and *Toscanino*,[63] the courts relied on *Rochin v. California*.[64] *Rochin* allows judicial intervention only to halt government conduct which is "shocking to the conscience," offensive to a "sense of justice," or counter to the "decencies of civilized conduct."[65] The court also held that jurisdiction is invalid when the conduct of law enforcement officials is "so outrageous" that due process demanded court intervention.[66] In *Lujan*, the Second Circuit held that the *Ker-Frisbie* Doctrine did not provide United States officials "carte blanche" to violate the aforementioned standards[67] in bringing fugitives into the United States. The court explicitly indicated, however, that some level of irregularity in the manner by which the defendant arrives in the jurisdiction is tolerable.[68]

Using *Toscanino* and *Lujan* as precedent, most courts hold that actions by United States agents taken in the course of an abduction do not constitute impermissible conduct.[69] In addition, courts will not bar jurisdiction unless United States agents actually participate in the alleged mistreatment of defendants.[70] Apparently, courts abandoned

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62. 510 F.2d at 62.

63. 500 F.2d at 273-77.

64. 342 U.S. 165 (1952). The Court held that due process demanded the reversal of a conviction where police officers forced the defendant to have his stomach pumped after swallowing two capsules of morphine while his home was searched. *Id.* at 165.

65. 342 U.S. at 169, 172-73. The Court subsequently reaffirmed the "fundamental fairness" standard. Kinsella v. United States *ex. rel.* Singleton, 361 U.S. 234, 246 (1960). *Kinsella* held that the court-martial conviction of a defendant wife of a soldier was unconstitutional. *Id.* at 249.

66. United States v. Russell, 411 U.S. 423, 431-32 (1973).

67. 510 F.2d at 65.

68. *Id.*

69. *See, e.g., Matta-Ballesteros*, 896 F.2d at 263 (declining to adopt *Toscanino* as a standard of abuse despite the allegation that United States marshals beat and repeatedly burned the defendant with a "stun gun"); United States v. Reed, 639 F.2d 896, 901-02 (2d Cir. 1981) (holding that forcing the defendant to lie on the floor of a plane for thirty minutes while U.S. agents pointed a gun at his head and repeatedly threatened him was not gross enough conduct to invoke *Toscanino*); United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir.) *cert. denied*, 423 U.S. 985 (1975) (finding that Mexican army personnel, acting as paid agents of the United States, did not act egregiously enough to fall within the *Toscanino* exception). *But see Matta-Ballesteros*, 896 F.2d at 263 (Will, J., concurring) (finding the conduct at issue less egregious than in *Toscanino*, but equally as shocking to the conscience, and holding that the possibility should be left open for reconsideration of the exception).

70. *See* United States v. Lira, 515 F.2d 68, 71 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (finding valid personal jurisdiction where Chilean police tortured the defendant immediately before United States agents abducted him); *see also* United States v. Lara, 539 F.2d 495 (5th Cir. 1976) (maintaining proper jurisdiction where defendant failed to show United States agents played a "direct role" in torture administered by Panamanian authorities); United States v. Degollado, 696 F. Supp. 1136, 1137 (S.D. Tex. 1988) (finding valid jurisdiction and the agent's conduct not shocking where United States officials solicited assistance of Mexican police to arrest defendant and

their concern for judicial integrity in favor of their prosecutorial function.[71] Moreover, these decisions suggest that courts first decide the accused's guilt and then formulate a decision that avoids applying a legal rule barring jurisdiction that would allow the defendant to go free.[72] Critics of the *Ker-Frisbie* Doctrine believe this encourages law enforcement officials to kidnap fugitives.[73]

Although many courts acknowledge that certain conduct necessitates the exercise of its supervisory powers,[74] no court has actively asserted its powers[75] since the *Toscanino* decision.[76] Some courts rationalize their passivity by explaining that although abductions have the potential to erode respect for the law, there is no necessity to exercise supervisory powers[77] because no "pattern of repeated abductions"[78] exists. Other courts conclude that existing mechanisms in the judicial system deter police misconduct. These mechanisms include the financial costs of operations,[79] alienation of foreign states,[80] the risk that kidnappers could be prosecuted in foreign states,[81] and most significantly, complaints from foreign nations of international law violations and the loss of international standing.[82] In *Lujan*, the Second Circuit stressed that

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witnessed use of "seltzer water treatment" as a method of interrogation but left when the interrogation became "rough").

71. M. BASSIOUNI, *supra* note 1, at 212.

72. *Id.*

73. *Id.*

74. *See, e.g.*, United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (acknowledging that the *Toscanino* exception could be applied in some instances at hand); *Lira*, 515 F.2d at 73 (Oakes, J., concurring) (noting that the government's interest in stopping international drug traffic through the use of repeated abductions invites the exercise of supervisory powers); United States *ex. rel.* Lujan v. Gengler, 510 F.2d 62, 69 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (leaving open the possibility that conduct could be so egregious as to nullify jurisdiction).

75. *See Matta-Ballesteros*, 896 F.2d 255, 260-61 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 209 (1990) (tracing the history of rulings since *Toscanino*).

76. 500 F.2d at 267.

77. United States v. Reed, 639 F.2d 896, 903 (2d Cir. 1981). *Lira* stressed the importance of exercising supervisory powers to preserve respect for the laws, particularly when the government engages in kidnapping. *Lira*, 515 F.2d at 72-73 (Oakes, J., concurring). Justice Oakes also stressed that, "[c]rime is contagious. . . . To declare that in the administration of the 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." *Id.* at 72 n.1 (Oakes, J., concurring) (quoting Justice Brandeis' dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928)).

78. *Reed*, 639 F.2d at 903.

79. *Lujan*, 510 F.2d at 68 n.9.

80. *Id.*

81. *Id.*

82. *Matta-Ballesteros*, 896 F.2d at 262.

if these mechanisms failed to act as effective deterrents, this conclusion would be reevaluated.[83]

Since *Toscanino*, the Supreme Court has firmly adhered to the *Ker-Frisbie* Doctrine and has rejected numerous opportunities to reconsider the Doctrine's scope.[84] Recent actions of United States officials in the course of abducting fugitives, however, reveal a profound need for the Supreme Court to address the rationale of the *Toscanino* decision and its qualifications.[85]

II. THE NORIEGA CASE: ARGUMENTS FOR A *KER-FRISBIE* EXCEPTION

The United States invasion of Panama and abduction of General Manuel Noriega once again subjected the *Ker-Frisbie* Doctrine to renewed domestic and international legal criticism.[86] The invasion began

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83. *Lujan*, 510 F.2d at 68 n.9. According to critics, however, these mechanisms are failing and in fact, the long line of decisions favoring *Ker-Frisbie* actually encourages abductions to obtain jurisdiction. *See* M. BASSIOUNI, *supra* note 1, at 212 (noting that the string of pro-*Ker-Frisbie* decisions encourages law enforcement officials to utilize the abduction alternative).

84. *See, e.g.*, United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987) (adhering strictly to the *Ker-Frisbie* Doctrine and rejecting the exception in *Toscanino*); United States v. Winter, 509 F.2d 975, 987 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975) (adopting the Supreme Court's strict adherence to the *Ker-Frisbie* Doctrine despite criticism of the Doctrine); United States v. Postal, 589 F.2d 862, 862 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (stating that a defendant may not defeat the court's jurisdiction by asserting the illegality of his arrest).

85. *See generally*, *M. Bassiouni*, *supra* note 1, at 190, 212 (noting the growing importance of respect for international law and the fact that recent court decisions encouraged the practice of abductions); *Lewis*, *supra* note 17, at 368 (stating that in terms of international kidnapping for jurisdiction, "[court] analysis of domestic need ought not transcend national government assessment of international obligation"); *Lowenfeld*, *supra* note 7, at 461, 467 (arguing that the values reflected in the *Ker* decision are substantially different from the values of today and, thus, the *Ker* decision should not be regarded as the final word on the subject of kidnapping, given the significant changes in the application of the fourth and fifth amendments and the perception of human rights internationally); Note, *Drug Diplomacy*, *supra* note 12, at 1298, 1300 (recognizing that the rights of individuals under international law evolved substantially since the *Ker* and *Frisbie* decisions and noting that other countries have expressed dissatisfaction with United States policy); Note, *International Kidnapping*, *supra* note 10, at 1215 (claiming that because no United States federal statute recognizes kidnapping as a legal alternative to extradition, the United States should adopt the international law prohibition on kidnapping into our domestic law, in accordance with the *Paquette Habana* case, 175 U.S. 677 (1900)).

86. *See generally*, Maechling, *Washington's Illegal Invasion*, 79 FOREIGN POL'Y 113, 121 (1990) (characterizing the United States' justification for the invasion—the need to seize Noriega for violation of United States anti-narcotics statutes —as "astonishing" and violative of state sovereignty); Nanda, *Agora: U.S. Forces in Panama: Defenders, Aggressors, or Human Rights Activists?* 84 AM. J. INT'L L. 494, 502 (1990) (noting that the American invasion was not mitigated by the fact that Noriega was

on December 20, 1989, when President Bush ordered 24,000 American troops into combat in Panama.[87] This action followed the December 15, 1989 Panamanian National Assembly's proclamation of Manuel Noriega as "maximum leader" of the Panamanian government and Noriega's subsequent declaration of a state of war between the United States and Panama.[88] The military attack purportedly resulted in the death of twenty-six Americans and more than 700 Panamanians, primarily civilians, as well as "severe and widespread physical devastation, property damage and dislocation."[89] Noriega, after eluding the United States in the initial days of the invasion,[90] took refuge with the Papal

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charged with an international crime); Lowenfeld, *supra* note 9, at 491 (expressing hope that in the future the issue of restricting the breadth of *Ker-Frisbie* is addressed in "calmer settings"); Brooke, *U.S. Denounced by Nations Touchy about Intervention*, N.Y. Times, Dec. 21, 1989, at A24. Following the United States invasion of Panama, many Latin American nations condemned the United States action. *Id.* The president of Brazil called the attack "a step backward in international relations." *Id.* The Cuban Foreign Ministry described the invasion as "incredible evidence of the disdain of the United States for international law." *Id.* The Mexican government issued a statement saying that it publicly censured Noriega's conduct and reiterated the need to face the international drug smuggling problem. *Id.* Nonetheless, the Mexican government stated that "*the combat of international crimes cannot be a motive for intervening in a sovereign nation.*" *Id.* (emphasis added). Other countries protesting the United States action in Panama include Argentina, Venezuela, Uruguay, Chile, Bolivia, Costa Rica, Guatemala and Nicaragua. *Id.* The United Nations also "strongly deplored the invasion by a vote of 75-20, with 40 abstentions" and the Organization of American States denounced the invasion by a vote of 20-1. Maechling, *supra*, at 125.

