

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

HUMBERTO ALVAREZ-MACHAIN

CASE NO: 91-712

PLACE: Washington, D.C.

DATE: April 1, 1992

PAGES: 1 - 51

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 91-712

6 HUMBERTO ALVAREZ-MACHAIN :

7 - - - - - X

8 Washington, D.C.

9 Wednesday, April 1, 1992

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 KENNETH W. STARR, ESQ., Solicitor General, Department of
15 Justice, Washington, D.C.; on behalf of the
16 Petitioner.

17 PAUL HOFFMAN, ESQ., Los Angeles, California; on behalf of
18 the Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
KENNETH W. STARR, ESQ.	
On behalf of the Petitioner	3
PAUL HOFFMAN, ESQ.	
On behalf of the Respondent	23
REBUTTAL ARGUMENT OF	
KENNETH W. STARR, ESQ.	
On behalf of the Petitioner	48

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-712, United States v. Humberto
5 Alvarez-Machain.

6 General Starr.

7 ORAL ARGUMENT OF KENNETH W. STARR

8 ON BEHALF OF THE PETITIONER

9 MR. STARR: Mr. Chief Justice, and may it please
10 the Court:

11 For over 100 years this Court has steadfastly
12 adhered to what has become known as the Ker-Frisbie
13 doctrine. Under that doctrine, the jurisdiction of courts
14 is not impaired by the fact that an individual was
15 unlawfully brought before the court to stand trial.

16 That doctrine has served as the backdrop for the
17 executive branch's negotiation of numerous extradition
18 treaties, including our treaty with Mexico. This case,
19 involving the forcible abduction of an individual from
20 Mexico to stand trial in this country in connection with
21 the torture and death of special agent Enrique Camarena of
22 the Drug Enforcement Administration brings this doctrine
23 once again before the Court.

24 In this case, the lower courts concluded that
25 the Ker-Frisbie doctrine does not apply where there is an

1 extradition treaty in effect, the extradition treaty was
2 arguably violated by the abduction, and where the foreign
3 government protests the abduction.

4 QUESTION: General Starr, as a preliminary
5 matter, has the State Department Legal Advisors' Office
6 joined your group?

7 MR. STARR: The legal advisor is not on the
8 brief, but the brief expresses the views of the United
9 States, which includes the Department of State, and
10 Justice Blackmun, there should be no significance to the
11 fact that they are not shown on the brief. Their legal
12 advisor, Mr. Williamson has in fact opined that in his
13 view it is entirely appropriate and proper for courts to
14 exercise jurisdiction under circumstances such as these.

15 The Government speaks with one voice with
16 respect to this case.

17 QUESTION: Nothing formal to that effect,
18 however?

19 MR. STARR: He did provide --

20 QUESTION: Just opinion?

21 MR. STARR: A letter or an opinion, that is
22 correct, but that is a customary way, Justice Blackmun, in
23 which the legal advisor expresses his views.

24 In our view the --

25 QUESTION: May I ask a question --

1 MR. STARR: Yes.

2 QUESTION: Before you get into your argument,
3 why is this case a little different than some of the other
4 Ker-Frisbie cases, has the doctrine ever been applied to a
5 case involving the crime committed in another country by a
6 national of that country?

7 MR. STARR: By a national of that country, I
8 believe the answer to that question is no.

9 QUESTION: So this is a unique -- this is a case
10 of first impression?

11 MR. STARR: The facts are different, yes, but I
12 think the doctrine itself, Justice Stevens, speaks quite
13 broadly to the courts, that it is the role of the courts
14 to try cases, and not to involve themselves with how the
15 individual came into the court.

16 QUESTION: But in the Rauscher case, that is
17 discredited --

18 MR. STARR: Yes, because under that -- that is
19 exactly right, and I think that gets to the core of this
20 case. The distinction between Ker on the one hand and
21 Rauscher on the other. Justice Miller's opinion in the
22 Rauscher case examined very carefully the background of
23 the treaty, the Webster-Ashburton treaty --

24 QUESTION: And they also emphasized the fact
25 that he was a fugitive and an American citizen, whereas

1 the facts here are much different.

2 MR. STARR: The facts here are different, but
3 the point remains, Justice Stevens, that the doctrine
4 itself has been the broad doctrine that one simply does
5 not inquire into how -- the court does not inquire into
6 how the individual came there unless, and this is
7 Rauscher's point, there is a violation of a treaty.

8 A treaty is law. It must be respected as law,
9 but here it is uncontested that there is no express
10 provision of the treaty that speaks to this --

11 QUESTION: But you do concede that if there were
12 a violation of the treaty, that the Court would not have
13 jurisdiction?

14 MR. STARR: Depending on the precise terms of
15 the treaty, I don't want to speak so broadly as to say any
16 violation might give rise to a divesting of jurisdiction.
17 But certainly if we had a situation where, as in the
18 Rauscher case, there is a clear treaty provision, the
19 doctrine of specialty, well-understood, discussed at great
20 length indeed. That doctrine finds its way into the text
21 of our treaty with Mexico. It is quite well-settled that
22 if a state is going to perform an official act and render
23 a fugitive over, then that state has an interest in that
24 individual only be charged with a crime that has been laid
25 at his feet.

1 But note that in Rauscher, the only relief for
2 Rauscher in contrast to the situation here, was that he
3 had to be tried for murder and not for cruel and unusual
4 punishment.

5 There was no requirement that Rauscher be
6 returned to the United Kingdom where he had found asylum.

7 QUESTION: He would have to return before he
8 could be tried for cruel and unusual punishment.

9 MR. STARR: He might have to be --

10 QUESTION: If he is --

11 MR. STARR: Before he is tried for a crime other
12 than that for which the nation rendered him over. I think
13 this is a very important aspect of this case: to what
14 extent does the extradition treaty operate exclusively
15 with respect to our relationships with Mexico, and I think
16 it is vitally important for me to make one point: that
17 the extradition treaty is a tool, it is a valuable tool,
18 but it is only a tool.

19 We deal with the Government of Mexico quite
20 informally. There are numerous instances of informal
21 renditions of individuals outside the treaty terms. There
22 have been instances where there have been informal
23 renditions of individuals where it would appear that to
24 extradite them might run afoul of the terms of the treaty,
25 and Mexico therefore chooses, for political reasons,

1 to --

2 QUESTION: It is perfectly clear, there is no
3 precedent for our kidnapping a foreign national when that
4 national's country is asserting jurisdiction.

5 MR. STARR: There is no case that involves those
6 specific facts, Justice Stevens. I think that I concede
7 to you. What I do not concede is that the insight of Ker
8 in any way is compromised by the point that the individual
9 happens to be a foreign national, and when the Court
10 thinks as to the circumstances that might well arise,
11 terrorism, narcotrafficking, there may very well be
12 circumstances when it is the sober judgment of the United
13 States Government that extraordinary action is required.

