

MILITARY MIGHT *VERSUS* SOVEREIGN RIGHT: THE KIDNAPPING OF DR. HUMBERTO ALVAREZ-MACHAIN AND THE RESULTING FALLOUT¹

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The desire for revenge exerts "a kind of hydraulic pressure ... before even which well settled principles of law will bend".

Justice Oliver Wendell Holmes, 1904³

SUMMARY: I. *Factual Background.* II. *The legal decisions on Alvarez-Machain.* III. *The reactions to Alvarez-Machain.* IV. *Alvarez-Machain and the dangers it presents to American Citizens.* V. *Conclusion.*

On February 7, 1985, United States Drug Enforcement Agent (DEA) Enrique "Kiki" Camarena was kidnapped outside the United States Consulate in Guadalajara, Mexico.⁴ Camarena had been assigned to the region to combat drug trafficking and had successfully infiltrated the Guadalajara drug cartel. In return, the cartel tortured and eventually murdered him.⁵ The traffickers, however, got more than they bargained for. Camarena's murder set the stage for what many consider a major shift in United States foreign policy⁶ and United States domestic law;

¹ This article was adapted from remarks delivered at the *meeting of the American Society of International Law and the Instituto de Investigaciones Juridicas on "The Role of International Law in the Americas: Rethinking National Sovereignty in an Age of Regional Integration"* which was held June 6-7, 1996 in Mexico City, Mexico. The author expresses his thanks to Paul Hoffman, Esq. and the organizers and sponsors of the Conference for inviting him to participate.

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³ *Northern Securities Co. v. United States*, 193 U. S. 197, 201 (1904)(Holmes, J. dissenting).

⁴ See e. g., "Storm Arises Over Camarena; U. S. Wants Harder Line Adopted", *Latin Am. Weekly Rep.*, Mar. 8, 1985, at 10; "U. S. Presses Mexico To Find Agent", *Chicago Tribune*, Feb. 20, 1985, at 10.

⁵ *United States v. Caro-Quintero*, 745 F. Supp. 599, 601-602 (C. D. Cal. 1990), *aff'd sub nom.*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U. S. 655 (1992).

⁶ Many consider the June 21, 1989 legal opinion issued by the Office of Legal Counsel of the Department of Justice as having provided the basis for the actions taken against Dr. Alvarez-Machain and the territorial violation of Mexico's sovereignty. See *infra* notes 14-16 and accompanying text. for discussion.

both of which would have far reaching consequences throughout the world. Motivated by an understandable need for revenge for the horrible murder of one of its own, the United States government, through the acts of the DEA, saw fit to violate the sovereignty and territorial integrity of its neighbor, Mexico, in order to secure custody over individuals suspected to have participated in Camarena's torture and murder. This blatant disregard of one of the oldest principles of international law threatens the balance between law, order and chaos and invites reciprocal actions against United States citizens.⁷

During the last decade the United States has demonstrated its willingness and aggressiveness to apprehend and punish foreign nationals accused of violating United States laws through extraordinary means, notwithstanding that these laws and/or methods were close to being or were in violation of international law. Most of these cases involved either enticing the suspect into

In testifying before a House Judiciary Subcommittee, however, Judge Abraham D. Sofaer, then the Legal Adviser for the U. S. Department of State, emphasized that "no change has been made in U. S. policy concerning extraterritorial arrests". *FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 25 (1989) (Statement of Judge Abraham D. Sofaer). Alvarez-Machain was kidnapped just five months after Judge Sofaer made this statement.

⁷ The *Alvarez-Machain* case stands for the proposition that there is no role for international law in the decision-making process of the United States government if the effected outcome would not suit the interests of the United States. As a result of this incident, scholars and government officials alike, need to rethink the proper place for national sovereignty in this age of regional integration because the United States' actions have jeopardized the working relationships between states, particularly in the Americas, and the sanctity of basic principles of international law.

It has taken nearly 50 years for member states of the United Nations to begin to recognize the role of international law in preserving order. But recognition is not enough. For international law to have any substance, it must have teeth. There must be consequences that occur when the rule of law is broken. International law has probably seen the greatest change in the last half-century in the field of international humanitarian law and, in particular, the interplay between sovereignty and preservation of human rights. Now, sovereignty is no longer an absolute. The theme the "king can do no wrong" has become part of the past. Nations that violate human rights invite intervention by third parties. In essence a State waives its rights to sovereignty when it decides to forego certain concepts of international law.

This present trend is a significant change from the days of 1945 and the creation of the United Nations Charter. Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state". Article 2(7) goes further to prohibit the United Nations from intervening in "matters which are essentially within the jurisdiction of any state". These two articles were incorporated into the Charter at the insistence of Joseph Stalin who then, of course, used the Charter as a shield to protect himself and his activities of slaughtering tens of thousands of Soviet citizens. Fifty years ago the United Nations would and did do nothing in response to a States' internal inhumane treatment of its own citizens or others.

With interventions having occurred in Iraq, Haiti, Somalia and the former Yugoslavia, there now exists a new norm. See e. g., Friedman, Saul, "Fulfilling a Promise", *Newsday*, Dec. 6, 1992, at 59 (highlighting United Nations' "Operation Restore Hope" humanitarian action in Somalia); Note, "Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military", *41 Duke Lj.* 867, 867 (1991)(citing Gulf War as evidence of new respect for international law). Indeed, the United States has led the charge to craft this new norm. However, merely because sovereignty is no longer absolute in some respects does not mean that it has been entirely dismantled in others and must not be respected.

international waters⁸, or onto United States territory⁹ or into a third party state where they were then forcibly abducted to the United States.¹⁰ Despite the fact that such conduct has occurred fairly consistently throughout the world in modern times,¹¹ it still remains a well-settled rule that such abductions violate some of the most basic tenets of international law.¹²

Notwithstanding the rule of law, the United States government has been no stranger to the abductions of other States' nationals.¹³ Where the underlying crime was more of a "personal" matter to an agency of the United States—such as the murder of a DEA agent—there was little hesitation to allow principles of international law to fall by the wayside. The Bush Administration had tried to prepare quietly for the moment when the opportunity would present itself that extraterritorial law enforcement activities might be necessary to effect capture of an individual outside of the United States. On June 21, 1989, then Assistant Attorney General William P. Barr, provided the "green light" for transborder abductions by concluding in a secret memorandum that United States law enforcement could legally conduct extraterritorial activities in pursuit of individuals who had allegedly violated United States' laws, despite the fact that such activities might contravene international law and the domestic law of the host State.¹⁴ The existence of the "Barr Memorandum",

⁸ *United States v. Yunis*, 681 F. Supp. 909 (D. D. C. 1988).

⁹ Fialka, John J., "Custom Service's 'Stings' to Curtail Arms Sales Draw Blood (Its Own) as Cases Collapse in Court", *Wall St. J.*, Mar. 18, 1994, at A12.

¹⁰ *Idem*, Walsh, Maureen, "U. S. Customs Agents 'Sting' of Cypriot in the Bahamas and Costa Rican Court's Invalidation of U. S. Extradition Treaty Put Pressure on U. S. Extradition Policy", *9 Int'l Enforcement L. Rep.* 58 (1993).