87. Maechling, *supra* note 86, at 121.

88. *Id. See generally* Nanda, *supra* note 86, at 496-503 (explaining the background of the invasion and the reasons for United States action).

89. Nanda, *supra* note 86, at 497. There are significant discrepancies between the figures on death and destruction resulting from the invasion. *Id.* The United States contends that only 202 civilians died, but Noriega's counsel cites to studies that place the numbers much higher. Motion to Dismiss Indictment as a Consequence of Conduct by United States Government Shocking to the Conscience and in Violation of the Laws and Norms of Humanity, at 2-7, Exhibits A, B, United States v. Noriega, No. 88-79 (S.D. Fla. filed Mar. 22, 1990) [hereinafter Motion to Dismiss]. For example, The Independent Commission of Inquiry on the United States Invasion of Panama (March 5, 1990), headed by former Attorney General Ramsey Clark, estimated the death toll at 3,000-4,000 people, mostly civilians, and claims 50,000 people were displaced. Catholic Bishops Emiliani of Darien and Ariz of Colon claim that 3,000 persons died. Moreover, The Physicians for Human Rights documented more than 300 civilian deaths, 3,000 casualties, and estimated that 18,000 citizens were left homeless. Motion to Dismiss, *supra*, at 2-7. *But see* Governments Memorandum of Law in Response to Defendant Noriega's Motion to Dismiss Indictment as a Consequence of "Conduct by United States Government Shocking to the Conscience and in Violation of the Laws and Norms of Humanity," at 1-2 United States v. Noriega, No. 88-79 Cr. at 1-2 (S.D. Fla. filed Mar. 30, 1990) [hereinafter *Government's Response*] (contending that the report by the Independent Commission of Inquiry on the United States Invasion of Panama, is "extraordinarily biased and inaccurate in many respects").

90. N.Y. Times, Dec. 21, 1989, at A1, A12.

Nuncio in the Vatican Embassy.[91] Noriega remained there until January 3, 1990 when he surrendered to the United States at the urging of the Papal Nuncio.[92] United States military officials subsequently arrested Noriega and flew him to the United States for arraignment on a criminal indictment pending in the Southern District of Florida.[93] This indictment, handed down in the United States District Court on February 4, 1988, charged Noriega with participating in an international conspiracy to import cocaine and materials used to produce cocaine into the United States.[94]

Capturing Noreiga was one of the four grounds upon which President Bush justified the invasion:[95] 1) to protect American citizens;[96] 2)

91. *See* F. KEMPE, DIVORCING THE DICTATOR 398 (1990) (discussing the events which occurred during Noriega's brief stay at the Nunciatura, otherwise known as the Vatican Embassy). Noriega arrived at the papal residence shortly after 2 p.m. on December 24, 1989. *Id.* at 399. The Nuncio was acquainted with Noriega and was one of the few people Noriega trusted. *Id.* at 402. Those familiar with the relationship between the Nuncio and Noriega were surprised that the United States neglected to guard the Vatican Embassy after Noriega escaped initial attacks. *Id.*

92. *Id.* at 404. United States Secretary of State James Baker sent cables to the Vatican requesting that the Nuncio turn Noriega over to United States authorities. *Id.* at 404. The Vatican, however, refused to become involved and left the decision up to the Nuncio himself. *Id.* at 405. American troops unsucessfully attempted to force Noriega out of the Vatican Embassy with loud rock music and false news reports of Panamanians supposedly invading the Vatican Embassy to tear Noriega apart "limb-from-limb." *Id.* at 406. On January 2, 1990, the Nuncio persuaded Noriega that the best course to take was to surrender to the United States. *Id.* at 412. The Nuncio reached an agreement on behalf of Noriega and the United States, which allowed Noriega to surrender in full uniform at night in the presence of a general officer. *Id.* at 414. Noriega turned himself over at 8:44 p.m. on January 3, 1990. *Id.* at 416.

93. N.Y. Times, Jan. 4, 1990, at A1, A12; *see also* KEMPE, *supra* note 91, at 416 (describing the details of Noriega's surrender to the United States).

94. Indictment, United States v. Noriega, No. 88-0079 Cr. (S.D. Fla. filed Sept. 14, 1988) [hereinafter Indictment]. The Indictment named Noriega and fifteen other persons in twelve counts. Counts I and II charged RICO violations under 18 U.S.C. § 1962 (c), (d). *Id.* at 1-24. Counts III, VII and IX charged narcotics conspiracies under 21 U.S.C. § 963. *Id.* at 24, 26-27, 28. Counts IV, V, VI, and X under 21 U.S.C. § 959 and VIII under 21 U.S.C. § 952 charged substantive narcotics violations. *Id.* at 25-26, 29. Counts XI and XII charged violations of the Travel Act under 19 U.S.C. § 1952 (a)(3). *Id.* at 25-26, 29-30; *see also* N.Y. Times, Jan. 4, 1990, at A12 (describing the indictment charges and the circumstances producing the charges).

95. *See* N.Y. Times, Jan. 4, 1990 at A12 (reprinting the text of President Bush's announcement of Noriega's surrender); *see generally*, Nanda, *supra* note 86, at 496-503 (evaluating President Bush's four reasons for the invasion); Maechling, *supra* note 86, at 122 (discussing whether the United States can reconcile the invasion with its own treaty commitments and international law).

96. N.Y. Times, Jan. 4, 1990, at A12. The most serious incident that allegedly triggered the invasion occurred on December 15, 1989. At a roadblock, a Panamanian Defense Force member killed a United States Marine officer, wounded another, and beat a third officer and threatened his wife. Nanda, *supra* note 85, at 497. Following this incident, an American officer shot and wounded a Panamanian police officer who was allegedly reaching for his gun. *Id.*

to assist in the reestablishment of Panamanian democracy;[97] 3) to preserve the integrity of the Panama Canal Treaties;[98] and 4) to obtain the presence of General Manuel Noriega for prosecution in the United States.[99] A number of sources contend that the United States invaded

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Noriega's declaration of war with the United States also constituted a significant provocation. Maechling, *supra* note 86, at 497. Additionally, the United States relied on an unconfirmed intelligence report stating that Noriega planned to initiate an "urban commando attack on American citizens in a residential neighborhood." Nanda, *supra* note 86, at 497. Some critics argue that, viewed in terms of necessity, the situation in Panama did not constitute a legal justification. *Id.* Other critics add that the use of a full scale invasion to counter the above incident was not proportionate to the threat posed. Maechling, *supra* note 86, at 124; *see also*, Nanda, *supra* note 86, at 497 (doubting the legitimacy of the claim that the invasion was a case of humanitarian intervention).

97. N.Y. Times, Jan. 4, 1990, at A12. This rationale is premised on Noriega's rise to power through the use of "strong-arm tactics" and refusing to relinquish his rule despite the clear opposition of the Panamanian people. Nanda, *supra* note 86, at 498. In May 1989, Noriega nullified the election of the opposition candidate for president, whom the United States supported. Oberdorfer, *U.S., Noriega Negotiated Recently*, Wash. Post, Dec. 21, 1989 at A37. Despite the dictatorial situation in Panama, however, "there is no basis in international law for dropping paratroops into another country in order to change its government, and the O.A.S. Charter expressly prohibits it." Maechling, *supra* note 86, at 123. Arguably, military intervention is not an effective method of encouraging democratic values and may actually inhibit true democratic development. Nanda, *supra* note 86, at 499. Both the OAS and the UN rejected the view that American intervention was justified to promote Panamanian self-determination, defined by the United States as the right to democratic representation and the need for the government to respond to the peoples' will. *Id.* at 500; *see also*, Maechling, *supra* note 86, at 123 (noting that the Panamanian government has never been democratic).

98. N.Y. Times, Jan. 4, 1990 at A12. According to the 1977 Panama Canal Treaties (The Panama Canal Treaty, Sept. 7, 1977, T.I.A.S. No. 10,030 and The Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, 33 U.S.T. 1, T.I.A.S. No. 10,029, 1161 U.N.T.S. 17798, the United States does, in fact, carry the responsibility of defending the Canal and is allowed to place troops in Panama for this purpose. Maechling, *supra* note 86, at 125. The language of the treaties arguably allows the United States to maintain the stability of the Canal's surrounding political situation. *Id.* at 125. The United States Senate, however, amended the Neutrality Treaty upon ratification to clarify that those treaties did not give the United States the right to intervene in Panama's internal affairs. Nanda, *supra* note 86, at 501. Because Noriega went to great lengths to avoid giving the United States a reason to invoke the treaty and never threatened canal operations, this justification for invasion does not seem to carry much legal validity. Maechling, *supra* note 86, at 125.

99. N.Y. Times, Jan. 4, 1990 at A12. *See infra* note 92 (discussing the indictment of Noriega and the need to apprehend him for prosecution as a primary motive in the United States invasion of Panama). In asserting that Noriega's apprehension was a rationale for invasion, Maechling believes that:

> Bush has elevated a U.S. law-enforcement instrument, a local federal grand jury, to the status of a secular holy office whose mere accusation is sufficient to unleash a posse of 24,000 soldiers to seize a foreign leader in his own capital.

Maechling, *supra* note 86, at 124.

Panama primarily to abduct Manuel Noriega so that he could stand trial in the United States on the above indictment.[100]

Once Noriega was brought to the United States, his counsel unsucessfully[101] promulgated three arguments to support their contention that jurisdiction over the General was void due to the method of his apprehension.[102] First, Noriega argued that the manner in which United States officials brought him within the court's jurisdiction was "shocking to the conscience and in violation of the laws and norms of humanity."[103] Second, Noriega asserted that jurisdiction was invalid because the invasion of Panama violated international law.[104] Finally, Noriega argued in the alternative that his case represented a situation in which the court needed to exercise its supervisory powers and bar prosecution.[105] The district court's rejection of the first and second theories are well-founded in current case law.[106] The facts of the *Noriega* case, however, necessitate the exercise of the court's supervisory powers

100. *See* Lowenfeld, *supra* note 9, at 490 (arguing that the 1989 invasion of Panama was undertaken "in large measure" to bring Noriega to the United States for prosecution). Attempts to use the indictment as a bargaining chip to remove Noriega from power met with failure. *See* Hoffman & Woodward, *'It Will Only Get Worse.' Bush Told Aides*, Wash. Post, Dec. 21, 1989, at A31 (noting that after the October Panamanian coup attempt the United States government offered not to seek extradition if Noriega would relinquish power).