14 And that is a matter that is entrusted in this
15 Court, speaking initially through Chief Justice Marshall
16 in the Head Money cases and in the Ship Richmond case said
17 these are issues ultimately for the political branches.
18 If the --

19 QUESTION: General Starr, is it any less a
20 violation of international law to kidnap a foreign
21 national from a foreign country than an American national
22 from a foreign country?

23 MR. STARR: I do not --

24 QUESTION: Can I assume that we are not supposed
25 to go in and just snatch people from foreign countries

1 without their consent?

2 MR. STARR: I think it certainly could be
3 maintained that as Mexico can reasonably maintain, that
4 there was a violation of Mexico's sovereignty, and in your
5 hypothetical, certainly a violation of sovereignty.

6 What I don't want to readily concede, Justice
7 Scalia, is that a violation of sovereignty is necessarily
8 a violation of international law, of customary
9 international law.

10 QUESTION: That isn't the point I am making.
11 Whether it is a violation --

12 MR. STARR: Correct.

13 QUESTION: -- of Mexico's sovereignty depends
14 upon whether the person snatched was a Mexican citizen or
15 not.

16 MR. STARR: The answer is no. It is the
17 territorial integrity that would have been compromised.

18 QUESTION: And indeed, an American national
19 might have more cause to complain about the violation of
20 international law by his country than a Mexican national
21 might.

22 MR. STARR: It is certainly clear from the
23 standpoint of the Nation that its sovereignty has been
24 violated, and that is a very serious matter. Chief
25 Justice Marshall in Ship Richmond said that is a matter

1 for the political branches. Indeed, in the Head Money
2 cases he said this is a matter that may entail the most
3 delicate kind of contretemps between nations, including
4 the possibility of hostilities, but of this, the courts
5 are to have no cognizance.

6 QUESTION: General Starr, historically, has the
7 situation ever been reversed, where Mexico has come and
8 raided us and taken someone? I am old enough to remember
9 the days of Pancho Villa.

10 (Laughter.)

11 MR. STARR: There are in fact episodes, in fact,
12 at footnote 23 of our opening brief we do recount a
13 situation which is quite similar to that.

14 QUESTION: What would this country do if it
15 happened?

16 MR. STARR: But in terms of what this country
17 would do, in fact, what we saw in the Sidney Chaffee case
18 I think is quite illustrative. Individuals go into Canada
19 and kidnap a Canadian businessman and bring him to the
20 United States to stand trial.

21 It would not be our position, Justice Blackmun,
22 that notwithstanding the affront to Canada's sovereignty
23 or to Mexico's sovereignty or to the United States'
24 sovereignty, that the courts of those countries were
25 divested of jurisdiction. That is the narrow point that

1 we are making, that these are matters that are entrusted
2 to the political branches through the diplomatic process,
3 to examine and to explore and to resolve.

4 QUESTION: Do we decide this case, General
5 Starr, on the assumption that there has been a violation
6 of international law?

7 MR. STARR: I don't think that you need to
8 assume that there has been a violation of international
9 law, but we are prepared, Justice Kennedy, to say that,
10 assuming arguendo that there was, nonetheless, the
11 Government's position should prevail.

12 QUESTION: Do you concede that there is a
13 violation of international law?

14 MR. STARR: I do not concede that there is a
15 violation of international law but for purposes of
16 argument, I am prepared to say that if there were a
17 violation of international law, still Ker-Frisbie applies,
18 just as it applies when there is a violation of the
19 Constitution of the United States.

20 QUESTION: But there is no violation of
21 international law in either Ker or Frisbie.

22 MR. STARR: Oh, there clearly was a violation of
23 international law --

24 QUESTION: Maybe civilian law possibly, but the
25 man did not have an asylum status in that case.

1 MR. STARR: Well, Justice Stevens, I have to
2 respectfully disagree that there was at least a violation
3 of Peruvian sovereignty by virtue of -- as the Court has
4 described this case --

5 QUESTION: But he did not have asylum status, he
6 was a mere fugitive.

7 MR. STARR: But he was nonetheless, and this
8 Court -- when I read the Court's opinion in Ker it does
9 not place any emphasis at all or any significance on that
10 individual's status as an American citizen and as a
11 fugitive --

12 QUESTION: -- at that point could have --

13 MR. STARR: But Rauscher, again, talks about the
14 point, and we have no quarrel with that as embodied, as
15 reflected in the fact that the extradition treaty with
16 Mexico incorporates the specialty principle, but that is a
17 narrow principle --

18 QUESTION: -- it has the distinction between
19 Mexican nationals and those who are not Mexican
20 nationals --

21 MR. STARR: Yes, it does, and in fact, I think
22 that is a very important point. One of the reasons,
23 Justice Stevens, that it is somewhat impracticable to
24 proceed under the extradition treaty is that Mexico has no
25 obligation to extradite its nationals. The United States

1 will and does. The Government of Mexico has never
2 extradited one of its nationals under the terms of an
3 extradition treaty.

4 It has done so in --

5 QUESTION: But, General Starr, the treaty in
6 Article 9 does say that if Mexico doesn't extradite one of
7 its own nationals, that nevertheless, the United States
8 can require Mexico to prosecute the person there.

9 MR. STARR: There is no question we have a right
10 under Article 9.2 to have it submitted --

11 QUESTION: My concern, frankly, is that it is
12 not so clear to me that the extradition treaty doesn't
13 contemplate that that is the exclusive process to be
14 followed. When you read Article 2, that says for the
15 designated offenses, including murder, extradition shall
16 take place subject to the treaty, and if you look at
17 Article 9 which says the country doesn't have to yield up
18 its own nationals, but will have to prosecute, I think one
19 could come away thinking the treaty covers this case.

20 MR. STARR: I think with all respect that would
21 be a misimpression. First of all, and foremost is the
22 legal backdrop of our negotiation, Justice O'Connor, of
23 this treaty. This treaty, along with our 102 other
24 treaties, was negotiated against the backdrop of
25 Ker-Frisbie, which has been very generally understood

1 throughout the world, but certainly by the courts of this
2 Nation as meaning that courts are not divested of
3 jurisdiction even if there is an unlawful abduction.

4 But now let me move to the treaty.

5 I think, with all respect, that represents an
6 overreading of the treaty. The treaty in various terms
7 speaks in terms of requesting, the party requesting and
8 invoking the treaty.

9 If I leave nothing else with the Court other
10 that Ker-Frisbie, it is this: the extradition treaty is
11 employed only in some cases. We continue to have
12 relations with Mexico informally outside the umbrella of
13 the treaty, including when the terms of the treaty would
14 be violated. I'm sorry.

15 QUESTION: But isn't that always possible, that
16 parties to a treaty, like parties to a contract, can agree
17 to some other specific arrangement?

