International Fugitive Snatching in U.S. Law: Two Views from Opposite Ends of the Eighties

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International “Fugitive Snatching” in U.S. Law: Two Views from Opposite Ends of the Eighties

Introduction

When Butch Cassidy and the Sundance Kid escaped to South America, they relied on the reluctance of the United States to violate “customary” international law.\(^1\) Pursuing the pair into Bolivia to bring them back to justice in the United States, without the consent of the Bolivian government, would have violated the rule that sovereign nations are afforded complete and exclusive control over their territory.\(^2\) The United States can exercise legal authority in a foreign country, according to international law, only to the extent that the foreign country consents to such an exercise of authority.\(^3\) Thus, if U.S. officials entered Bolivia without permission and undertook to arrest a pair of fugitives, Bolivia’s sovereignty would be breached.\(^4\)

Upholding the sovereignty of Bolivia, or of any other country, necessarily limits that of the United States. Sovereignty constrains law enforcement because fugitives can escape the grasp of a pursuing authority simply by fleeing beyond that authority’s territorial jurisdiction and into the jurisdiction of another sovereign.\(^5\) Legally, the pursuing country must secure the cooperation of the “asylum” authority,

\(^1\) See Restatement (Third) of Foreign Relations Law of the United States § 102 (1986) [hereinafter Restatement]: Sources of International Law (1) A rule of international law is one that has been accepted as such by the international community of states
(a) in the form of customary law;

\(^2\) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

\(^3\) Restatement, supra note 1, at § 432, comment b. See also United States v. Toscanino, 500 F.2d 267, 277 (2d Cir. 1974).

\(^4\) Restatement, supra note 1, at §§ 432(2), 433(1).


informally or through extradition, to capture the fugitive.  

States have devised ways of getting around this rule while purporting to respect it. The United States is no exception. On the one hand, the United States believes that "fugitive snatching" violates customary international law, and, because customary international law is part of the law of the United States, fugitive snatching violates U.S. law. On the other hand, while fugitive snatching is illegal, putting the fugitive on trial after he or she has been snatched is not. Under the venerable Ker-Frisbie doctrine, a court will not inquire into how a defendant was brought within its jurisdiction. Barring cruel or outrageous treatment, abducting the defendant in violation of international law does not divest the court of jurisdiction. Thus, while abduction of fugitives by pursuing authorities is illegal and can lead to criminal and civil liability for the abductors, it does not impair the court's jurisdiction over the abducted fugitive.

A March 1980 opinion by the Office of Legal Counsel of the Justice Department (the "1980 Opinion") illustrates the inherent contradiction in this state of affairs. Examining the legal and political consequences

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6. Id. "States have sought to overcome the limitations on international law enforcement activities arising from the principle of territorial integrity by cooperating in dealing with extraterritorial crime and in apprehending fugitives." Id.
7. See RESTATEMENT, supra note 1, at § 432, reporter's note 2.
8. "Fugitive snatching" is used in this Note as a convenient way to refer to the abduction of a fugitive or suspect by the nation in which that person is wanted, from the territory of another nation in which the fugitive is found, without the latter nation's consent. See Ostrow, F.B.I. Gets O.K. For Arrests Overseas, L.A. Times, Oct. 13, 1989, at A1, col. 5.
9. See infra notes 167-78 and accompanying text.
10. In Ker v. Illinois, 119 U.S. 436 (1886), the Supreme Court held that a defendant who was forcibly abducted from Peru and returned to the United States for trial in state court could not challenge his indictment or conviction on the ground that he was improperly brought within the jurisdiction of the court. In Frisbie v. Collins, 342 U.S. 519 (1952), a case of alleged interstate abduction, the Court reaffirmed Ker v. Illinois and announced what became an oft-quoted formulation of the rule:

[D]ue 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. Id. at 522. Thus, neither the violation of international law nor the fact of abduction gives the defendant due process claims against the exercise of a court's jurisdiction once he is brought within it.
11. RESTATEMENT, supra note 1, at § 433(2). An abducted fugitive may be prosecuted in the United States "unless his apprehension or delivery was carried out in such reprehensible manner as to shock the conscience of civilized society." Id. The qualification that jurisdiction may be defeated by prosecutorial conduct that shocks the conscience is based on due process analysis in United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974), which in turn relied on Rochin v. California, 342 U.S. 165 (1952).
12. See Ker v. Illinois, 119 U.S. at 444.
of a proposed fugitive abduction scheme, the opinion conceded that under the *Ker-Frisbie* doctrine a court will maintain jurisdiction over a defendant brought before it in violation of international law. The opinion concluded, however, that the United States in general, and the FBI in particular, do not have authority to abduct fugitives from foreign countries. Thus, although it is illegal for official U.S. agents to abduct fugitives, the court’s power to try such fugitives is unaffected.