Additionally, Panamanian opposition leaders indicated that even in the event of a successful coup attempt, they would not turn the General over to the United States to stand trial on drug-trafficking charges. Sciolino, *Panama Jinx: What Should Washington Do about Noriega?*, N.Y. Times, Oct. 8, 1989, at E1. Hints that the United States would resort to the abduction of Noriega to secure jurisdiction for prosecution surfaced earlier in the year before the invasion. *See* Pear, *U.S. is Easing Its Terms for the Ouster of Noriega*, N.Y. Times, Aug. 16, 1989, at A9. (stating that President Bush refused to rule out the abduction of Noriega to bring him to trial on drug-trafficking charges); *see also* Lowenfeld, *supra* note 9, at 484 (citing headlines speculating that because of a change in administration policy allowing the FBI to kidnap alleged criminals outside the United States, Noriega might be kidnapped). *But see infra* note 149 and accompanying text (indicating that Noriega's abduction was not a primary motive for invasion); *supra* notes 87-90 (discussing validity of other justifications for the invasion); *Report of the Independent Commission of Inquiry on the U.S. Invasion of Panama*, March 5, 1990 (indicating that Noriega's apprehension was merely a justification to prepare the American public for the invasion).

101. Omnibus Order, United States v. Noriega, No. 88-79 Cr. at 51-80 (S.D. Fla. filed June 8, 1990) (hereinafter Omnibus Order).

102. Motion to Dismiss, *supra* note 89, at 8-29.

103. *Id.* at 8.

104. *Id.* at 15.

105. *Id.* at 20.

106. *See* Omnibus Order, *supra* note 101, at 51 (rejecting Noriega's arguments that the method of his abduction was shocking and that the invasion was a violation of international law).

in order to restrict the breadth of the *Ker-Frisbie* rule and prevent future government abuse.[107]

A. THEORY ONE: ABDUCTION OF NORIEGA WAS "SHOCKING TO THE CONSCIENCE"

Relying upon Justice Rehnquist's statement in *United States v. Russell*,[108] Noriega argued that the invasion of Panama and his subsequent abduction presented the court with a situation in which the law enforcement agent's conduct was so outrageous that the court must bar his prosecution for violation of due process.[109] Noriega compared the conduct of the United States military to the situation that the *Toscanino* Court considered "shocking to the conscience."[110] Noriega did not contend, however, that the invasion caused a violation of his due process rights.[111] Instead, Noriega based his claims on the rights of third parties with a particular reference to those Panamanian citizens who were killed, wounded, or suffered property loss as a result of the invasion.[112] Noriega claimed that those citizens could not assert their rights themselves.[113]

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107. *See* Motion to Dismiss, *supra* note 89, at 20 (stating that the Noriega case is a clear example of the need for the court to exercise its supervisory power because hundreds of innocent lives were lost in the process of abduction); *see also* Lowenfeld, *supra* note 9, at 491 (observing that it would be ironic and unfortunate if Noriega were able to launch a successful challenge to the *Ker-Frisbie* rule). *But see* Omnibus Order, *supra* note 101, at 66-80 (rejecting Noriega's request that the court utilize its supervisory powers because the invasion was not a "pure law enforcement effort").

108. United States v. Russell, 411 U.S. 423, 431 (1973).

109. Motion to Dismiss, *supra* note 89, at 8.

110. *Id.* at 10, 15. Noriega also distinguished his case from cases not controlled by *Toscanino* because the conduct alleged was not sufficiently outrageous. *Id.* at 10. *See, e.g.*, United States v. Darby, 744 F.2d 1508, 1531 (11th Cir. 1984) (holding that kidnapping the defendant at gunpoint was not egregious enough to divest the court of jurisdiction); United States v. Rosenthal, 793 F.2d 1214, 1232 (11th Cir. 1986) (refusing to adopt *Toscanino* but noting that the arrest and expulsion of the defendant from Colombia did not shock the conscience).

111. Motion to Dismiss, *supra* note 89, at 25-27.

112. *Id.*

113. *Id.* Noriega claimed that case law supported his argument that as the leader of Panama he had the authority to assert the rights of innocent third parties. *Id.*; *see, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (holding that a white vendor was the only party capable of asserting the rights of blacks where the vendor was sued for breach of a racially restrictive covenant that denied blacks equal protection); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449 (1958) (allowing the NAACP to assert the rights of its members by refusing to produce membership lists because litigation would reveal their identities and violate their freedom of association); Griswold v. Connecticut, 381 U.S. 479 (1965) (permitting a physician and birth control official to assert the privacy rights of the recipients based on the accessorial and professional relationship between the two parties).

The district court disagreed with Noriega's contentions.[114] The court rejected the application of *Toscanino* to Noriega's case because the invasion of Panama did not violate any of his personal rights under the fifth amendment.[115] The court noted that asserting third party rights was wholly inconsistent with existing case law regarding physical trespass on the defendant's person.[116] Additionally, the court rejected Noriega's standing to assert the rights of third parties because no third party had an interest in the remedy—the dismissal of Noriega's indictment.[117] Therefore, Noriega's theory asserting vicarious due process claims necessarily failed to bar jurisdiction.[118]

B. THEORY TWO: ABDUCTION OF NORIEGA VIOLATED INTERNATIONAL LAW

Noriega's second contention was that the invasion of Panama violated international law.[119] Specifically, Noriega asserted that the invasion violated international treaties and principles of customary interna-

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Noriega argued that the injured Panamanians were unable to assert their rights because United States courts would not consider claims submitted by or on behalf of victims of the United States armed forces. *See* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (finding it not to be the court's function to consider private suits, especially by non-citizens, that question the President's decision to send troops abroad).

114. Omnibus Order, *supra* note 101, at 80.

115. *Id.* at 56; *see* United States v. Payner, 447 U.S. 727 (1980) (stating that the due process clause can only be asserted when government conduct violates some protected right *of the defendant*). The court noted that the only possible mistreatment which Noriega could claim for these purposes was the incident in which American troops blasted loud rock-and-roll music at the Vatican Embassy to force Noriega out of this refuge. Omnibus Order, *supra* note 101, at 57 n.27; *see also supra* note 92 (discussing the events which occurred during Noriega's stay at the Vatican Embassy). The Florida district court concluded,

> while there are those who might consider continued exposure to such music an Eighth Amendment violation . . . such action does not rise to the level of egregious misconduct sufficient to constitute a due process violation.

Omnibus Order, *supra* note 101, at 57 n. 27. In making its decision, the court assumed that Fifth Amendment Due Process rights extend to aliens abroad. *Id.* at n. 28.

116. *Id.* at 57-58; *see* United States v. Toscanino, 500 F.2d 267, 267 (1974) (holding personal bodily torture of defendant during the course of abduction sufficient to prevail on due process claim); Rochin v. California, 342 U.S. 165, 165 (1952) (holding that forcibly extracting evidence by pumping defendant's stomach violated due process).

117. Omnibus Order, *supra* note 101, at 58-59. The Florida district court noted that third party standing only addresses the issue of who may raise the claim and did not lead to an expansion of "right or remedy in question" where the claim is upheld. *Id.* at 58.

118. *Id.* at 58.

119. *See* Motion to Dismiss, *supra* note 89, at 15, 24 (explaining why the invasion of Panama was a violation of international law and how Noriega, as head of state, has standing to protest the violations).

tional law including the United Nations (UN) Charter,[120] the Organization of American States (OAS) Charter,[121] and the Hague Convention Respecting the Laws and Customs of War on Land.[122] Noriega maintained that the treaty violations arising from the invasion voided the effect of the *Ker-Frisbie* Doctrine.[123] In addition, Noriega

120. U.N. CHARTER art. 2, para. 4. The Charter provides, in pertinent part, 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, or in any other manner inconsistent with the purposes of the United Nations.

Id.

121. Organization of American States Charter, May 2, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361. The O.A.S. Charter states that
> [t]he territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

Id. art. 20, para. 17, 2 U.S.T. at 2420.

122. Hague Convention, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (1907). Article 23(b) declares that "it is especially forbidden. . .[t]o kill or wound treacherously individuals belonging to the hostile nation or army." *Id.* art. 23(b), 36 Stat. at 2301. Article 25 states that "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited." *Id.* art. 25, 36 Stat. at 2302.

Noriega also claimed that the invasion violated the Geneva Convention. Motion to Dismiss, *supra* note 89, at 20. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter Geneva Convention]. This provision differentiates between combatants and noncombatants, strictly prohibiting "violence to life and person," as well as other conduct which would impose unnecessary suffering on noncombatants. Geneva Convention, *supra*, at 3116. The Florida District Court rejected this application because it applies only to armed conflicts which are purely domestic in nature, not international. Omnibus Order, *supra* note 101, at 64.

Additionally, Noriega claimed that the invasion of Panama violated the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), which condemns and prohibits target area bombing. Motion to Dismiss, *supra* note 89, at 21, n.8 (citing U.N. DOC. a/32/144 Annex I (1977)). The court disagreed, however, and noted that Congress expressly refused to ratify the Protocol I because it is "fundamentally unfair and irreconcilably flawed" and "would undermine humanitarian law and endanger civilians in war." Omnibus Order, *supra* note 101, at 60, n.32 (quoting S. TREATY DOC. 2, 100th Cong., 1st Sess. iii-iv (1987)).

Finally, Noriega asserted that the invasion violated The Nuremberg Charter. Motion to Dismiss, *supra* note 89 at 22-23, n.9 (citing The Nuremberg Charter, Art. 6., 1 I.M.T. (Nuremberg) (1945)). Under the Charter, the United States can be held accountable for war crimes by the Nuremberg Tribunal. Motion to Dismiss, *supra* note 89, at 22, n.9. The *Noriega* court also rejected this argument by declaring that the Nuremberg Charter applies only to the conduct of war and has no effect on the right of the United States to arrest foreign nationals to gain jurisdiction over their crimes. Omnibus Order, *supra* note 101, at 65.

123. Motion to Dismiss, *supra* note 89, at 16, 18. Noriega's counsel cited a number of cases to support the proposition that the court's power is circumscribed in this case by treaty obligations. *Id.* at 16; *see e.g.*, Cook v. United States, 288 U.S. 102, 120-21

claimed that, unlike most individuals protesting jurisdiction based on treaty violations,[124] he had standing as the leader of Panama.[125]

The court denied Noriega's request and held that if the offended government fails to object to United States actions,[126] individuals lack standing to claim violations of international treaties, unless the treaties are self-executing.[127] The court found that the UN Charter, the OAS Charter, and the Hague Convention were not self-executing and therefore did not give Noriega a private right of action.[128] Because the rec-

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(1933) (holding that adjudication cannot follow the U.S. seizure of a British vessel in violation of territorial limits set by treaty); Ford v. United States, 273 U.S. 593, 606 (1927) (noting that the *Ker* decision is inapplicable where a United States treaty is directly implicated).