18 MR. STARR: Yes, and it's one of the reasons why
19 individuals should not be seen as having enforceable
20 rights under this particular treaty. Which in contrast to
21 the practice that is embodied in the treaty at Rauscher,
22 this is a treaty that should not be seen as giving rise to
23 privately enforceable rights, even --

24 QUESTION: Don't -- don't extradition treaties,
25 if they apply routinely, give rise to individual

1 enforceable rights that they --

2 MR. STARR: Well certainly, it can be argued
3 that if there is a violation of the treaty -- but my point
4 is a very important and narrow one here, which is this
5 treaty was crafted with this backdrop in mind of
6 Ker-Frisbie. And if, if what we wanted to accomplish was
7 what has been suggested by the other side, then there was
8 a very readily available tool; the Harvard Project, in
9 1935, crafted a proposed insertion in extradition
10 treaties, article 16, this is referred to in the briefs.

11 That's quite clear that the Court shall not
12 proceed under those circumstances. There is nothing here
13 at all in the treaty itself about the courts being
14 divested of jurisdiction. And it would be quite
15 extraordinary for the Court to conclude that it's all
16 right to proceed with the prosecution if there's been a
17 violation of the Constitution of the United States, but a
18 violation, at most accepting the other side's submission,
19 of an implied obligation.

20 QUESTION: General Starr, do any --

21 QUESTION: Go ahead.

22 QUESTION: Thank you. Do any of our other
23 extradition treaties include what you refer to as article
24 16?

25 MR. STARR: They do not, and they do not for a

1 reason. We would not readily accede to such a limitation
2 on the ability of the executive branch under various
3 circumstances to proceed by other means; and certainly not
4 to give an argument or a right to an individual to say, I
5 do not have to face these serious charges against me by
6 virtue of my reading of an implied obligation in the
7 treaty, or in that instance, an express obligation.

8 QUESTION: Just to --

9 MR. STARR: And unless we were willing to
10 engage-- I'm sorry.

11 QUESTION: No, you finish your sentence.

12 MR. STARR: Unless we were willing to enter into
13 a Webster-Ashburton type treaty and then bind ourselves
14 with respect to the doctrine of specialty. We've done
15 that here, but that's all that we have done.

16 QUESTION: So it would be -- it would be correct
17 to say that in no presently operative extradition treaty
18 of the United States there is any express bar to the
19 United States' resort to some means other than extradition
20 to get the person back.

21 MR. STARR: That is true.

22 QUESTION: Okay. Is it -- may I ask you another
23 treaty question? Your brief on page 32 refers both the
24 U.N. charter and to the OAS charter, which the court of
25 appeals referred to. Did -- did this abduction violate

1 the terms of either of those charters?

2 MR. STARR: No, we would not concede that they
3 do. We certainly do understand the point of the
4 Government of Mexico that its sovereignty was violated,
5 but by virtue -- the record is not terribly extensive in
6 this case, but footnote 2 at least adumbrates briefly the
7 background. That is to say, no DEA agents were in the
8 territory of the Government of Mexico, and this activity
9 followed on the heels of informal discussions with
10 representatives of the Government of Mexico. We did not,
11 in fact, physically intrude directly into the territorial
12 integrity of the Government of Mexico, but we do not
13 suggest that these were not our agents.

14 But in terms of whether there was a violation or
15 not of the U.N. charter and the like, I think the law is
16 clear, Justice Souter, that that does not give rise to
17 privately enforceable rights. Again, what underlies, I
18 think, the Ker-Frisbie doctrine, is the principle that
19 it's not for courts to involve themselves in these sorts
20 of very delicate determinations as to whether there were
21 violations of international law and the like; that these
22 are matters that are to be adjusted between the
23 Governments of the United States and Mexico and any other
24 affected country. And that's the assurance that the Court
25 has. We are held to account to the Congress of the United

1 States, which knows how to legislate.

2 I should add, Justice Stevens, with respect to
3 the Webster-Ashburton treaty, that the Court was not of
4 one voice in that case. As you will recall, there was, of
5 course, the dissent by Chief Justice White. But more than
6 that, one of the --

7 QUESTION: Justice White made the argument that
8 there's nothing express in the treaty.

9 MR. STARR: But one --

10 QUESTION: But the majority said that it wasn't
11 necessary to be express.

12 MR. STARR: And what the majority said, Justice
13 Stevens, is the Congress of the United States in those two
14 statutes had clearly made its view known. And the point I
15 was making to Justice -- may I conclude with Justice
16 Souter?

17 The point I was making with Justice Souter is
18 Congress knows how to step in and legislate. It has done
19 through -- done so through the Mansfield amendment. It
20 did so in the legal backdrop of Webster-Ashburton, and the
21 Court did place emphasis on that and we think that was an
22 important aspect of the case.

23 That is not so here. There are no confirming
24 statutes here. This is a very general treaty. There's
25 no -- and our colleagues on the other side admit there's

1 no express treaty provision, and it is extraordinary --

2 QUESTION: Upon the statute point in the case
3 you refer to, one Justice concurred separately on that
4 ground alone.

5 MR. STARR: That's correct.

6 QUESTION: The Court as a whole did not regard
7 that as a central part of its decision, it was the second
8 ground of its decision.

9 MR. STARR: Justice Miller's opinion is quite
10 scholarly, lengthy, much of it can be referred to as
11 dicta, but I do think that he was placing emphasis -- my
12 reading may be different with all respect, was placing
13 emphasis on the fact that its understanding of this
14 treaty, with the doctrine of specialty, with which we have
15 no quarrel --

16 QUESTION: -- created it in that case.

17 MR. STARR: But they created it against the
18 backdrop of the practice of nations. And when you look.

19 QUESTION: The State law decisions were their
20 principal reliance. State court decisions in the United
21 States.

22 MR. STARR: And when -- when you look at what
23 Ker did, Justice Stevens, in the last page of the opinion
24 it spoke about authorities of the highest respectability,
25 including State law authorities, State v. Brewster out of

1 Vermont in 1835 involving the abduction of an individual
2 from Canada. And the Vermont supreme court said, and this
3 Court unanimously said we have no quarrel with that, these
4 are authorities of the highest respectability, that it is
5 not for us to question how that individual came from
6 Canada into Vermont, if he was kidnapped.

7 And Ker then went on, what happens if there is
8 that sort of violation? An individual may find himself
9 extradited to Canada to stand trial for kidnapping. There
10 are other remedies that are available. There are
11 obviously diplomatic and political remedies that are
12 available, Ker noted that.

13 But that the cost to society, I think that was
14 an insight of Justice Harlan in United States v. Blue, the
15 costs to society are simply too great to say because you
16 came, in our view, unlawfully into our jurisdiction, we're
17 going to divest ourselves of jurisdiction.

18 That is a very heavy cost for society to bear,
19 and that is one of the reasons that I think Justice Black
20 spoke so forcefully to this in Frisbie itself,
21 where -- the assertion there, interstate, not going across
22 international lines to be sure, but there was an
23 allegation of a severe beating and a violation of the
24 Federal Kidnapping Act, and Justice Black said no. There
25 may be a violation of law and there may be remedies for

1 those violations of law, but if you have been charged with
2 a crime, you have to stand trial for that crime.