¹¹ Probably the best known example is that of Israel's 1960 kidnapping of Nazi Dr. Joseph Mengele from his home in Argentina to stand trial in Israel for the atrocities committed at the Auschwitz death camp during World War Two. *Attorney Gen. v. Eichmann*, 36 I. L. R. 18 (Isr. Dist. Ct. 1961), *aff'd*, *Attorney Gen. v. Eichmann*, 36 I. L. R. 277 (Isr. Sup. Ct. 1962). Although Israel's actions violated international law, Argentina accepted Israel's apology and waived its opposition. "Eichmann", 36 I. L. R. at 70.

¹² See *e. g.*, Restatement (Third) of Foreign Relations Law of The United States 432, And Comment C; 1 Oppenheim's International Law 295 (Lauterpacht ed., 8th ed. 1955); Lowenfeld, "U. S. Law Enforcement Abroad: The Constitution in International Law, Continued", *84 A. J. I. L. L.* 444, 474, 481 (1990).

¹³ See *e. g.*, *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991); *Jaffe v. Smith*, 825 F.2d 304 (11th Cir. 1987); *United States v. Toscanino*, 500 F.2d 267 (2nd Cir.), *reh'g denied*, 504 F.2d 1380 (2nd Cir. 1974)(Italian citizen living in Uruguay lured to a meeting, knocked unconscious, taken to Uruguay-Brazil border, then flown to U. S.); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2nd Cir.), *cert. denied*, 421 U. S. 1001 (1975)(Argentinean national under indictment in U. S. for drug trafficking forcibly removed from Bolivia after being lured there by DEA agents); *United States v. Lira*, 515 F.2d 68 (2nd Cir.), *cert. denied*, 423 U. S. 847 (1975)(Chilean arrested in Chile by local police at the request of the DEA and placed on U. S. bound plane with DEA agents); *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1040 (S. D. Ill. 1988)(Defendant seized from his Honduran home by Honduran troops driven by U. S. Marshals to air base and flown to U. S. to face drug charges).

¹⁴ *13 Op. Off. Legal Counsel* 195 (1989). The memorandum reconsidered the conclusion of a 1980 opinion that the FBI lacked authority to apprehend and abduct a fugitive residing in a foreign state in contravention of international law. See "Extraterritorial Apprehension by the Federal Bureau of Investigation", *4B Op. Off. Legal Counsel* 543 (1980). The Bush Administration believed it necessary to revisit the Carter

as it soon became known, ultimately leaked to the press¹⁵ and was the subject of harsh Congressional criticism.¹⁶ Nevertheless, its conclusions paved the way for the DEA's actions of April 2, 1990 and the kidnapping of Dr. Humberto Alvarez-Machain.

This article details the reactions throughout the United States and the international community to the kidnapping of Dr. Alvarez-Machain and, more specifically, to the decision of the Supreme Court of the United States that sanctioned the act.¹⁷ The premonition invoked by Justice Stewart that "... most

Administration's earlier legal analysis because of what it perceived as a growing threat. The memorandum explains that:

[T]he United States is facing increasingly serious threats to its domestic security from both international terrorist groups and narcotics traffickers. While targeting the United States and United States citizens, these criminal organizations frequently operate from foreign sanctuaries. Unfortunately, some foreign governments have failed to take effective steps to protect the United States from these predations, and some foreign governments actually act in complicity with these groups. Accordingly, the extraterritorial enforcement of United States laws is becoming increasingly important to the nation's ability to protect its own vital national interests. *13 Op. Off. Legal Counsel* at #.

¹⁵ Ostrow, Ronald, "FBI Gets OK for Overseas Arrests", *L.A. Times*, Oct. 13, 1989, at A1; Marcus, Ruth, "FBI Told it Can Seize Fugitives Abroad; Critic Says Justice Opinion Makes U. S. an 'International Ruffian'", *Wash Post*, Oct. 14, 1989, at A15; see also Isikoff, Michael, "U. S. 'Power' on Abductions Detailed; Controversial Justice Dept. Memo Asserts Authority to Act Overseas", *Wash Post*, Aug. 14, 1991, at A14.

¹⁶ *FBI Authority to Seize Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989)[hereinafter "*Barr Hearing*"]. Congressman Don Edwards (D-CA) chided the FBI and Justice Department for issuing the legal opinion. During the hearing he stated "I just think it's extraordinary that you [condone extraterritorial abduction], especially at this time when we have these nations emerging into the sunshine of democracy; we want them to copy us as the beacon of democracy. And yet at the same time, we say that we're going to thumb our nose at international law, when really, whenever the President makes that decision that it's so serious — in my lifetime, we've had these situations where in the long run we lose terribly." *Idem*, at 63. The criticism, though widespread, was not unanimous. For example, Congressman James Sensenbrenner, Jr. (R-WI), in his opening statement, remarked that "there appears to be an attempt to hamstring the efforts of the FBI in the apprehension of international terrorists abroad and returning them to justice in the United States...[T]he only people who will take joy in that are the Muammar Qadhafis, the Manuel Ortega, and the drug bosses of the Medellin drug cartel, and that is an accomplished fact." *Idem*, at 1. For a recent analysis of the Barr Memorandum, see Woods, Jeanne M., "Presidential Legislating in the Post-Cold War Era: A Critique of the Barr Opinion on Extraterritorial Arrests", *14 Bu. Int'l L.J.* 1 (1996)[hereinafter "*Barr Critique*"]. See also Zaid, Mark S., "Classified 1989 Justice Memorandum Opining President Has Authority to Disregard International Law in Favor of U. S. Extraterritorial Law Enforcement Activities Is Released to the Public", *9 Int'l Law Enforcement Rep.* 60 (Feb. 1993).

¹⁷ *United States v. Alvarez-Machain*, 504 U. S. 655, 657 (1992). An analysis of the judicial decisions that led up to and including the Supreme Court decision is beyond the scope of this article. This article explores the policy and reactionary concerns expressed in the wake of the acts discussed herein. For analysis of the decisions, see e. g., Jonathan Gluck, "The Customary International Law of State-Sponsored Abduction and United States Courts", *44 Duke L. J.* 612 (1994); Hagan, Patrick M., "Government Sponsored Extraterritorial Abductions in the New World Order: The Unclear Role of International Law in United States Courts and Foreign Policy", *17 Suffolk L. Rev.* 438 (1994)[hereinafter "*Government Sponsored*"]; Comment, "Jurisdiction in Violation of an Extradition Treaty: *United States v. Alvarez-Machain*", *27 Creighton L. Rev.* 1105 (1994); Bush, Jonathan, "How Did We Get Here? Foreign Abduction After Alvarez-Machain", *45 Stan. L. Rev.* 939 (1993); Note, "*United States v. Alvarez-Machain: International Abductions: The Court's Invitation for Reciprocal Action Against American Citizens*", *20 Ohio N.U. L. Rev.* 191 (1993);

courts throughout the civilized world ... will be deeply disturbed by the 'monstrous' decision the Court announces today", was to soon prove itself true.¹⁸

I. FACTUAL BACKGROUND

As a result of its investigation into Camarena's murder, the United States indicted twenty-two persons who allegedly participated in some fashion.¹⁹ According to the United States the investigation also led straight to Dr. Alvarez-Machain. The government alleged Alvarez-Machain had helped prolong Camarena's life so that "others could further torture and interrogate him".²⁰ Initially the DEA attempted to arrange for Alvarez-Machain's apprehension through irregular rendition.²¹ Negotiations between Mexican police officials and the DEA centered around a possible exchange of Alvarez-Machain for a Mexican national residing in the United States who was wanted for embezzlement from Mexican politicians.²² Despite a tentative agreement for the transfer to take place in early 1990, the Mexican officials suddenly demanded an advance payment of \$50,000 to transport Alvarez-Machain to the border.²³ The agreement was terminated and no further negotiations occurred.

