An Issue of U.S. Foreign Policy: The Judicial Branch and Transnational Abductions

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The expressions "foreign policy" and "making or implementing foreign policy" have not been included in the U.S. Constitution which just assigns particular powers and responsibilities relating to intercourse with other nations and foreign states to different branches of the federal government. Thus it neither has a "distribution clause" nor establishes who is in charge of foreign policy making or implements it in particular cases. According to the American Constitution the Executive and the Legislative Branches are in charge of policy matters, mainly regarding international norms governing relations between sovereign states. Moreover, deciding what are

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adequate measures in regard to national objectives turns to be a political question, a decision at times beyond, legal and constitutional principles. That is why the Judicial Branch has repeatedly refrained from reviewing matters involving international relations such as the legality of the Vietnam War or President's Carter revocation of the Taiwan Defense Treaty. Things have slightly changed since 1962, in the case of Baker v. Carr, when Supreme Court Judges established three inquiries to decide whether a lawsuit could be considered ready for review. Thus in Alvarez-Machain case Supreme Court carried out duties related to foreign policies. The case involved the abduction of a Mexican national in Mexico, and it can be considered an important precedent, a decision that must be followed by lower courts in subsequent similar cases. At present several lawsuits have been decided according to that precedent which can be considered a new American Foreign policy. Recently, on September 11, 2001, the Ninth Circuit Court ruled that Dr. Alvarez-Machain's rights had been violated, allowing him to sue the U.S., even though the case against the US was remanded for further proceedings.

This paper aims at describing the present state of affairs in the judicial scene regarding such an issue, posing questions and proposing answers and determining its connection with American Foreign policy towards Latin American countries.

Key Words: Foreign policy - policy-making process – national interest – sovereignty - political questions - forcible abduction - Extradition treaties - prosecution

I. - U.S. Foreign policy: Constitutional principles.

According to Charles B. Marshall the foreign policy of the Unites States is "the course of action undertaken by the authority of the United States in pursuit of national objectives beyond the span of

jurisdiction of the United States.[1]" Two main elements of this definition are: 1. - Actions in consequence of such a policy, and 2. - Things beyond the direct control of the government. And its main purpose of "enlightening" such a policy "holds true in all stages of " its national life.[2] To accomplish such requirements, within the policy-making process, some necessary steps are required such as the perception and definition of questions or issues related to the conflict or unsolved situation "respecting the matters on which objectives, policy positions, strategies, and methods of procedure require determination,[3]" ascertain, order, evaluate facts and information and to perceive and analyze "rationally conceived alternative national interests goals, and primary and secondary, long-range and immediate, objectives to be served by policy formulation,[4]" to analyze alternatives in relation to "the form and timing of policy enunciation--both substantive and procedural.[5]" To decide which is the adequate measure for certain national objects turns out to be a political question, a type of decision beyond legal or constitutional principles, even though the latter as well as international law should frame such policies. So one of the main problems to settle foreign policies is connected with decision-making whose essential elements of judgment have been exposed by the Department of State.[6] Such

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[1] Charles B. Marshall, *The Nature of Foreign Policy*, 26 Department of State Bulletin (March 17, 1952), 415-420.

[2] Charles B. Marshall, Ib..

[3] Elmer Plischke, *Foreign Relations: Analysis of Its Anatomy* (Westport, Connecticut: Greenwood, 1988), 257, *See also* Alexander L. George, T*owards a More Soundly Based Foreign Policy*, commission on the Organization of the Government for the Conduct of Foreign Policy, June 1975, vol.2 appendix D, 10

[4] Elmer Plischke, ibid.

[5] Elmer Plischke, ibid.

[6] Department of State, *Diplomacy for the 70'* (Washington: Government Printing

elements can be divided in two groups:

1. - For the U.S. and for other countries or group of countries: interest involved and different degree of importance attached to a particular interest.

2. - For the U.S.: "major pertinent considerations such as the current political/military/economic situation both at home and in the country, or group of countries, affected which challenge or offer opportunities for the advancement, or preservation, of U.S. interest;" "costs in terms of time, people, money influence and good."

The importance of "interest" implies the existence of something valuable for one's own benefit, advantage, or self-interest in connection with changing ideas. It may be any kind of issue according to different periods or situations in order to encourage involvement with or participation in something, in a positive or negative way, and such state of things cannot be clearly and exactly defined. Thus, it all turns out to be a political question. At the same time to finally decide whether something is or is not an "interest," in order to link the above-mentioned elements to determine priorities and decide the best course of action and policy choice with respect to a specific issue, adequate factual and conceptual information, is one of the most important requirements. It is also very difficult to achieve as it implies accurate comprehension of other countries' ideologies, cultures, and decision-making processes.

The Secretary of State, the head of the State Department, is the principal adviser of the President[7] in delineating policies which are made in two principal ways: 1. - "by decisions as to how existing

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Office, 1970), 545-546.

[7] The CIA and the Defense Department are also dominant players in foreign policy-making, *See* James A. Nathan and James K. Oliver, *Foreign Policy making and the American Political System*, Third Edition (Baltimore; The John Hopkins University Press, 1994), 23-26.

policy directives should be executed,"[8] and 2. - by recommendations for new policies or for changes in already existing ones. In order to fulfill such commitments, an adequate and professional staff is needed, but sometimes the staff may find it difficult to change their point of view due to errors and misunderstandings about conflicting issues; it is not easy to set aside ones' opinions and previously analyzed decisions[9] to forge a consensus due to ideological disputes.[10] Besides, it is not easy to determine other countries' interests only by relying on governmental decisions. In Third World countries authorities and people usually have different opinions and interests due to political leaders and parties' own desires.

Neither the expression "foreign policy" nor the phrase "making or implementing foreign policy" has been included within the Constitution, as it just assigns particular powers and responsibilities relating to the intercourse with another nations and foreign states to the various branches of the federal government. Even though the Constitution adheres to the principles of "separation of powers" and the "system of checks and balances," and also stipulates certain specific foreign relations powers, it does not include a special "distribution clause" nor does it establish who is in charge of foreign-policy making or implementation in each particular case. Matters related to foreign policy are made by the President[11] and in some

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[8] John W. Bowling, *How We Do Our Thing: Policy Formulation*, Foreign Service Journal (January 1970), reprinted in U.S. Army War College: Readings (Carlisle, Pennsylvania: U.S. Army College, 1972), 1-5, reprinted by permission of the Foreign Service Journal.

