SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES v. ALVAREZ-MACHAIN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 91-712. Argued April 1, 1992-Decided June 15, 1992

Respondent, a citizen and resident of Mexico, was forcibly kidnapped from his home and flown by private plane to Texas, where he was arrested for his participation in the kidnapping and murder of a Drug Enforcement Administration (DEA) agent and the agent's pilot. After concluding that DEA agents were responsible for the abduction, the District Court dismissed the indictment on the ground that it violated the Extradition Treaty between the United States and Mexico (Extradition Treaty or Treaty), and ordered respondent's repatriation. The Court of Appeals affirmed. Based on one of its prior decisions, the court found that, since the United States had authorized the abduction and since the Mexican government had protested the Treaty violation, jurisdiction was improper.

Held: The fact of respondent's forcible abduction does not prohibit his trial in a United States court for violations of this country's criminal laws. Pp. 3-15.

(a) A defendant may not be prosecuted in violation of the terms of an extradition treaty. United States v. Rauscher, 119 U.S. 407. However, when a treaty has not been invoked, a court may properly exercise jurisdiction even though the defendant's presence is procured by means of a forcible abduction. Ker v. Illinois, 119 U. S. 436. Thus, if the Extradition Treaty does not prohibit respondent's abduction, the rule of Ker applies and jurisdiction was proper. Pp. 3-7.

(b) Neither the Treaty's language nor the history of negotiations and practice under it supports the proposition that it prohibits abductions outside of its terms. The Treaty says nothing about either country refraining from forcibly abducting people from the other's territory or the consequences if an abduction occurs. In addition, although the Mexican government was made aware of the Ker doctrine as early as 1906, and language to curtail Ker was drafted as early as 1935, the Treaty's current version contains no such clause. Pp. 7-11.

(c) General principles of international law provide no basis for interpreting the Treaty to include an implied term prohibiting international abductions. It would go beyond established precedent and practice to draw such an inference from the Treaty based on respondent's argument that abductions are so clearly prohibited in international law that there was no reason to include the prohibition in the Treaty itself. It was the practice of nations with regard to extradition treaties that

formed the basis for this Court's decision in Rauscher, supra, to imply a term in the extradition treaty between the United States and England. Respondent's argument, however, would require a much larger inferential leap with only the most general of international law principles to support it. While respondent may be correct that his abduction was "shocking" and in violation of general international law principles, the decision whether he should be returned to Mexico, as a matter outside the Treaty, is a matter for the Executive Branch. Pp. 11-15.

946 F. 2d 1466, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined.

[June 15, 1992]

THE CHIEF JUSTICE delivered the opinion of the Court.

The issue in this case is 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. We hold that he does not, and that he may be tried in federal district court for violations of the criminal law of the United States.

Respondent, Humberto Alvarez-Machain, is a citizen and resident of Mexico. He was indicted for participating in the kidnap and murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar and a Mexican pilot working with Camarena, Alfredo Zavala-Avelar. [1] The DEA believes that respondent, a medical doctor, participated in the murder by prolonging agent Camarena's life so that others could further torture and interrogate him. On April 2, 1990, respondent was forcibly kidnapped from his medical office in Guadalajara, Mexico, to be flown by private plane to El Paso, Texas, where he was arrested by DEA officials. The District Court concluded that DEA agents were responsible for respondent's abduction, although they were not personally involved in it. United States v. Caro- Quintero, 745 F. Supp. 599, 602-604, 609 (CD Cal. 1990). [2]

/* One problem with the ruling is that it might encourage other countries to take the same view. "Hard cases" make bad law. */

Respondent moved to dismiss the indictment, claiming that his abduction constituted outrageous governmental conduct, and that the District Court lacked jurisdiction to try him because he was abducted in violation of the extradition treaty between the United States and Mexico. Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, T.I.A. S. No. 9656 (Extradition Treaty or Treaty). The District Court rejected the outrageous governmental conduct claim, but

held that it lacked jurisdiction to try respondent because his abduction violated the Extradition Treaty. The district court discharged respondent and ordered that he be repatriated to Mexico. Caro-Quintero, supra, at 614.