3 QUESTION: General Starr, let me just go back to
4 one point, and then I'll -- I'm taking more of your time,
5 I realize.

6 MR. STARR: That's right.

7 QUESTION: Do you think you can compare two
8 cases? Suppose if a Mexican fugitive fled into Texas and
9 was kidnapped by Mexican authorities and brought back into
10 Mexico on the one hand. In the other case they came in
11 and apprehended an American citizen in Texas and took him
12 to Mexico. Do you think they would be equally offensive
13 to our sovereignty, or do you think our sovereignty would
14 be more offended by the kidnapping of the American citizen
15 as contrasted with the Mexican fugitive?

16 MR. STARR: I think our -- our territorial
17 sovereignty would be equally violated in each instance. I
18 think our sense of violation is obviously enhanced if
19 one's own citizen is affected. But the key point, the
20 nationality principle -- but it still would not be our
21 position, Justice Stevens, that the courts of Mexico were
22 divested of jurisdiction.

23 That's exactly what we told, with all respect,
24 the Government of Mexico in the episode that we recount in
25 footnote 23, the Martinez episode. They come

1 across -- there is, in fact, an abduction from Mexico into
2 the United States. We say that was improper. Martinez
3 has to go back to stand trial in Mexico for kidnapping.

4 We responded to the extradition request, but we
5 told the Government of Mexico, with all respect, I'm
6 sorry, the courts are not divested of jurisdiction, that
7 was the holding of the Ker case. And we think the Ker
8 case spoke in very broad terms, including looking at
9 English authorities, which are very much to the same
10 effect.

11 The authorities throughout, and especially in
12 this country, have been that there is no reason for a
13 court not to try a case just because of an unlawful
14 apprehension. Let other remedies suffice, but the remedy
15 of divesting the Court of jurisdiction is too heavy a cost
16 and it also, quite frankly in my judgment, tranches on
17 separation of powers concerns, especially when the order
18 is to repatriate the individual against the will of the
19 executive branch.

20 QUESTION: Can I suggest one thing on the costs.
21 In the other cases, if the American tribunal can't try
22 him, he's not going to be tried at all. Whereas here it's
23 not the same cost, because he's subject to trial in the
24 state from which he was abducted.

25 MR. STARR: Well he is subject to -- I think if

1 a careful parsing of 92, by the way is given, all that 92
2 says is that it shall be submitted to the proper
3 authorities. There's no requirement of prosecution,
4 there's the requirement of submitting the matter to
5 prosecutorial authority.

6 QUESTION: Well, at least he's subject to
7 prosecution there, whereas in the Peru case --

8 MR. STARR: That is --

9 QUESTION: The man was not subject to
10 prosecution in Peru.

11 MR. STARR: But my final point with respect to
12 that is that does not vindicate the sovereign interests of
13 the United States. It is critical to note that Enrique
14 Camarena was tortured and murdered when he was serving in
15 his official capacity trying to stop the flow of drugs
16 from Mexico into the United States. And the district
17 court found that it had extra -- that it had subject
18 matter jurisdiction. That is crystal clear, and that
19 distinguishes this from a crime that might somehow
20 indirectly affect the interests of the United States that
21 carried -- that is carried on overseas. I'd like to
22 reserve the remainder of my time.

23 QUESTION: Very well, General Starr. Mr.
24 Hoffman, we'll hear from you.

25 ORAL ARGUMENT OF PAUL HOFFMAN

1 ON BEHALF OF THE RESPONDENT

2 MR. HOFFMAN: Mr. Chief Justice, and may it
3 please the Court:

4 This case does depend on a choice between the
5 line of authority that begins with Ker v. Illinois and the
6 line of authority that begins with United States v.
7 Rauscher, and in the line of authority starting with
8 United States v. Rauscher, this Court has made it clear on
9 several occasions, an unbroken chain of occasions, in
10 Johnson v. Brown, in the Ford case, in United States v.
11 Cook, that the jurisdiction of the United States, the
12 authority of the United States can be limited by treaty
13 obligations.

14 That is the basic principle of Rauscher and
15 Rauscher really stands as an answer to all of the
16 arguments that the Government has made in this case. In
17 the Rauscher case, there was no explicit rule of
18 specialty, in the Webster-Ashburton treaty of 1842, nor
19 was there any explicit mention that a violation of the
20 rule of specialty would limit the jurisdiction of the
21 Court.

22 In fact, in that case there had been a
23 conviction of somebody. Mr. Rauscher had been convicted.
24 He was physically before the Court, and yet this Court
25 decided that our international obligations under the

1 Webster-Ashburton treaty were more important and the Court
2 found that in the language of the treaty, in the manifest
3 purpose and object of the treaty, the Court had to find
4 that there was a rule of specialty, and the Court did not
5 defer to the executive branch version of that rule of
6 specialty.

7 In fact, there had been a diplomatic controversy
8 raging between the United States and Great Britain for
9 more than a decade on this very point, and the British
10 Government had made its position very clear that a rule of
11 specialty was required because of the background rule of
12 customary law that the parties had to have intended by
13 creating the language that they created in the treaty,
14 which is the same argument that we make here.

15 The Government of Mexico has made it very clear
16 that they understood, as Canada understood, that
17 extradition treaties, when they place specific limits on
18 how people can be rendered, mean that. The deal was
19 article 9, with respect to obtaining the presence of a
20 Mexican national before this Court. That was the deal
21 that was made, and in the context of that treaty and its
22 purpose and the entire structure of it, it must mean that
23 the United States is not free to kidnap Mexican nationals
24 to circumvent that.

25 QUESTION: How about Americans in Mexico who are

1 charged with having committed a crime, in America?

2 MR. HOFFMAN: Justice White, it would be our
3 view based on the language of the treaty, its purpose and
4 the fact that it is the exclusive means, that Americans
5 should not be kidnapped consistent with this treaty
6 either, because the limitations, for example, on the
7 political offense doctrine and the other limitations in
8 the treaty also, we believe, should lead a court to
9 conclude that kidnapping to circumvent those limitations
10 would also be a violation of the treaty.

11 But with respect to article 9, it is different.
12 There are very few cases of kidnapping, there are very few
13 cases -- there are no cases of kidnapping of a national in
14 the Ker-Frisbie line that the Government argues is a
15 backdrop. Article 9 makes it very clear what the deal was
16 with respect to Mexican nationals, as Judge Browning in
17 the Verdugo case in the Ninth Circuit found that one could
18 base a decision, a court could base a decision on
19 article 9 that there was a specific arrangement, but our
20 belief is that --

21 QUESTION: I don't understand what you mean by
22 specific right what article 9 said if you don't turn it
23 over you may consider prosecution.