[9] In a similar way, James A. Nathan and James K. Oliver, *Foreign Policy Making and the American Political System*, 3rd. Edition (Baltimore-The Johns Hopkins University Press, 1994), 242-244.

[10] David Ignatius, *Bush's Foreign Policy Problems*, in The Wall Street Journal Europe, September 2, 2003, A8.

[11] U.S. Constitution, Art. 2, Section 2 "The President shall be Commander in Chief

cases by Congress,[12] and some others by a combination of the President and the Senate[13]. But, such provisions are not always complete. For example, the clause assigning power to make treaties is allocated to the President and the Senate; but, on the other hand, the Constitution does not mention who can terminate them. A similar instance relates to the declaration of peace and the control and conduct of U.S. relations with other nations. Moreover, the Constitution does not establish whether the Senate is to take part in the negotiation of a treaty or just deliberate on its merits after the Executive conclude the negotiation.[14] At present distinctions are made between treaties, congressional-executive agreements[15] and sole executive

of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."

[12] U.S. Constitution, Article 1, Section 8**: "**The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; …. … To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; … To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;…"

[13] U.S. Constitution, Article 2, **Section 2: "**He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[14] See *ut supra* note 11.

[15] "A **congressional-executive agreement** is an agreement with a foreign power that has been approved by Congress and the United States. Unlike a treaty, in the US constitutional sense of that term, it does not supercede existing law and does not require a two-thirds vote by the Senate, but rather is enacted as an ordinary law which requires majority votes by both the House and Senate followed by approval

agreements[16]. Such distinctions consider how the agreement is ratified and may be fullfilled and if it supercedes an existing law. Treaties must be ratified by a two-thirds vote of the Senate, while congressional-executive agreements are ratified by a normal Act of Congress, and an executive agreement is only ratified by the President. More than once Presidents have unilaterally terminated agreements through an "executive agreement". This occurred in 1979, when President Jimmy Carter unilaterally terminated the Mutual Defense Treaty with Taiwan in order to recognize the mainland Chinese government[17]. Senator Barry Goldwater, and 20 other senators sued, arguing that if one needs two-thirds of the Senate to make a treaty, breaking one also requires a two-thirds majority. The Supreme Court dismissed Goldwater's complaint.[18] Chief Judge Wright observed in his concurring opinion that Congress not only has initiated the termination of treaties, without presidential request, directing or requiring the President to give notice of termination; but also has annulled treaties without any Executive Branch notice or enacted statues that nullify the domestic effects of treaties. At the same time it conferred to the President the power to terminate a particular treaty.

Moreover, Congress itself has many powerful tools to influence foreign policy decisions regarding treaty matters. For example, under

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by the President". They are usuually used to implement trade agreements such as the North American Free Trade Agreement, in http://www.wikipedia.org/wiki/Congressional-executive_agreement.

[16] Since 1789 to 1970', with the only main exception being Woodrow Wilson's failure in the League of the Nations, in 1919, the President has developed and employed the "executive agreement" to, up to a certain extent, exclude Senate involvement in international agreements.

[17] In a similar way, President Reagan put an end to the bilateral treaty of Friendship, Commerce and Navigation with Nicaragua, as well as U.S. membership in UNESCO.

[18] U.S. Supreme Court Goldwater v. Carter, 444 U.S. 996 (1979).

Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates. Congress thus retains a strong influence over the President's conduct in treaty matters. Judge Wright asserted, "As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government. We thus should decline the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination."[19]

U.S. foreign policy making analyzes U.S. and other countries' interests but its final decisions are connected with domestic elements of judgments such as costs "in terms of time, people, money influence and good." At the same time, to understand the interests of other countries is a difficult task to achieve.

1. - U.S. Foreign policy vis-à-vis Latin American countries

Since the Monroe Doctrine[20] was proclaimed in 1823, the relationship between Latin America and the United States has always been special, though marked, from time to time, with tension. The Monroe Doctrine can be considered as the first and most important doctrine. In a broad sense, foreign relations doctrines established by Presidents can be defined as a distinctive aspiration or goal that may also be accomplished as specific objectives and put into effect through policies and programs of action. In its early stage of development each presidential doctrine is focused on specific geographic areas, for

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[19] App. to Pet. for Cert. 44A-45A.

[20] It declared that the United States would regard European intervention in the hemisphere as "the manifestation of unfriendly disposition towards the United States."

example: 1. Monroe, Johnson and Reagan: Western Hemisphere, 2. Truman: Europe; 3. Eisenhower and Carter: Middle East; 4. Johnson, Nixon and Ford: Asia and the Pacific. So, whenever they intend to extend such doctrines to other places important conflicts and difficulties arise due to the specific characteristics of the new selected areas.

After 1945, the United States set forth two basic concepts within its policy towards Latin America: "opposition to the spread of Communism and support for the growth of a free market economy,"[21] and including from time to time, new concepts and principles such as security, development, corruption, drugs, arms. As for drugs, in 1969, U.S. policy makers considered that to control drugs was important for U.S. hegemony over Latin America. That is why, during Richard Nixon's Presidency, Operation Intercept at the Mexican borders was considered as both domestic and foreign policies objectives. Later in the 1980s National Security Council considered that international narcotrafficking was connected with domestic affairs, and fear of international terrorism[22].

In the 1980s President Ronald Reagan delineated his anti-Communist policies for the Caribbean and Central America. According to President Reagan Communist actions were against U.S. national interests and his aim of peace and security for the Western Hemisphere. He pointed out that there were four basic goals in Central America: 1. - Democracy, reform and human freedom, 2. - economic development, 3. – the security of the region's threatened nations, and 4.

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[21] William O. Walker III, *The Bush Administration's Andean Drug Strategy in Historical Perspective*, in Bruce M. Bagley and William O. Walker III, eds. *Drug Trafficking in the Americas* (North-South Center-University of Miami, 1996), 9.

[22] Sewall H. Menzel, *Fire in the Andes* (New York: University Press of America, 1996), 12.

- dialogue and negotiations.[23] During Reagan's first term Central America turned out to be the dominant in U.S. foreign policy issue. He firmly supported El Salvador, Costa Rica, Honduras and Guatemala, and opposed the leftist government of Nicaragua, and finally invaded a non-Latin American Caribbean country, Grenada. He implemented his policies with complex and arguable tools encountering a sustained opposition from Congress and the public.