The Court of Appeals affirmed the dismissal of the indictment and the repatriation of respondent, relying on its decision in United States v. Verdugo-Urquidez, 939 F. 2d 1341 (CA9 1991), cert. pending, No. 91-670. 946 F. 2d 1466 (1991). In Verdugo, the Court of Appeals held that the forcible abduction of a Mexican national with the authorization or participation of the United States violated the Extradition Treaty between the United States and Mexico. [3] Although the Treaty does not expressly prohibit such abductions, the Court of Appeals held that the "purpose" of the Treaty was violated by a forcible abduction, 939 F.2d, at 1350, which, along with a formal protest by the offended nation, would give a defendant the right to invoke the Treaty violation to defeat jurisdiction of the district court to try him. [4] The Court of Appeals further held that the proper remedy for such a violation would be dismissal of the indictment and repatriation of the defendant to Mexico.

In the instant case, the Court of Appeals affirmed the district court's finding that the United States had authorized the abduction of respondent, and that letters from the Mexican government to the United States government served as an official protest of the Treaty violation. Therefore, the Court of Appeals ordered that the indictment against respondent be dismissed and that respondent be repatriated to Mexico. 946 F. 2d, at 1467. We granted certiorari, 502 U. S. -- (1992), and now reverse.

Although we have never before addressed the precise issue raised in the present case, we have previously considered proceedings in claimed violation of an extradition treaty, and proceedings against a defendant brought before a court by means of a forcible abduction. We addressed the former issue in United States v. Rauscher, 119 U. S. 407 (1886); more precisely, the issue of whether the Webster-Ashburton Treaty of 1842, 8 Stat. 576, which governed extraditions between England and the United States, prohibited the prosecution of defendant Rauscher for a crime other than the crime for which he had been extradited. Whether this prohibition, known as the doctrine of specialty, was an intended part of the treaty had been disputed between the two nations for some time. Rauscher, 119 U.S., at 411. Justice Miller delivered the opinion of the Court, which carefully examined the terms and history of the treaty; the practice of nations in regards to extradition treaties; the case law from the states; and the writings of commentators, and reached the following conclusion:

> [A] person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his

> extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." Id., at 430 (emphasis added).

In addition, Justice Miller's opinion noted that any doubt as to this interpretation was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party. Id., at 423. [5] Unlike the case before us today, the defendant in Rauscher had been brought to the United States by way of an extradition treaty; there was no issue of a forcible abduction.

In Ker v. Illinois, 119 U. S. 436 (1886), also written by Justice Miller and decided the same day as Rauscher, we addressed the issue of a defendant brought before the court by way of a forcible abduction. Frederick Ker had been tried and convicted in an Illinois court for larceny; his presence before the court was procured by means of forcible abduction from Peru. A messenger was sent to Lima with the proper warrant to demand Ker by virtue of the extradition treaty between Peru and the United States. The messenger, however, disdained reliance on the treaty processes, and instead forcibly kidnapped Ker and brought him to the United States. [6] We distinguished Ker's case from Rauscher, on the basis that Ker was not brought into the United States by virtue of the extradition treaty between the United States and Peru, and rejected Ker's argument that he had a right under the extradition treaty to be returned to this country only in accordance with its terms. [7] We rejected Ker's due process argument more broadly, holding in line with "the highest authorities" 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." Ker, supra, at 444.

In Frisbie v. Collins, 342 U. S. 519, rehearing denied, 343 U. S. 937 (1952), we applied the rule in Ker to a case in which the defendant had been kidnapped in Chicago by Michigan officers and brought to trial in Michigan. We upheld the conviction over objections based on the due process clause and the Federal Kidnapping Act and stated:

> This Court has never departed from the rule announced in [Ker] that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a `forcible abduction.' No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing

> in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." Frisbie, supra, at 522 (citation and footnote omitted) . [8]

/* The problem of course being that this works both ways. What would the react be to President Bush being abducted by Iraq for crimes under Iraqi law? */