24 MR. HOFFMAN: Your Honor -- I'm sorry -- Justice
25 Scalia, what article 9 does, as it says, if you want to

1 obtain personal jurisdiction over a Mexican national you
2 have two alternatives. I mean, the alternatives are you
3 ask and either extradition will be granted or the case
4 will be submitted for prosecution. It doesn't mean that
5 you can kidnap to obtain jurisdiction.

6 QUESTION: It does not go on to say and nothing
7 else. It is a treaty that gives to the United States
8 benefits that the United States did not have before. You
9 can get extradition, and if you don't get that you might
10 also get prosecution, and it doesn't go on to say and
11 that's it.

12 MR. HOFFMAN: But it can't be understood as also
13 suggesting that a kidnapping in violation of those terms
14 would be proper. The history --

15 QUESTION: -- anything about the point --

16 MR. HOFFMAN: But those words can't be read in
17 isolation. I think the whole text of the treaty indicates
18 that the parties agreed on specific limitations on how you
19 would get jurisdiction, and it's in the context and the
20 Vienna Convention and the rules in Rauscher indicate that
21 one has to read those treaty terms in the context.

22 QUESTION: The rule in Rauscher, I mean the rule
23 you suggest may be a reasonable one, but it wasn't the
24 rule that was pronounced in Rauscher. Rauscher said and
25 in the words of Mr. Justice Miller, we feel authorized to

1 state that the weight of authority and of sound principle
2 are in favor of the proposition that a person who has been
3 brought within the jurisdiction of the court by virtue of
4 proceedings under an extradition treaty can only be tried
5 for one of the offenses described in that treaty. That is
6 a quite different principle. If you are using the treaty
7 to get him here, you have to abide by the terms of the
8 treaty.

9 Here, the treaty is not used to get him here. I
10 don't, I mean, there may be good reasons, but I thought
11 Rauscher was a good reason.

12 MR. HOFFMAN: Justice Scalia, I think that the
13 principle in Rauscher is that the court may find an
14 inherent provision that's not specifically stated. Our
15 case is not a case based on the rule of specialty, but
16 it's based on an even more fundamental rule, and the
17 Court's analysis in Rauscher certainly would permit this
18 Court to look to the background rules of customary law; as
19 they did in Rauscher, it would look to the history, where
20 Secretaries of State of the 19th century, from the
21 beginning of our extradition treaties on said that
22 abductions violated the treaty, they were not consistent.

23 QUESTION: You don't suggest that Mexico could
24 not have voluntarily turned over -- turned over one of
25 their nationals for a trial in the United States?

1 MR. HOFFMAN: I would suggest that the Mexican
2 Government would certainly not turn over a Mexican
3 national because of the restrictions --

4 QUESTION: Would it violate the treaty?

5 MR. HOFFMAN: No. Justice White.

6 QUESTION: Has it ever happened?

7 MR. HOFFMAN: I do not know that Mexico has
8 handed over a national in the course of our relations.

9 QUESTION: But you don't think it would violate
10 the treaty?

11 MR. HOFFMAN: No. Our position --

12 QUESTION: Do you?

13 MR. HOFFMAN: No.

14 QUESTION: So it wouldn't be that the treaty
15 would not be the only way of securing the presence of a
16 Mexican national in the United States?

17 MR. HOFFMAN: There has been a long history of
18 informal relations between Mexico and the United States,
19 and those are perfectly consistent with the treaty and
20 with our version of the treaty, our position on the
21 treaty.

22 QUESTION: You don't think that if Mexico turned
23 over one of its citizens informally, not under the treaty,
24 would the defendant have a --

25 MR. HOFFMAN: If Mexico --

1 QUESTION: If they turned him over and he was
2 being -- he was charged with a crime here, would he have a
3 valid motion for dismissal of the case?

4 MR. HOFFMAN: I think Mexico has the ability to
5 defease that right from him, I mean, I think that and that
6 is perfectly consistent with Rauscher and the specialty
7 cases.

8 QUESTION: So what you are saying maybe it's
9 Mexico's right and not the individual's right?

10 MR. HOFFMAN: No, well, it's both. It's both
11 and I think in the case of a --

12 QUESTION: If an individual's right can be
13 defeated by Mexico saying we don't care --

14 MR. HOFFMAN: And that was true in Rauscher. In
15 Rauscher Great Britain could have decided to allow
16 Rauscher to be tried for a lesser offense than the murder
17 that they extradited him for. That is true in every
18 specialty case that the foreign sovereign has the absolute
19 right to take away the principle of specialty that's
20 asserted by the individual.

21 QUESTION: Doesn't that suggest then that it's
22 the foreign sovereign's right and that the individual may
23 be a third-party beneficiary so long as that -- but it
24 isn't primarily the individual's right.

25 MR. HOFFMAN: But there is a long history in

1 this country of self-execution, of the notion that
2 extradition treaties are self-executing, and extradition
3 treaties serve different purposes.

4 To be sure they serve the purposes of mutual
5 cooperation and law enforcement, but they also serve the
6 purpose of protecting sovereign interest and they serve
7 the purpose of protecting individual interest and that has
8 been understood in the cases from the very beginning which
9 have given individuals the rights to claim interests which
10 are really sovereign rights too.

11 In this particular case, the sovereign rights
12 and the individual rights are almost identical, and they
13 coincide in the sense that for a Mexican national, Mexico
14 owes a duty to the respondent in this case to protect him
15 and offer the benefits of Mexican law, and so when they
16 are asserting their sovereign interests to prevent the
17 United States from circumventing this treaty and bringing
18 him to the United States they are also protecting his
19 interests.

20 The interests are really in the same alignment
21 in this case and under Rauscher and Johnson and cases
22 before and after that, individuals have been given the
23 right to claim benefits under treaties.

24 QUESTION: But you agree that if Mexico had not
25 protested this and said we don't care about this, then the

1 treaty would not bar the trial of this person?

2 MR. HOFFMAN: If Mexico had given its consent, I
3 think that would be very similar to what Justice O'Connor
4 talked about with respect to contracts. If Mexico and the
5 United States enter into a different agreement and if they
6 do it in the context of a consensual rendition, then it is
7 true that that respondent would not have the ability to
8 assert this right in the court.

9 QUESTION: What is your case authority for that
10 proposition?

11 MR. HOFFMAN: With respect to the informal
12 renditions? The line of -- first of all, Ker v. Illinois
13 is certainly a case in which the fact of an absence of
14 protest by Peru was noted, that Peru did not assert its
15 sovereign interest in preventing an abduction from its
16 territory to the extent it had it, that the court was very
17 clear to say that Peru had not asserted that right, and in
18 many of the cases that have followed Ker, Ker is the only
19 international abduction case in this Court.

20 But in the cases since then, courts have gone
21 out of their way to point out that the foreign sovereign
22 had not protested, and I think that that is consistent
23 with the theory that the foreign sovereign is in a
24 position to consent to a rendition outside of the terms of
25 the treaty.

1 QUESTION: Well, suppose that it happened in
2 this case and the United States, well, do you think the
3 rule of specialty would apply then?