In 1988, a subcommittee of the Senate Foreign Relations Committee, issued a report which pointed out the following: "The American criminal justice system has been overwhelmed by the drug war," and added that "The narcotics problem is a national security and foreign policy issue of significan proportions. The drug cartels are also so large and powerful in our hemisphere. They work with revolutionaries and terrorists. They have demostrated the power to corrupt military and civilian institutions alike. Their objectives seriously jeopardize U.S. foreign policy interests and objectives throughout Latin America and the Caribbean."[24] A year later, Colombian events connected with narcoterrorism offered an excellent oportunity for the United States to increase its military role in Latin America. A similar scenario unfolded in Peru and Bolivia during that same period. The success of

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[23] "First, in response to decades of inequity and indifference, we will support democracy, reform and human freedom… Second, in response to the challenge of world recession and, in the case of El Salvador, to the unrelenting campaign of economic sabotage by the guerrillas, we will support economic development. And, third, in response to the military challenge from Cuba and Nicaragua… we will support the security of the region's threatened nations…And, fourth, we will support dialogue and negotiations—both among the countries of the region and with each country," Ronald Reagan, address, Joint Session of Congress, April 17, 1983; American Foreign Policy: Current Documents, 1983, 319-320.

[24] U.S. Congress Senate, A Report Prepared by the Subcommittee on Terrorism, Narcotics and International Operations of the Committee on Foreign Relations, *"Drugs, Law Enforcement and Foreign Policy"* December 1988, 100th Cong., 2d. Sess (Washington, DC: Government Printing Office, 1989).

the so-called Operation Just Cause, in Panama, increased U.S. interest in military solutions for Latin American conflicts considered as U.S. national interests.

U.S. foreign policy vis-à-vis Latin American countries have evolved including national security issues in such a way that policy-makers decided to increase U.S. presence and actions in those countries, and not only from the military point of view. For example, according to the 1979 extradition treaty implementation Colombia "transferred to the United States its sovereign right to prosecute, convict and imprison Colombian nationals."[25] Violation of sovereignty has also been accepted in treaties signed with Peru and Venezuela, Matta-Ballesteros' abduction,[26] and Noriega's indictment,[27] among other events. For some scholars this pattern indicates the U.S. tendency to "substitute the sovereignty of Latin American states in order to solve its territorial and domestic drug problems."[28]

II. - Judicial Branch: Supreme Court precedents.

To a certain extent some similarities exist between the State Department and the Supreme Court decision-making process as in both of them able people are employed to gather information and provide arguments "to particular decision maximizing the benefits

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[25] Samuel I. Del Villar, *Rethinking Hemispheric Antinarcotics Strategy and Security*, in Donald J. Mabry ed., The Latin American Narcotics Trade and U.S. National Security (U.S.A.-Greenwood Press, 1989), 111. In a similar way, Felipe E. Mc Gregor ed., *Coca and Cocaine,* Published under the auspices of the Asociación Peruana de Estudios e Investigación para la Paz (U.S.A.-Greenwood Press, 1993) 91-92.

[26] See *infra* 3.1.

[27] See *infra* 3.1.

[28] Samuel I. Del Villar, ob.cit page 110.

accruing to different special interests or a coalition of such interests"[29] But in the case of judicial decision judges also give importance to an advocate's arguments to achieve a final decision. Adequate and complete information is needed in both cases to decide in controversial cases what is the main political interest or the just and fair decision to be made.

The U.S. Judicial Branch has three main functions: judicial review, judicial interpretation and the generation of common law, so-called *case law.* Common law decisions,[30] collected in "reporters," are considered as "precedent;" that is to say a decision that must be followed by lower courts in subsequent similar cases. To establish a precedent at least 5 of the 9 justices on the U.S. Supreme Court must vote the same way. A simple plurality, such as 4-4-1, would not be sufficient to establish a precedent, but such a vote would provide some guidance. In such a way, judges also make laws. Regarding judicial interpretation, a case or controversy is needed. Such a problem has to be submitted to the courts for resolution through a lawsuit. A "case or controversy" is one of the elements of justiciability; the other two are genuineness and standing. Genuineness means that it must not be made up or feigned. The doctrine of standing is applicable to administrative law cases, as before complaining to the courts a person has to exhaust the administrative alternatives in order to give the agency "an opportunity to correct its own errors, if possible and creates a record for judicial review."[31] After that to seek judicial enforcement of a public law a party must make it clear that it possesses a specific right to be heard by the court, known as "standing to sue." In recent years, the U.S. Supreme Court determined in different cases the requirements for

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[29] John W. Bowling, ob. cit. pages 1-5.

[30] That is to say opinions or cases.

[31] Daniel M Warner, *The Legal Environment of Business* (The Dryden Press-USA, 1992), 116.

plaintiffs to demonstrate standing to sue. In the case *Lujan* v. *Defenders of Wildlife,*[32] the U.S. Supreme Court held that "to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact', that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Recently, the Supreme Court, in deciding the case of Friends of the Earth Inc. v. Laidlaw Environmental Services Inc., [33] concluded that there existed "members' reasonable concerns about the effects of environmental conflict, as it directly affected their recreational, aesthetic, and economic interests. "These submissions present dispositively more than the mere 'general averments' and 'conclusory allegations' found inadequate in the *National Wildlife Federation*."[34] Both of them differ from *Los Angeles* v. *Lyons*[35] in which, according to the decision, "a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy."[36]

The U.S. Constitution does not stipulate that the Supreme Court can review acts of the Legislative branch or of a state legislature and acts of the Executive to determine whether they are constitutional, but such power was assumed in some cases such as, respectively, Marbury and

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[32] 504 U.S. 555, 560—561 (1992).

[33] 528 U.S. 167, 120 S.Ct. 693 (2000). No. 98—822. Argued October 12, 1999–Decided January 12, 2000

[34] *Id.,* at 888.

[35] 461 U.S. 95 (1983).

[36] *Id.,* at 107, n. 7.

Madison[37], in 1803, and United Sates vs. Nixon, in 1974.[38] More than once the Supreme Court has refrained from reviewing such cases considering that they are non-justiciable political questions that can never be considered by the Court. Things have changed slightly since 1962. In Baker v. Carr,[39] Supreme Court Judges established that they would have to answer each of the following inquiries to decide a lawsuit if it were ready for review: (i) Does the issue involve resolution of a question committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? Considering such inquiries in the above-mentioned case, Goldwater v. Carter,[40] the Supreme Court determined that it neither involved review of Presidential activities as Commander in Chief nor illegal interference in the field of foreign affairs, but constitutional division of powers between Congress and the President. That is why " it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[41]

In United States vs. Nixon, Chief Justice Warren Burger, *majority opinion,* held that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of

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[37] 1 Cranch 137 (1803).

