SUPREME COURT OF THE UNITED STATES

No. 91–712

UNITED STATES, PETITIONER *v.* HUMBERTO ALVAREZ-MACHAIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 15, 1992]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

The Court correctly observes that this case raises a question of first impression. See *ante,* at 3. The case is unique for several reasons. It does not involve an ordinary abduction by a private kidnaper, or bounty hunter, as in *Ker* v. *Illinois*, 119 U. S. 436 (1886); nor does it involve the apprehension of an American fugitive who committed a crime in one State and sought asylum in another, as in *Frisbie* v. *Collins*, 342 U. S. 519 (1952). Rather, it involves this country's abduction of another country's citizen; it also involves a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty.

A Mexican citizen was kidnaped in Mexico and charged with a crime committed in Mexico; his offense allegedly violated both Mexican and American law. Mexico has formally demanded on at least two separate occasions[1] that he be returned to Mexico

[1]The abduction of respondent occurred on April 2, 1990. *United States* v. *Caro-Quintero*, 745 F. Supp. 599, 603 (CD Cal. 1990). Mexico responded quickly and unequivocally. Tr. of Oral Arg. 33; Brief for Respondent 3. On April 18, 1990, Mexico requested an official report on the role of the United States in the abduction, and on May 16, 1990 and July 19, 1990, it sent diplomatic notes of protest from the Embassy of Mexico to the United States Department of State. See Brief for United Mexican States as *Amicus Curiae* (Mexican *Amicus*) 5–6; App. to Mexican

and has represented that he will be prosecuted and punished for his alleged offense.[2] It is clear that Mexico's demand must be honored if this official abduction violated the 1978 Extradition Treaty between the United States and Mexico. In my opinion, a fair reading of the treaty in light of our decision in *United States* v. *Rauscher*, 119 U. S. 407 (1886), and applicable principles of international law, leads inexorably to the conclusion that the District Court, *United States* v. *Caro-Quintero*, 745 F. Supp. 599 (CD Cal. 1990), and the Court of Appeals for the Ninth Circuit, 946 F. 2d 1466 (1991) *(per curiam)*, correctly construed that instrument.

Amicus 1a–24a. In the May 16th note, Mexico said that it believed that the abduction was "carried out with the knowledge of persons working for the U. S. government, in violation of the procedure established in the extradition treaty in force between the two countries," App. to Mexican *Amicus* 5a, and in the July 19th note, it requested the provisional arrest and extradition of the law enforcement agents allegedly involved in the abduction. *Id*., at 9a-15a.

[2]Mexico has already tried a number of members involved in the conspiracy that resulted in the murder of the DEA agent. For example, Rafael Caro-Quintero, a co-conspirator of Alvarez-Machain in this case, has already been imprisoned in Mexico on a 40–year sentence. See Brief for Lawyers Committee for Human Rights as *Amicus Curiae* 4.

The Extradition Treaty with Mexico[3] is a comprehensive document containing 23 articles and an appendix listing the extraditable offenses covered by the agreement. The parties announced their purpose in the preamble: The two Governments desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition."[4] From the

[3]App. 72–87.

[4]*Id*., at 72. In construing a treaty, the Court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U. S. 392, 399 (1985). It is difficult to see how an interpretation that encourages unilateral action could foster cooperation and mutual assistance—the stated goals of the Treaty. See also Presidential Letter of Transmittal attached to Senate Advice and Consent 3 (Treaty would "make a significant contribution to international cooperation in law enforcement").

Extradition treaties prevent international conflict by providing agreed-upon standards so that the parties may cooperate and avoid retaliatory invasions of territorial sovereignty. According to one writer, before extradition treaties became common, European States often granted asylum to fugitives from other States, with the result that "a sovereign could enforce the return of fugitives only by force of arms . . . . Extradition as an inducement to peaceful relations and friendly cooperation between states remained of little practical significance until after World War I." M. Bassiouni, International Extradition and World Public Order 6 (1974). This same writer explained that such treaties further the purpose of international law, which is "designed to protect the sovereignty and territorial integrity of states, and [to] restrict impermissible state conduct." 1 M. Bassiouni,

