

REVISITING *UNITED STATES V. ALVAREZ-MACHAIN*: THE CONSTITUTIONAL ARGUMENT

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Advance freedom for the benefit of the American people and the international community by helping to build and sustain a more democratic, secure, and prosperous world composed of well-governed states that respond to the needs of their people, reduce widespread poverty, and act responsibly within the international system.

The United States Department of State's Mission Statement¹

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¹ Bureau of Resource Management, U.S. DEP'T OF STATE (Dec. 10, 2010, 11:35 AM), <http://www.state.gov/s/d/rm/index.htm>.

INTRODUCTION

The United States of America has long been regarded as the driving force behind international human rights and historically “set the standard” for what those rights entail. Often admired and respected, the United States has been considered a pioneer of human rights, in large part because of its role in founding the United Nations. The United Nations Charter, crafted in part to protect human rights and maintain international stability, is one of many mechanisms established to achieve the ultimate ends of respecting human rights and the territorial sovereignty of other nations. Article 55(c) highlights the notion of respecting human rights in providing that:

[w]ith a view to the creation of conditions of stability and well being, which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote: . . . c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.²

This general principle of Article 55 and the aforementioned U.S. Department of State’s mission statement generally sets the backdrop for the United States’ stance on international human rights and its respect for other nations’ sovereignty.

However, the unprecedented and arguably tyrannical exercise of “executive” power in *United States v. Alvarez-Machain*³ not only undermines the rule of law and the United States’ reputation in the international world, it sets a dangerous precedent that unjustifiably sacrifices the liberty of many for the questionable justice of few. The position of the United States, historically, has demonstrated that this type of event is the exception rather than the norm. Yet, it does not detract from the underlying notion that it can, and may, happen again and that it detrimentally affects not only the populace of the United States, but the territorial sovereignty of other nations.

Section II of this note provides a history of the extradition process, its natural effects on nations’ sovereignty, and a review of the executive branch’s role in the extralegal abduction of Humberto Alvarez-Machain. Section III describes and analyzes the purpose and essence of the Constitution, the inherent checks and balances therein, the enumerated text implicated in *Alvarez-Machain*, and the Supreme Court’s failure to consider constitutional implications, resulting in a potential constitutional violation. Lastly, this note illustrates the repercussions of the executive branch’s

2. U.N. Charter art. 55(c).

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

actions on foreign affairs, international relations, and, arguably most important, United States citizens.⁴

I. EXTRADITION, SOVEREIGNTY, AND *UNITED STATES V. ALVAREZ-MACHAIN*

A. Extradition

Extradition is defined as “the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged.”⁵ Furthermore, international extradition is defined as an “extradition in response to a demand made by the executive of one nation on the executive of another.”⁶ To secure alleged criminals who commit crimes within one nation and then later flee to another nation, or who commit the crimes from abroad, nations have relied on the extradition process for their apprehension.

The United States’ first extradition treaty, the Jay Treaty with Great Britain in 1794, stated the United States or Great Britain, “on mutual requisition, . . . will deliver up to justice all persons who, being charged with murder or forgery, committed within the jurisdiction of either.”⁷ Centuries later, the Supreme Court of the United States posited that “international law recognize[s] no right to extradition apart from treaty [T]he legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.”⁸

As international relationships became more interconnected and complex, the need for a formal process was further emphasized. Cherif Bassiouni, speaking of international law in the 20th century, argued that “[r]elations between nation-states are ceasing to be a matter of limited interest and exclusive concern to the parties immediately involved, but are broadening to encompass some aspects of the world community’s interests in the maintenance and preservation of minimum world order.”⁹ Further,

4. Generally, the United States has extradition treaties with many other countries. The particular instances argued herein are not meant to be representative of all treaties. Rather, they are used only to support the general principles subsequently argued. Moreover, this paper does not address the issue of extraditions, legal or otherwise, of criminals in relation to individual states to be tried under state law, which raises interesting questions of federalism. Nor does this paper discuss the certain exceptions or immunities applicable to extradition, such as the political exception doctrine or the Second Circuit’s “Toscanino exception.”

5. BLACK’S LAW DICTIONARY 655 (9th ed. 2009).

6. *Id.*

7. M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 26 (1974).

8. *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933). For a general discussion of the development of United States extradition policy, see Abraham Abramovskya, *Extraterritorial Abductions: America’s “Catch and Snatch” Policy Run Amok*, 31 VA. J. INT’L L. 151, 154-56 (1991).

9. BASSIOUNI, *supra* note 7, at 571.

Bassiouni suggested that “[s]ince World War II, the peoples of the world have become, more than ever, in the history of Humankind, conscious of the need to insure their collective safety and survival.”¹⁰

Today, this sentiment resonates even more strongly, given the interconnectivity of the international world, where actions taken with respect to one nation can result in social, economical, political, or other fallout with another nation. H. Jefferson Powell argues, referring to the 21st century, “the government of the [U.S.] possesses almost incalculable power to affect the lives of people all over the globe [and] . . . is the world’s mightiest military power, its largest economy, and a pervasive cultural influence, for good and ill.”¹¹ As a result, “[t]he decisions which its government makes in the name of American foreign policy thus are of the greatest human significance.”¹²

The United States presently has extradition treaties with 112 nations.¹³ Each of these agreements outlines in detail the particular procedures that a respective nation must follow and meet in order to obtain the sought after suspect, such as the necessary level of cause. While each nation may have different motivations for executing such agreements, two fundamental incentives are constant. Each nation retains the authority to obtain fugitives outside of its jurisdiction,¹⁴ and the extradition treaty provides recourse when the necessary procedures are not satisfied, such as when a hosting nation objects to the taking of an individual from its border without consent.