124. *See, e.g., Matta-Ballesteros v. Henman*, 896 F.2d 255, 259-60 (7th Cir.) *cert. denied*, ___ U.S. ___, 111 S. Ct. 209 (1990) (noting that where the Honduran sovereign did not protest defendants abduction from Honduras individuals had standing to challenge international treaty violations, despite popular protest); United States v. Zabaneh, 837 F.2d 1249, 1261 (5th Cir. 1988) (holding that where United States agents abducted the defendant from Guatemala the defendant did not have standing to assert violations of extradition treaties where neither governments protested the kidnapping); United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) (noting that a violation of an extradition treaty between the United States and Panama cannot be asserted by an individual absent Panamanian government protest); United States v. Reed, 639 F.2d 896, 902 (explaining that an extradition treaty is not violated where the country in which an American fugitive was residing failed to protest violation). *But see* United States v. Caro-Quintero, No. 87-422 Cr, at 8-9 (C.D. Cal. Aug. 10, 1990) (holding that the defendant had derivative standing to protest a violation of an extradition treaty where Mexico "expressly and adequately" protested the United States abduction); *Toscanino*, 500 F.2d at 270, 277-79 (noting that the abduction of the defendant violated international law and treaties notwithstanding a protest by the Uruguayan government).

125. Motion to Dismiss, *supra* note 89, at 24, 26-27; *see* Maechling, *supra* note 86, at 127 (acknowledging that before the invasion all major governments, except the United States, recognized Noriega's government as legitimate, either de jure or de facto; Lowenthal, *In Central America, an Unhappy Legacy Bush Can Undo*, Chicago Trib., Feb. 19, 1989, at C3 (noting that the United States was the only nation to not recognize Noriega's government); *see generally*, Note, *The Dictator, Drugs and Diplomacy by Indictment: Head-of-State Immunity in United States v. Noriega*, 4 CONN. J. INT'L L. 729 (1989) [hereinafter *Dictator*] (analyzing Noriega's indictment in the context of head-of-state immunity).

126. Omnibus Order, *supra* note 101, at 61.

127. *Id.* at 60. A self-executing treaty bestows individual rights upon citizens of the signatory state. United States v. Postal, 589 F.2d 862, 875 (5th Cir. 1979). Therefore citizens of a country that is a party to a treaty may assert rights accorded by the treaty in a United States court. *Id.* These rights enure under a self-executing treaty which is "a self-imposed limitation of the jurisdiction of the United States and hence on its courts." *Id.*; *see also supra* note 124 (listing decisions holding that unless treaties are self-executing they bestow rights on a signatory nation, and not on individuals).

128. Omnibus Order, *supra* note 101, at 62. The *Noriega* court noted that these documents represent "broad principles" meant to govern the conduct of the signatory states, not to confer "individual or private rights." *Id.*; *see, e.g.*, Forlova v. Union of Soviet Socialist Republics, 761 F.2d 370, 374 (7th Cir. 1985) (rejecting plaintiff's argument that Articles 55 and 56 of the UN Charter create rights enforceable by United

ognized Panamanian government did not protest Noriega's abduction, he lacked standing to assert treaty violations that would necessitate the divestment of the district court's jurisdiction.[129]

Noriega claimed that as head-of-state he could assert treaty violations on behalf of the Panamanian government.[130] While the court found this argument somewhat meritorious, it determined that the contention lacked factual support.[131] The court observed that the United States government explicitly refused to recognize Noriega's regime as the legitimate Panamanian government.[132] Noriega's nullification of the results of the Panamanian presidential elections simultaneous to the alleged treaty violations further weakened his position.[133] The court held that because the current Panamanian government, led by Guillermo Endara, did not protest the treaty violations, the court's jurisdiction over Noriega was valid.[134] Because the recognized Panamanian government failed to object and because Noriega lacked standing as an

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States citizens in American courts); Diggs v. Richardson, 555 F.2d 848, 850 (D.C. Cir. 1976) (holding that UN Resolutions do not confer rights upon United States citizens enforceable in a United States court absent domestic legislation implementing the resolution).

129. Omnibus Order, *supra* note 101, at 63.

130. Motion to Dismiss, *supra* note 89, at 24.

131. Omnibus Order, *supra* note 101, at 63.

132. *Id.*; *see also* Republic of Panama v. Citizens & S. Int'l Bank, 682 F. Supp. 1544 (S.D. Fla. 1988) (denying Noriega's motion to intervene in an action regarding Panamanian funds and stating that an agent's unrecognized government may not have access to United States courts); *see also* Maechling, *supra* note 86, at 127 (observing the United States' contention that the Panamanian Assembly's appointment of Noriega as "maximum leader" was illegal because National Assemblies installing both the Solis Palma and Rodriguez governments were appointed in violation of the Panamanian constitution); Note, *Dictator*, *supra* note 125, at 729-30 (stating that Noriega, as a military dictator, was widely considered the de facto head of Panama even though the United States consistently refused to officially recognize him as such). The United States also refused to recognize the Solis Palma government and instead recognized Devalle as president even after he was dismissed and went into hiding. Maechling, *supra* note 86, at 118-19.

Under international law, a government is eligible for recognition if it "effectively controls the national territory and . . . [is] willing and capable of meeting its international obligations." *Id.* The method that the government uses to take power is irrelevant. *Id.* at 1195. Applying this test to the Solis Palma government, Solis Palma clearly had sole control of the state, and there was no indication that the government would not meet its international obligations. *Id.* at 119. Thus, the United States' recognition of Devalle's government was a fiction. *Id.* at 119.

133. Omnibus Order, *supra* note 101, at 63-64; *see also*, Oberdorfer, *U.S., Noriega Negotiated Recently*, Wash. Post, Dec. 21, 1989, at A37 (tracing the recent history of Panamanian elections). Observers noted that opposition leader Guillermo Endara won the May 7, 1989 election. *Id.* Noriega, however, claimed victory for his candidate, Rodriguez, and annulled the election on May 9, 1989. *Id.* Rodriguez was sworn in as President on September 1, 1989. *Id.*

134. Omnibus Order, *supra* note 101, at 64. Guillermo Endara, Ricardo Arias Calderon, and Guillermo Ford, all front-runners in the May 1989 elections, were sworn in

individual, the court's refusal to consider whether the United States invasion was in violation of the treaty provisions was appropriate.[135]

C. Theory Three: Abduction Merits the Court's Exercise of its Supervisory Powers to Invalidate Jurisdiction

Noriega's final theory asked the court to exercise its supervisory powers to divest itself of jurisdiction.[136] Although the court rejected this theory, this was Noriega's strongest argument for circumventing the *Ker-Frisbie* Doctrine.[137] In fact, the *Noriega* court should have exercised its supervisory powers and nullified its jurisdiction to deter future governmental misconduct in the acquisition of personal jurisdiction over criminal defendants.[138]

Supervisory powers provide a means to preserve judicial integrity and to prevent courts from aiding government impropriety.[139] By exer-

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as president and vice-presidents, respectively, at a United States base immediately before the United States invasion. Maechling, *supra* note 86, at 122.

135. Omnibus Order, *supra* note 101, at 64; *see also* Government's Response, *supra* note 89, at 4-9 (offering support for the court's conclusion that Noriega lacked standing to assert the alleged treaty violations).

136. Motion to Dismiss, *supra* note 89, at 18.

137. *See* United States v. Lira, 515 F.2d 68, 73 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J., concurring) (noting that the government's repeated use of abductions to halt international drug traffic invites court to exercise their supervisory powers in the interests of "the greater good of preserving respect for law"). *But see* United States v. Reed, 639 F.2d 896, 903 (2d Cir. 1981) (stating that supervisory powers should not be exercised where the court observes no pattern of abductions).

138. *See infra* notes 151-78 and accompanying text (explaining how the court erred in failing to exercise its supervisory powers in *Noriega*); Lowenfeld, *supra* note 9, at 467 (recognizing the need to abandon the *Ker-Frisbie* doctrine in light of the current regard for fourth and fifth amendment rights in the United States and international individual human rights); *see also* M. Bassiouni, *supra* note 1, at 190 (advocating reform of the extradition process to encourage its use instead of abduction to preserve respect for international law). *But see* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1246 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd*, ___ U.S. ___, 110 S. Ct. 1056 (1990) (recognizing that a court may not exercise supervisory powers without "a clear basis in fact and law for doing so" and noting that concern for overzealous law enforcement does not require court intervention); United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985) (asserting that "[p]roper regard for judicial integrity does not justify a 'chancellor's foot veto' over activities of coequal branches of government").

139. Omnibus Order, *supra* note 101, at 66; *see Gatto*, 763 F.2d at 1045 (stating that supervisory powers derive from the constitutional system of checks and balances necessary to preserve judicial integrity); United States v. Payner, 447 U.S. 727, 744 (1980) (Marshall, J., dissenting) (explaining the supervisory power doctrine and its role in protecting judicial integrity); McNabb v. United States, 318 U.S. 332, 340 (1943) (noting that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence"); *see generally* Beale, *Reconsidering Supervisory Powers in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal*

cising its supervisory powers, the judiciary deters misconduct and remedies injustices not violating the Constitution or a specific statute, but are nonetheless intolerable as contrary to fairness and justice.[140] This is a severe remedy, however, and should be applied only in cases of the government's blatant or repeated abuse which "shock the conscience," not mere violations of technical rules.[141]

To persuade the court to exercise its supervisory powers, Noriega attempted to establish a pattern of abuses by the United States.[142] He argued that the United States repeatedly abducts fugitives illegally and consistently ignores the formal extradition process.[143] Relying primarily

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Courts, 84 COLUM. L. REV. 1433, 1433 (1984) (tracing the development of the supervisory power doctrine, theoretically and practically).

140. Omnibus Order, *supra* note 101, at 67; *see* United States v. Leslie, 783 F.2d 541, 569 (5th Cir. 1986) (Williams, J., dissenting) (stating that supervisory power is an "appropriate tool" to mend injustices that are neither constitutional nor statutory violations). In justifying the need for the court's supervisory powers, the court in McNabb v. United States, 318 U.S. 332 (1942) stated that:

> Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

Id. at 343; *see also infra* note 162 (discussing supervisory powers and the role of the legislature).

141. Omnibus Order, *supra* note 101, at 67; *see* United States v. Omni Int'l Corp., 634 F. Supp. 1414, 1438 (D. Md. 1986) (noting that courts should exercise supervisory powers "sparingly," only where the government's conduct shocks the conscience); United States v. Baskes, 433 F. Supp. 799, 806 (N.D. Ill. 1977) (recognizing that supervisory powers are a "harsh ultimate sanction" reserved for conduct that shocks the conscience).