preamble, through the description of the parties' obligations with respect to offenses committed within as well as beyond the territory of a requesting party,[5] the delineation of the procedures and evidentiary requirements for extradition,[6] the special provisions for political offenses and capital punishment,[7] and other details, the Treaty appears to have been designed to cover the entire subject of extradition. Thus, Article 22, entitled "Scope of Application" states that the "Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force," and Article 2 directs that "[e]xtradition shall take place, subject to this Treaty, for willful acts which fall within any of [the extraditable offenses listed in] the clauses of the Appendix."[8] Moreover, as noted by the Court, *ante*, at 8, Article 9 expressly provides that neither Contracting Party is bound to deliver up its own nationals, although it may do so in its discretion, but if it does not do so, it "shall submit the case to its competent authorities for purposes of prosecution."[9]

Petitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more

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International Extradition: United States Law and Practice Ch. 5, §2, p. 194 (2d rev. ed. 1987).

The object of reducing conflict by promoting cooperation explains why extradition treaties do not prohibit informal consensual delivery of fugitives, but why they do prohibit state-sponsored abductions. See Restatement (Third) of Foreign Relations (Restatement) §432, and Comments *a*-*c* (1987).

[5]App. 72–74 (Articles 2 and 4).

[6]*Id*., at 73, 75, 76–79 (Articles 3, 7, 10, 12, and 13).

[7]*Id*., at 74–75 (Articles 5 and 8).

[8]*Id*., at 83, 73.

[9]*Id*., at 76.

than verbiage. For example, provisions requiring "sufficient" evidence to grant extradition (Art. 3), withholding extradition for political or military offenses (Art. 5), withholding extradition when the person sought has already been tried (Art. 6), withholding extradition when the statute of limitations for the crime has lapsed (Art. 7), and granting the requested State discretion to refuse to extradite an individual who would face the death penalty in the requesting country (Art. 8), would serve little purpose if the requesting country could simply kidnap the person. As the Court of Appeals for the Ninth Circuit recognized in a related case, "[e]ach of these provisions would be utterly frustrated if a kidnapping were held to be a permissible course of governmental conduct." *United States* v. *Verdugo-Urquidez*, 939 F. 2d 1341, 1349 (1991). In addition, all of these provisions "only make sense if they are understood as *requiring* each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation." *Id*., at 1351.

It is true, as the Court notes, that there is no express promise by either party to refrain from forcible abductions in the territory of the other Nation. See *ante*, at 9. Relying on that omission,[10]

[10]The Court resorts to the same method of analysis as did the dissent in *United States* v. *Rauscher*, 119 U. S. 407 (1886). Chief Justice Waite would only recognize an explicit provision, and in the absence of one, he concluded that the Treaty did not require that a person be tried only for the offense for which he had been extradited: "The treaty requires a delivery up to justice, on demand, of those accused of certain crimes, but says nothing about what shall be done with them after the delivery has been made. It might have provided that they should not be tried for any other offences than those for which they were

the Court, in effect, concludes that the Treaty merely creates an optional method of obtaining jurisdiction over alleged offenders, and that the parties silently reserved the right to resort to self help whenever they deem force more expeditious than legal process.[11] If the United States, for example, 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.[12] That, however, is a highly improbable interpretation of a consensual agreement,[13] which on its face appears to

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surrendered, but it has not." *Id*., at 434. That approach was rejected by the Court in *Rauscher*, and should also be rejected by the Court here.

[11]To make the point more starkly, the Court has, in effect, written into Article 9 a new provision, which says: "Notwithstanding paragraphs 1 and 2 of this Article, either Contracting Party can, without the consent of the other, abduct nationals from the territory of one Party to be tried in the territory of the other."

[12]It is ironic that the United States has attempted to justify its unilateral action based on the kidnaping, torture, and murder of a federal agent by authorizing the kidnaping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico. See App. to Mexican *Amicus* 5a. This goes to my earlier point, see n. 4, *supra*, that extradition treaties promote harmonious relations by providing for the orderly surrender of a person by one State to another, and without such treaties, resort to force often followed.