[38] 418 U.S. 683 (1974)

[39] 369 U.S. 186, 217 (1962)

[40] 444 U.S. 996 (1979).

[41] Baker v. Carr, supra, 369 U.S., at 211

this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison, that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Although no holding of the Court defined the nature of such judicial power the Court has "authority to interpret claims with respect to powers alleged to derive from enumerated powers," otherwise a clear conflict with the functions of the Courts will arise, according to the Constitution[42].

At present, the U.S. Circuit Courts of Appeals has significantly increased their importance. As the U.S. Supreme Court diminished its opinions, the federal courts of appeals have turned out to be the final decision-makers for most federal cases on many important issues. Thus some lower courts decided not to follow U.S. Supreme Court precedents considering that "that these precedents are no longer good law, even though the U.S. Supreme Court has not overturned such precedents. Because the Court is reviewing fewer and fewer cases, circuit courts are less bound to precedent and the threat of appellate review."[43]

The U.S. Supreme Court has evolved from avoiding decisions on political question to deciding them whenever Baker and Carr enquiries are present. But at present even U.S. Supreme Court precedents are not as important as they used to be because some judges no longer regarded them as "good law." The increasing importance of District

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[42] U.S. Constitution, Article III, Section 2, 1st. paragraph: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[43] The U.S. Circuit Courts are just as important as the U.S. Supreme Court. http://www.fairjudges.or/nominee/pickering/tpoints.html

Courts of Appeals decisions turns out to be a new element within the U.S. Judicial Branch. They will be considered as they set aside Supreme Court precedents labeled as unconstitutional, relying, instead, on their own sentences.

III. - Abduction of a Trans-national: The Alvarez-Machain case[44]:

In April 1990 DEA officials and agents forcibly kidnapped from Guadalajara, Mexico, Humberto Alvarez-Machain, a Mexican physician, indicted for participating in the 1985 torture-murder of Enrique Camarena, a DEA agent. He was taken to El Paso, Texas. In December 1992, he was tried and acquitted of all charges. After several years, on September 11, 2001,[45] the Ninth Circuit Court affirmed the judgment Dr. Alvarez-Machain had obtained against one of his Mexican kidnappers under the Alien Tort Claims Act (ATCA). The Court ruled that his kidnapping violated Dr. Alvarez-Machain's right of freedom of movement, his right to remain in one's own country, his right to security of person and his right to be free from arbitrary arrest and detention under international law. In addition, the Ninth Circuit Court ruled that Dr. Alvarez-Machain was subjected to false arrest when he was kidnapped and that this arrest could be remedied under the Federal Tort Claims Act (FTCA).

In 1992, the Chief Justice delivered the opinion of the Court[46] that the issue in that case was if someone who had been charged with a criminal offense could acquire a defense to the jurisdiction of U.S. courts in the case of having been abducted to that country from

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[44] United States v. Alvarez-Machain (91-712), 504 U.S. 655 (1992).

[45] See, http://www.aclu-sc.org/litigation/intrntnl.shtml

[46] Judge 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.

another with which an extradition treaty existed. He concluded that such a person might be tried in U.S. courts for violations of the criminal law of the United States. Thus, the conflict was connected with the Extradition Treaty, between the United States and the United Mexican States.[47]

Before reaching the Supreme Court, the district court ordered that Alvarez-Machain had to be repatriated to Mexico.[48] At a later date, the Court of Appeals also affirmed the dismissal of the indictment and the repatriation of the respondent, relying on its decision in *United States* v. *Verdugo Urquidez*[49]. 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. 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,[50] "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. It also affirmed 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

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[47] 31 U. S. T. 5059, T. I. A. S. No. 9656 (Extradition Treaty or Treaty), May 4, 1978, [1979].

[48] *United States* v. *Caro Quintero*, 745 F. Supp. 599, 602-604, 609 (CD Cal. 1990), at 614.

[49] Rene Martin Verdugo Urquidez was also indicted for the murder of agent Camarena. In an earlier decision, the Supreme Court held that the Fourth Amendment did not apply to a search by United States agents of Verdugo Urquidez' home in Mexico. *United States* v. *Verdugo Urquidez*, 494 U.S. 259 (1990), cert. pending, No. 91-670. 946 F. 2d 1466 (1991).

[50] 939 F. 2d, at 1350.

against respondent be dismissed and that respondent be repatriated to Mexico.[51]"

The Supreme Court majority opinion, relying on its own precedents, considered the forcible abduction in *United States* v. *Rauscher*[52] in which the defendant had been brought to the United States by way of an extradition treaty. In *Rauscher*, Justice Miller delivering the opinion of the Court examined[53]: 1. - the terms and history of the treaty; 2. - the practice of nations in regard to extradition treaties; 3. - the case law from the states; and 4. - the writings of commentators. Finally he 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."[54]

In *Ker* v. *Illinois*,[55] also written by Justice Miller[56], judges addressed the issue of Frederick Ker who had been tried and convicted in an Illinois court for larceny, and brought before the court by way of a

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[51] 946 F. 2d, at 1467

[52] 119 U.S. 407 (1886),

[53] In connection with the doctrine of specialty if the Webster Ashburton Treaty of 1842, 8 Stat. 576, that governed extraditions between England and the United States, prohibited Rauscher's prosecution for a different crime than the one for which he had been extradited.

[54] *Id.*, at 430 (emphasis added).

[55] 119 U.S. 436 (1886)

[56] Justice Miller also stated that the "treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and 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."

forcible abduction from Peru. In *Ker,*[57] they determined 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."[58]. Such rule has also been applied in *Frisbie* v. *Collins*,[59] a case in which the defendant had been kidnapped in Chicago by Michigan officers and brought to Michigan for his trial. On such occasions the Judges 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."[60]

According to the majority opinion in *Alvarez-Machain* the only differences between *Ker* and *Alvarez-Machain* are that in *Ker* the government of Peru did not object to his prosecution, while in *Alvarez-Machain* there was governmental involvement.

Supreme Court Judges, *majority opinion,* the first inquiry was whether

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[57] This case has been applied to numerous cases where the presence of the defendant was obtained by an interstate abduction. See, *e. g.*, *Mahon* v. *Justice*, 127 U.S. 700 (1888); *Cook* v. *Hart*, 146 U.S. 183 (1892); *Pettibone* v. *Nichols*, 203 U.S. 192, 215-216 (1906).