B. Sovereignty

A fundamental principle of sovereignty is that every state has legal authority over those within its boundaries. A common rationale for nations to enter into extradition agreements is to retain their sovereignty and have it respected by other nations.¹⁵ This is achieved by requiring nations who wish to obtain criminals from the hosting nation to conform to the formal treaty

10. *Id.* at 558.

11. H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* xiii (2002).

12. *Id.*

13. For a list of countries with which the United States has extradition treaties, including when they were signed and entered into force, see 18 U.S.C. § 3181 (2006).

14. BASSIOUNI, *supra* note 7, at 9 (“[E]xtradition has not been looked upon as an absolute international duty, and that if a state wishes to ensure that it secures the return of its own criminals it must enter into treaties with other states . . .”).

15. David H. Herrold, Comment, *A New, Emerging World Order: Reflections of Tradition and Progression Through the Eyes of Two Courts*, 2 *TULSA J. COMP. & INT’L L.* 143, 149 (“Article 10 of the Treaty . . . illuminates the importance of the process to both States. Such procedural formality can only imply a certain respect for and consideration of the sovereignty of each State and that of each State’s legal processes as well.”).

process.¹⁶ However, conforming to such procedures may in fact deprive them of sovereignty, rather than ensure it.

Without a treaty, the hosting nation would have complete control over the individual and could do what it wished within its own laws and processes. An extradition treaty inextricably limits this control by creating a reciprocal role to be played by the hosting country, which may be against its ultimate wishes within the treaty's procedures. However, under some treaties, even though the requesting nation has complied with all procedures, the hosting nation, through its executive or a designated final arbiter, may nonetheless retain control over the suspect.¹⁷ Alternatively, some treaties provide that if a hosting nation refuses to extradite, the requesting party can demand that the case be submitted to the hosting nations' authorities for prosecution.¹⁸ These alternative mechanisms, in turn, counteract any questions regarding a treaty's limitation on the sovereignty of the hosting nation, as they provide, through formal means, the final choice in the proceedings.

Irrespective of a treaty's effect on a nation's sovereignty, it is generally held that rendition techniques such as abduction and kidnapping, taken outside of a formal treaty process, are not only a violation of a nation's sovereignty, but ultimately much more.¹⁹ As David H. Herrold writes regarding forced extradition and kidnapping under color of law, abductions are "considered violations of State sovereignty and territorial integrity. These actions allegedly permit a State to exercise judiciary power over a fugitive offender brought before it by any means, regardless of the legality of those means."²⁰ Bassiouni states that these acts threaten "minimum world order" and violate other lofty principles, including: the state of refuge's

16. *Id.* at 145 ("Extradition treaties confer upon the contracting States a greater degree of control over certain citizens of the States . . . putting into place a means by which a State may lawfully, and with respect for the sovereignty of the other, exercise jurisdiction over a particular national of the other State."); *United States v. Alvarez-Machain*, 504 U.S. 655, 668 n.14 (1992) ("[M]ost international agreements have the common purpose of safeguarding the sovereignty of signatory nations, in that they seek to further peaceful relations between nations").

17. Herrold, *supra* note 15, at 149 ("Whether the State from which extradition is requested is bound to deliver an alleged offender is a question of the State's executory power and discretion. Under the Article 9 of the Treaty, neither State is bound to deliver any national, and the ultimate decision is made by 'executive' authority and discretion.").

18. Abramovskya, *supra* note 8, at 206-07 ("Under the United States-Mexico Extradition Treaty, neither country is required to extradite its own nationals. . . . [A]rticle 9(2) provides for the requested party to submit the case to its own authorities for prosecution, provided that they have jurisdiction over the offense.").

19. BASSIOUNI, *supra* note 7, at 123. "[E]nd result of all such processes is the rendition of a person against his or her will by one state to another because what is at issue is not the end result but the processes employed." *Id.* at 121. More troublesome is that "there is no deterrent to them because their consequences are allowed to produce legally valid results." *Id.* at 123.

20. Herrold, *supra* note 15, at 146.

sovereignty, territorial integrity, and domestic process; the individual's right to freedom from arbitrary arrest and detention and international due process and fairness; and the integrity of the international process.²¹

C. United States v. Alvarez-Machain

In 1984, the Drug Enforcement Administration (DEA) conducted a series of successful raids of marijuana operations by a drug cartel in Mexico.²² These successes incited retaliation by the drug cartel, including the abduction and torture of DEA agent Enrique Camarena-Salazar and a Mexican pilot, both of whom were subsequently murdered.²³ Humberto Alvarez-Machain was a doctor who "was present during Camarena-Salazar's interrogation and administered a drug 'to revive the agent when he passed out while being interrogated by his captors.'"²⁴ Suspecting Alvarez-Machain conspired in Camarena-Salazar's torture and subsequent death, the United States sought to bring him to justice.

Thereafter, the United States twice unsuccessfully negotiated with the Mexican government for the extradition of Alvarez-Machain.²⁵ The first negotiation failed due to the refusal by Mexican officials to pay for the expense of transportation, while the second failed because of increased tension between the two nations from the publicity of Camarena-Salazar's murder.²⁶ Subsequently, four men sponsored by the U.S. government abducted Alvarez-Machain from Mexico and placed him on a plane to El Paso, Texas, where he was then arrested by DEA agents.²⁷ The Mexican government responded by filing three separate diplomatic protests of this abduction to the United States Department of State.²⁸

In 1992, the Supreme Court of the United States, while having "previously considered proceedings in claimed violation of an extradition treaty and proceedings against a defendant brought before a court by means of a forcible abduction,"²⁹ held in *United States v. Alvarez-Machain* that the "fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States."³⁰

21. BASSIOUNI, *supra* note 7, at 182.

22. Stephen Fone, Note, *Do DEA Field Agents Have the Power to Unilaterally Execute a Trans-Border Abduction?: The Ninth Circuit's Take on Alvarez-Machain v. United States*, 27 HOUS. J. INT'L L. 221, 223 (2004).