[13]This Court has previously described a treaty as generally "in its nature a contract between two nations," *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829); see *Rauscher*, 119 U. S., at 418; it is also in this country the law of the land. 2 Pet., at 314; 119 U. S.,

have been intended to set forth comprehensive and exclusive rules concerning the subject of extradition.[14] In my opinion, "the manifest scope and object of the treaty itself," *Rauscher*, 119 U. S., at 422, plainly imply a mutual undertaking to respect the territorial integrity of the other contracting party. That opinion is confirmed by a consideration of the "legal context" in which the Treaty was negotiated.[15] *Cannon v. University of Chicago,* 441 U. S. 677, 699 (1979).

In *Rauscher,* the Court construed an extradition treaty that was far less comprehensive than the 1978 Treaty with Mexico. The 1842 Treaty with Great

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at 418–419.

[14]Mexico's understanding is that "[t]he extradition treaty governs comprehensively the delivery of all persons for trial in the requesting state `for an offense committed outside the territory of the requesting Party.'" Brief for United Mexican States as *Amicus Curiae*, O.T. 1991, No. 91–670, p. 6. And Canada, with whom the United States also shares a large border and with whom the United States also has an extradition treaty, understands the treaty to be "the exclusive means for a requesting government to obtain . . . a removal" of a person from its territory, unless a Nation otherwise gives its consent. Brief for Government of Canada as *Amicus Curiae* 4.

[15]The United States has offered no evidence from the negotiating record, ratification process, or later communications with Mexico to support the suggestion that a different understanding with Mexico was reached. See M. Bassiouni, International Extradition: United States Law and Practice Ch. 2, § 4.3, at p. 82 ("Negotiations, preparatory works, and diplomatic correspondence are an integral part of th[e] surrounding circumstances, and [are] often relied on by courts in ascertaining the intentions of the parties") (footnote omitted).

Britain determined the boundary between the United States and Canada, provided for the suppression of the African slave trade, and also contained one paragraph authorizing the extradition of fugitives "in certain cases." 8 Stat. 576. In Article X, each Nation agreed to "deliver up to justice all persons" properly charged with any one of seven specific crimes, including murder. 119 U. S., at 421.[16] After Rauscher

[16]Article X of the Treaty provided:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed: and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who

had been extradited for murder, he was charged with the lesser offense of inflicting cruel and unusual punishment on a member of the crew of a vessel on the high seas. Although the treaty did not purport to place any limit on the jurisdiction of the demanding State after acquiring custody of the fugitive, this Court held that he could not be tried for any offense other than murder.[17] Thus, the treaty constituted the exclusive means by which the United States could obtain jurisdiction over a defendant within the territorial jurisdiction of Great Britain.

The Court noted that the Treaty included several specific provisions, such as the crimes for which one could be extradited, the process by which the extradition was to be carried out, and even the evidence that was to be produced, and concluded that "the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offence and for no other." *Id*., at 423. The Court reasoned that it did not make sense for the Treaty to provide such specifics only to have the person "pas[s] into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place." *Id*., at 421. To interpret the Treaty in a contrary way would mean that a country could request extradition of a person for one of the seven crimes covered by the Treaty, and then try the person for another crime, such as a political crime, which was clearly not covered by the Treaty; this result, the Court concluded, was clearly contrary to the intent of the parties and the purpose

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makes the requisition, and receives the fugitive." 8 Stat. 576.

[17]The doctrine defined by the Court in *Rauscher*––that a person can be tried only for the crime for which he had been extradited—has come to be known as the "doctrine of specialty."

of the Treaty.

Rejecting an argument that the sole purpose of Article X was to provide a procedure for the transfer of an individual from the jurisdiction of one sovereign to another, the Court stated:

> "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.
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> "The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the offence was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud or by what pretence of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offence against the laws as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offences than that for which he was extradited, is met by the manifest scope and object of the treaty itself." *Id*., at 422.