[58] *Ker, supra*, at 444

[59] 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952)

[60] *Frisbie, supra*, at 522.

the abduction of the respondent from Mexico violated the extradition treaty between the United States and Mexico. Regarding the terms to determine its meaning[61] they concluded that there was nothing in its text to refrain each part from transnational forcible abductions; moreover, it just applied to extraditions requested after it had been put into effect without considering when the crime took place. [62] The Judges also considered that Article 9 of the Treaty[63] "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.[64] …Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures." [65] They also concluded that abductions outside the treaty were not considered a

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[61] *Air France* v. *Saks*, 470 U.S. 392, 397 (1985); *Valentine* v. *United States ex. rel. Neidecker*, 299 U.S. 5, 11 (1936)

[62] 504 U.S. 655 (1992). "This interpretation is supported by the second clause of Article 22 which provides that "[r]equests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899, . . ." Extradition Treaty, May 4, 1978, [1979] United States-United Mexican States, 31 U. S. T. 5059, 5074, T.I.A.S. No. 9656," Note 10 in 504 U.S. 655 (1992).

[63] Article 6 of the Treaty "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.

[64] 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).

[65] See 1 J. Moore, A Treatise on Extradition and Interstate Rendition, 1891, § 72.

violation of that same treaty according to such treaty's history of negotiation and its practice.

Another question considered was if the prohibition of the defendant's prosecution could be interpreted as an implied term as it was obtained from different means than those mentioned in the treaty.[66] The Judges sustained that it was beyond established precedents and practice to conclude that the text of the Treaty prohibits different ways to obtain the presence of individuals outside the U.S.; in such a way the respondent failed to persuade Supreme Court Judges that the United States Mexico Extradition Treaty included a term that prohibited international abductions.

In sum, the United States Supreme Court concluded that the express language of the treaty "d [id] 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,"[67] and "d [id] not support the proposition that the Treaty prohibits abductions outside of its terms."[68] It also rejected to *imply* a term, based upon international practice and precedent, that would "prohibit [] prosecution where the defendant's presence is obtained by means other than those established by the Treaty." [69]

It is also important to point out some highlights of Judge Stevens' dissent decision.[70] Regarding the Extradition Treaty with Mexico,[71]

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[66] 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").

[67] United States v. Alvarez-Machain (91-712), 504 U.S. 655 (1992), *id.* at 664,

[68] *id*. at 666.

[69] *Id.*

[70] Judges Blackmun and O'Connor, JJ., joined Judge Stevens, J., filed a dissenting opinion.

[71] It has been defined by Judge Stevens as a "a comprehensive document containing

he determined that parties' purpose had already been announced in the preamble in which both Governments agreed that their desire "to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition." The treaty also describes parties' obligations in connection with offenses committed within as well as beyond each territory and procedures and requirements for extradition, along with political offenses and capital punishment, and other details.

Judge Stevens agreed with the *majority opinion,* that the Treaty does not include an " express promise by either party to refrain from forcible abductions in the territory of the other Nation."[72] In Judge Stevens' opinion, the interpretation treaty's text[73] plainly implied a mutual undertaking to respect the territorial integrity of the other contracting party, which is confirmed by a consideration of the "legal context" in which the Treaty was negotiated.[74] That is why he held that the Extradition Treaty gave enough protection to Alvarez Machain even though there was no specific expression "in the Treaty itself purporting to limit this Nation's power to prosecute a defendant over whom it had lawfully acquired jurisdiction."

He also pointed out that Justice Story found it shocking that the United States would try to justify an American seizure of a foreign vessel in a Spanish port. He thought that: "*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

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23 articles and an appendix listing the extraditable offenses covered by the agreement."

[72] See 504 U.S. 655 (1992), at 9.

[73] *Rauscher*, 119 U. S., at 422

[74] *Cannon v. University of Chicago,* 441 U.S. 677, 699 (1979).

voluntarily justify such a clear violation of the laws of nations."[75] The laws of Nations, as understood by Justice Story in 1824, have not changed. As Oppenheim stated: "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."[76]

Judge Stevens also considered that the Court's entire opinion "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," and also constitutes a breach of U.S. treaty obligations. Even though he understood that the Executive Branch's deep interest was to ensure Alvarez Machain, who was believed to have taken part in Camarena's murder, be judged in the U.S.,[77] it was not enough to justify "disregarding the Rule of Law that this Court has a duty to uphold. That the Executive may wish to reinterpret the Treaty to allow for an action that the Treaty in no way authorizes nor should influence this Court's interpretation. Indeed, the desire for revenge exerts 'a kind of hydraulic pressure . . . before which even well settled principles of law will bend.'[78] But it is precisely at such moments that we should

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[75] *The Apollon*, 9 Wheat. 362, 370-371 (1824).

[76] 1 Oppenheim's International Law 295, and n. 1 (H. Lauterpacht 8th ed. 1955).

[77] 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.

[78] *Northern Securities Co*. v. *United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

remember 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.'"[79] Judge Stevens also understood that the present case would be an example for foreign judges to emulate, and mentioned a decision of the Court of Appeals of the Republic of South Africa that included U.S. judges' decision in *Ker* v. *Illinois* to hold that the prosecution of a defendant kidnapped by agents of South Africa in another country must be dismissed. *S* v. *Ebrahim*, S. Afr. L. Rep. (Apr. June 1991).[80] Finally he characterized the present Court's decision as "monstrous," because to preserve the Rule of Law is important for every nation. He noted that Thomas Paine warned 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."[81]

Supreme Court Judges, *majority opinion,* in considering the extradition treaty between the United States and Mexico, held that there was no clause connected with forcible transnational abductions of individuals; besides, in their view, extradition treaties established procedures for certain if not all circumstances in such a way a country may seize a transnational to be prosecuted as abductions can be considered a possible option. It was without doubt a dangerous precedent. On the contrary, dissenting opinion held that such an interpretation had been influenced by the Executive and "constitutes a flagrant violation of international law." In a similar way, some years later District Court of Appeals affirmed that Alvarez-Machain's

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[79] *United States* v. *Mine Workers*, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)

[80] 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.

[81] 2 *The Complete Writings of Thomas Paine* 588 (P. Foner ed. 1945).

abduction was illegal.