23. *Id.* at 224.

24. *Id.* at 225 (quoting *Physician in Camarena Case Pleads Not Guilty*, L.A. TIMES, Apr. 11, 1990, at B2).

25. *Id.*

26. *Id.* at 226.

27. Abramovskya, *supra* note 8, at 156.

28. *Id.* at 168.

29. *United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992).

30. *Id.* at 670.

The Supreme Court, framing the issue as whether the abduction of a criminal defendant to the United States from a nation with which the U.S. maintains an extradition treaty provides him a defense to the jurisdiction of United States courts,³¹ rationalized that the treaty had no express provision regarding forced abduction or extradition on its face to consider the abduction a violation of the treaty.³² Further, through an analysis of the historical practice between each nation under the treaty, notably the Martinez incident of 1905,³³ the Court held there was no implied provision prohibiting such conduct because the Mexican government was aware of the United States' position on forcible abductions around that time.³⁴ Lastly, the Court reasoned that Alvarez-Machain's arguments regarding customary international law were unpersuasive, as the examples cited were of "little aid in construing the terms of an extradition treaty, or the authority of a court to later try an individual who has been so abducted"³⁵ and "to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap."³⁶ Thus, the Court found that the *Ker* doctrine applied and jurisdiction was proper. The *Ker* doctrine (commonly referred to as *Ker-Frisbie* doctrine, combining Supreme Court cases *Ker v. Illinois*³⁷ and *Frisbie v. Collins*³⁸), as a general rule, held that the "power of a court to try a person for a crime is not impaired by the manner in which he has been brought within the court's jurisdiction, whether by forcible abduction, violation of international treaty, or illegal arrest."³⁹

Justice Stevens, joined by Justices Blackmun and O'Connor, offered a forceful dissenting opinion. The dissent reasoned that the *Ker* and *Frisbie* cases did not apply, as this case "involve[d] this country's abduction of another country's citizen; it also involves a violation of the territorial

31. *Id.* at 657.

32. *Id.* at 663.

33. *Id.* at 665 & n.11.

34. *Id.* at 665. *See also* Herrold, *supra* note 15, at 149.

35. Alvarez-Machain, 504 U.S. at 668 & n.15.

36. *Id.* at 669; Herrold, *supra* note 15, at 156-57 ("Alvarez's main argument caused the majority to briefly consider international custom. The Court recognized that it had created a term by implication in the U.S.-England extradition treaty in *Rauscher* in 1886; but it also noted the term had been created by implication because of the similar 'practice by nations with regard to extradition treaties' during that period.") (footnotes omitted) (citation omitted).

37. *Ker v. Illinois*, 119 U.S. 436 (1886).

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

39. Richard P. Shafer, Annotation, *District Court Jurisdiction Over Criminal Suspects who was Abducted in Foreign Country and Returned to United States for Trial or Sentencing*, 64 A.L.R. FED. 292, § 2 (1983). Neither *Ker* nor *Frisbie*, however, touched on "whether the U.S. courts have jurisdiction when the U.S. government sponsors an extraterritorial abduction." Michael J. Weiner, *The Importance of a Clear Rule for Judicial Deference to Executive Interpretations of Treaties: A Defense of United States v. Alvarez-Machain*, 12 WIS. INT'L L.J. 125, 140 (1993).

integrity of that other country, with which this country has signed an extradition treaty.”⁴⁰

In *Ker*, Ker was abducted from Peru by a private U.S. citizen in order to stand trial for larceny in Illinois, arguably violating the extradition treaty between Peru and the United States. The Court held that its power to try a person for a crime was not impaired because the defendant was obtained by forcible means against his will. Similarly, in *Frisbie*, the Court held that Collins’ kidnapping in Illinois by Michigan officers did not make jurisdiction improper, reasoning that “due process of law is satisfied when one present in court is convicted of [a] crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.”⁴¹

The Supreme Court majority’s approach of deciding the matter narrowly on the jurisdictional grounds was akin to finding a needle in a haystack. In *Alvarez-Machain*, the Court inappropriately minimized the distinction between private actors abducting a suspect, as opposed to government or government-sponsored abductions attaining the same end. The Court acknowledges that the only difference between *Ker* and the case at bar was that *Ker* was decided on the premise that there was no governmental involvement in the abduction.⁴² Given the Court’s admitted distinction of this critical fact, highlighted by the dissenting view of Justice Stevens, the application of the *Ker* doctrine was inappropriate.

The dissent further reasoned in *Alvarez-Machain* that the abduction of Alvarez-Machain violated the treaty between the nations as the explicit provisions within the treaty would be completely undermined to mere verbiage.⁴³ The dissent noted that, if the Court’s argument regarding how abduction was not expressly prohibited by the treaty and therefore was allowable, then “[i]f the United States . . . thought it more expedient to torture or simply to execute a person rather than to attempt extradition, these options would be equally available because they, too, were not explicitly prohibited by the Treaty.”⁴⁴ Furthermore, in reciting Justice Story’s opinion in *The Apollon*,⁴⁵ finding support in a leading treatise (*Oppenheim’s International Law*),⁴⁶ and echoing the chief reporter of the American Law

40. *Alvarez-Machain*, 504 U.S. at 670 (Stevens, J., dissenting).