The DEA now found itself faced with a difficult decision. Utilization of the extradition treaty was disfavored as Mexico's track history in complying with previous United States requests for individuals allegedly connected to Camarena's murder was dismal.²⁴ Additionally, Mexican law prohibited the extradition of its own nationals.²⁵ DEA agents, therefore, arranged with their local contacts to effect the kidnapping of Alvarez-Machain in exchange for a

Comment, "United States v. Alvarez-Machain: The Deleterious Ramifications of Illegal Abductions", 17 *Fordham Int'l L.J.* 126 (1993); Wilder, Andrew L., "Recent Development, United States v. Alvarez-Machain", 32 *VA. J. Int'l L.* 979 (1992).

18 *Alvarez-Machain*, 504 U. S. at 687 (Stewart, J., dissenting).

19 *Caro-Quintero*, 745 F. Supp. 599, 602 (C. D. Cal. 1990).

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

21 *Caro-Quintero*, 745 F. Supp. at 602.

22 *Ibidem*.

23 *Ibidem*.

24 In fact, up to this time Mexico had never extradited one of its national to the United States under the Extradition Treaty. Brief for the United States *on writ of certiorari* to the U. S. Court of Appeals for the Ninth Circuit at 21 n.17; *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 504 U. S. 655 (1992).

25 The Mexican Law of International Extradition, Chapter 1, Article 14, does not permit extradition of a Mexican national absent exceptional circumstances. Ley de Extradición Internacional, Capítulo I, Artículo 14, in *Diario Oficial* (Dec. 29, 1975). Article 9 of the United States-Mexico Extradition Treaty expressly provided that "neither contracting party is bound to deliver up its own nationals, although it may do so in its own discretion...." Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, T. I. A. S. No. 9656 (Article 9).

\$50,000 reward, plus expenses.²⁶ Approval for the operation was received from the highest levels of the DEA and, presumably, the Attorney General's Office.²⁷

On April 2, 1990, five or six armed men abducted Dr. Alvarez-Machain from his office in Guadalajara, Mexico. He was subjected to electric shocks through the soles of his shoes, injected with a sedative and flown to El Paso, Texas where he was arrested by federal agents.²⁸

II. THE LEGAL DECISIONS ON ALVAREZ-MACHAIN

A. District Court Decision

The Court considered Dr. Alvarez-Machain's motion to dismiss the pending charges on the basis of outrageous government conduct and lack of personal jurisdiction, the latter due to the government's violation of the United States-Mexico Extradition Treaty.²⁹ Although the Court rejected the defendant's arguments on outrageous government conduct, the Court agreed that because of the unilateral actions of the United States to secure custody of Dr. Alvarez-Machain in violation of the existing Extradition Treaty, the United States must "return him to the territory of Mexico".³⁰

B. Court of Appeals Decision

In a terse opinion, the Ninth Circuit Court of Appeals affirmed the District Court's dismissal of the indictment.³¹ The Court applied its earlier decision in *United States v. Verdugo Uruidez*,³² which held that (a) the "forcible abduction of a Mexican national from Mexico by agents of the United States without the consent or acquiescence of the Mexican government violates the 1980 Extradition Treaty between the United States and Mexico"; (b) the "pro-

²⁶ The District Court concluded that "DEA agents were responsible for [Alvarez-Machain's] abduction, although they were not personally involved in it. *Alvarez-Machain*, 504 U. S. at 657. The DEA eventually paid \$20,000 to the abductors and continued to provide them \$6,000 per week. *Caro-Quintero*, 745 F. Supp. at 603-04. Additionally, seven of the abductors and their families were evacuated to the United States. *Ibidem*."

²⁷ A DEA agent testified that "the abduction and the final terms of the abduction had been approved by the DEA in Washington, D. C., and [the] agent ... believed that the United States Attorney General's Office had also been consulted", *Idem*, at 603.

²⁸ *Ibidem*.

²⁹ *Caro-Quintero*, 745 F. Supp. 599 (C. D. Cal. 1990).

³⁰ *Idem*, at 614.

³¹ *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991).

³² 939 F.2d 1341 (9th Cir. 1991).

test of the Mexican government in letters to the district court that Verdugo's abduction violated the 1980 treaty provided standing for Verdugo to assert rights under the Treaty in United States courts, and that (c) the proper remedy for such a violation of the 1980 Extradition Treaty is repatriation of the Mexican national seized by United States agents".³³ The *Verdugo* holding applied *a fortiori* to Alvarez-Machain. As a result, the indictment was ordered dismissed.

C. Supreme Court

On June 15, 1992, in a 6-3 decision, the Supreme Court of the United States held that the fact of Alvarez-Machain's forcible abduction did not "prohibit his trial in a court in the United States for violations of the criminal laws of the United States".³⁴ The majority focused on the question of whether the abduction violated the Extradition Treaty between the United States and Mexico. If it did not, then the Court's long-standing rule in *Ker v. Illinois*³⁵ would apply and the Court need not inquire as to how the defendant came before it.³⁶

Because the Treaty "says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nations, or the consequences under the Treaty if such an abduction occurs", no violation of the Treaty had taken place.³⁷ Therefore, under this reasoning, "the decision of whether [Alvarez-Machain] should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch".³⁸ The case was ordered remanded for Alvarez-Machain to be tried for his alleged participation in the murder of Agent Camarena.³⁹

³³ *Alvarez-Machain*, 946 F.2d at 1466.

³⁴ 504 U. S. at 670.

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

³⁶ *Alvarez-Machain*, 504 U. S. at 662.

³⁷ *Idem*, at 663.

³⁸ *Idem*, at 669.

³⁹ Upon remand back to the District Court, Alvarez-Machain was ordered released on December 14, 1992 following the conclusion of the government's case. In an unpublished opinion, Judge Rafeedie chastised the government that there is "no proof that he [Alvarez-Machain] participated in the kidnapping of Camarena or that he even knew about it". Transcript of Proceedings in *United States v. Alvarez-Machain*, No. CR-87-422-(G)-ER (C.D.Cal. Dec. 14, 1992), republished in *Secretaria de Relaciones Exteriores*, 2 *Limits to National Jurisdiction* 161-185 (1993)[Hereinafter "*Limits to National Jurisdiction*"]. See also "Mexico Doctor Acquitted in DEA Agent's Murder", *Hous. Chron.*, Dec. 15, 1992, at A1; Cannon, Lou,

A stinging dissent was filed by Justice Stevens, who characterized the majority's conclusion as nothing less than "monstrous".⁴⁰ Criticizing the government's claim that failure to specifically prohibit forcible abductions within the terms of the Extradition Treaty somehow sanctions such conduct, Justice Stewart exclaimed this interpretation would transform the Treaty's provisions into "little more than verbiage" and utterly frustrates the intent of the Treaty.⁴¹ "[M]ost courts throughout the civilized world ... will be deeply disturbed by the 'monstrous' decision the Court announces today", Justice Stewart warned.⁴²

III. THE REACTIONS TO ALVAREZ-MACHAIN

The negative reactions from across the globe came swift and expectedly, just as Justice Stewart had forewarned. However, these reactions were of no surprise to officials in the United States government. Many countries had previously, in the wake of the public discussions of the Barr Memorandum, expressed concerns that "somehow a new law had been passed, or a new authority had been given to the FBI to engage in extraterritorial arrest without consent."⁴³ Despite the United States government's assurances to these countries that there "will be no change in our practice and our policy of coordinating with them and getting their approval for all law enforcement activities that would occur within their territory on behalf of the FBI", apparently no one failed to apply that assurance to the DEA and its activities.⁴⁴

A sampling of the reactions throughout the international community and the United States has been compiled below.