1- Other Judicial Branch decisions relying on Alvarez-Machain:

a. - United States of America v Manuel Antonio Noriega.[82] The appeals of Manuel Antonio Noriega, who was indicted on drug-related charges, asserted that: "the district court should have dismissed the indictment against him due to his status as a head of state and the manner in which the United States brought him to justice."[83] Regarding the issue of abduction of the transnational Noriega it was considered that he was brought to the United States in violation of the Treaty Providing for the Extradition of Criminals, May 25, 1904.[84] But, as that treaty contains language similar to the U.S.-Mexico Extradition Treaty, that is "to say neither of them says nothing about the treaty signatories' rights to opt for self-help (i.e., abduction) over legal process (i.e., extradition)," so that, like in *Alvarez-Machain,* "to prevail on an extradition treaty claim, a defendant must demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to

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[82] United States Court of Appeals, Eleventh Circuit. Nos. 92-4687, 96-4471. July 7, 1997.

[83] "On December 15, 1989, Noriega publicly declared that a state of war existed between Panama and the United States. Within days of this announcement by Noriega, President George Bush directed United States armed forces into combat in Panama for the stated purposes of "safeguard[ing] American lives, restor[ing] democracy, preserv[ing] the Panama Canal treaties, and seiz[ing] Noriega to face federal drug charges in the United States." *United States v. Noriega,* 746 F.Supp. 1506, 1511 (S.D.Fla.1990). The ensuing military conflagration resulted in significant casualties and property loss among Panamanian civilians. Noriega lost his effective control over Panama during this armed conflict, and he surrendered to United States military officials on January 3, 1990. Noriega then was brought to Miami to face the pending federal charges."

[84] United States of America-Republic of Panama, 34 Stat. 2851 ("U.S.-Panama Extradition Treaty").

seize foreign nationals from the territory of its treaty partner. Noriega has not carried this burden, and therefore, his claim fails."

b. - **U.S. v Matta Ballesteros:**[85] Matta-Ballesteros was a Honduran, who became involved with drug trafficking in 1982 and 1983, and later introduced large amounts of cocaine into the United States. "On April 29, 1985, in Cartagena, Colombia, Matta-Ballesteros was detained by Colombian police on charges unrelated to Camarena's kidnapping and murder. The Colombian police took him to Bogotá where DEA agents interviewed him. He denied participating in Camarena's murder but admitted having some knowledge of it, which he refused to share because he feared he would be killed if he did." On April 5, 1988, Matta-Ballesteros[86] was abducted from his home in Tegucigalpa, Honduras and driven to the United States, via the Dominican Republic, and finally was made a prisoner in the federal penitentiary at Marion, Illinois.

Regarding the abduction issue and the extradition treaties between Honduras and the United States, the judge relied on the Alvarez-Machain sentencing that where the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national.[87] So, "in the absence of express prohibitory terms, a treaty's self-executing nature is illusory." Moreover, treaties between the United States and Honduras are within *Alvarez-Machain*[88] and do not

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[85] U.S. 9th Circuit Court of Appeals, No. 91-50336, D.C. No. CR-87-00422-ER, Argued and Submitted January 4, 1993, Pasadena, California Submission Vacated April 7, 1994; Resubmitted June 6, 1994, Filed December 1, 1995

[86] Matta-Ballesteros unsuccessfully petitioned for a writ of habeas corpus. Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), cert. denied 111 S. Ct. 209 (1990).

[87] Id. at 664-66.

[88] Compare 504 U.S. at 665 -66 with 1909 Honduras-United States Extradition Treaty (37 Stat. 1616; 45 Stat. 2489), Art. VIII; 1933 Inter-Americas Extradition

sufficiently specify extradition as the only way in which one country may gain custody of a foreign national for purposes of prosecution. Thus, treaties between the United States and Honduras include no clause that authorizes dismissal of the indictment against Matta-Ballesteros. Finally, according to the Judges, the Supreme Court "has long held that the manner by which a defendant is brought to trial[89] does not affect the government's ability to try him."[90]

The Judges also analyzed the differences between that case and United States v. Toscanino.[91] In "Toscanino, the defendant alleged that United States agents abducted him from Uruguay, pistol-whipped, bound, blindfolded, brutally tortured, and interrogated him for seventeen days, and finally drugged and brought him to the United States by airplane, all with the knowledge of an Assistant United States Attorney. Id. at 269-70. That court held that if Toscanino's allegations were true, his indictment was subject to dismissal based on the federal court's supervisory powers over the administration of criminal justice first outlined by the Supreme Court in *McNabb v. United States*, 318 U.S. 332, 340 -41 (1943)."[92]

The Court also held that their supervisory powers to order dismissal of prosecutions are connected with just three legitimate reasons: "(1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury;

Treaty (49 Stat. 3111), Arts. II-IV, XXI.

[89] "The rule in Ker applies, and the court need not inquire as to how respondent came before it." Alvarez-Machain, 504 U.S. at 662 .

[90] Ker v. Illinois, 119 U.S. 436 , 444 (1886); Frisbie v. Collins, 342 U.S. 519, 522 (1952).

[91] 500 F.2d 267 (2d Cir. 1974).

[92] In Toscanino judges partially relied on Supreme Court decisions regarding other types of outrageous governmental conduct, such as Rochin v. California, 342 U.S. 165, 172 (1972)3 and United States v. Russell, 411 U.S. 423, 431-32 (1973).

and (3) to deter future illegal conduct."[93] The circumstances connected with Matta-Ballesteros' abduction could not be included among them; nor could governmental misconduct be demonstrated.

c. - United States of America v. Ramón Torres González (2001):[94]

According to Circuit Judge **Lynch** there are two facts important to this appeal:

First: "On May 10, 1990, the United States brought civil forfeiture proceedings in rem to seize property belonging to Torres-Gonzalez, including some $43 million thought to be buried in barrels on Torres-Gonzalez's farm at Barrio Espinosa in Dorado, Puerto Rico. Under an arrest warrant, the government seized most of the property in the complaint, but did not find any hidden barrels of money. In August 1990, the district court issued a partial decree of forfeiture, which did not describe any buried monies."

Second: It "began in November 1990, when a grand jury indicted Torres-Gonzalez on drug charges. In early December 1990, he was detained in Venezuela and brought to the United States. Torres-Gonzalez and his wife each told the government there were drug monies hidden at the home of the wife's father." The government, after having found close to $14 million, seized the property but never filed a separate forfeiture action for such amount.