41. *Frisbie*, 342 U.S. at 522.

42. *Alvarez-Machain*, 504 U.S. at 662.

43. *Id.* at 673-74 (Stevens, J., dissenting).

44. *Id.* at 674. The dissent further found it was “ironic that the United States has attempted to justify its unilateral action based on the kidnapping, torture, and murder of a federal agent by authorizing the kidnapping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico.” *Id.* at 674 & n.12.

45. *Id.* at 679.

46. *Id.* at 680 (Stevens, J., dissenting).

Institute's *Restatement of Foreign Relations*,⁴⁷ the dissent found a clear case of a violation against internationally accepted principles.

II. THE CONSTITUTION

The executive branch's coordination of an international abduction of a fugitive from Mexico in *Alvarez-Machain* is distinguishable from the precedent relied upon by the Supreme Court in its holding, thus making its application inappropriate. In *Ker*, the Court held the international abduction performed by a bounty hunter was conducted "without any pretence of authority under the treaty or from the government of the United States."⁴⁸ Moreover, the Peruvian government did not technically object because it was in disarray. The implication of this fact is that it cannot be determined whether Peru would have acquiesced in the abduction for there to be a challengeable violation in the first place, as an objection is often required for there to be a violation of a treaty.⁴⁹ Moreover, in *Frisbie*, the Court held that an *interstate* abduction did not prevent jurisdiction even in cases where there was direct government involvement.⁵⁰ However, factually and legally *Frisbie* did not address the propriety of government involvement in *international* abductions. Therefore, the appropriate question would have turned on whether this act of abduction and kidnapping organized by the executive branch is a legitimate power under the Constitution. The answer is likely no because the Court undervalued the importance of the government's involvement in the abduction, the executive branch's kidnapping constituted a violation of the separation of powers, the meaning of "executive" power at the time of the United States' founding did not include the ability to seize individuals, and acquiescing in the executive branch's action circumvents the inherent accountability created by the Constitution.

Most fundamental is Justice Stevens' dissenting opinion regarding the "critical flaw" in the majority's opinion that it "fails to differentiate between the conduct of private citizens, which does not violate any treaty obligations, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law."⁵¹ However, irrespective of deciding the case on international law grounds, *Alvarez-Machain* could have been decided as executive action violating the Constitution.

47. *Alvarez-Machain*, 504 U.S. at 680-81 (Stevens, J., dissenting).

48. *Ker v. Illinois*, 119 U.S. 436, 443 (1886); *See also* Weiner, *supra* note 39, at 140.

49. *Ker*, 119 U.S. at 438-43.

50. *Frisbie v. Collins*, 342 U.S. 519, 519-23 (1952) (emphasis added); *See also* Weiner, *supra* note 39, at 141.

51. *Alvarez-Machain*, 504 U.S. at 682 (Stevens, J., dissenting).

A. The Constitutional Text and Basis of the Executive Power in Foreign Affairs

The Constitution is one of the most sophisticated documents ever created. Its fundamental purpose is to ensure and promote the liberty and freedom of its constituents. It achieves this purpose through a variety of means found in the document itself. These structural devices consist of notions of federalism, separation of powers, elections, and checks and balances in order to prevent any one branch of government, the executive, judiciary, or legislature, to acquire an excess of power in any particular matter.

The Constitution, through the aptly named “Vesting Clauses,” allocates powers to the respective branches. Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁵² Importantly, Article II provides “[t]he executive Power shall be vested in a President of the United States of America.”⁵³ Finally, Article III provides “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁵⁴ These specific sections merely set the groundwork of the separation of powers, and have been further delineated through particular sections and case law.

There has been much written by the Supreme Court and commentators regarding the nature and amount of executive power afforded by the Constitution. According to Edward S. Corwin, “[t]hroughout the last half century the theory of presidential power has recruited strength from a succession of ‘strong’ presidents, from an economic crisis, from our participation in two world wars and a ‘cold’ war, and finally from organization of the labor movement.”⁵⁵ Moreover, the Constitution makes clear that all federal executive power is afforded in the President to “ensure a unity in purpose and energy in action . . . [and] is particularly crucial in matters of . . . foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.”⁵⁶

52. U.S. CONST. art. I, § 1.

53. U.S. CONST. art. II, § 1.

54. U.S. CONST. art. III, § 1.

55. Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 54 (1953).

56. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., to the Deputy Counsel to the President, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.justice.gov/olc/warpowers925.htm> [hereinafter Memorandum].

The Supreme Court has recognized “the generally accepted view that foreign policy [is] the province and responsibility of the Executive.”⁵⁷ “The Founders in their wisdom made [the President] not only the Commander-in-Chief but also the guiding organ in the conduct of our foreign affairs, possessing ‘vast powers in relation to the outside world.’”⁵⁸ The foreign affairs power is “the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”⁵⁹ Lastly, “[b]oth the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: ‘a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by §1 of Art. II.’”⁶⁰

In light of a treaty, however, “the basic framework for the making of foreign policy is, or ought to be, the Constitution of the United States . . . [that it] is the product of independent and often antagonistic institutions—the legislative and executive branches of the federal government.”⁶¹

The Treaty Clause of Article II of the Constitution provides the “[President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”⁶² *Alvarez-Machain* presents an issue where the Senate has authorized the treaty through ratification, thus giving the treaty the force of law and making it the “supreme law of the land,”⁶³ circumscribing the legal framework and process of extradition vis-à-vis Mexico.