"Mexican Doctor Acquitted in U. S. Agent's Death", *Boston Globe*, Dec. 15, 1992, at 3; Scott, David Clark, "Mexico Hails Acquittal in U. S. Murder Case", *Christian Sci. Monitor*, Dec. 16, 1992, at 4.

⁴⁰ 504 U. S. at 680, 687 (Stewart, J. dissenting).

⁴¹ *Idem*, at 673. Justice Stewart explained that the government's argument would, therefore, equally permit the United States to "torture or simply to execute a person rather than to attempt extradition" because these, too, "were not explicitly prohibited by the Treaty". *Idem*, at 674.

⁴² *Idem*, at 687 (Stewart, J., dissenting).

⁴³ *Barr Hearings*, *supra* note 16, at 66 (statement of Judge Sofaer). Oliver "Buck" Revell, Associate Deputy Director of the FBI, further testified that several countries had contacted the Bureau's legal attaches to indicate their concern that "we were going to mount up like the Lone Ranger and go out and start seizing fugitives all over the world....", *idem*, at 67 (Statement of Oliver B. Revell).

⁴⁴ *Ibidem*.

A. Reactions of Foreign Governments

i) Host State

Mexico

Mexico, of course, immediately protested the abduction of Alvarez-Machain. Three diplomatic notes of protest were completely ignored by the United States.⁴⁵ When the case went to the Supreme Court, Mexico filed its own *amicus* brief urging the Court to release Alvarez-Machain.⁴⁶

Following the Supreme Court's decision, Mexico was outraged. The Mexican Foreign Minister held a press conference in which he announced that: (1) Mexico repudiates as invalid and illegal the Supreme Court decision; (2) Mexico will consider as a criminal act any attempt by foreign nationals or governments to apprehend from Mexican territory any person suspected of a crime; (3) Mexico demands the immediate return of Alvarez-Machain; (4) Mexico declares that the only proper means to obtain custody of a person within another state are through treaties and mechanisms of extradition established under international law; and (5) foreign law enforcement officials of any country who may wish to operate in Mexico must observe updated rules established by the government.⁴⁷ Mexico's immediate response to the decision was quite powerful — it stopped all American anti-drug operations in Mexico.⁴⁸ Financial aid from the United States was also rejected.⁴⁹ However, these steps were merely temporary political shows of force and bilateral efforts were reinitiated within days.⁵⁰

In response to Mexico's understandable outrage, President Bush sent a "letter to Mexican President Salinas, ... assuring him that the United States government would 'neither conduct, encourage, nor condone' trans-border abductions

⁴⁵ Mexico sent its first diplomatic note on April 18, 1990 requesting an official report on the role of the United States in the abduction. *Caro-Quintero*, 745 F.Supp. at 604. Two official letters of protest were thereafter sent on May 16, 1990 and July 19, 1990, respectively, from the Embassy of Mexico to the U. S. Department of State. The latter note requested the provisional arrest and extradition of the DEA agents and Mexican nationals allegedly involved in the abduction. *Idem*. See also Brief for United Mexican States as *Amicus Curiae* (Mexican *Amicus*) 5-6, 31 L. M. 934 (1992); App. to Mexican *Amicus* 1a-24a; Secretaria de Relaciones Exteriores, 1 LIMITS TO NATIONAL JURISDICTION 3-15 (1992)(republishing English translation of Mexican diplomatic notes)(hereinafter "LIMITS").

⁴⁶ *Mexican Amicus*, *supra* note 45.

⁴⁷ Krezcko, "The Alvarez-Machain Decision", 3 *U. S. Dep't. State Dispatch* 614 (August 3, 1992)(republishing the statement delivered by Alan J. Krezcko, Deputy Legal Adviser, U. S. Department of State, before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on July 24, 1992)[Hereinafter "Krezcko Statement"].

⁴⁸ *Mexico Bans All Activities by DEA Agents*, Associated Press Online, Jun. 16, 1992, available in Lexis/Nexis News file.

⁴⁹ "No to Anti-Drugs Aid", *Latin Am. Newsletters. LTD.*, Aug. 20, 1992.

⁵⁰ LaFraniere, Sharon, "Baker Offers Reassurances After Court Kidnap Rule", *Wash Post*, June 17, 1992, at A2.

from Mexico.”⁵¹ The two governments agreed to re-review the Extradition Treaty and avoid any possible repetitions of the events leading up to the *Alvarez-Machain* decision.⁵² Secretary of State Jim Baker also exchanged letters with Mexican Foreign Secretary Solana recognizing that trans-border abductions by “bounty hunters” and other private individuals would be considered extradictable offenses by both nations.⁵³ President Clinton indicated that his Administration would also not condone or conduct such operations.⁵⁴

Upon the insistence of Mexico the United States agreed to adopt a separate treaty specifically pertaining to transborder abductions between the two countries.⁵⁵ The Treaty to Prohibit Transborder Abductions, which was signed by both countries on November 23, 1994, establishes obligations on the two nations separate from those contained in the Mexican-United States Extradition treaty and is not intended to be a supplemental document.⁵⁶ Most importantly to Mexico, the remedy for a violation of the Treaty is repatriation of the abductee.⁵⁷

ii) Other States

Argentina

The Foreign Minister of Argentina, Guido Di Tella, said that if any kidnapping was carried out on Argentine soil, “it will be a shocking and extremely serious step”.⁵⁸

51 Stewart, David O., “The Price of Vengeance: U. S. Feels Heat for Ruling that Permits Government Kidnapping”, 78 *A.B.A. J.* 50, 51 (1992).

52 Lewis, Neil A., “U. S. Tries to Quiet Storm Abroad Over High Court’s Right to Kidnap”, *N.Y. Times*, June 17, 1992, at A8.

53 *Krezcko*, *supra* note 46, at 615.

54 “Clinton, High Court Differ on Abduction”, *L. A. Times*, Dec. 16, 1992, at A32; Newton, Jim, “Clinton Urged to Ban Foreigners’ Abductions”, *L. A. Times*, Jan. 7, 1993, at B3. However, President Clinton would not rule out such actions in limited circumstances. *Idem*.

55 “USA, Mexico OK Extradite Pact”, *Associated Press Online*, Nov. 23, 1994, available in Lexis/Nexis, News file. A similar treaty has apparently also been drafted with Canada which, along with Mexico, will be the only two countries with which treaties on transborder abductions will be signed. Telephone conversation between author and U. S. government official on June 1, 1996.

56 As neither the Mexican or American legislatures have ratified the Treaty the specific provisions of the document are not yet available to the public. Mexican officials have privately indicated that they are less than optimistic that the Treaty will be ratified anytime soon. Conversation between author and Senior Mexican Diplomat in June 1996. It is clear, at the very least, that no action shall occur within the U. S. Congress until after the 1996 elections and perhaps — given some of the strong Republican opposition to prohibitions on transborder abductions — not until a Democratic Congress resumes power again.