Regarding those facts, District Judge Lynch stated that Torres-Gonzalez raised one argument connected with present paper: "he argues that the sentence should be vacated because the U.S. did not have jurisdiction to try him upon his seizure in Venezuela, and no proper extradition proceedings were held."[95]

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[93] United States v. Simpson, 927 F.2d 1088, 1090, cert. denied, 484 U.S. 898 (1987). See also United States v. Hastings, 461 U.S. 499, 505 (1982); United States v. Gatto, 763 F.2d 1040, 1044 (9th Cir. 1985).

[94] U.S v Gonzalez, U.S. 1st Circuit Court of Appeals, 00-1370, 00-1384, 02/13/01.

[95] The Treaty of Extradition Between the United States of America and Venezuela,

Regarding this issue the District Court held that the issue should not be vacated and the former Court had sentenced in an adequate way relying on *United States v. Alvarez-Machain*, in which, as the Supreme Court stated, there was no implied or express mentioned against forcible abduction, and it added that "such means of apprehension did not deprive the district court of jurisdiction over the defendant"[96] who "provides no reason to distinguish his case." Moreover, in the present case the "Venezuelan authorities cooperated in his apprehension and voluntarily surrendered him to the United States."[97]

d. - Mir Aimal Kasi[98] v Ronald J. Angelone, Director of the Virginia Department of Corrections. Judge Traxler wrote the opinion, in which Judge Wilkins and Judge King joined.[99] On January 25, 1993, a Virginia State Court Jury convicted Mir Aimal Kasi for capital

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Jan. 19-21, 1922, 43 Stat. 1698, T.S. No. 675 did not encompass drug trafficking offenses. "Article 6 of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 I.L.M. 493 (1989), did incorporate drug trafficking offenses into pre-existing extradition treaties between the parties. The applicability of this provision to Torres-Gonzalez is not clear, as the Convention was not ratified by Venezuela until July 16, 1991, after the completion of defendant's offense and his removal. The United States and Venezuela were also parties to the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407. Article 36 of that Convention, as amended, also made narcotic offenses extraditable offenses under existing treaties, see 1971 WL 31612, at *8. Since the issue of whether or not the defendant's offense was extraditable is not relevant to our conclusion, we do not reach that question." From Note 1.

[96] *See* id. at 663-69

[97] Ibid.

[98] On January 25, 1993, Kasi, also known in Pakistan as Kansi, killed and wounded many people in Langley, Virginia, U.S.. The following day he flew to Pakistan, and 4 years later he was abducted and taken to the U.S. where he was sentenced to die. On November 14, 2002, he was executed in Virginia.

[99] U.S. Court of Appeals for the Fourth Circuit, No. 02-2, (CA-00-470-2), Argued: June 5, 2002, Decided: August 15, 2002.

murder and other crimes. The Virginia Supreme Court denied Kasi's petition for state habeas relief.[100] He then appealed the district court's denial of his federal petition for writ of habeas corpus, and the court decided that he "is not entitled to habeas relief." Mir Aimal Kasi was in Pakistan when F.B.I. agents abducted him in order to send him to the United States to be sued, and on his way to that country he signed a written confession recognizing the crimes and a waiver on his rights. So, one of his claims was connected with his abduction in violation of an Extradition Treaty in force between the United States and Pakistan. The Court held, among other principles, that: "Under this country's jurisprudence, it has long been held that a criminal defendant who has been *abducted* to the United States from a foreign nation with which the United States has an extradition treaty does not thereby acquire a defense to the jurisdiction of the courts within this country."[101] Moreover, the 1931 Extradition Treaty between the United States and the United Kingdom, Pakistan's former colonial sovereign, still governs extradition proceedings between the two countries. Considering the Alvarez-Machain case, the Court concluded that "In sum, although the terms of an extradition treaty might limit a court's ability to prosecute a defendant who has been returned to the United States by virtue of the treaty in certain circumstances, the Court has plainly held that an extradition treaty does not divest courts of jurisdiction over a defendant who has been abducted from another country where the terms of the extradition treaty do not prohibit such

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[100] *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998).

[101] *See Ker v. Illinois*, 119 U.S. 436, 444 (1886) (rejecting defendant's claim that he was illegally subjected to trial in Illinois where a person acting on behalf of the United States government, although armed with a warrant to effectuate the defendant's removal from Peru pursuant to the applicable extradition treaty between the countries, opted instead to forcibly abduct defendant and return him to the United States without Peruvian assistance).

forcible abduction."[102]

There are some similarities among all the cases considered above and their sentences:

1. - All of them included the Avarez-Machain decision regarding extradition treaties to hold that there is no mention of abduction of transnationals as an option to sending a person to the U.S. to be prosecuted.

2. – In all the above-mentioned cases the abduction was an Executive Branch decision.

3. - All of the cases were connected with sensitive U.S. domestic interests and national security issues: drugs and/or terrorism (murder).

4. - Unlike *Alvarez-Machain* no government presented a formal protest against the abduction.[103]

5. - None of them relied or even mentioned, in connection with abductions, the Caro Quintero case,[104] a lower court decision ordering the repatriation of a transnational who had been abducted.

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[102] *See Alvarez-Machain*, 504 U.S. at 670; *United States v. Noriega*, 117 F.3d 1206, 1213 (11th Cir. 1997) ("Under Al*varez-Machain*, to prevail on an extradition treaty claim, a defendant must demonstrate by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner.").

[103] "Panama has not sought immunity for Noriega," United States Court of Appeals, Eleventh Circuit. Nos. 92-4687, 96-4471. July 7, 1997. "This case does not turn on a protest by the sovereign of the country from which the defendant was abducted for trial in federal court; for there was no such protest," Matta-Ballesteros v. Henman, 896 F.2d 255, 259-260 (7th Cir. 1990). "Kasi was forcibly abducted by United States officials and returned to this country, perhaps with the acquiescence of the Pakistani government or other Pakistani citizens, but not in violation of the terms of the Extradition Treaty between the two countries," U.S. Court of Appeals for the Fourth Circuit, No. 02-2, (CA-00-470-2) "Indeed, in this case the Venezuelan authorities cooperated in his apprehension and voluntarily surrendered him to the United States," U.S v Gonzalez, U.S. 1st Circuit Court of Appeals, 00-1370, 00-1384, 02/13/01.

[104] *United States* v. *Caro Quintero*, 745 F. Supp. 599, 602-604, 609 (CD Cal. 1990).

The case of Matta-Ballesteros was the only one considered in all cases in which a District Court of Appeals sentenced[105] different cases connected with abductions.