While the president is dependent on Congress for the provision of most of the tools of foreign policy . . . the president needs no legislative authorization to use such tools as may exist to create and pursue a foreign policy, and in most instances (though not all) is constitutionally entitled to adhere to presidential policy even in the teeth of the contrary wishes of the legislature.⁶⁴

57. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

58. Memorandum, *supra* note 56, at 5 (quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948)).

59. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

60. Memorandum, *supra* note 56, at (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).

61. POWELL, *supra* note 11, at xiii.

62. U.S. CONST. art. II, § 2.

63. *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

64. POWELL, *supra* note 11, at xiv.

It is within this category of “though not all” that the Court overlooked. “[T]he idea of executive foreign affairs power contained in Article II, Section I grants the President material independent power, but this power is not an open-ended or unlimited source of authority.”⁶⁵

B. The Executive’s Ability to Internationally Abduct Suspected Criminals Violates Separation of Powers Principles Fundamental to the Constitution

The Court’s decision in *Alvarez-Machain* essentially obliterates the core mechanisms of the Constitution for checking the power of the executive branch if it were merely labeled as within the foreign affairs power. Explicitly, the enumerated text of the Treaty Clause in Article II of the Constitution is undermined if the executive branch can merely go above and beyond the text of the treaty as ratified by the Senate. Deference to an executive’s power is not absolute, even if it is with an international objective. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court held that President Truman’s order directing the Secretary of Commerce to seize the nation’s steel mills was invalid as the President did not have the authority to issue such an order.⁶⁶ Justice Black reasoned that there was no congressional statute that authorized such a seizure,⁶⁷ the President’s military power as Commander and Chief did not encompass labor disputes,⁶⁸ and the President’s power “to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁶⁹

While the seizure of the steel mills was domestic in nature, while the seizure of *Alvarez-Machain* was internationally related, they both were intended to achieve international objectives. In *Youngstown*, the objective was national security and “to avert a national catastrophe which would inevitably result from a stoppage of steel production” in light of the Korean War,⁷⁰ whereas the objective in *Alvarez-Machain* was his capture from Mexico to be tried within the U.S. for the homicide of a DEA agent in Mexico.

The most impactful opinion in *Youngstown*, Justice Jackson’s concurrence, has become a measuring stick for the Court in interpreting executive authority. Justice Jackson reasoned that deference, from highest to lowest, by the judiciary to the executive is dependent on whether he or she is acting pursuant to an express or implied authorization of Congress, acting in absence of either a congressional grant or denial of authority, or taking

65. Michael D. Ramsey, *The Textual Basis of the President’s Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL’Y 141, 150 (2006).

66. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

67. *Id.* at 586.

68. *Id.* at 587.

69. *Id.*

70. *Id.* at 582.

actions that are incompatible with the expressed or implied will of Congress.⁷¹ The executive branch's involvement in the kidnapping, the first of its kind presented to the Supreme Court, is not of such routine practice as to rise to a "gloss" on executive power as described by Justice Frankfurter in his concurring opinion.⁷² But, Congress or, in the *Alvarez-Machain* case, the Senate has spoken and created a basis for which the executive branch *must* follow to achieve its ends. The executive branch's connivance in the abduction of Alvarez-Machain is akin to an order that was not "executed in a manner prescribed by Congress,"⁷³ by its ratification of the treaty.

The Senate's ratification of the applicable treaty between the United States and Mexico addressed the specific situation where our government wished to punish a particular person outside of United States' boundaries and how the government must go about obtaining suspects via the treaty. If the executive could merely go above and beyond what is written within the treaty, it essentially guts the entire purpose of its creation and makes Senate ratification a mere formality, rather than an essential mandate required by the Constitution.⁷⁴

71. *Id.* at 635 (Jackson, J., concurring) ("1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it. 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law. 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

72. For an example where routine practice represented a "gloss" in executive power, see *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

73. *Youngstown*, 343 U.S. at 588.

74.

Tho' several writers on the subject of government place that power [of making treaties] in the class of *Executive authorities*, yet this is *evidently* an *arbitrary disposition*. For if we attend *carefully*, to its operation, it will be found to partake *more* of the *legislative* than of the *executive* character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative

The aforementioned action arguably results in a violation of the separation of powers.⁷⁵ “The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the [executive branch] and represents an exercise of authority without law.”⁷⁶

authority, is to enact laws; or in other words, to prescribe rules for the regulation of the society. While the execution of the laws and the employment of the common strength, either for this purpose, or for the common defence, seem to comprize *all* the functions of the *Executive magistrate*. The power of making treaties is *plainly* neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones, and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the *force of law*, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong properly neither to the legislative nor to the executive. The qualities elsewhere detailed as indispensable in the management of foreign *negotiations*, point out the executive as the most fit agent in those transactions: whilst the vast importance of the trust, and the operation of treaties *as Laws*, plead strongly for the participation of the whole or a part of the *legislative body* in the office of making them.

James Madison, *Helvidius No. 1* (Aug. 24, 1793), reprinted in 15 THE PAPERS OF JAMES MADISON 66, 69 (Thomas A. Mason et al. eds., 1985) (quoting THE FEDERALIST NO. 75 (Alexander Hamilton)).

It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is *clear*, *consistent*, and *confident*, in deciding that the power is *plainly* and *evidently* not an executive power.

Id.

75.

It cannot be contended that the President would have had power to issue this order had Congress explicitly negated such authority in formal legislation. Congress had expressed its will to withhold this power from the President as though it had said so in so many words. The authoritatively expressed purpose of Congress to disallow such power to the President and to require him, when in his mind the occasion arose for such a seizure, to put the matter to Congress and ask for specific authority from it, could not be more decisive if it had been written into [the Taft-Hartley Act].