142. Motion to Dismiss, *supra* note 89, at 18-19; Omnibus Order, *supra* note 101 at 67.

143. *Id.*; *see, e.g.*, United States v. Caro-Quintero, No. 87-422 (C.D. Cal. Aug. 10, 1990) (involving abduction of a defendant from Mexico); Matta Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990) (considering the legality of the abduction of a defendant from Honduras by United States marshals in cooperation with Honduran special troops); United States v. Toro, 840 F.2d 1221 (5th Cir. 1988) (discussing the kidnapping of a defendant from Panama by United States agents); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986) (addressing the abduction of a defendant from Columbia by United States officials); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (involving the kidnapping of a defendant from Honduras by United States agents); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (discussing the kidnapping of a defendant from Panama by United States officials); United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (involving the abduction of a defendant from Bimini by United States agents); *see also*, Taylor *Mexico Says Extraditions Are Illegal*, NAT'L L.J., Dec. 3, 1990, at 3 (discussing the Mexican government's outrage over recent cases of illegal extraditions).

Noriega's contention that the United States consistently abducts fugitives instead of extraditing them is evidenced by the recent change in administration policy which allows United States agents to kidnap terrorists and other alleged criminals from foreign nations. *See* Findlay, *supra* note 1, at 2-3 (considering whether the Reagan administration's change in policy to enhance law enforcement efforts against terrorists is proper); Note, *Drug Diplomacy*, *supra* note 14, at 1295 (noting the legal opinion of Attorney

upon the concurring opinion in *United States v. Lira*,[144] Noriega urged the court to exercise its supervisory powers to preserve "civilized standards" of the judicial process.[145] Noriega argued that if ever there was a case requiring the court's intervention to remedy conduct that was "shocking to the conscience," this was it.[146]

The *Noriega* court ultimately decided against exercising its supervisory powers.[147] The court acknowledged that a violation of a defendant's *individual* rights is not a prerequisite to the exercise of its supervisory powers,[148] but it also noted that the invasion was motivated by foreign policy goals which deterred the *Noriega* court from intervening.[149] The court concluded that President Bush ordered United States military officials to arrest Noriega in the course of the invasion of Panama, and thus Noriega's seizure was a foreign policy objective.[150] The court therefore declined to decide if the United States military action was "shocking to the conscience," which would mandate the exercise of the court's supervisory powers, because such a determination violated

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General William Barr which would permit United States agents to abduct alleged criminals from foreign states without that country's consent).

144. 515 F.2d 68, 72 (2d Cir. 1975) (Oakes, J., concurring).

145. Motion to Dismiss, *supra* note 89, at 19; *see Lira*, 515 F.2d at 73 (Oakes, J., concurring) (speculating that the court will eventually exercise supervisory powers to preserve respect for the law in the abductions of alleged drug traffickers). Noriega cited the hundreds of civilian deaths and injuries resulting from the invasion to support his argument that the court should exercise its supervisory powers. Motion to Dismiss, *supra* note 89, at 20; *see also supra* note 89 and accompanying text (discussing the figures submitted regarding the number of people who were injured, killed, or had property destroyed as a result of the United States invasion).

146. Motion to Dismiss, *supra* note 89, at 9-10.

147. Omnibus Order, *supra* note 101, at 70.

148. *Id.* at 68; *see* United States v. Leslie, 783 F.2d at 569-71 (discussing the relationship between supervisory powers and constitutional and statutory law).

149. Omnibus Order, *supra* note 101, at 71-72.

150. *Id.* at 71 n.37. In reaching its decision, the court considered the Government's analysis of the issue in The Government's Memorandum in Response to Motion to Dismiss Indictment, United States v. Noriega, No. 88-0079 Cr. at 3 (S.D. Fla. filed Feb. 2, 1990), which cited to The Memorandum for the Secretary of Defense from the President of the United States (Dec. 20, 1989) (ordering Noriega's arrest "in the course of carrying out the military operations in Panama"). Omnibus Order, *supra* note 101, at 71-72. The court found that Noriega's counsel inadequately refuted the Government's statement that the invasion was primarily for foreign policy objectives. *Id.* at 71. Moreover, the court noted that Noriega erroneously relied upon statements made by the Independent Commission of Inquiry on the United States Invasion of Panama because that report rejected the theory that Noriega's arrest was a motive for the invasion. *Id.*; *see* Motion to Dismiss, *supra* note 89, at Exhibit A, p. 1 (referring to the report by the Independent Commission of Inquiry on the United States Invasion of Panama).

the political question doctrine.[151] The court, therefore, held that it had jurisdiction.[152]

III. WHY THE *NORIEGA* COURT ERRED BY FAILING TO EXERCISE ITS SUPERVISORY POWERS

The *Noriega* court viewed the facts surrounding the invasion and the seizure of General Noriega narrowly.[153] Hence, the *Noriega* decision invites even more serious governmental misconduct and squanders an opportunity to reconcile conflicts within the United States laws governing abductions with international legal and humanitarian standards.[154]

A. THE *Noriega* COURT ERRED IN APPLYING EXISTING DOCTRINE

One of President Bush's four goals in invading Panama was the seizure and arrest of General Manuel Noriega in order to bring him to justice in the United States.[155] If the Bush administration claims

151. Omnibus Order, *supra* note 101, at 72-73. The political question doctrine involves a category of matters that courts consider the exclusive province of the executive and legislative branches. *Id.* at 73. Political questions involve either subjects that are traditionally beyond the expertise of the judiciary, such as foreign policy, or subjects better decided by the executive and/or legislature. *See* Baker v. Carr, 369 U.S. 186, 210 (1962) (formulating the test to determine whether an issue involves a political question). Topics deemed political questions are therefore excluded from judicial review. *Id.*; *see, e.g.*, Atlee v. Laird, 411 U.S. 911 (1972) (refusing to consider whether the President has power to maintain United States forces in Southeast Asia); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (deciding that President Nixon's order to bomb targets and mine harbors in North Vietnam constituted a constitutionally unauthorized escalation of war was a non-justiciable political question); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (refusing to decide whether United States military aid and advisors were introduced into El Salvador under conditions implicating the War Powers Resolution and the constitutional war powers clause).

152. Omnibus Order, *supra* note 101, at 70. The court explained that if the invasion presented a pure law enforcement effort where government agents intentionally killed and tortured people "for the sole purpose of discovering a fugitive's whereabouts" to effectuate his arrest, it would properly invoke its supervisory powers. *Id.* Instead, the court viewed the Noriega incident as a "military war" in which innocent lives were sacrificed for foreign policy goals. *Id.*

153. *See* Lowenfeld, *supra* note 9, at 491 (stressing the difference between "true war" and the "war on drugs"). The "war on drugs" requires adherence to our values of due process, and it is not subject to the relaxation of governmental restraint often inherent to "true war". *Id.*

154. *See id.* at 467, 491 (advocating the abandonment of the *Ker-Frisbie* doctrine in light of society's higher respect for human rights). Lowenfeld notes, however, that it would be unfortunate if Noriega were the first individual to successfully challenge the Doctrine. *Id.*

155. *Text of Bush Announcement On the General's Surrender*, N.Y. Times, Jan. 4, 1990, at A12.; *see supra* notes 95-99 and accompanying text (discussing President

Noriega's apprehension as an independent justification for the invasion of Panama, a sovereign state, the United States courts should evaluate it as such.[156] Once Noriega's case is removed from the "foreign policy" context and placed in the realm of strict law enforcement, the court can properly exercise its supervisory powers.[157] Thus recharacterized, Noriega's original contentions of governmental misconduct[158] and disregard for the law of nations,[159] previously rejected by the court, become viable arguments against the exercise of jurisdiction.[160]

The court rejected Noriega's argument that the United States invasion of Panama was "shocking to the conscience," because he could not show that the misconduct violated his individual rights.[161] The supervisory powers doctrine requires no such showing.[162] Rather, Noriega need only establish that the government's actions in effectuating his arrest were shocking and contrary to public policy.[163] The United States inva-

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Bush's four objectives); *see also* Lowenfeld, *supra* note 9 (claiming that the invasion was undertaken substantially to bring Noriega to the United States for prosecution).

156. *See* Lowenfeld, *supra* note 9, at 491 (stressing that the "war on drugs" should be considered normal law enforcement subject to normal due process restraints).

157. *See id.*; *see also* Omnibus Order, *supra* note 101, at 70 (explaining reasons how the invasion of Panama could be characterized as a foreign policy objective).

158. *See* Motion to Dismiss, *supra* note 89, at 8 (asserting that the court must divest itself of jurisdiction because the invasion was "shocking to the conscience").

159. *See id.* at 15 (alleging that the invasion of Panama and the subsequent arrest of Noriega violated numerous tenets of international law and several United States treaties).

160. *See* United States v. Leslie, 783 F.2d 541, 569-71 (5th Cir. 1986) (stating that supervisory powers are designed to correct injustices not falling within the confines of constitutional or statutory violations but that threaten the integrity of the judicial system); McNabb v. United States, 318 U.S. 332, 340 (1943) (maintaining that judicial supervision is necessary to preserve civilized standards of procedure).

161. *See* Omnibus Order, *supra* note 101, at 67-68 (explaining that the court must find that the government repeatedly engaged in outrageous or shocking conduct to employ supervisory authority where a defendant's personal constitutional or statutory rights were not violated).

162. *See Leslie*, 783 F.2d at 569-70 (noting the shift in supervisory authority focus from violation of defendant's rights to protection of judicial integrity).

163. United States v. Omni Int'l Corp., 634 F. Supp. 1414, 1438 (D. Md. 1986). The open-ended nature of the supervisory power doctrine led to expansive interpretations, and courts freely formulate rules meant to promote "the ends of justice and good public policy." Beale, *supra* note 139, at 1434. If such a ruling by the court proves impractical or undesirable, however, the courts or the legislature can easily revise it. *Id.* Additionally, no conflict is posed between state and federal courts as a result of supervisory rulings because these decisions apply only in federal proceedings. *Id.*; *see also* RESTATEMENT 3D, *supra* note 3, at § 433 (stating that where United States or foreign officials abduct a person and bring him or her to the United States, the United States cannot prosecute that person if apprehension or delivery was found to be shocking to the conscience).

sion of Panama caused staggering damages to that country.[164] The court must decide, through the exercise of its supervisory powers, whether such destruction is justified, even in part, by the desire to bring a single individual to justice and whether such action is consistent with public policy.[165]

No case involving United States officials abducting fugitives from abroad approaches the extreme level of interference with a sovereign state exhibited in the *Noriega* case.[166] Some observers argue that the exercise of the court's supervisory powers is unjustified in this case because there was no repeated governmental abuse.[167] Others note, however, that the consistent toleration of past governmental actions permitted government conduct to deteriorate to the point where an invasion of a foreign sovereign was condoned simply to bring a fugitive to jus-

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164. *See supra* note 89 and accompanying text (noting the different estimates of destruction resulting from the United States invasion of Panama). In the words of Judge Hoeveler, who presided over the *Noriega* proceedings,

> [d]efendant's counsel makes much of the numbers of innocent civilians killed and the extent of property damage, but the Court fails to see what that argument proves; the death of but one woman or man is one too many.