IV. - Conclusions:

The importance of U.S. foreign policy interests cannot be diminished as it can be considered the key to understand certain courses of action undertaken by the Executive Branch, and sometimes, also, by the Judicial Branch. But as human beings have to determine what type of conflict or issue is to be considered an "interest," error, misunderstanding and mistake are within their scope. The word "interest" has no objective and general definition for each case as it implies the existence of something valuable for one's own benefit, advantage, self-interest, and it is the starting point to do, or refrain from doing, something. Besides, the U.S. Constitution has no definition of "interest" within foreign policy or "political" issues. Moreover there is no Constitutional "distribution clause;" rather, the Constitution envisages a partnership between the Legislative and Executive Branches in foreign policy, so some matters related to foreign policy are made by the President, some by Congress , and some are jointly made by the President and Senate. Thus, Judicial review turns out to be an interlocking totality of governance and the last tool that the U.S. governmental system has to determine whether an action, course of action or any other decision about the conduct of public business could be considered constitutional or not. At present there also exists a distinction between treaties, congressional-executive agreements and sole executive agreements. The last mentioned has been an important presidential tool for foreign policiy decision-making without Legislative Branch presence.

The above-mentioned principles, concepts, tools, including also

[105] They mentioned Toscanito case, 500 F.2d 267 (2d Cir. 1974).

Presidential foreign relations doctrines, can be considered the most important elements for understanding the relationship between Latin America and the United States. Since 1945, Communism and the free market economy have been two basic concepts along with others connected with development, corruption, arms, drugs, et al; by 1969, the drug issue was regarded as highly important for U.S. hegemony over Latin America, and in the 1980s it was connected with national or domestic interests, up to the extent that, it was believed that it would "seriously jeopardize U.S. foreign policy interests and objectives throughout Latin America and the Caribbean."[106] Since then the U.S. presence as well as a wide range of different actions have increased in Latin America up to the extent that abductions of transnationals were considered and put into effect, undermining U.S.-Latin American relations. Then it was the Judicial Branch's turn to decide whether such courses of actions were within the Constitutional frame or not.

Judicial review and political issues are two important concepts that have neither been included in the Constitution nor have a strict and unique definition. So the three inquiries incorporated in *Baker v. Carr* as well as personal decisions regarding a lawsuit are part of Judicial Branch interpretation. In the Alvarez-Machain case there was another important element for some, but not all, judges to decide: national policy interest. The torture-murder of Enrique Camarena was a terrible issue to deal with and the Executive Branch's desire to prosecute Alvarez-Machain was understandable. But it is one thing to understand such behavior and another quite different thing to accept the Executive Branch's decision to set aside international agreements

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[106] U.S. Congress Senate, A Report Prepared by the Subcommittee on Terrorism, Narcotics and International Operations of the Committee on Foreign Relations, *"Drugs, Law Enforcement and Foreign Policy"* December 1988, 100th Cong., 2d. Sess (Washington, DC: Government Printing Office, 1989).

and constitutional principles.

It is interesting to note than in connection with the Alvarez-Machain case the sentences of lower courts differed from the Supreme Court decision as they affirmed the dismissal and repatriation of Alvarez-Machain considering that the Extradition Treaty between the United States and Mexico had been violated, mainly relying on their own sentences. The District Court interpretation was according to the text and the "purpose" of the Treaty. But Supreme Court, *majority opinion*, considered that something that is not expressly prohibited could be permitted, so, in a way, they went beyond the practices and intentions of nations. It can also be argued that in relying on *Frisbie* v. *Collins*,[107] they assumed that Alvarez-Machain was guilty, as they pointed out that "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."[108] They even pointed out that the only difference between *Ker* and *Alvarez- Machain* is that in the first one there was no governmental involvement in the abduction.

Judges Blackmun and O'Connor joined Judge Stevens' dissenting opinion. For dissenting opinion, considering "legal context" and interpretation of the Treaty, abductions are beyond the purpose of the parties. Judge Stevens also recalled Justice Story's expression regarding a similar issue: *"It would be monstrous."* That is why he held that such behavior was a "flagrant violation of international law," and also a "breach of our treaty obligations." This opinion turned out to be upheld on September 11, 2001, by the Ninth Circuit Court when it affirmed that the judgment of Alvarez-Machain's abduction was illegal, allowing him to sue the U.S., even though the case against the U.S. was remanded for further proceedings. But, regardless, the case

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[107] 342 U.S. 519, rehearing denied, 343 U.S. 937 (1952)

[108] *Frisbie, supra*, at 522.

will have to be reviewed in a country whose impartiality is under discussion and it will possibly depend on political reasons more than the rule of law; even in this last case, it is almost certain that proceedings and legal principles will be according to local and not international points of view. Thus an international justice court would be the most adequate jury to try such a case.

Judge Stevens' assertion that the present decision could be an example for foreign judges proved to be partially true, but only in connection with U.S. lower courts, as there have been several lawsuits that have been considered in a similar way. Most of them are connected with drug-related issues and one with terrorist activities, and at the same time, mainly with Latin Americans abductions. Very few of them were connected with people from another region such as the Kasi case. It might be a coincidence, or perhaps it could be easier to impose that particular rule over Latin American citizens, whose governments, sometimes, are not strong enough or have enough interest to protect their citizens.

The Alvarez-Machain judgment proved that some U.S. Supreme Court judges sometimes decide according to national political interests and set aside constitutional interpretation, and that they can be deeply influenced by the Executive Branch. But as U.S. Supreme Court precedents are not regarded to be as important as they formerly were it will all depend on decisions of the lower courts to rely on them or not. In such a way, the 2001 Ninth Circuit decision ruling that Dr. Alvarez-Machain's rights had been violated can be considered an important sentence to respect the sovereignty and independence of other countries, mainly Latin American ones. It is also connected with foreign policy as it states that it is an important commitment for the U.S. government to abstain from the unilateral use of illegal actions involving the illicit drug trade or terrorism, and that it is necessary for it to look for constitutional courses of action in accordance with another countries within international agreements and law.

It seems to be a paradox that the country that created the federal system and established an independent Judicial Power, within an adequate balance of powers, is the one who sets aside the rule of law and international agreements. But, at the same time it proved that dissention is possible among its own institutions, and respect for their decisions prevails over political interests.

From a constitutional point of view such U.S. Supreme Court decisions allow us to recall that, as it has already been stated in the 1948 UN Type List, Constitutional Law is a part of Political Science and cannot be understood without considering other social and political institutions as well as the development and state of affairs of societies taken as a whole.