Youngstown, 343 U.S. at 602 (Frankfurter, J., concurring).

76. *Id.* at 655 (Jackson, J., concurring).

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division between President and Congress.⁷⁷

In light of Jackson's concurring opinion the executive branch's action falls within either the second or third category of judicial deference. As can be inferred, the Mexican-American Extradition Treaty neither granted nor explicitly denied the authority to abduct suspects outside of the treaty process. Adopting this view for the moment, the executive can only rely upon his or her own independent powers and that "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables."⁷⁸ The abduction of Alvarez-Machain was not in the midst of a national emergency. Nor was it a condition meant to improve national security. Rather, the motivation behind the abduction was potentially a multitude of reasons: the executive branch's personal interest in the matter (death of one of its own agents),⁷⁹ fear of corrupt officials within Mexico, the lack of faith in the efficacy of the Mexican legal system as an alternative, frustration with the Mexican government in negotiations, and/or more. None of these arise to a justifiable reason to go beyond the rule of law. Thus, the executive's actions in this case would likely constitute a violation.

Alternatively, a stronger argument is that the Senate, rather than stating explicitly that the government cannot perform abductions outside of the treaty, had implied it in some manner.⁸⁰ The executive's power would then "be at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁸¹ Justice Jackson reasoned that "[c]ourts can sustain exclusive presidential

77. *Id.* at 609 (Frankfurter, J., concurring).

78. *Id.* at 637 (Jackson, J., concurring).

79. "The Executive Branch freely admits that it was at least partially motivated by a vengeful spirit." Jonathan A. Lonner, *Official Government Abductions in the Presence of Extradition Treaties*, 83 J. CRIM. L. & CRIMINOLOGY 998, 1021 (1993).

80. The Court's "literalist approach to treaty interpretation such as that employed by the majority may have virtue in some cases. But that, in this case, Chief Justice Rehnquist's reading of the U.S.-Mexico Extradition Treaty yielded a result clearly inconsistent with the treaty's intent." Michael Shawn Hudson, *U.S. Government Sanctioned Extraterritorial Abduction of Criminals: Permissible or Violations of International Law?*, 31 LINCOLN L. REV. 25, 43 (2003).

81. *Youngstown*, 343 U.S. at 637.

control in such a case only by disabling the Congress from acting upon the subject.”⁸² However, to disable the Senate from acting upon this subject would be in complete contradiction to the plain words of the Constitution as provided in Article II’s Treaty Clause, a strict limitation on the President’s foreign affairs power. Thus, the executive branch’s connivance in the abduction of Alvarez-Machain was tantamount to a violation of the Constitution.

“The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”⁸³ Edward S. Corwin argued that the best safeguard against presidential autocracy is Congress, through timely action and procedures as can be anticipated by them.⁸⁴ However, in retrospect, it may be argued that Congress is acquiescing in the executive branch’s activity and is, through its continued silence, endorsing it. In that case, it must fall to the judiciary to curb such an abuse of power.

As Charles L. Black Jr. argued, a government must devise a way of “bringing about a feeling in the nation that the actions of government, even when disapproved of, are authorized rather than merely usurpative.”⁸⁵ Black suggested that hope in determining what is authorized versus usurpative lies best with the Supreme Court.⁸⁶ As Justice Stevens penned, an executive’s interest in the matter is no “justification for disregarding the Rule of Law that this Court has a duty to uphold.”⁸⁷ Justice Stevens then went on to echo Justice Brandeis regarding the Court’s duty “to render judgment evenly and dispassionately according to law”⁸⁸:

[I]n a case of this kind sets an example that other tribunals in other countries are sure to emulate. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare

82. *Id.* at 637-38.

83. *Id.* at 629 (Douglas, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)).

84. Corwin, *supra* note 55, at 66. “‘Presidential autocracy,’ when it is justified, is an inrush of power to fill a power vacuum. Nature abhors a vacuum; so does an age of emergency. Let Congress see to it that no such vacuum occurs.” *Id.*

85. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 47 (Greenwood Press 1977) (1960).

86. *Id.* at 51.

87. *United States v. Alvarez-Machain*, 504 U.S. 655, 686 (1992) (Stevens, J., dissenting).

88. *Id.* At 687 (quoting *United States v. Mine Workers*, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)).

that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.⁸⁹

C. A Historical Interpretation of “Executive” Power Does Not Include the Power to Abduct

While the meaning of “executive” power at the time of ratification included foreign affairs power, it is unlikely that the Founders envisioned this to include the power to abduct citizens of other nations to be tried in United States courts. Therefore, the executive’s action in *Alvarez-Machain* is not authorized by an interpretation of the “executive” power and constitutes a violation of the Constitution.

In Philip Bobbitt’s work, *Constitutional Fate: Theory of the Constitution*, Bobbitt typifies six modalities, ways in which legal propositions are characterized to form a constitutional point of law, to express various interpretations of the constitution.⁹⁰ Bobbitt’s historical approach, which questions what the intentions of the framers and ratifiers of the Constitution were to interpret what the Constitution affords, lends insight into what powers the Executive may have.⁹¹ In this respect, we look to what the framers intended the scope of the executive branch’s power with respect to foreign affairs is to be. Specifically, analyzing whether “executive” power affords the ability to circumvent a procedural process created through a treaty, which at its core is proposed by the Executive and ratified by a majority of the Senate, to abduct a citizen of another country for crimes committed that essentially affect the United States.