57 Furthermore, the Treaty contains specific language that no private rights exist emanating from the Treaty or violations therefrom. *Alvarez-Machain*, in fact, is currently seeking damages against the United States for their actions against him. Seper, Jerry, “Justice Sued for \$20 Million by Doctor in Camarena Case”, *Wash. Times*, July 10, 1993, at A5.

58 Lewis, Neil, “U. S. Tries to Quiet Storm Abroad Over High Court’s Right-to-Kidnap Ruling”, *N. Y. Times*, Jun. 16, 1992, at A8.

Brazil

Brazil expressed its desire to invalidate its extradition treaty with the United States.⁵⁹

Canada

The Canadian government, no stranger to abduction disputes with the United States,⁶⁰ took the unusual step of filing an *amicus curie* brief in support of Mexico's position before the Supreme Court. In its brief Canada related the findings of a survey it conducted of the views of Australia, Austria, Finland, Germany, Great Britain, the Netherlands, Norway, New Zealand, Sweden, and Switzerland. Each State "indicated that they would regard such an abduction as a violation of their sovereignty and would protest."⁶¹ Several countries, including Finland, Germany, Great Britain, and the Netherlands stated they would demand the return of the abducted person.⁶² Austria, Finland, the Netherlands, Norway, Sweden and Switzerland also indicated that if an abducted person were brought to their territory, they "would consider that the ... person should be returned" to the asylum state.⁶³

Following the Supreme Court's decision, and the rejection of the Canadian arguments, the Canadian Minister of External Affairs informed the Canadian Parliament that any attempt by the United States to kidnap someone in Canada would be regarded as a criminal act and a violation of the Canadian-United States Extradition Treaty.⁶⁴ This stance was reiterated in a diplomatic message to the United States Department of State on June 23, 1992.⁶⁵

⁵⁹ Walsh, *supra* note 10, at 60.

⁶⁰ Canada and the United States have a long history of conducting transborder abductions within each others territory. See *Barr Hearings*, *supra* note 16, at 32 (referencing 1876 abduction of convict from Alaska by Canadian authorities and 1872 seizure by a U. S. citizen of an individual from Canada)(statement of Judge Sofaer); 1 John B. Moore, A Treatise On Extradition & Interstate Rendition Sec. 189 (1991)(describing incident in which British soldiers seized American citizen from his house in Vermont in 1841 and brought him to Canada); John B. Moore, 4 A Digest of International Law Sec. 603 (discussing 1863 incident where Canadian constables abducted two individuals from the United States and 1960 incident where Michigan policemen arrested American Indians in Canadian waters); Cole, C.V., "Extradition Treaties Abound, but Unlawful Seizures Continue", *Int'l Perspectives*, Mar.-Apr. 1975, at 40-41 (discussing 1908 incident involving American who was arrested in Illinois, taken to Canada and then jailed in Winnipeg).

⁶¹ Brief of the Government of Canada as *Amicus Curiae*, *United States v. Alvarez-Machain*, 31 I. L. M. 919 (1992), "reprinted in", *Limits*, *supra* note 45, at 91.

⁶² *Ibidem*.

⁶³ *Idem*, at 91-92. "[A] State Department spokesperson acknowledged following the decision, 'Many governments have expressed outrage that the United States believes it has the right to decide unilaterally to enter their territory and abduct one of their nationals.'" Stewart, *supra* note 50, at 50.

⁶⁴ Carter, Barry E. & Phillip R. Trimble, *International Law* 809 (2nd Ed. 1995)[Hereinafter "Carter & Trimble"].

⁶⁵ *Limits To National Jurisdiction*, *supra* note 39, at 75-76.

Chile

In a ruling announced after the *Alvarez-Machain* decision, two dissenting Justices of the Chilean Supreme Court opposed extradition of a suspect to the United States on the grounds that the United States violates its' extradition treaties with other countries.⁶⁶

China

On December 14, 1992, the Department for Latin American Affairs of the Chinese Ministry of Foreign Affairs issued the following statement:

"The Chinese Government supports the fair position adopted by the Mexican Government in this case. The Chinese Government has always sustained that relations among States must be based on equality and that every country must respect the sovereignty of others and the general principles of International Law".⁶⁷

Colombia

The government of Colombia declared on June 15, 1992, that it "energetically rejects the judgment issued by the United States Supreme Court...." Although the decision was recognized as having taken issue with a specific treaty between the United States and Mexico, Columbia believed that "its substance threatens the legal stability of [all] public treaties".⁶⁸

In a statement issued June 17, 1992, the Colombian government added that "[i]f the kidnapping of a [Colombian] national, in order to proceed to judge him abroad, would ever take place, the excellent relations that traditionally have been held among the governments of Columbia and the United States could be seriously affected".⁶⁹

Costa Rica

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

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

⁶⁶ Stewart, *supra* note 50, at #.

⁶⁷ *Idem*, at 77.

⁶⁸ Carter & Trimble, *supra* note 63, at 808-809; Stewart, *supra* note 50, at 50.

⁶⁹ "Limits To National Jurisdiction", *supra* note 39, at 80.

In this manner this Court respectfully petitions the Executive and Legislative Powers of the United States of America, to legislate as rapidly as it may be possible, rules deemed necessary to guarantee all individuals and all nations of the world, that acts such as those commented will never be conducted again.⁷⁰

The Court's sharp denouncement of the decision was not merely vocal opposition. Apparently still not satisfied with the response of the United States government, on January 12, 1993, the Costa Rican Supreme Court invalidated the Costa Rican-United States Extradition Treaty following a *habeas corpus* appeal of a United States citizen.⁷¹

Cuba

Cuba issued the following statement, in part, on June 29, 1992:

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

The Government of Cuba reaffirms that national sovereignty is inviolable and that it can not be questioned, nor belittled by false decisions of foreign tribunals and that no state, powerful as it may be, has any authority whatsoever to ignore the rules of law and to act as if it owned the world.⁷²

Denmark

Denmark's Ministry of Justice condemned the abduction and Supreme Court decision on June 17, 1992 and added that "any attempt of kidnapping in Danish territory, carried out by United States' authorities, would be a violation of International Law and of the Danish Criminal Code."⁷³

Ecuador

The Ministry of Foreign Affairs issued a press release that it "considers that the United States' Supreme Court decision in the 'Alvarez-Machain' case is positively illegal, because it attempts against fundamental rules of international law, and violates the principles of sovereign equality of the States, and non-intervention in internal affairs, contained in the Charter of the United Nations and in the one of the Organization of American States".⁷⁴

⁷⁰ *Idem*, at 81-82.

⁷¹ Walsh, *supra* note 10, at 58; "Costa Rica Throws Out U. S. Extradition Treaty", *Associated Press Online*, Jan. 14, 1993, available in Lexis/Nexis News file; McPhaul, John, "Costa Rica Throws Out U. S. Extradition Treaty", *Miami Herald*, Jan. 16, 1993, at A24. As of the writing of this article the United States and Costa Rica were still without a valid extradition treaty.

⁷² "Limits to National Jurisdiction", *supra* note 39, at 84-85.

⁷³ *Idem*, at 87.

⁷⁴ *Idem*, at 89.