Omnibus Order, *supra* note 101, at 79.

165. Beale, *supra* note 163, at 1434. Beale notes that

> in the absence of congressional action . . . the federal courts should decide evidentiary questions 'in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past.'

Id. at 1441. *But see*, *supra* note 155 and accompanying text (noting that both the courts and the legislature have the power to revise court decisions based on supervisory powers if they prove undesirable).

166. *See, e.g.*, Matta-Ballesteros v. Henman, 896 F.2d 255, 255 (7th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 209 (1990) (involving the torture of a single individual which was not egregious according to the *Toscanino* standard); United States v. Toro, 840 F.2d 1221 (5th Cir. 1988) (maintaining jurisdiction where defendant was abducted but alleged no torture); United States v. Zabaneh, 837 F.2d 1249 (5th Cir. 1988) (addressing the abduction of a defendant who alleged no other governmental abuse); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (validating jurisdiction where a Panamanian jail treated the defendant poorly).

167. Lowenfeld, *supra* note 9, at 490-91. *See* United States v. Omni Int'l Corp., 634 F.2d at 1438 (stating that courts should exercise supervisory powers in cases where long-standing government misconduct can be demonstrated). Justice Oakes' opinion in *Lira* supports the exercise of supervisory authority for repeated abductions, absent any suggestion that the abductions must in some way involve torture or other egregious action. 515 F.2d at 73. In other words, Justice Oakes views the abductions themselves as the outrageous action which the court needs to curb in order to protect judicial integrity. *Id.*

tice.[168] Consequently, the court must exercise its supervisory powers to stop this erosion of respect for the sovereignty of other nations.[169]

Noriega's argument that the invasion violated international law should also be reconsidered to the extent that Noriega's arrest was an independent justification for the invasion of Panama.[170] The supervisory powers doctrine does not require that a foreign government protest the violation of a treaty or international law.[171] Rather, the doctrine merely requires a court to determine that the government's actions were shocking to the conscience,[172] damaging to judicial integrity,[173] or against public policy.[174] If any of these criteria are met, judicial intervention is justified.[175]

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168. *See Matta-Ballesteros*, 896 F.2d at 260 (holding jurisdiction valid although the defendant was severely tortured at the direction of United States Marshals during abduction). Consistent application of the *Ker-Frisbie* doctrine to situations involving foreign abductions caused a "slippery slope" of misconduct in which the government is permitted to engage. Lowenfeld, *supra* note 9, at 489. Lowenfeld aptly notes that "[a]s jurisdiction is believed to expand, so does the drive to exercise it, often without the care that is observed in domestic law enforcement." *Id.*

169. *See* United States v. Lira, 515 F.2d 68, 73 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J., concurring) (stressing that courts must exercise their supervisory powers to bar jurisdiction in abduction cases because of the government's repeated abuses in its fight against drugs). As Lowenfeld asserts:

> [A]ll abduction organized by governments shocks the conscience, not only because kidnapping is a crime everywhere, but because there is a strong probability that the very safeguards and professionalism that distinguish civilized police action from vigilantism—warrants upon probable cause, prompt arraignment before a judicial officer, fair interrogation—will be unavailable.

Lowenfeld, *supra* note 9, at 589-90; *see also* Harris v. United States, 331 U.S. 145, 172 (1947) (Frankfurter, J., dissenting) (noting that "dubious police methods defeat the very ends of justice by which such methods are justified"); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (emphasizing that the government must be a model for law-abiding behavior in order to preserve judicial integrity).

170. *See* Motion to Dismiss, *supra* note 89, at 15 (arguing that the arrest of Noriega constituted a violation of United States treaty and international law obligations).

171. *See* Omnibus Order, *supra* note 101, at 60 (explaining that individual claims of international law and treaty violations cannot be successful without the offended government's protest, unless the treaty is deemed self-executing); *supra* notes 119, 127 (discussing the concept of self-executing treaties with emphasis on abduction cases).

172. *See Omni Int'l*, 634 F. Supp. at 1438 (finding supervisory power to be a severe sanction for conduct which "shocks the conscience").

173. *See id.* (noting that supervisory powers seek to preserve the integrity of the judicial system); *Leslie*, 783 F.2d at 569-70 (stating that supervisory powers are a method by which erosion of judicial integrity is protected).

174. *See* Beale, *supra* note 139, at 1434 (explaining that the courts regularly use supervisory powers to promote what they believe to be good public policy).

175. *See Leslie*, 783 F.2d at 571 (indicating when supervisory powers are properly applied).

B. THE *Noriega* COURT SHOULD HAVE USED ITS SUPERVISORY POWERS TO CHANGE EXISTING DOCTRINE

Abduction, particularly as a justification for an invasion,[176] violates international law.[177] This is true not only in the *Noriega* case, but in all other cases of government abduction.[178] The *Noriega* court, therefore, should have divested itself of jurisdiction through its supervisory powers to promote respect for international law and human rights.[179]

Abduction of fugitives from foreign nations without that state's official consent clearly violates that state's sovereignty and territorial integrity.[180] As Noriega argued, his forcible abduction from Panama vio-

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176. *See* Nanda, *supra* note 86, at 502 (asserting that no state has authority to violate another sovereign's territorial integrity to effectuate the arrest of a fugitive and therefore United States actions in Panama clearly violated international law); *see also* Maechling, *supra* note 86, at 123 (explaining that the United States' reasons for invading Panama have no basis in international law). *But see* D'Amato, *Agora: U.S. Forces in Panama: Defenders, Aggressors, or Human Rights Activists?; The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 520 (1990) (arguing that the United States invasion of Panama was justified and that international law does not require a state to give valid international law explanations for its actions); *see generally* Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984) (discussing common rationales for state intervention in international law).

177. *See* S.C. Res. 138, 15 U.N. SCOR (868th mtg.) at 4, U.N. Doc. S/4349 (1960) (noting in its review of the Adolf Eichmann case that foreign fugitive abduction violates the UN Charter and the rights of sovereign states and warning that such actions can result in the breakdown of international order); M. BASSIOUNI, *supra* note 1, at 236 (claiming unlawful seizures violate international law and suggesting sanctions for offending nations); Lowenfeld, *supra* note 9, at 472-77 (explaining fugitive abduction from foreign nations encourages violations of the standards of international law).

178. *See* Lowenfeld, *supra* note 9, at 472 (arguing that *any* "exercise of law enforcement" by a country on the territory of another is a violation of the foreign state's sovereignty). *But see* Findlay, *supra* note 1, at 52 (supporting abduction of terrorists in foreign nations due to the unique nature of their threat).

179. *See* Lowenfeld, *supra* note 9, at 493 (expressing hope that in the future courts will consider abduction shocking to the conscience and formulate a new rule emphasizing international law and humanitarian rights).

180. RESTATEMENT 3D, *supra* note 3, at § 432(2). Section 432(2) of the Restatement notes:

> A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.

Id.; *see also* Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial*, 42 U. MIAMI L. REV. 447, 457 (1987) (noting that the United States has an "international obligation" not to invade another sovereign's territory to apprehend a fugitive); Findlay, *supra* note 1, at 16 (noting that abuductions abroad on the territory of other states amount to "prima facie" violations of a nation's sovereignty and territorial integrity). The seizure of a fugitive from a foreign territory does not violate international law if there is no effective government which could assert its sovereignty. *Id.* at 17. Examples of this include Lebanon and Germany during the American occupation after World War II. *Id.*

lated Article Two, section four of the UN Charter[181] and Article Twenty of the OAS Charter.[182] Both of these Charters condemn states' actions that breach the territorial integrity of another nation, such as kidnapping.[183] Additionally, some observers argue that abductions are particularly inappropriate when an extradition treaty exists between the two nations, and the formal extradition process is circumvented by the forcible removal of the defendant to the United States.[184]

The modern legal trend is to classify illegal foreign abductions as violations of international human rights law.[185] Although no international agreements expressly list abductions of fugitives abroad as violations of international human rights law, the idea is implicit in several international declarations.[186] Some observers claim that these agree-

181. U.N. CHARTER, art. 2, para. 4; *see supra* note 120 (quoting text of Article 2(4) of the U.N. Charter); *see also* S.C. Res. 138, 15 U.N. SCOR (868th mtg.) at 4, *U.N. Doc.* S/4349 (1960) (observing in its examination of the abduction of Eichmann that "the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations"). *But see* D'Amato, *supra* note 176, at 520 (claiming that the United States invasion did not violate the UN Charter because in order to act against a state's territorial integrity there must be an intent to annex part or all of that nation or there must be an exercise of force against the political independence of the state).

182. Art. 20, para. 17, 2 U.S.T. 2394, 2420, T.I.A.S. No. 2361; *see also supra* note 112 (quoting the text of Article 20 of the Organization of American States Charter).

183. *See United States v. Toscanino*, 500 F.2d 267, 277-78 (1974) (stating that abductions of fugitives from a foreign territory violate both the OAS Charter and the UN Charter, both of which articulate long-standing principles of international law).

184. *See* Lowenfeld, *supra* note 9, at 474 (noting that strict adherence to the formal extradition process is not universally accepted but that treaty provisions must be followed as a matter of international law). The argument that extradition should be the only process by which a state gains jurisdiction over an individual creates problems in cases such as *Noriega* where the government refuses extradition despite a treaty, or in cases involving terrorists which are often supported by the governments themselves. *See* Sciolino, *What Should Washington Do about Noriega?*, N.Y. Times, Sept. 10, 1989, at E1 (explaining that even the Panamanian opposition would refuse to turn over Noriega if he were ousted from power); Findlay, *supra* note 1, at 7 (stating that "Libya, Iran, and the putative government of Lebanon would be as willing to deport terrorists to the United States as terrorists themselves would be likely to saunter into the nearest American embassy and turn themselves in"). *See generally* Treaty Between the United States of America and the Republic of Panama, Providing for the Extradition of Criminals, May 25, 1904, United States-Panama, 34 Stat. 2851, T.S. No. 445 (describing the terms of extradition between the United States and Panama).