The only differences between Ker and the present case are that Ker was decided on the premise that there was no governmental involvement in the abduction, 119 U. S., at 443; and Peru, from which Ker was abducted, did not object to his prosecution. [9] Respondent finds these differences to be dispositive, as did the Court of Appeals in Verdugo, 939 F. 2d, at 1346, contending that they show that respondent's prosecution, like the prosecution of Rauscher, violates the implied terms of a valid extradition treaty. The Government, on the other hand, argues that Rauscher stands as an "exception" to the rule in Ker only when an extradition treaty is invoked, and the terms of the treaty provide that its breach will limit the jurisdiction of a court. Brief for United States 17. Therefore, our first inquiry must be whether the abduction of respondent from Mexico violated the extradition treaty between the United States and Mexico. If we conclude that the Treaty does not prohibit respondent's abduction, the rule in Ker applies, and the court need not inquire as to how respondent came before it. In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning. Air France v. Saks, 470 U. S. 392, 397 (1985); Valentine v. United States ex. rel. Neidecker, 299 U. S. 5, 11 (1936). 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 nation, or the consequences under the Treaty if such an abduction occurs. Respondent submits that Article 22(1) of the Treaty which states that it "shall apply to offenses specified in Article 2 [including murder] committed before and after this Treaty enters into force," 31 U. S. T., at 5073-5074, evidences an intent to make application of the Treaty mandatory for those offenses. However, the more natural conclusion is that Article 22 was included to ensure that the Treaty was applied to extraditions requested after the Treaty went into force, regardless of when the crime of extradition occurred. [10]

/* Foreign policy (which is the reason given by the defense for dismissing the charges is uniquely within the province of the Executive branch. The Executive Branch opposes return, which shows that the official policy of the US does not recognize the claim made by the defendant. */

More critical to respondent's argument is Article 9 of the Treaty which provides:

"1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

"2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense."
Id., at 5065.

According to respondent, Article 9 embodies the terms of the bargain which the United States struck: if the United States wishes to prosecute a Mexican national, it may request that individual's extradition. Upon a request from the United States, Mexico may either extradite the individual, or submit the case to the proper authorities for prosecution in Mexico. In this way, respondent reasons, each nation preserved its right to choose whether its nationals would be tried in its own courts or by the courts of the other nation. This preservation of rights would be frustrated if either nation were free to abduct nationals of the other nation for the purposes of prosecution. More broadly, respondent reasons, as did the Court of Appeals, that all the processes and restrictions on the obligation to extradite established by the Treaty would make no sense if either nation were free to resort to forcible kidnapping to gain the presence of an individual for prosecution in a manner not contemplated by the Treaty. Verdugo, supra, at 1350.

We do not read the Treaty in such a fashion. Article 9 does not purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution. In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution. Rauscher, 119 U. S., at 411-412; Factor v. Laubenheimer, 290 U. S. 276, 287 (1933); cf. Valentine v. United States ex. rel. Neidecker, supra, at 8-9 (United States may not extradite a citizen in the absence of a statute or treaty obligation). Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures. See 1 J. Moore, A Treatise on Extradition and Interstate Rendition, 72 (1891). The Treaty thus provides a mechanism which would not otherwise exist, requiring, under certain circumstances, the United States and Mexico to extradite individuals to the other country, and establishing the procedures to be followed when the Treaty is invoked.

The history of negotiation and practice under the Treaty also fails to show that abductions outside of the Treaty constitute a violation of the Treaty. As the Solicitor General notes, the Mexican government was made aware, as early as 1906, of the Ker doctrine, and the United States' position that it applied to forcible abductions made outside of the terms of the United

States-Mexico extradition treaty. [11] Nonetheless, the current version of the Treaty, signed in 1978, does not attempt to establish a rule that would in any way curtail the effect of Ker. [12] Moreover, although language which would grant individuals exactly the right sought by respondent had been considered and drafted as early as 1935 by a prominent group of legal scholars sponsored by the faculty of Harvard Law School, no such clause appears in the current treaty. [13]

Thus, the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms. The remaining question, therefore, is whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty. See Valentine, 299 U. S., at 17 ("Strictly the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied") .

Respondent contends that the Treaty must be interpreted against the backdrop of customary international law, and that international abductions are "so clearly prohibited in international law" that there was no reason to include such a clause in the Treaty itself. Brief for Respondent 11. The international censure of international abductions is further evidenced, according to respondent, by the United Nations Charter and the Charter of the Organization of American States. Id., at 17.

Respondent does not argue that these sources of international law provide an independent basis for the right respondent asserts not to be tried in the United States, but rather that they should inform the interpretation of the Treaty terms.