Guatemala

During the Forty-Seventh Session of the meetings of the United Nations General Assembly on September 29, 1992, the Guatemalan Minister of Foreign Affairs remarked that "it is peremptory that [sic] international community rejects any claim of a State to extraterritorially apply its laws."⁷⁵

Honduras

On June 17, 1992, the Ministry of Foreign Affairs stressed that "[i]t is also an international rule that a State may not invoke provisions of its internal law, either administrative or judicial as a justification of its failure to perform a treaty."⁷⁶

Iran

Not satisfied with merely condemning the decision by parliamentary resolution or statement, the government of Iran passed a draft law giving the president of Iran "the right to arrest anywhere Americans who take action against Iranian citizens or property anywhere in the world and bring them to Iran for trial."⁷⁷ Islamic law, of course, would be applied by the Iranian courts. The legislation indicated it "aims at preserving the prestige and territorial integrity of the Islamic Republic, safeguarding the lives and properties of Iranian nationals abroad and defending the interests of the Islamic Republic."⁷⁸

Jamaica

The decision was criticized by the Jamaican Minister of Security and Justice as based on the principle "might makes right." The ruling was "an atrocity that would disturb the world." The United States should come "back to its senses."⁷⁹

Malaysia

Prime Minister Mahathir Bin Mohamad delivered a scathing rebuke against the United States during the Non-Aligned Movement Summit in Jakarta, Indonesia on October 1, 1992 when he stated that:

⁷⁵ *Idem*, at 91.

⁷⁶ *Idem*, at 93. In fact, Honduras adopted a policy of imposing up to twenty years in jail for any Honduran who aided the DEA in kidnappings. "Up to 20 Years in Jail Proposed for Hondurans Who Aid DEA Kidnappings", *Notimex Mexican News Serv.*, Aug. 2, 1992, cited in Hagan, *Government Sponsored*, *supra* note 17, at #.

⁷⁷ Carter & Trimble, *supra* note 63, at 812.

⁷⁸ *Idem*. The Iranian representatives who introduced the bill indicated that their law would remain in force so long as the U. S. law remained the same. Ostensibly, the Iranian law is still on the books although no known prosecutions have been commenced under its authority. The Iranian law did not pass unnoticed in the U. S. government. Senator Moynihan referenced the Iranian Parliament's approval of its legislation as a primary reason for his introducing Senate Resolution 319. 138 Cong. Rec. S8535 (Daily ed. June 16, 1992). See *infra* note 98 and accompanying text.

⁷⁹ Carter & Trimble, *supra* note 63, at 809.

...recent history most surely convince [sic] us that a unipolar world is every bit as threatening as a bipolar world ... We see soldiers invading a weak country to capture the head of government and bring him back for trial under the laws of the invader. We see a citizen being kidnapped in his own country by authorities of another country, sanctioned by the kidnapper's court. We see the extra-territorial application of the laws of the strong over the weak.⁸⁰

Nicaragua

The Nicaraguan government claimed that "the ruling allows the U.S. government to 'solve a crime with a crime'".⁸¹

Spain

The president of Spain publicly criticized the decision as "erroneous".⁸²

Switzerland

The Swiss Justice Ministry, Juerg Kistler, expressed disfavor with the Supreme Court's ruling by stating "imagine where it would lead if every country would do that. You would have anarchy".⁸³

Uruguay

On June 30, 1992, the lower house of the Uruguayan Parliament voted that the decision demonstrates "a lack of understanding of the most elemental norms of international law, and in particular an absolute perversion of the function of extradition treaties".⁸⁴

Venezuela

The following statement, in part, was issued on June 22, 1992:

"The Ministry of Foreign Affairs calls the attention upon the serious potential disturbance of peace and international security found in the resolution of the United States' Supreme Court, by confirming precedents that can offer to this and to other States the excuse to enter the sovereign territories of one or another, in search of persons sought by its own justice organs".⁸⁵

B. Reactions of International Organizations

American Juridical Committee, Organization of American States

On June 26, 1992, the governments of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, issued a joint declaration expressing their concern

⁸⁰ "Limits To National Jurisdiction", *supra* note 39, at 97.

⁸¹ Ruiz-Bravo, Herman de J., "Monstrous Decision: Kidnapping is Legal", 20 *Hastings Const. L. Q.* 833, 835-36 (1993).

⁸² Carter & Trimble, *supra* note 63, at 809.

⁸³ LaFraniere, *supra* note 49, at A2.

⁸⁴ Carter & Trimble, *supra* note 63, at 808.

⁸⁵ "Limits to National Jurisdiction", *supra* note 39, at 100.

with the Supreme Court's decision and requested that the Inter-American Juridical Committee issue an advisory opinion on the decision.⁸⁶ A formal request was submitted to the Permanent Council of the OAS on July 15, 1992 which referred the matter to the Committee.⁸⁷

The Committee issued its opinion on August 15, 1992 and found, by a vote of nine in favor and one abstention (the one being that of the U. S. judge), "that it cannot be disputed that the abduction in question was a serious violation of public international law ... and that the United States of America is responsible for the conduct of the DEA in this case...".⁸⁸

Caribbean Community (CARICOM)

The States of Port-of-Spain, Trinidad and Tobago issued a statement on July 2, 1992 "emphatically reject[ing] the notion that any State may seek to

⁸⁶ Several Latin American and European nations also considered requesting an Advisory Opinion from the International Court of Justice on the legality of the United States' actions. In its joint statement of July 24, 1992, the Ibero-American countries expressed their concern that the Supreme Court's decision violated international law and the United Nations Charter and would ask the United Nations General Assembly to seek ICJ review. Doc. A/47/356-S/24367 On November 13, 1992 the countries of Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela notified the U. N. Secretary General to include their request for an ICJ advisory opinion on the next agenda of the General Assembly and seek review by the Sixth Committee (Legal Questions) of the General Assembly. The Sixth Committee, on November 25, 1992, recommended that the General Assembly continue consideration of the matter into its next session. "Limits to National Jurisdiction", *supra* note 39, at 71-72. See also Angulo, Manuel R. & James D. Reardon, Jr., "The Apparent Political and Administrative Expediency Exception Established by the Supreme Court in United States v. Humberto Alvarez-Machain to the Rule of Law as Reflected by Recognized Principles of International Law", 16 *B. C. INT'L & COMP. L. Rev.* 245, 284 (1993).

⁸⁷ CP/RES.586 (909/92).

⁸⁸ 32 I. L. M. 277 (1993); "Limits To National Jurisdiction", *supra* note #, at 32. The question before the Committee was "confined to examining the decision of the United States Supreme Court from the standpoint of its conformity with public international law." *Idem*, at 31. The decision was based on the following reasons:

- a) By upholding the jurisdiction of United States courts to try the Mexican citizen, Humberto Alvarez Machain, forcibly abducted from his country of origin, the United States is ignoring its obligation to return him to the country from whose jurisdiction he was abducted.
- b) By maintaining that it is free to try persons abducted by the action of its government in the territory of another state, unless this is expressly prohibited by a treaty in effect between the United States and the country in question, the United States is ignoring a fundamental principle of International Law which is respect for the territorial sovereignty of states.
- c) By interpreting the United States/Mexico Extradition Treaty to the effect that it is not an impediment to the abduction of person, the United States fails to consider the precept by which treaties must be interpreted in conformity with their purpose and aim and in relation to the applicable rules and principles of international law.