Thus, the Extradition Treaty, as understood in the context of cases that have addressed similar issues, suffices to protect the defendant from prosecution despite the absence of any express language in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction.[18]

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[18]In its opinion, the Court suggests that the result in *Rauscher* was dictated by the fact that two federal statutes had imposed the doctrine of specialty upon

Although the Court's conclusion in *Rauscher* was supported by a number of judicial precedents, the holdings in these cases were not nearly as uniform[19] as the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor.[20] It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory.[21] Justice Story

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extradition treaties. *Ante*, at 4. The two cited statutes, however, do not contain any language purporting to limit the jurisdiction of the Court; rather, they merely provide for protection of the accused pending trial.

[19]In fact, both parties noted in their respective briefs several authorities that had held that a person could be tried for an offense other than the one for which he had been extradited. See Brief for United States in *United States* v. *Rauscher*, O.T. 1885, No. 1249, pp. 6–10 (citing *United States* v. *Caldwell*, 8 Blatchford 131 (SDNY 1871); *United States* v. *Lawrence*, 13 Blatchford 295 (SDNY 1876); *Adriance* v. *Lagrave*, 59 N.Y. 110 (1874)); Brief for Respondent in *United States* v. *Rauscher*, O.T. 1885, No. 1249, pp. 8–16 (same).

[20]This principle is embodied in Article 17 of the Charter of the Organization of American States, Apr. 30, 1948, 2 U. S.T. 2394, T.I.A.S. No. 2361, as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U. S.T. 607, T.I.A.S. No. 6847, as well as numerous provisions of the United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (to which both the United States and Mexico are signatories). See generally Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in International Law at a Time of Perplexity 407 (Y. Dinstein and M. Tabory eds. 1989).

[21]When Abraham Sofaer, Legal Adviser of the State

found it shocking enough that the United States would attempt to justify an American seizure of a foreign vessel in a Spanish port:

> "But, even supposing, for a moment, that our laws had required an entry of the Apollon, in her transit, does it follow, that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. *It would be monstrous* to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations." *The Apollon*, 9 Wheat. 362, 370–371 (1824) (emphasis added).[22]

Department, was questioned at a congressional hearing, he resisted the notion that such seizures were acceptable: "`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 Subcommittee on Security and Terrorism of the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 63 (1985).

[22]Justice Story's opinion continued:

"The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the

The law of Nations, as understood by Justice Story in 1824, has not changed. Thus, a leading treatise explains:

> "A State must not perform acts of sovereignty in the territory of another State.
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> . . . . . .
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> "It is . . . a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. Apart from other satisfaction, the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended." 1 Oppenheim's International Law 295, and n. 1 (H. Lauterpacht 8th ed. 1955).[23]

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range of a common shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the American." *The Apollon*, 9 Wheat., at 371–373.

[23]See Restatement §432, Comment *c* ("If the unauthorized action includes abduction of a person,

Commenting on the precise issue raised by this case, the chief reporter for the American Law Institute's Restatement of Foreign Relations used language reminiscent of Justice Story's characterization of an official seizure in a foreign jurisdiction as "monstrous:"

> "When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states)."[24]

In the *Rauscher* case, the legal background that supported the decision to imply a covenant not to prosecute for an offense different from that for which extradition had been granted was far less clear than the rule against invading the territorial integrity of a treaty partner that supports Mexico's position in this case.[25] If *Rauscher* was correctly decided—-and I am

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the state from which the person was abducted may demand return of the person, and international law requires that he be returned").

[24]Henkin, A Decent Respect to the Opinions of Mankind, 25 John Marshall L. J. 215, 231 (1992) (footnote omitted).

[25]Thus, the Restatement of Foreign Relations states in part:

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

. . . . .

"*c. Consequences of violation of territorial limits of*

convinced that it was—its rationale clearly dictates a comparable result in this case.[26]

A critical flaw pervades the Court's entire opinion. It fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law,[27]

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law enforcement. If a state's law enforcement officials exercise their functions in the territory of another state without the latter's consent, that state is entitled to protest and, in appropriate cases, to receive reparation from the offending state. If the unauthorized action includes abduction of a person, the state from which the person was abducted may demand return of the person, and international law requires that he be returned. If the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws." Restatement §432, and Comment *c*.