185. Note, *Drug Diplomacy*, *supra* note 14, at 1298; *see also* M. BASSIOUNI, *supra* note 1, at 217-44 (discussing the treaties and agreements under which seizure of persons abroad are a violation of international law and human rights).

186. Lowenfeld, *supra* note 9, at 474. For example, Article 9 of the Universal Declaration of Human Rights, provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), *cited in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 161-64 (B. Weston, R. Falk & A. D'Amato ed. 1980) [hereinafter BASIC DOCUMENTS]. Article 9(1) of the International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except

ments have no effect because they are not legally binding.[187] These agreements, however, evolved subsequent to *Ker* and reflect a shift in societal values toward a more expansive definition and protection of international human rights.[188]

IV. RECOMMENDATIONS

The United States has a duty to foreign nations to respect their territorial sovereignty in obtaining fugitives, as well as a moral responsibility to guard against breaches of individual rights as defined by international agreement.[189] Repeated violations of these obligations threaten international stability.[190] Thus, courts must formulate new standards for jurisdiction to replace the *Ker-Frisbie* rule and manifest respect for international principles.[191]

A. ABANDONING THE *Ker-Frisbie* DOCTRINE IN THE CONTEXT OF THE *Noriega* CASE

Noriega's abduction presents an extreme example of the United States government's application of the *Ker-Frisbie* Doctrine to obtain jurisdiction over a fugitive abroad.[192] Noriega was a powerful and highly visible representative of the drug world and a notorious blemish on the United States government's efforts in its "war on drugs."[193]

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on such grounds and in accordance with such procedure as are established by law." BASIC DOCUMENTS, *supra*, at 201-10.

187. Note, *Drug Diplomacy*, *supra* note 14, at 1298.

188. *Id.*; *see also* Lowenfeld, *supra* note 9, at 481 (concluding that contemporary thought views foreign kidnapping as violative of international law and the *Ker* decision should, therefore, be reconsidered); Note, *International Kidnapping*, *supra* note 5, at 1215-16 (detailing the increased focus, domestically and abroad, on human rights and stressing that courts should interpret these provisions in international charters as "implicit guarantees" of human rights).

189. *Id.* at 1214, 1216; *see also supra* notes 179-88 and accompanying text (discussing the United States' obligations under international law with regard to fugitive abductions).

190. Note, *International Kidnapping*, supra note 5, at 1216; *see also* S.C. Res. 138, 15 U.N. SCOR (868th mtg.) at 4, U.N. Doc. S/4349 (1960) (declaring that international abductions "affect the sovereignty of a Member State and therefore cause international friction, [and] may, if repeated, endanger international peace and security").

191. *See* Note, *International Kidnapping*, *supra* note 5, at 1216 (stating that "[c]ourts should interpret international agreements and treaties that recognize the inviolate territorial sovereignty of the party nations as implicit prohibitions against actions, such as kidnapping, which fail to respect that sovereignty"); Lowenfeld, *supra* note 9, at 467 (expressing need to revise the *Ker-Frisbie* Doctrine in accordance with modern standards of international human rights and domestic concern for the mandates of the fourth and fifth amendments).

192. *See supra* note 167 (listing abduction cases less egregious than *Noriega*).

193. *See* Sciolino, *Panama Jinx: What Should Washington Do About Noriega?*, N.Y. Times, Sept. 8, 1989, at E1 (discussing the United States' failure to oust Noriega

There is little doubt that a move by the district court to divest itself of jurisdiction in this highly publicized case would have been an unpopular action.[194] Nonetheless, the *Noriega* case questions whether the *Ker-Frisbie* Doctrine is a policy which the United States, as a member of the United Nations and a leader in the world community, ought to continue supporting.[195] The *Noriega* case invited the court to exercise its supervisory powers to begin the process of change.[196] The court, however, declined this challenge.[197]

B. ALTERNATIVES TO THE *Ker-Frisbie* DOCTRINE

In the last century, numerous individuals have articulated the problems arising from the *Ker-Frisbie* Doctrine.[198] Few, however, have suggested alternatives that would satisfy both the needs of law enforcement officials seeking to bring an accused to justice and the needs of the accused and the violated countries to be free from illegal intrusions.[199] Given the severity of the situation with regard to international

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from power and the refusal of the Panamanian opposition leaders to turn Noriega over for prosecution on drug-trafficking charges); Pear, *U.S. is Easing Its Terms for the Ouster of Noriega*, N.Y. Times, Aug. 16, 1989, at A9 (noting that President Bush declined to rule out Noriega's abduction).

194. *See* Lowenfeld, *supra* note 9, at 491 (recognizing the irony if Noriega, as an ex-dictator, were to successfully challenge the *Ker-Frisbie* doctrine and expressing the need to address the issue in "calmer settings").

195. Note, *International Kidnapping*, *supra* note 5, at 1214; *see also* Lowenfeld, *supra* note 9, at 493 (emphasizing that the United States should create a model rule prohibiting international abductions and mandating divestment of jurisdiction as a remedy to such occurrences); M. BASSIOUNI, *supra* note 1, at 190 (stating that "[a]t this stage in the development of international law, it is no longer possible to rationalize violations of international law on grounds of expediency or to allow such violations to be perpetuated without an adequate deterrent-remedy").

196. *Motion to Dismiss*, *supra* note 89, at 18; *see also supra* notes 127-43 and accompanying text (explaining Noriega's reasons for requesting that the court exercise its supervisory powers to revoke jurisdiction).

197. Omnibus Order, *supra* note 101, at 79-80; *see also supra* pp. 13-19 (outlining Noriega's arguments for nullifying jurisdiction and discussing the court's rationale for rejecting these arguments). The *Noriega* case, however, is unlikely to be the last opportunity that the courts will have to reconsider this issue. *See* M. BASSIOUNI, *supra* note 1, at 212 (stating that the line of court decisions showing support for the *Ker-Frisbie* Doctrine encourages more frequent exercise of such practice by United States law enforcement officers).

198. *See, e.g.*, Findlay, *supra* note 1, at 1 (discussing the problems arising from the *Ker-Frisbie* Doctrine with regard to the abduction of terrorists from abroad); Rogers, *supra* note 180 at 447 (analyzing the ramifications of United States seizures of terrorists abroad); Lowenfeld, *supra* note 9, at 444 (identifying the violations of both United States constitutional law and international law resulting from application of the *Ker-Frisbie* Doctrine).

199. *See, e.g.*, Note, *International Kidnapping*, *supra* note 5, at 1216 (considering the violation of territorial sovereignty posed by foreign seizures and advocating review of United States treaty obligations *after* the accused has been abducted to determine if

kidnappings, some action must be taken to begin harmonizing United States laws with the modern concept of world order.[200]

1. A Ban on International Kidnappings

The United States' disregard for international law, evidenced by abductions, should "shock the conscience" of today's courts.[201] United States courts should completely ban kidnapping.[202] This would make extradition by treaty the only means by which courts could obtain jurisdiction.[203] Such action is the best way to approach the internationally sensitive, and potentially explosive, kidnapping problem.[204] An absolute ban on kidnapping would also enhance judicial integrity through a greater sense of respect for the law of foreign nations.[205]

Critics would argue that the extradition process in the United States is so fraught with difficulties that such a system would prove unwork-

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jurisdiction should be refused); M. BASSIOUNI, *supra* note 1, at 236 (discussing possible remedies for abductions in violation of international law, such as holding the perpetrator internationally responsible, return of the accused and payment for damages, and payment of reparation to the violated state). The problem posed by these remedies is that they are not aimed at *preventing* the damage, outside of a questionable deterrent effect. *See* Note, *International Kidnapping*, *supra* note 5, at 1216 (considering the deterrent effect of the proposed post-seizure review of jurisdiction under the *Ker-Frisbie* Doctrine).

200. Note, *International Kidnapping*, *supra* note 5, at 1216; *see also supra* notes 189-92 and accompanying text (discussing the impact of abductions on the territorial integrity of foreign nations with emphasis on the *Noriega* case).

201. *See* Lowenfeld, *supra* note 9, at 444 (detailing how international abductions violate international law, extradition treaties, international human rights, and the fourth and fifth amendments of the United States Constitution and asserting that this method of gaining jurisdiction *should* be considered "shocking to the conscience"); *see also supra* notes 161-75 and accompanying text (discussing why abductions are shocking to the conscience and violate international law and human rights).

202. Note, *International Kidnapping*, *supra* note 5, at 1215; *see also supra* notes 65-66 and accompanying text (explaining how the United States courts' treatment of abductions has encouraged increasing abuse of the rule of law).

203. *See* Lowenfeld, *supra* note 9, at 473 (noting that extradition treaties advance the state's interest in law enforcement and supply safeguards for the individual over whom jurisdiction is sought).

204. *See* Note, *International Kidnapping*, *supra* note 5, at 1215 (noting that the United States courts should include the international-law ban on kidnapping in its national jurisprudence); Nanda, *supra* note 86, at 502 (stating that the invasion of Panama and the subsequent apprehension of Noriega is inconsistent with the principles of international law).

205. *See* Lowenfeld, *supra* note 9, at 493 (urging the United States, in examining international abductions, to "look at the uneven practice of other states not as a justification for indecent action, but as a challenge to develop—by example and treaty—a rule worthy to be called international law); M. BASSIOUNI, *supra* note 1, at 190 (explaining that allowing nations to benefit from the practice of illegal abductions "encourages further violations and erodes voluntary observance of international laws," by both states and individuals).

able, inhibit the apprehension of accused criminals, and thus reduce the probability that justice will be served.[206] In fact, it is likely that the number of fugitives brought to justice will decline.[207] There are many possibilities, however, for increasing the efficiency of the extradition process which would alleviate barriers inherent in that system.[208] Such concerns must become secondary to the more compelling interests of promoting respect for international law and human rights.[209]

2. *Enhanced Judicial Supervision Over International Kidnapping*

Because a complete ban on all kidnapping would likely face substantial opposition,[210] particularly from law enforcement officials, another possibility exists that would strike a better balance between the promotion of justice in the United States and respect for the territorial sovereignty of other nations.[211] This revision would set aside the outdated *Ker-Frisbie* Doctrine and require the United States prosecutor to file a motion with the court requesting permission to abduct an individual accused of a crime in the United States.[212]

Accompanying this request would be affidavits indicating the failure of formal attempts to obtain jurisdiction and the reasons for such failures.[213] The affidavit should also explain why extreme measures, such

206. *See supra* note 12 and accompanying text (indicating the ineffectiveness of the formal extradition process as it presently exists).