Idem, at 33-34; 32 I. L. M. 277. With respect to the lone absence by the United States Judge, Dr. Seymour J. Rubin, it must be noted that Dr. Rubin's vote was based on his belief that the Committee lacked jurisdiction to issue an opinion on this matter and did not reflect his view of the merits of the decision. Indeed, Dr. Rubin stated on the record that he believed that the acts "committed by agents of the United States Drug Enforcement Administration were a clear violation of International Law". "Limits to National Jurisdiction", *supra* note 39, at 47; 32 I. L. M. 277.

enforce its domestic law by means of abduction of persons from the territory of another sovereign state with the intention to bring them within its jurisdiction in order to stand trial on criminal charges".⁸⁹

Group of Rio

The Group of Rio published a statement on June 16, 1992 that rejected "any interpretation that pretends to give recognition to the possibility of extraterritorial application of laws of one country in another".⁹⁰

C. Reactions Within the United States

Harsh criticisms to the kidnapping of Alvarez-Machain and the Supreme Court's decision was not limited to those outside the United States. Many American international scholars,⁹¹ newspaper editorial boards⁹² and legislators⁹³ warned of the deleterious consequences that could occur due to the flagrant disregard of international law demonstrated by the United States.

The United States government, of course, attempted to distance itself from the potential magnitude of the Supreme Court's decision. Indeed, a "statement by Assistant Attorney General William Barr, applauding the ruling, was considered to be so inflammatory that Press Secretary Marlin Fitzwater immediately issued a statement reiterating U. S. respect for international rules of law".⁹⁴ That the Court ostensibly accorded a "green light" for future United States' transborder abductions without host State consent was becoming a political issue.⁹⁵ The White House issued a public statement reaffirming that:

⁸⁹ *Idem*, at 13.

⁹⁰ *Idem*, at 17.

⁹¹ See e. g., David Scheffer, "Sanctity of Law Stops at the Border", *L. A. Times*, June 17, 1992 at A11; Professor Louis Henkin, the president of the American Society of International Law, wrote that "[e]xtradition treaties apart, kidnapping someone from another country is a clear, established undoubted violation of international law". "Limits to National Jurisdiction", *supra* note 39, at 105-108. The American Bar Association adopted a resolution on February 8-9, 1993 calling for "federal, state and domestic territorial authorities dealing with rendition of individuals from foreign territories, by extradition or otherwise, [to] full respect international law". *Idem*, at 109-121.

⁹² "Comity, Not Kidnapping", *Wash Post*, Jun. 16, 1992, at A20; "Pandora's Box; Supreme Court Ruling on Kidnapping Out of Bounds", *Houston Chron.*, Jun. 16, 1992 at A18; "Jeopardizing Relations with Mexico; High Court Ruling Justifies Dangerous 'Snatch' Technique in Notorious Camarena Case", *L. A. Times*, Jun. 16, 1992, at B6; "A Victory for Lawlessness", *ST. Louis Post-Dispatch*, Jun. 17, 1992, at 2B.

⁹³ Representative Jim Kolbe introduced a sense-of-Congress on June 16, 1992 "calling on the United States Government to do everything in its power to ensure that our antidrug effort with Mexico does not suffer as a result of the Supreme Court's action". 138 Cong. Rec. H4698 (Daily ed. June 16, 1992). See *infra* footnotes 96-101 and accompanying text.

⁹⁴ *Barr Critique*, *supra* note 16, at #; Note, "United States v. Alvarez-Machain and the Status of International Law in American Courts", 53 *LA. L. Rev.* 1411, 1415 n.15 (1993).

⁹⁵ In fact, the political fallout prompted the Justice Department to issue a memorandum on August 12, 1992 to all U. S. Attorneys concerning "Extraordinary Renditions and United States v. Alvarez-Machain." The memorandum "requested that they inform their staff that the Alvarez-Machain decision

... The United States strongly believes in fostering respect for international rules of law, including, in particular, the principles of respect for territorial integrity and sovereign equality of states. U.S. policy is to cooperate with foreign states in achieving law enforcement objectives. Neither the arrest of Alvarez-Machain, nor the ... Supreme Court decision reflects any change in this policy....⁹⁶

On July 7, 1992, the House of Representatives commenced hearings on the International Kidnapping and Extradition Treaty Enforcement Act of 1992⁹⁷ which was introduced by Congressman Leon Panetta and sought to specifically bar prosecution of persons forcibly abducted by United States' agents from foreign states where an extradition treaty is in place. The legislation was intended to restore "our respect for other nations' sovereignty..."⁹⁸ The Act, which was never enacted, provided in pertinent part:

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

(1) by the agents of a governmental authority in the United States for the purposes of a criminal prosecution; and

(2) in violation of the norms of international law; shall not be subject to prosecution by any governmental authority in the United States.

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

Efforts were also initiated to legislatively repair the perceived damage arising from the Alvarez-Machain case within the Senate. In particular, Senator Patrick Moynihan (D-NY)⁹⁹ and Senator Paul Simon introduced a bill on Sep-

does not constitute a 'green light' for unrestricted efforts to secure custody over persons abroad without regard to international extradition treaties, or the laws of foreign states, international law, or coordination with the Department of Justice." 32 I. L. M. 277 (1993).

⁹⁶ Krezcko, *supra* note 46, at 616.

⁹⁷ 138 Cong. Rec. H6019, 102 Cong., 2d Sess. (1992).

⁹⁸ *Ibidem*.

⁹⁹ Earlier, on June 16, 1992, Senator Moynihan (along with Senator Clairborne Pell) introduced Senate Resolution 319 which resolved that:

- (1) Anyone who attempts to kidnap a person in the United States for the purpose of bringing that person to trial abroad should be deemed to have committed a crime in the United States and dealt with accordingly;
- (2) The United States should vigorously pursue drug traffickers and any person involved in the murder of United States Drug Enforcement Agency officials through the existing international legal framework, including extradition treaties; and,

tember 18, 1992 to prohibit direct arrest and abduction by U.S. agents from any non-U.S. nations. The bill, which failed to be passed, would have amended Section 481(c) of the Foreign Assistance Act of 1961 as follows:

(1) Prohibition on Direct Arrest and Abduction.

(A) Notwithstanding any other provision of law, no officer, agent or employee of the United States may directly effect an arrest in any foreign country as part of any foreign police action; and

(B) Notwithstanding any other provision of law, no officer, agent or employee of the United States government may, directly or indirectly, authorize, carry out or assist in the abduction of any person within the territory of any foreign state exercising effective sovereignty over such territory without the express consent of such state.¹⁰⁰

The following year Senators Moynihan and Simon reintroduced S.3250 as S.72. Representative Henry Gonzales (D-TX) introduced similar legislation in the House¹⁰¹ for the reason there was a "clear need for corrective legislation since the executive branch acted in an unlawful manner and the judicial branch sanctioned it".¹⁰² Neither bill was enacted. As a result, the Barr Memorandum and the Supreme Court decision remain good law.

IV. ALVAREZ-MACHAIN AND THE DANGERS IT PRESENTS TO AMERICAN CITIZENS

In considering the ramifications of the *Alvarez-Machain* decision, one must separate the legal consequences from the policy implications. Though the Supreme Court's legal analysis was widely condemned as flawed, the law, as in most cases, surrounding the decision is subject to interpretation.¹⁰³ More threatening than the repercussions stemming from the legal analysis is the precedent established by the United States that transborder abductions conducted without host state consent can, at least in some circumstances, be war-

(3) United States officials should refrain from committing the crime of kidnapping which weakens international cooperation against crime, encourages the abduction of American citizens and subverts respect for the rule of law. 138 Cong. Rec. S 8535 (Daily ed. June 16, 1992).