[26]Just as Rauscher had standing to raise the treaty violation issue, respondent may raise a comparable issue in this case. Certainly, if an individual who is not a party to an agreement between the United States and another country is permitted to assert the rights of that country in our courts, as is true in the specialty cases, then the same rule must apply to the individual who has been a victim of this country's breach of an extradition treaty and who wishes to assert the rights of that country in our courts after that country has already registered its protest.

[27]"In the international legal order, treaties are concluded by states against a background of customary international law. Norms of customary international law specify the circumstances in which the failure of one party to fulfill its treaty obligations

and in my opinion, also constitutes a breach of our treaty obligations. Thus, at the outset of its opinion, the Court states the issue as "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Ante*, at 1. That, of course, is the question decided in *Ker* v. *Illinois*, 119 U. S. 436 (1886); it is not, however, the question presented for decision today.

The importance of the distinction between a court's exercise of jurisdiction over either a person or property that has been wrongfully seized by a private citizen, or even by a state law enforcement agent, on the one hand, and the attempted exercise of jurisdiction predicated on a seizure by federal officers acting beyond the authority conferred by treaty, on the other hand, is explained by Justice Brandeis in his opinion for the Court in *Cook* v. *United States*, 288 U. S. 102 (1933). That case involved a construction of a prohibition era treaty with Great Britain that authorized American agents to board certain British vessels to ascertain whether they were engaged in importing alcoholic beverages. A British vessel was boarded 11 1/2 miles off the coast of Massachusetts, found to be carrying unmanifested alcoholic beverages, and taken into port. The Collector of Customs assessed a penalty which he attempted to collect by means of libels against both the cargo and the seized vessel.

The Court held that the seizure was not authorized by the treaty because it occurred more than 10 miles off shore.[28] The Government argued that the illegality

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will permit the other to rescind the treaty, retaliate, or take other steps." Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 301, 375 (1992).

[28]The treaty provided that the boarding rights could

of the seizure was immaterial because, as in *Ker*, the Court's jurisdiction was supported by possession even if the seizure was wrongful. Justice Brandeis acknowledged that the argument would succeed if the seizure had been made by a private party without authority to act for the Government, but that a different rule prevails when the Government itself lacks the power to seize. Relying on *Rauscher*, and distinguishing *Ker*, he explained:

> "*Fourth*. As the Mazel Tov was seized without warrant of law, the libels were properly dismissed. The Government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.
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> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. *Dodge* v. *United States*, 272 U. S. 530, 532 [(1926)]. Compare *Ker* v. *Illinois*, 119 U. S. 436, 444. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has

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not be exercised at a greater distance from the coast than the vessel could traverse in one hour, and the seized vessel's speed did not exceed 10 miles an hour. *Cook* v. *United States*, 288 U. S. 102, 107, 110 (1933).

> become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. *Gelston* v. *Hoyt*, 3 Wheat. 246, 310 [(1818)]; *Taylor* v. *United States*, 3 How. 197, 205–206 [(1845)]. The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a `vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with' the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare *United States* v. *Rauscher*, 119 U. S. 407." *Cook* v. *United States*, 288 U. S., at 120–122.

The same reasoning was employed by Justice Miller to explain why the holding in *Rauscher* did not apply to the *Ker* case. The arresting officer in *Ker* did not pretend to be acting in any official capacity when he kidnaped Ker. As Justice Miller noted, "the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty *or from the government of the United States*." *Ker* v. *Illinois*, 119 U. S., at 443

(emphasis added).[29] The exact opposite is true in this case, as it was in *Cook*.[30]

The Court's failure to differentiate between private abductions and official invasions of another sovereign's territory also accounts for its misplaced reliance on the 1935 proposal made by the Advisory Committee on Research in International Law. See *ante,* at 10, and n. 13. As the text of that proposal plainly states, it would have rejected the rule of the

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[29]As the Illinois Supreme Court described the action: "The arrest and detention of [Ker] was not by any authority of the general government, and no obligation is implied on the part of the Federal or any State government . . . . The invasion of the sovereignty of Peru, if any wrong was done, was by individuals, perhaps some of them owing no allegiance to the United States, and not by the Federal government." *Ker* v. *Illinois*, 110 Ill. 627, 643 (1884).