4 MR. HOFFMAN: The rule of specialty would apply
5 in an informal case? Well, there is certainly some
6 authority. This Court has not decided that question,
7 there is certainly authority in lower courts that an
8 informal rendition would include a rule of specialty.
9 That is not an issue that certainly applies in this case
10 because there was a clear, unequivocal protest, there is
11 no doubt about Mexico's position.

12 There is also no doubt about the violation of
13 international law, and in reading this treaty we would
14 submit that there can be no doubt that the United States
15 can't come into Mexico to circumvent the prohibitions in
16 article 9 of the treaty.

17 One of the ways to look at it, I suppose, is
18 that the U.S. position would be that if they had asked for
19 extradition formally and then they were denied and Mexico
20 said instead what they say before this Court, we will not
21 extradite Dr. Alvarez-Machain, what we will do is try him
22 as we have tried many others associated with the case,
23 allegedly involved in the Camarena case, and the United
24 States Government says, no that doesn't satisfy us. We
25 want something more than that, and so we will kidnap him.

1 Presumably if the request had been made then
2 that would violate the treaty.

3 QUESTION: Mr. Hoffman, assuming that the
4 kidnapping was a violation of international law, do you
5 assert that gives a U.S. court any power to remedy the
6 situation?

7 MR. HOFFMAN: Justice O'Connor, I believe that
8 that --

9 QUESTION: In a subsequent prosecution of the
10 individual?

11 MR. HOFFMAN: That raises different questions,
12 clearly, than the ones upon which this case was decided.
13 I think that there are strong arguments for the authority
14 of the courts to enforce a customary prohibition in
15 international law in this case. The Mollocoptus principle
16 does involve a violation, this kind of violation and a
17 protest meaning that there has to be repatriation, but I
18 think that those would raise very different questions and
19 the authority of the United States to overcome that
20 customary principle might be greater than in the case of a
21 treaty where the courts have a constitutional role that's
22 been recognized.

23 QUESTION: Well, if we were to conclude the
24 treaty doesn't cover this, do you fall back on some
25 violation of international law?

1 MR. HOFFMAN: Justice O'Connor, there were
2 alternative grounds for affirmance that were presented to
3 the Ninth Circuit and the courts below. Those have not
4 been ruled upon either by the district court or the Ninth
5 Circuit and presumably those would be litigated if this
6 Court finds that there is no provision in the treaty.

7 One of the things that, to return to Rauscher
8 for a moment, the point that the Government has made about
9 the statutes really don't amount -- this Court has already
10 rejected that, I think in Rauscher and Johnson v. Brown,
11 where the Court has said that the statutes were not an
12 essential ground for the decision, and clearly there were
13 no statutes in Ford and Cook of the kind that the
14 Government claims.

15 Nor were there any explicit treaty provisions
16 that dealt with the consequences of seizure in violation
17 of the treaty limitations. With respect to the
18 Ker-Frisbie, the Ker doctrine, the Government has claimed
19 that Ker stands for a much broader proposition than the
20 actual decision in Ker would suggest. In Ker, there was
21 no -- under our presentation of this case, Ker would be
22 decided the same way.

23 In Ker there was a private abduction and so it
24 was not a state-sponsored case of kidnapping,
25 that's -- and the Chaffee case that was mentioned by the

1 Government is another case of a private abduction and I
2 think that under customary law and under what Mexico and
3 Canada have understood this treaty to mean, it is
4 state-sponsored kidnapping that would be prohibited, not
5 necessarily a private abduction.

6 So Ker is limited to that situation. In
7 addition, the Court went out of its way to say that there
8 had been no protest and therefore Peru's sovereign
9 interests were not at stake, and that that is a key
10 distinction between that case and this case.

11 In the cases since Ker, the courts have, the
12 cases have all fallen into situations where there has been
13 consent or acquiescence in the informal renditions or
14 where there had been private abductions, and that's
15 true -- our recitation of the foreign cases which says
16 that they appear to be in alignment too, that really the
17 Ker doctrine that the Government claims as a backdrop
18 principle has not been known widely in the world, has not
19 been known in this country, and certainly would not have
20 been known to Mexico as meaning that the United States
21 could engage in state-sponsored kidnapping and that that
22 would not affect the jurisdiction of the court to try
23 somebody.

24 QUESTION: If there were a case concededly
25 controlling from this Court, governing a

1 particular -- would it make any difference whether Mexico
2 knew about the case or not?

3 MR. HOFFMAN: No, Chief Justice Rehnquist, if
4 this Court were to find that Ker stands for a broad
5 principle that notwithstanding treaty obligations a court
6 should try the person who comes before it no matter how
7 that person comes before it, then obviously the treaty
8 would not, well, it would apply.

9 QUESTION: What you're saying then is that the
10 holding of Ker, the teaching, whatever you want to call
11 it, has not been understood in the international community
12 as broadly as the Government is saying it has?

13 MR. HOFFMAN: That's correct, and I don't think
14 it's been understood by lower court cases. Now there is
15 some broad language about what Ker means, but the cases, I
16 think, have been very careful to distinguish between the
17 different situations that point out the absence of protest
18 and I think that the Rauscher line stands for an equally
19 important line of authority and policy interest.

20 What this Court said in Johnson v. Brown was
21 that treaty obligations, the enforcement in good faith of
22 treaty obligations is of vital importance to the Nation,
23 and it was understood from the beginning.

24 QUESTION: Well, counsel, I think your point
25 that this was not against a background where Mexico knew

1 of our policy is much diminished in force by the
2 Government's citation of a letter in 1906 from the acting
3 Secretary of State pointing out to the Mexican Government
4 that Ker is on the books and that the Government of the
5 United States follows that principle with reference to
6 persons taken from foreign sovereignty.

7 MR. HOFFMAN: But the Martinez case is a
8 different case, and it is fully consistent with the
9 position that we are asserting before this Court. In
10 Martinez the person was abducted -- excuse me, that was
11 abducted by private kidnappers.

12 Mr. Felix was not a U.S. Government agent sent
13 across the border to capture somebody. A private abductor
14 brought someone across the border and the United States
15 took the position that Ker-Frisbie applied in that
16 situation and there was no violation at stake, and the
17 United States extradited the kidnappers, and so the
18 Martinez incident is --

19 QUESTION: But the point is that the Mexican
20 Government has been advised of this doctrine and of its
21 applicability.

22 MR. HOFFMAN: But Justice Kennedy, the Mexican
23 Government was never advised and the United States has
24 never asserted -- and it's my belief that the United
25 States has never asserted before this case that the United

1 States reserves the rights with its extradition partners
2 to itself engage in kidnapping from other countries to
3 avoid the limitations and extradition treaties, and that's
4 our main point, that the extradition treaty -- and this is
5 the point that Mexico.

6 QUESTION: What -- you're referring to the
7 limitations in the expedition treaty, and you referred
8 earlier to the limitations in Article 9. There are no
9 limitations in Article 9. You can read it from beginning
10 to end. There is no limitation.