¹⁰⁰ S.3250, 138 Cong. Rec. S14123 (Daily ed. Sept. 8, 1992).

¹⁰¹ The International Kidnapping and Extradition Enforcement Act of 1993, H. R. 3346, 103d Cong. 1st Sess. (1993).

¹⁰² 139 Cong. Rec. H8430 (Daily ed. Oct. 22, 1993).

¹⁰³ As Professor Abraham Chayes, a former legal adviser to the U. S. Department of State, has noted the President can always receive a "thin memorandum of law" supporting his actions. "Panel on Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law", 80 A. J. I. L. 297 (1986).

ranted. Therefore, once such conduct is sanctioned by the United States it may not be too long before it is repeated by another country, perhaps against a United States citizen.¹⁰⁴

Consider the following hypothetical:

As the night turns into morning, four heavy-set men burst into Aramco's corporate headquarters in Houston, Texas, and point an AK-47 at the head of Aramco's CEO. "Do as you're told and nobody will get hurt," they explain, and they deposit him in the back of a waiting automobile. The captive is informed that he is under indictment for complicity in plundering of natural resources from the Rumaila oil fields in violation of the sovereignty of Iraq. The four abductors tie the astonished CEO up and beat him about the head and body with blunt instruments. They smuggle him into Iran with the acquiescence of Iranian authorities, and with their assistance he is placed under arrest by Iraqi law enforcement agents. Finally, they bring him before a court in Baghdad, where he is accorded all the due process rights to which he is entitled under Iraqi criminal law and promptly sentenced to prison. The U.S. State Department adamantly protests his apprehension and capture as a violation of U.S. sovereignty and territorial integrity, but the Iraqis respond with nothing less than unqualified scorn. Meanwhile, a U.S. citizen finds himself alone in the vagaries of the Iraqi criminal justice system.¹⁰⁵

Such a scenario should not be considered too far fetched, particularly given the actual reaction of the government of Iran specifically authorizing its law enforcement agents to arrest Americans anywhere in the world for perceived

¹⁰⁴ In co-sponsoring S.3250 which was designed to prohibit transborder abductions, Senator Simon recognized that "[i]f the United States can kidnap a citizen from another country for trial in our courts, what is to prevent other nations from kidnapping our citizens to be tried and punished abroad?" 138 Cong. Rec. S14123 (Daily ed. Sept. 18, 1992). Judge Sofaer, while testifying about the Barr Memorandum, described other implications that may occur due to the United States conducting a nonconsensual arrest in a foreign territory, including death of the agent(s) or other American assets, apprehension and punishment of our agents who would lack immunity from criminal or civil actions for violations of local laws, extradition requests for our agents, the possibility of civil actions against the United States government in foreign courts, and an adverse impact on bilateral relations between the United States and the host country. *Barr Hearing, supra* note 16, at 25. Judge Sofaer, in fact, was quite right. Most of these concerns proved true in the aftermath of the Alvarez-Machain case. Relations were temporarily, and still to some degree, strained between the United States and Mexico. Mexico issued extradition requests for the DEA agents involved in the abduction, which were ignored by the United States. And Alvarez-Machain filed a \$20 million dollar civil action against the United States and several of the agents who abducted him. Seper, Jerry, "Justice Sued for \$20 Million by Doctor in Camarena Case", *Wash. Times*, July 10, 1993, at A5. The action was dismissed, in part, because the Fifth Amendment was not held to apply outside the United States and as the Torture Victim Protection Act, 28 U. S. C. 1350 app. was not applicable to acts occurring before 1992. The case is presently on appeal to the Ninth Circuit. *Alvarez-Machain v. United States et al.*, Civ. No. 95-56121 and oral arguments were held during the Summer 1996.

¹⁰⁵ Abramovsky, Abraham, "Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok", *31 Va. J. Int'l L.* 151, 151 (1991).

violations of Iranian law. Whether such a situation will actually occur, however, is likely more controlled by policy considerations within the highest reaches of a government, particularly considerations stemming from possible retaliatory actions of the United States, than existing or apparent legal authority. Nevertheless, the United States' actions have established a dangerous precedent from which it may not be possible to retreat.¹⁰⁶

V. CONCLUSION

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

Although the Clinton Administration has assured Mexico and other nations that it is not United States' policy to embark upon transborder abductions, the decision of the Supreme Court and the Barr Memo remains unaffected and in place, ready to be utilized again by an Administration that chooses to do

¹⁰⁶ As Senator Moynihan stated "there are terrorists the world over prepared to see Americans killed, and we have legitimated the proposition that a foreign government can send agents into this country or find agents in this country which will take Americans out of the jurisdiction, leave them defenseless in foreign lands, and they will say to us, 'You did it, and we are doing it. What is the difference?'" 138 Cong. Rec. S8535 (Daily ed. June 16, 1992). By no means was this a novel concern for the U. S. government. Seven years before the *Alvarez-Machain* decision, Judge Sofaer discussed the very issue before a Senate Subcommittee hearing on extraterritorial abductions. Resisting the notion that such conduct was acceptable, he stated: "Can you imagine us going into Paris and seizing some person we regard as a terrorist....? [H]ow would we feel if some foreign nation —let us take the United Kingdom— came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, ... because we refused through the normal channels of international, legal communications, to extradite that individual?" *Bill To Authorize Prosecution of Terrorists and Others Who Attack U. S. Government Employees and Citizens Abroad: Hearing before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess., 63 (1985)(Statement of Judge Sofaer).

so.¹⁰⁷ Until an Executive Order or legislative statute states otherwise, no nation's citizen is safe from the grasp of the United States.¹⁰⁸ An early American scholar and patriot, Thomas Paine, once said that an "avidity to punish is always dangerous to liberty" because it leads a Nation "to stretch, to misinterpret, and to misapply even the best of laws."¹⁰⁹ To counter that tendency, Paine reminds us "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."¹¹⁰ Two hundred years after Paine professed his warning, it is a message the United States still should be wary.

¹⁰⁷ In fact, Alan J. Krezcko, then Deputy Legal Adviser at the U. S. Department of State [and now General Counsel for the National Security Council in the Clinton Administration], informed the House Judiciary Subcommittee on Civil and Constitutional Rights that the United States was "not prepared to rule out unilateral action." Krezcko, *supra* note 46, at 616. Then President-elect Clinton stated: "I believe that when another nation is willing to obey the law, and in the absence of information that the government itself has willfully refused to obey the law, that the United States should not be involved in kidnapping." Newton, *supra* note 53, at B3. Still, the best assurance the United States was willing to give other nations to allay their concerns was their "statements and procedures" and "the record of U. S. cooperation in law enforcement matters...." *Idem*. Yet, at the same time, the United States was still insisting there had been "no change in U. S. government policy....", *ibidem*.

¹⁰⁸ Referring to the Barr Memorandum, which essentially was adopted by the Supreme Court, one commentator voiced concern that so long as it is not unequivocally overruled it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need". *Barr Critique, supra*, note 16, at #.

¹⁰⁹ 2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945).

¹¹⁰ *Idem*. Justice Brandeis expressed a similar theme in 1928 when he opined: "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy, to declare that in the administration of criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal— would bring terrible retribution." *Olmstead v. United States*, 277 U. S. 438, 485 (1928)(Brandeis, J., dissenting).