[30]The Martinez incident discussed by the Court, see *ante,* at 9–10, n. 11, also involved an abduction by a private party; the reference to the *Ker* precedent was therefore appropriate in that case. On the other hand, the letter written by Secretary of State Blaine to the Governor of Texas in 1881 unequivocally disapproved of abductions by either party to an extradition treaty. In 1984, Secretary of State Schultz expressed the same opinion about an authorized kidnaping of a Canadian national. He remarked that, in view of the extradition treaty between the United States and Canada, it was understandable that Canada was "outraged" by the kidnaping and considered it to be "a violation of the treaty and of international law, as well as an affront to its sovereignty." See Leich, Contemporary Practice of the United States Relating to International Law, 78 Am. J. Int'l L. 200, 208 (1984).

Ker case.[31] The failure to adopt that recommendation does not speak to the issue the Court decides today. The Court's admittedly "shocking" disdain for customary and conventional international law principles, see *ante,* at 14, is thus entirely unsupported by case law and commentary.

As the Court observes at the outset of its opinion, there is reason to believe that respondent participated in an especially brutal murder of an American law enforcement agent. That fact, if true, may explain the Executive's intense interest in punishing respondent in our courts.[32] Such an explanation, however, provides no justification for disregarding the Rule of Law that this Court has a duty to uphold.[33] That the Executive may wish to

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[31]Article 16 of the Draft provides:

"In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. 435, 623 (Supp. 1935).

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

[33]As Justice Brandeis so wisely urged:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a

reinterpret[34] the Treaty to allow for an action that the Treaty in no way authorizes should not influence this Court's interpretation.[35] Indeed, the desire for revenge exerts "a kind of hydraulic pressure . . . before which even well settled principles of law will bend," *Northern Securities Co*. v. *United States*, 193 U. S. 197, 401 (1904) (Holmes, J., dissenting), but it is precisely at such moments that we should remember

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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 the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

[34]Certainly, the Executive's view has changed over time. At one point, the Office of Legal Counsel advised the Administration that such seizures were contrary to international law because they compromised the territorial integrity of the other Nation and were only to be undertaken with the consent of that Nation. 4B Op. Off. Legal Counsel 549, 556 (1980). More recently, that opinion was revised and the new opinion concluded that the President did have the authority to override customary international law. Hearing before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 101st Cong., 1st Sess., 4–5 (1989) (statement of William P. Barr, Assistant Attorney General, Office of Legal Counsel, U. S. Department of Justice).

[35]Cf. *Perkins* v, *Elg*, 307 U. S. 325 (1939) (construing treaty in accordance with historical construction and refusing to defer to change in Executive policy); *Johnson* v. *Browne*, 205 U. S. 309 (1907) (rejecting

and be guided by our duty "to render judgment evenly and dispassionately according to law, as each is given understanding to ascertain and apply it." *United States* v. *Mine Workers*, 330 U. S. 258, 342 (1947) (Rutledge, J., dissenting). The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.

The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Court's cases—including our decision in *Ker* v. *Illinois*—that court held that the prosecution of a defendant kidnaped by agents of South Africa in another country must be dismissed. *S* v. *Ebrahim*, S. Afr. L. Rep. (Apr.-June 1991).[36] The Court of Appeal of South Africa—indeed, I suspect most courts throughout the civilized world—will be deeply disturbed by the "monstrous" decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character.[37] As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a Nation "to stretch, to misinterpret, and to misapply

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Executive's interpretation).

[36]The South African court agreed with appellant that an "abduction represents a violation of the applicable rules of international law, that these rules are part of [South African] law, and that this violation of the law deprives the Court . . . of its competence to hear [appellant's] case . . . ." S. Afr. L. Rep., at 8–9.

[37]As Judge Mansfield presciently observed in a case not unlike the one before us today: "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *United States* v. *Toscanino*, 500 F. 2d 267, 274 (CA2 1974).

even the best of laws."[38] To counter that tendency, he reminds us:

> "He 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."[39]

I respectfully dissent.

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[38]2 The Complete Writings of Thomas Paine 588 (P. Foner ed. 1945).

[39]*Ibid*.