The Court of Appeals deemed it essential, in order for the individual defendant to assert a right under the Treaty, that the affected foreign government had registered a protest. Verdugo, 939 F. 2d, at 1357 ("in the kidnapping case there must be a formal protest from the offended government after the kidnapping"). Respondent agrees that the right exercised by the individual is derivative of the nation's right under the Treaty, since nations are authorized, notwithstanding the terms of an extradition treaty, to voluntarily render an individual to the other country on terms completely outside of those provided in the Treaty. The formal protest, therefore, ensures that the "offended" nation actually objects to the abduction and has not in some way voluntarily rendered the individual for prosecution. Thus the Extradition Treaty only prohibits gaining the defendant's presence by means other than those set forth in the Treaty when the nation from which the defendant was abducted objects.

This argument seems to us inconsistent with the remainder of respondent's argument. The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation. In Rauscher, the Court noted that Great Britain had taken the position in other cases that the Webster-Ashburton Treaty included the doctrine of specialty, but no importance was attached to whether or not Great Britain had protested the prosecution of Rauscher for the crime of cruel and unusual punishment as opposed to murder.

More fundamentally, the difficulty with the support respondent garners from international law is that none of it relates to the practice of nations in relation to extradition treaties. In Rauscher, we implied a term in the Webster-Ashburton Treaty because of the practice of nations with regard to extradition treaties. In the instant case, respondent would imply terms in the extradition treaty from the practice of nations with regards to international law more generally. [14] Respondent would have us find that the Treaty acts as a prohibition against a violation of the general principle of international law that one government may not "exercise its police power in the territory of another state." Brief for Respondent 16. There are many actions which could be taken by a nation that would violate this principle, including waging war, but it cannot seriously be contended an invasion of the United States by Mexico would violate the terms of the extradition treaty between the two nations. [15]

In sum, to infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice. In Rauscher, the implication of a doctrine of specialty into the terms of the Webster-Ashburton treaty which, by its terms, required the presentation of evidence establishing probable cause of the crime of extradition before extradition was required, was a small step to take. By contrast, to imply from the terms of this Treaty that it prohibits obtaining the presence of an individual by means outside of the procedures the Treaty establishes requires a much larger inferential leap, with only the most general of international law principles to support it. The general principles cited by respondent simply fail to persuade us that we should imply in the United States-Mexico Extradition Treaty a term prohibiting international abductions.

Respondent and his amici may be correct that respondent's abduction was "shocking," Tr. of Oral Arg. 40, and that it may be in violation of general international law principles. Mexico has protested the abduction of respondent through diplomatic notes, App. 33-38, and the decision of whether respondent should be returned to Mexico, as a matter outside of the Treaty, is a matter for the Executive Branch. [16] We conclude, however, that respondent's abduction was not in violation of the Extradition Treaty between the United States and Mexico, and therefore the rule of Ker v. Illinois is fully applicable to this case. The

fact of respondent's forcible abduction does not therefore prohibit his trial in a court in the United States for violations of the criminal laws of the United States.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

/* The footnotes for the main and dissenting opinion are placed at the end of the dissenting opinion. */

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 [17] that he be returned to Mexico and has represented that he will be prosecuted and punished for his alleged offense. [18] 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.

I

The Extradition Treaty with Mexico [19] 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." [20] From the preamble, through the description of the parties' obligations with respect to offenses committed

within as well as beyond the territory of a requesting party, [21] the delineation of the procedures and evidentiary requirements for extradition, [22] the special provisions for political offenses and capital punishment, [23] 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." [24] 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." [25]

Petitioner's claim that the Treaty is not exclusive, but permits forcible governmental kidnaping, would transform these, and other, provisions into little more 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, [26] 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. [27] 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. [28] That, however, is a highly improbable interpretation of a consensual agreement, [29] which on its face appears to have been intended to set forth comprehensive and exclusive rules concerning the subject of

extradition. [30] 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. [31] Cannon v. University of Chicago, 441 U. S. 677, 699 (1979).

II

In Rauscher, the Court construed an extradition treaty that was far less comprehensive than the 1978 Treaty with Mexico. The 1842 Treaty with Great 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. [32] After Rauscher 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. [33] 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 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.

> 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. [34]

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 [35] as the consensus of international opinion that condemns one Nation's violation of the territorial integrity of a friendly neighbor. [36] 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. [37] Justice Story 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). [38]

B 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.
>
> . . . . .

> "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).39

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). [40]

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. [41] If Rauscher was correctly decided--and I am convinced that it was-its rationale clearly dictates a comparable result in this case. [42]

III

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,43 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. [44] The Government argued that the illegality 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.

> 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 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 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).

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).45 The exact opposite is true in this case, as it was in Cook.46

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 Ker case.47 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.