11 MR. HOFFMAN: But Justice Scalia, the limitation
12 is the fact that Article 9 talks about how the United
13 States may obtain personal jurisdiction over a Mexican
14 national.

15 QUESTION: You create the limitation by simply
16 positing that it can't be done in another way. It does
17 not say in Article 9 or in the treaty --

18 MR. HOFFMAN: But Article 9 --

19 QUESTION: That it can't be done in that way.

20 MR. HOFFMAN: Article 9 comes with a long and
21 historical heritage in the sense that before Article 9 the
22 Mexican Government said it would not extradite its
23 nationals. In every one of the extradition treaties
24 before, Mexico took the position it would not under any
25 circumstances extradite nationals.

1 The Secretary of State, as this Court noted in
2 the Valentine case said that it was our understanding that
3 we couldn't even ask for Mexican nationals. It would be
4 inappropriate under the treaty to do that. So Article 9
5 was a step in the direction of the kinds of interests
6 that -- the law enforcement interests that the United
7 States was concerned about, and so what Mexico gave up in
8 Article 9, it said number 1, we will consider extradition
9 for the first time, and number 2, if we decide not to
10 extradite, as it is our right not to do, we will submit
11 the case for prosecution.

12 QUESTION: But there's no prohibition of any
13 other manner of getting the individual back to the United
14 States except to the extent that some such prohibition
15 exists in international law, quite apart from the treaty.

16 MR. HOFFMAN: Well, but there's no prohibition
17 in -- no explicit prohibition on the fact that you can't
18 execute summarily the person that's extradited, or you
19 can't torture them. I mean, what we're saying is that the
20 understanding that States have when they enter into
21 extradition treaties, and it's not just the respondent
22 saying it, but Canada has said it to this Court, Mexico
23 has said it to this Court, that the U.S. position in this
24 case is a shocking position and a new position, and it is
25 understood, just as it was understood that a rule of

1 specialty should be found to be part of the Webster-
2 Ashburton Treaty, that this could not be allowed, and just
3 as words were added, a provision was added --

4 QUESTION: Would it be any less shocking to them
5 if they had no extradition treaty with the United States
6 and the same thing occurred?

7 MR. HOFFMAN: No, it would be shocking
8 in both --

9 QUESTION: Of course, it would be no less
10 shocking at all. It seems to me you're not relying on the
11 treaty. You're relying upon a general rule of
12 international law.

13 MR. HOFFMAN: There was a -- I think that is not
14 the case in the sense that just because the United States
15 engages in egregious conduct that violates basic
16 principles of the international legal order and it
17 violates them in many different ways doesn't mean that it
18 doesn't also violate the explicit provisions -- the clear
19 intent of this treaty, and I think that --

20 QUESTION: The clear intent. Certainly not the
21 clear language.

22 MR. HOFFMAN: That's correct, Justice Scalia.
23 There's no -- Mexico has explained very clearly in its
24 brief why it believed it was not necessary to ask the
25 United States for such an explicit provision, because it

1 never believed that the United States would engage in that
2 conduct, and if the United States had asked for that, had
3 said we consider this to be optional, if we want to ask
4 under the treaty we'll ask under the treaty, but if we
5 don't ask under the treaty, we'll kidnap, they said they
6 would have picked up their briefcases and left and we
7 wouldn't have extradition treaties.

8 QUESTION: Mr. Hoffman, can I ask you a question
9 about the text of the treaty? Article 17 does have the
10 rule of specialty and it's spelled out in careful detail.
11 Was that a customary provision in extradition treaties
12 before the Rauscher decision?

13 MR. HOFFMAN: That is what the Court refers to
14 in Rauscher, that it had been the custom that when a
15 person had been handed over in that manner that they could
16 only be tried for that --

17 QUESTION: Was that a custom independently of
18 any written language in treaties --

19 MR. HOFFMAN: Yes.

20 QUESTION: Or was it a customary provision of
21 treaties?

22 MR. HOFFMAN: Yes, it was a customary --

23 QUESTION: It makes a big difference.

24 MR. HOFFMAN: I don't know if I can answer that.
25 I believe that it was a customary prohibition, but I

1 cannot answer whether --

2 QUESTION: The opinion itself doesn't refer to
3 any such provision in the treaty, and I had assumed that
4 they had implied that that was just a fair way to read the
5 treaty, that if we followed the procedure --

6 MR. HOFFMAN: My understanding, and certainly
7 the Justice Friendly decision in Fiacani would suggest,
8 that principles of international comity would require the
9 same result, that if someone is handed over informally as
10 sovereign nations have the right to do that that principle
11 would still obtain, that essentially what has happened is
12 that the State that has handed the person over has
13 essentially given up a sovereign right to give that person
14 asylum, and so the authority is limited in terms of
15 prosecution to what -- to that piece of sovereignty that
16 the Government has given up.

17 And I think that extradition treaties have to be
18 read in the context of those sovereign interests that this
19 Court has recognized from the beginning of its work.

20 QUESTION: Mr. Hoffman, certainly the Court in
21 Frisbie read Ker very broadly. It said this Court has
22 never departed from the rule announced in Ker that the
23 power of a court to try a person for a crime is not
24 impaired by the fact that he had been brought within the
25 Court's jurisdiction by reason of a forcible abduction.

1 MR. HOFFMAN: Well, Chief Justice Rehnquist,
2 that's true. Frisbie reads that very broadly in that
3 context, but the Frisbie context is very different. Under
4 the extradition clause within the United States, for
5 example, there is no right -- sovereign right that one
6 State has to delay or deny extradition to another, and so
7 there are no sovereign issues there, and the question is
8 whether the due process clause may be used to remedy that
9 kind of police conduct.

10 QUESTION: But if you're right that the fact
11 that it was a governmental kidnapping is important, there
12 was -- it's a governmental kidnapping in Frisbie, too.

13 MR. HOFFMAN: Well, but the reason that it's
14 important because it's a governmental kidnapping is that
15 it invokes our treaty obligations. I mean, our --

16 QUESTION: Why should the treaty obligations be
17 more important when a court is determining jurisdiction
18 than perhaps violations of the Constitution of the United
19 States?

20 MR. HOFFMAN: Well, I think that obviously the
21 Constitution is more important from our standpoint as
22 Americans than treaties, but treaties have been very
23 important to this country's history, and I think this
24 Court has recognized that treaties may place a limitation
25 on the authority of the United States Government to seize,

1 and that those limitations must be fulfilled, and it's not
2 just because it's a treaty obligation, it's because those
3 treaty obligations are part of a web of international
4 relationships that are essential to this country, and have
5 been thought to be essential to this country from the
6 beginning of time.

7 QUESTION: That really doesn't distinguish them
8 from a constitutional principle. In fact, as you concede,
9 a treaty is subordinate to the Constitution.