Michael D. Ramsey provides a complement to Justice Jackson’s *Youngstown* opinion in analyzing an Executive’s foreign affairs power.⁹² Adopting what he calls “Jeffersonian” executive power, Ramsey emphasizes that “[t]he Constitution . . . has declared that ‘the Executive powers shall be vested in the President.’ . . . The transaction of business with foreign nations is Executive altogether. It belongs then to the head of the department, *except* as to such portions of it as are specially submitted to the Senate.”⁹³ Ramsey’s argument is four-fold that the 18th century meaning of “executive” included foreign affairs power: first, that key writers, such as Montesquieu and Blackstone, whom the Framers relied upon, included

89. *Id.* at 686 n.33 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

90. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 4-5 (1984).

91. *Id.*

92. Ramsey, *supra* note 65, at 141.

93. *Id.* (quoting Thomas Jefferson, Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 PAPERS OF THOMAS JEFFERSON 378, 378-79 (Julian P. Boyd et al. eds., 1961)).

foreign affairs power; second, that the era leading up to the Constitution's drafting recognized that American discourse itself associated "executive" power with foreign affairs power; third, when George Washington was elected President, he swiftly took control over foreign affairs; and fourth, when figures of that era interpreted Washington's foreign affairs power they did so under the guise of Article II, Section 1.⁹⁴

However, it is difficult to imagine that the ability of the executive, or with his connivance generally with subordinates within the executive branch, to abduct a person from another country in order to try that person. As a matter of practicality during the 18th century, this not only would have been extremely difficult to accomplish given the state of technology and communication at that time without going through formal means, but also, factually it is doubtful this scenario ever arose for the framers to have even considered the issue. If the potential of international abduction had been recognized it likely would have been treated similarly to the other acts of George III, which actions led to the creation of the Declaration of Independence.⁹⁵

Moreover, Thomas Jefferson rejected "specific substantive attributes of the Crown's federative and prerogative powers: 'We do however expressly deny him the prerogative powers of . . . recalling to it any citizen thereof . . . except so far as he may be authorized.'"⁹⁶ It is not too great an inferential step to consider if the founding fathers wished to limit the Crown's powers of "recalling" any *citizen* to his presence in our Executive under our system of government, that a non-citizen, outside the context of war, could not similarly be "recalled."

Thus, the "executive" power did not entail the ability of an executive to abduct citizens of another country as intended by the ratifiers of the Constitution. Without the checks and balances inherent in the Constitution being triggered by such executive action, it affords the executive branch practical unaccountability.

94. *Id.* at 141-51. "[F]or example, the President cannot make law . . . even in support of foreign affairs objectives, as the Supreme Court rightly held in the *Youngstown* case, because the eighteenth-century meaning of "executive" powers did not extend so far." *Id.* at 150.

95. "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952).

96. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 16 (1993).

D. Presidential Action to Abduct Circumvents Notions of
Accountability Inherent in the Constitution

Condoning such “executive” behavior raises questions of accountability. If the structural devices of the Constitution, such as separation of powers and checks and balances, do not ultimately result in the prohibition of abductions, then on principles of democracy and accountability it should. As Rebecca Brown argues, “[e]lections provide the people with an opportunity to punish those who have violated their duty by invading the liberties of the people. The problem with unaccountable government is there is no one to blame if oppression ensues.”⁹⁷ Impeachment is an unlikely option, especially given the nature and motivation of the abduction of Alvarez-Machain. The President is, in part, directly elected and directly accountable to the citizens of the United States. This kind of accountability, however, is likely an ineffective deterrent.⁹⁸

Moreover, the officials appointed through the Appointments Clause in Article II are directly accountable to the President and can be removed per administrative law principles.⁹⁹ However, in situations such as *Alvarez-Machain*, middle level officials not directly accountable to the President can act on behalf of the executive branch, resulting in “various law enforcement networks and organizations, which operate with varying degrees of visibility to the public . . . , operate in a way that sets the legal framework for their operation rather than being confined by that legal frame.”¹⁰⁰ So, “far from protecting the people from a ‘tyranny of the majority’ . . . under this system the people are subject to the tyrannical whims of convenience of professionals who cannot be held to account under any mechanism, nor, indeed, do those professionals seem to be removable from office.”¹⁰¹

E. Effect on Foreign Affairs, International Relations, and U.S. citizens

John Locke, whose thought was highly influential to the founding fathers, described particular powers possessed by the executive in his *Second Treatise of Civil Government*, including the “prerogative” power.¹⁰²

97. Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998).

98. Direct election may not necessarily be a deterrent either. George H. W. Bush was President during the abduction of Alvarez-Machain and subsequently lost in re-election, but what weight can be attributed to that fact in his losing bid? For a general discussion of Bush’s presidency and reasons for not being re-elected, see *George H. W. Bush*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/georgehwBush> (last visited Mar. 7, 2012).

99. U.S. CONST. art. II, § 2, cl. 2.

100. J. W. E. Sheptycki, *Law Enforcement, Justice and Democracy in the Transnational Arena: Reflections on the War on Drugs*, 24 INT’L J. SOC. L. 61, 72 (1996).

101. *Id.* at 70.