207. *See* Findlay, *supra* note 1, at 7-15 (referring to problems inherent in extraditing terrorists accused of crimes in the United States).

208. *See* M. BASSIOUNI, *supra* note 1, at 238 (explaining that the current extradition process is cumbersome and suggesting methods to streamline the system).

209. *See Text of President Bush's Address to Joint Session of Congress*, N.Y. Times, Sept. 12, 1990, at A20, col. 1 [hereinafter *Bush*] (emphasizing the need to create a "new world order" and abide by the law of nations).

210. *See supra* notes 206-08 and accompanying text (discussing problems that could arise if extradition becomes the sole option for law enforcement in the United States).

211. *See supra* notes 203-05 and accompanying text (discussing the problems of a system of pure extradition); *supra* notes 161-72 (explaining the violations of international law resulting from application of the *Ker-Frisbie* Doctrine).

212. *See supra* notes 70-84 and accompanying text (explaining how the breadth of the *Ker-Frisbie* Doctrine has increased as courts have tolerated police conduct in the course of seizures abroad and emphasizing that courts must restrict the Doctrine's scope). This revision may necessitate legislative action to require such a writ of execution before a seizure. Under the All Writs Act, courts may issue "all writs necessary or appropriate in aide of their respective jurisdictions and agreeable with the usages and principles of law." 28 U.S.C. § 1651 (1988). Another possible method of implementation, absent legislative initiative, would require the Court to invalidate the *Ker-Frisbie* Doctrine in favor of strict use of the extradition process, which would create incentive for the legislature to adopt this compromise alternative.

213. *See supra* notes 201-05 and accompanying text (emphasizing that the extradition process is the most agreeable method of obtaining jurisdiction under international

as seizures, should be resorted to in that particular case.[214] Finally, in all cases, the government should prove that the asylum nation acquiesced to the territorial violation and the abduction of the accused.[215] If the government is able to meet these burdens, the court should grant a writ of execution, allowing the United States law enforcement officials to kidnap the accused from his or her state of refuge.[216] Otherwise, courts should deny the request and refuse jurisdiction in the case of any unauthorized seizures,[217] including those conducted by foreign agents on behalf of United States officials.[218]

Although this approach attacks some of the problems related to international abductions, some would argue it is a compromise that does not go far enough.[219] Increased judicial supervision over the process as suggested above, would significantly advance the concepts of sovereignty, territorial integrity, and domestic process.[220] This strategy, however, does not attempt to guard against the violation of the individual's

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law). The court should examine cases individually to determine whether the rationale behind the breakdown in the extradition process could be remedied expeditiously, allowing the government to go forward with the extradition. For example, often the government's case is weak at the time the request is made so that the refuge state denies cooperation. M. BASSIOUNI, *supra* note 1, at 238. In such a case, the court should determine whether development of a stronger case is necessary before a writ may be obtained.

214. M. BASSIOUNI, *supra* note 1, at 238.

215. *See supra* notes 180-89 and accompanying text (stressing the importance of adopting laws which respect the territorial sovereignty of foreign nations); *see also* Note, *International Kidnapping*, *supra* note 5, at 1216 (indicating that acquiescence is a necessary part of ensuring compliance with international law); United States *ex. rel.* Lujan v. Gengler, 510 F.2d 62, 67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (stating that a state's acquiescence to an informal seizure remedies any problems related to territorial-sovereignty under international law).

216. *See* BLACK'S LAW DICTIONARY 1610 (6th ed. 1990) (defining writ of execution as "a writ to put in force the judgment or decree of a court. [A] [f]ormal, written command of a court directing a sheriff or other official to enforce a judgment through process of execution").

217. *See supra* notes 70-84 and accompanying text (recommending that courts exercise greater control over the system which presently condones abduction as an alternative to extradition); *supra* notes 176-88 and accompanying text (explaining that adherence to international law should take precedence over the government's need to acquire jurisdiction over fugitives abroad).

218. *See supra* notes 7, 65-66 and accompanying text (expressing the need to control the acts of United States officials who hire or act in conjunction with foreign agents to kidnap fugitives).

219. *See generally* M. BASSIOUNI, *supra* note 1, at 239 (advocating the streamlining of the extradition process and dismissing possible alternatives as not protecting individual rights and the international process); Wolfenson, *The U.S. Courts and the Treatment of Suspects Abducted Abroad Under International Law*, 13 FORDHAM INT'L L.J. 705, 744 (1990) (objecting to the consideration of individual interests as secondary to those of the violated state).

220. M. BASSIOUNI, *supra* note 1, at 239; *see also supra* notes 176-84 and accompanying text (discussing the impact of international kidnapping on state territorial sov-

right to be free from arbitrary arrest and detention.[221] It also does not necessarily further international due process and fairness or preserve the integrity of the international process.[222] Without incorporating all these concerns into the formula, the threat to world order created by international kidnapping remains.[223]

There is little doubt, however, that by promoting cooperation amongst states in this area, the threat to stability is substantially alleviated.[224] Additionally, by placing greater burdens on the government to pursue extradition, and in the case of failure, requiring it to justify resorting to abductions, the rights of the individual and the integrity of the international process are indirectly enhanced by limiting the use of this procedure.[225] Overall, a system which intensifies judicial supervision over international kidnapping would largely reduce the tension of the present system and would allow the process to evolve with the expanding concept of a "new world order."[226]

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ereignty); *supra* note 215 (noting that acquiescence by a state to an abduction heals violations of international law).

221. M. BASSIOUNI, *supra* note 1, at 239; *see also supra* notes 185-89 and accompanying text (addressing violations of international human rights laws resulting from international kidnapping). The problem of human rights violations also includes torture and abuse of the individual while in captivity. Wolfenson, *supra* note 219, at 738-46; *see also, supra* notes 49-85 and accompanying text (examining the *Toscanino* exception and cases of abusive kidnapping that courts have labeled as not "shocking to the conscience").

222. M. BASSIOUNI, *supra* note 1, at 239.

223. *Id.* Bassiouni divides the "threats to minimum world order" created when one state acts without the cooperation or consent of another into three fields: violations of territorial sovereignty, violations of individual rights, and violations of the integrity of the international process. *Id.* Bassiouni contends that with mutual cooperation and consent the threats would be reduced to two: violations of international rights and violations threatening the integrity of the international process. *Id.* Bassiouni concludes that although cooperation is less disruptive to world order, all interests are better advanced by reformulating the extradition system. *Id.*

224. *Id.*; *see also, supra* notes 177-88 and accompanying text (examining the violations of international law arising from abductions of fugitives abroad and the threat they pose to international order).

225. *See supra* notes 176-88 and accompanying text (discussing the effects of virtually unregulated abductions on the international system, international law, and the movement toward greater recognition of international human rights).

226. *Id*; *see also* M. BASSIOUNI, *supra* note 1, at 239 (concluding that the protection of a state's territorial-sovereignty by cooperation would reduce the tensions uncontrolled abductions have created); *infra* notes 223-25 (referring to President Bush's proclamations regarding the need for a "new world order").

CONCLUSION

A wealth of cases spanning over a century provide strong support for the application of the *Ker-Frisbie* Doctrine in the United States law.[227] Attempts to limit the application of the *Ker-Frisbie* Doctrine to uphold international law and human rights[228] had little effect on remedying the abuses in the system.[229] The *Noriega* case is just one example where the United States has seized an accused individual who subsequently and unsuccessfully challenged the *Ker-Frisbie* Doctrine as inconsistent with the modern perception of international comity.[230]

Despite judicial consensus, however, challenges to the *Ker-Frisbie* Doctrine should gain increasing favor in the future, given the expanding concept of a "new world order";[231] a world that would strictly adhere to the principles of international law, including respect for territorial sovereignty.[232] In support of this goal, President Bush recently proclaimed the need for such a "new world order" in which the "rule of law" is supported and aggression is condemned.[233] It is ironic that these statements were made by President Bush in denouncing the invasion of

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227. *See supra* notes 12-43 and accompanying text (discussing the historical development of the *Ker-Frisbie* Doctrine).

228. *See* United States v. Toscanino, 500 F.2d at 267, 267, 277 (1974) (divesting jurisdiction over the defendant where the government's abduction was considered invasive of the defendant's rights and contrary to international law).

229. *See Lujan*, 510 F.2d at 66 (limiting the decision in *Toscanino* to cases where torture inflicted on the defendant was shocking to the conscience); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986) (rejecting the *Toscanino* exception that *Lujan* created in favor of the strict *Ker-Frisbie* Doctrine).

230. *See supra* notes 86-152 and accompanying text (reviewing and analyzing the arguments used in the *Noriega* case to deny United States jurisdiction).

231. *See Bush*, *supra* note 209, at A20 (outlining the need to prohibit international abductions of fugitives to promote the law of nations).

232. *See id.* (advocating adherence to the "rule of law" particularly with respect to the territorial sovereignty of nation states); *see also supra* notes 190-96 and accompanying text (discussing the effects of fugitive abductions on the territorial sovereignty of the asylum states).

233. Bush, *supra* note 208, at A20. In discussing how the Persian Gulf crisis has given the world a "rare opportunity" to promote greater cooperation, President Bush stated:

> Out of these troubled times, our . . . objective—a new world order—can emerge: a new era, freer from the threat of terror, stronger in the pursuit of justice, and more secure in the quest for peace. An era in which the nations of the world . . . can prosper and live in harmony. . . . Today [a] new world is struggling to be born. . . . A world were the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice.

Id. In this speech, Bush also emphatically pledged to "support the rule of law" and "stand up to aggression." *Id.*

Kuwait by Iraq, which took place only eight months after the United States' invasion of Panama.[234]

Perhaps the Persian Gulf War will give renewed strength to the idea that the United States must serve as a model for this "new world order."[235] Thus, as a necessity, the United States would have to abandon the *Ker-Frisbie* Doctrine in favor of stricter rules.[236] There are alternatives, such as a complete ban on abductions and enhanced judicial supervision of the abduction process.[237] In varying degrees, these measures would contribute to the movement toward global cooperation.[238] The duty, therefore, lies in the hands of the courts and the legislature to initiate the changes necessary to reconcile United States laws with international expectations.[239]

234. *See* Wash. Post, Dec. 21, 1989, at A1 (recounting the details of the United States invasion of Panama).

235. *See Bush*, *supra* note 208, at A20 (indicating the United States rule of "new world order").

236. *See supra* notes 198-226 and accompanying text (suggesting alternatives to the *Ker-Frisbie* Rule which are responsive to the needs of the international community).

237. *Id.*

238. *Id.*

239. *See supra* note 212 and accompanying text (explaining the roles of the courts and legislature in adopting alternatives to the *Ker-Frisbie* Doctrine).