10 MR. HOFFMAN: But the Constitution does -- was
11 found in Frisbie not to place limits of that kind. It was
12 found that the due process clause, which was the clause
13 that was relied upon in Frisbie, was found to be satisfied
14 by giving that person a fair trial.

15 Moreover, the only -- I think in the Frisbie
16 type case there's a kind of inherent futility. If you
17 send the person back as a remedy for that violation the
18 person will be back again, so unless you actually
19 affirmatively grant them immunity from prosecution,
20 they're going to be tried before that court no matter
21 what. That's not true here. The treaty obligation limits
22 the authority, and in fact the remedy is different in the
23 sense --

24 QUESTION: So in this case the accused murderer
25 perhaps never will be tried.

1 MR. HOFFMAN: I don't think that the Court can
2 assume that, because Mexico has --

3 QUESTION: Well, I thought that was your point
4 that you were just making.

5 MR. HOFFMAN: No, but the point is that it will
6 be a different -- what will happen is different, and in
7 fact in this case the policies of Frisbie are satisfied to
8 some degree because Mexico will agree to prosecute.

9 Mexico has stated to this Court that it will
10 live up to its obligations under Article 92, and it's
11 given the Court very good reason for believing that that's
12 true, and so the underlying policies of Ker-Frisbie about
13 immunity from prosecution don't apply because Mexico will
14 prosecute, and that's the bargain that the United States
15 made, and it made it willingly, that Mexico would be able
16 in a case like this, which after all involves also a
17 murder of a Mexican citizen. The events occurred in
18 Mexico -- Mexico has an interest.

19 QUESTION: That's no bargain. All it says is
20 that Mexico may prosecute. That's what the treaty says,
21 not that it must.

22 MR. HOFFMAN: Well, but that's a traditional
23 form of that kind of treaty provision --

24 QUESTION: You mean they say may when they mean
25 must?

1 MR. HOFFMAN: No. What it means is that -- and
2 the United States insists on this too, that obviously
3 there's prosecutorial discretion based on the kinds of
4 evidence that are presented. The United States hasn't
5 presented evidence, as far as anyone knows.

6 QUESTION: Are you telling me that Article 9
7 means that Mexico must prosecute --

8 MR. HOFFMAN: No.

9 QUESTION: If there is evidence to prosecute?

10 MR. HOFFMAN: No. What Article 9 says --

11 QUESTION: Does it mean Mexico can prosecute if
12 it feels like it, and if it doesn't feel like it it need
13 not prosecute?

14 MR. HOFFMAN: No. What it means is that Mexico
15 is under a good faith international obligation to submit
16 the case for prosecution, and if the case warrants
17 prosecution it will prosecute, and that is the same
18 arrangement that the United States made.

19 I mean, the United States has made no great a
20 commitment to Mexico, that if the reverse situation is the
21 case -- and this is a treaty that has benefits and
22 limitations for both sides that are important.

23 This protects Americans, too, and if the shoe
24 were on the other foot, and if the Mexican agents come
25 into the United States to Los Angeles and kidnap the DEA

1 agents that they have requested under the extradition
2 treaty in this case, I don't think that anyone would
3 believe that this treaty -- that it would be consistent
4 with this treaty to go outside that extradition process
5 that's set up by the treaty and to kidnap those DEA
6 agents, bring them down to Mexico, and say that it's fine
7 for them to be tried.

8 The treaty cannot be read that way. That would
9 be -- I think it would be blatantly a bad faith
10 interpretation of the treaty to allow either country to
11 perform in that way.

12 Mr. Chief Justice, I --

13 QUESTION: Thank you, Mr. Hoffman. General
14 Starr, you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF KENNETH W. STARR

16 ON BEHALF OF THE PETITIONER

17 QUESTION: General Starr, may I ask you one
18 quick question before you get onto what you're otherwise
19 going to say? Do you understand the rule of specialty to
20 have been a customary principle of international law, so
21 that technically its inclusion in this treaty would have
22 been unnecessary?

23 MR. STARR: I think that the court did not
24 come -- I don't understand that to be the case. I
25 understand it to be the case that the practice of nations

1 was one that had given rise to various disputes.

2 The court in Rauscher then examined that
3 practice and then examined the specific context of the
4 Webster-Ashburton Treaty itself, came to the view that the
5 doctrine of specialty was in fact understood to be a
6 resolution of the conflict in that particular instance,
7 and then secondly that that understanding was confirmed by
8 statutes passed by Congress, so that briefly is our
9 understanding of Rauscher.

10 QUESTION: General Starr, do you agree that
11 Mexico had an obligation to prosecute under Article 9 --

12 MR. STARR: The -- my -- I'm sorry.

13 QUESTION: If the evidence was adequate?

14 MR. STARR: My understanding of the treaty, I
15 take it at its terms, is that they shall submit it to the
16 prosecution, but it's up to the prosecution to then
17 determine to the appropriate authorities. We would simply
18 submit it to the Government of Mexico, but there's no
19 express obligation in 9(2) for a prosecution to actually
20 be brought. There's -- it would be completely consistent
21 with the literal language of the treaty for the
22 prosecution to be declined.

23 QUESTION: Well, don't you think there's a good
24 faith obligation to prosecute if they thought the evidence
25 warranted it?

1 MR. STARR: I don't think the treaty by its
2 terms --

3 QUESTION: I understand what the treaty by its
4 terms said.

5 MR. STARR: Requires -- obviously, the parties
6 to any contract or covenant or compact should proceed in
7 good faith, but nonetheless there is no specific
8 requirement.

9 Now, very, very briefly, legal backdrop is very
10 important. This Court has said that recently, that the
11 legal context is important, and therefore the
12 understanding of Ker is quite important.

13 The executive branch has relied on our
14 understanding of Ker, and when we look to what Ker itself
15 says in addition, as confirmed by what Justice Black said
16 in *Frisbie v. Collins*, what Justice Miller said in citing
17 his authorities of highest respectability, it was not only
18 common law authorities but English authorities, including
19 his lead authority was an English authority where an
20 individual had been seized in Belgium by an English police
21 officer, and yet the principle stood that the court does
22 not divest itself of jurisdiction by virtue of a forcible
23 or illegal, flagrant if you will, kidnapping, the point
24 remains that the jurisdiction of the court remains intact.

25 That is the legal backdrop. It was reaffirmed

1 by the Government of the United States to Mexico as
2 Justice Kennedy noted. That has been our clear
3 understanding, and more than that, those who believe that
4 the practice of international relations should be more
5 enlightened have had a proposed provision there on the
6 books for almost a half-century in the Harvard project.
7 It has not found its way into a single one of our
8 treaties. That I think is terribly important.

9 I thank the Court.

10 CHIEF JUSTICE REHNQUIST: Thank you, General
11 Starr. The case is submitted.

12 (Whereupon, at 11:03 a.m., the case in the
13 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 91-712 - UNITED STATES, Petitioner V. HUMBERTO ALVAREZ-MACHAI

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)