102. Monaghan, *supra* note 96, at 13.

The “prerogative” power that Locke posited was the “[p]ower to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it.”¹⁰³ In the instant case, however, it would be naive to postulate that the abduction of Alvarez-Machain is in the public good when its ramifications are considered. Congress’ arguable acquiescence and the Supreme Court’s holding in *Alvarez-Machain* sets a dangerous precedent. Within the context of the law of war, Peter J. Spiro, borrowing from Michael J. Glennon’s adoption of the international legal doctrine of *opinio juris*, argued that the legal significance of any particular action of a government branch hinges on three elements:

First, it is actions that count, not words; mere assertions of executive or legislative authority are largely irrelevant in the long run, the chaff of institutional bravado. Second, in order to take on lawmaking significance, the conduct must be known to the other branch; secret operations will have no constitutional significance until they are made known to Congress and it has had an opportunity to respond. Third, the other branch must have accepted or acquiesced in the action. Any conduct that satisfies (or even arguably satisfies) these requirements will become part of the precedential mix; a single historical episode can create incremental elements of custom in the same way that a single judicial decision will incrementally change court-made doctrine.¹⁰⁴

Allowing this kind of precedent further destroys America’s image in the world and its international relationships with other countries, and places U.S. citizens at risk.

There were a number of predominately negative reactions internationally towards the Supreme Court’s decision in *Alvarez-Machain*.¹⁰⁵ Most notably, it adversely affected United States’ relationship with Mexico, a border neighbor and close economic partner. It also placed tension in the two

103. *Id.*

104. Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1356 (1993) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)). “Individual episodes will, of course, have more or less weight in the same way that decisions from some courts are more meaningful than from others, and in this respect such factors as frequency, consistency, and regularity will be important to determining the constitutional probity of a particular practice.” *Id.* This idea speaks even more so against the government’s action in this case. Recently, notorious “merchant of death” Russian citizen Viktor Bout was extradited by Thailand to the United States through its formal treaty process. “[L]ong considered simply untouchable by law enforcement,” Bout was wanted because “of his ability to arm terrorists targeting the United States.” *Viktor Bout: Capturing “The Merchant of Death,”* CBS News (Nov. 21, 2010), <http://www.cbsnews.com/stories/2010/11/18/60minutes/main7067797.shtml>. It is difficult to imagine, outside of politics, why the United States, given the gravity of Bout’s reputation, would go through formal means of extradition, whereas Alvarez-Machain was abducted by the government.

105. See Aimee Lee, Comment, *United States v. Alvarez-Machain: The Deleterious Ramifications of Illegal Abductions*, 17 FORDHAM INT’L L.J. 126 (1993).

nations' ability to cooperate in the war against drugs.¹⁰⁶ The most impactful implication and worst case scenario is that it provides a precedent for other nations to "legally" abduct a U.S. citizen.¹⁰⁷ Abraham Abramovskya and Michael Shawn Hudson both provide chilling hypotheticals where this is the case.¹⁰⁸ Justice Stevens writes in his dissenting opinion that Abraham Sofaer, "a Legal Adviser of the State Department," resisted the notion that abductions were acceptable based on a hypothetical where the United Kingdom abducted a terrorist from the United States.¹⁰⁹ However, this is now possible under *Alvarez-Machain*.

CONCLUSION

The Supreme Court, irrespective of whether there was an international law violation, overlooked the question whether the Executive's authority, through the executive branch generally, was a legitimate exercise of power granted by the Constitution. The Constitution was purposely endowed with checks and balances to further the aims of liberty. The actions taken in abducting Alvarez-Machain amounted to a violation of the separation of powers explicitly laid out in Article II of the Constitution. Further, the 18th century meaning of the term "executive" and what powers it encompassed at that time did not amount to an executive being able to abduct persons located within or outside the borders of our nation. Moreover, the democratic ideals instilled in the Constitution are frustrated in that the

106.

The Alvarez case raises significant issues regarding the United States' foreign relations with Mexico. There are three essential reasons why the United States cannot condone vigilantism in the war against drugs. First, such activity jeopardizes three treaties currently in effect with Mexico which are important to combating narcotics trafficking: the extradition treaty, the transfer of penal sanctions treaty and the mutual legal assistance treaty. Second, unilateral extraterritorial abductions are likely to result in a breakdown of any *sub rosa* efforts previously employed to combat drug trafficking. Finally, this type of vigilantism endangers the broader issue of the future relations between Mexico and the United States, including legal, economic and strategic concerns.

Abramovskya, *supra* note 8, at 206.

107. "[F]oreign powers may refer to precedent within U.S. case law to justify the nefarious capture of either alleged offenders, government officials, or totally innocent citizens." *Id.* at 152 (footnote omitted).

108. For Hudson's hypothetical regarding a law professor being abducted by Iranian captors for criticizing the Islamic religion, see Hudson, *supra* note 80, at 25-26. For Abramovskya's hypothetical regarding Iraqi abductors kidnapping a U.S. citizen who is a CEO of an oil company, see Abramovskya, *supra* note 8, at 151.

109. *United States v. Alvarez-Machain*, 504 U.S. 655, 679 n.21 (1992) (Stevens, J., dissenting).

accountability of the actors involved is unrealistic and inefficient, a mere façade of legitimacy. It makes it difficult to see how the Department of State can meet the goals of its mission statement when such fundamental violations of sovereignty, respect, and human rights are condoned by the Supreme Court of the United States.

Martin Luther King Jr. commonly echoed “the arc of the moral universe is long, but it bends towards justice.” Given the consequences of the executive branch’s actions and the Supreme Court’s decision in *Alvarez-Machain*, the outcry by the international community, the loss of face in international relations, the disrespect of another nation’s sovereignty, and the jeopardy of U.S. citizens’ safety, it is difficult to see how justice has been served in this case. It is without a doubt that the United States government “won” the battle when the Supreme Court allowed for the abduction to be legitimate; however, it may come to be one of the gravest of Pyrrhic victories. Only time will tell, but it seems the arc of the moral universe needs some bending, and soon.