Nine years later, in a June 21, 1989, opinion (the “1989 Opinion”), the Justice Department’s Office of Legal Counsel advised the Attorney General that the FBI is authorized to abduct fugitives without the consent of the nation in which the fugitive is found. The 1989 Opinion reversed the 1980 Opinion which held that “nonconsensual extraterritorial arrests” exceeded the FBI’s authority under domestic law.

The furor caused by this clash of views is curious in light of the general agreement between the two opinions on the continued viability of the *Ker-Frisbie* doctrine. Because both opinions agreed that “fugitive snatching” should not affect a court’s jurisdiction over the defendant, the disagreement between them concerns only the civil liability of the U.S. government and its agents for wrongs committed in kidnapping the fugitive. Considering the other risks involved in fugitive snatching, the attention paid to the civil liability issue seems disproportionately great. However, because civil liability hinges on the question of whether the FBI is authorized under U.S. law to carry out non-consensual extraterritorial arrests, the issue assumes a symbolic importance that far

14. *Id.* at 544, 547. The Opinion raised serious concerns about the continued viability of the *Ker-Frisbie* doctrine in the Second Circuit, however. *See infra* notes 35-59 and accompanying text.


16. The Office of Legal Counsel of the Justice Department will not release the opinion, claiming that it is protected by an attorney-client privilege between the Office of Legal Counsel and its "client," the Attorney General. News of the existence of the opinion was leaked to the Los Angeles Times. *See Ostrow, supra* note 8. Subsequent publicity and controversy led to a hearing before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on November 8, 1989 (currently unpublished). The description of the 1989 Opinion in this Note is taken largely from the statement prepared by Assistant Attorney General William P. Barr for that hearing and from his testimony in answer to questions from subcommittee members. Mr. Barr is head of the Office of Legal Counsel of the Justice Department. As of this writing, the opinion has been requested under the Freedom of Information Act by a number of reporters. The House Subcommittee has not used its subpoena power to obtain the opinion.

17. The term “non-consensual extraterritorial arrests” is taken from the title of the Statement of Abraham D. Sofaer, *supra* note 5. It is used interchangeably in this Note with “fugitive snatching.”


20. *See infra* notes 68-89 and accompanying text.
exceeds its practical implications. The question is not just one of civil liability for the United States and its agents, but also whether the United States claims the power "legally" to violate international law. This assertion by the United States significantly affects foreign perceptions of U.S. actions, as well as Americans' perception of the proper role of their country in international affairs.

This Note concludes that the 1989 Opinion was correct, as a matter of U.S. law, in finding that the President and high level officials have independent authority to order the apprehension and abduction of fugitives in violation of international law. The timing and circumstances of the 1989 Opinion suggest that the United States may be more willing than it was in the past to utilize this "self-help measure." Moreover, the 1989 Opinion reveals a willingness to combine the President's powers as chief law enforcement officer and commander-in-chief, two of his most autonomous and potent roles, thereby putting his actions even further beyond the scrutiny of Congress and the courts.

This Note examines and critiques the legal reasoning by which the two Justice Department opinions reached diametrically opposite conclusions regarding the authority of executive agents to conduct nonconsensual extraterritorial arrests. The first and second sections summarize the background, reasoning and conclusions of the 1980 and 1989 opinions respectively. The third section analyzes and critiques the two opinions in light of relevant legal doctrines. The final section considers the political importance and consequences of the 1989 Opinion.

I. The 1980 Opinion

A. Background

On March 31, 1980, the Office of Legal Counsel of the Justice Department issued a Memorandum Opinion on "Extraterritorial Apprehension by the Federal Bureau of Investigation." The Attorney General requested the opinion to assess the implications of a proposed FBI operation to abduct "fugitive financier" Robert Vesco, then residing in the Bahamas. The Attorney General was directed to assume that the Bahamian government would formally protest the operation, but that local police would provide "physical surveillance and

21. See infra notes 213-17 and accompanying text.
22. See infra notes 297-315 and accompanying text.
23. See infra notes 26-140 and accompanying text.
24. See infra notes 141-296 and accompanying text.
25. See infra notes 297-315 and accompanying text.
27. Ostrow, supra note 8. Vesco was indicted for securities fraud and campaign finance violations.
28. Id. See also 1980 Opinion, supra note 13, at 543.
aid in the neutralization of bodyguards during the actual apprehension."29

B. Overview of 1980 Opinion

The opinion examined four major consequences, both legal and political, which could be expected to result from the operation. First, it assessed the impact of the operation on the criminal prosecution of the defendant in the United States.30 Second, it reviewed the international implications of the operation.31 Third, it considered the civil liability of the United States and its agents for various torts committed in the abduction.32 Finally, it assessed the criminal liability of U.S. agents who carried out the operation.33 After considering all of these factors, the opinion recommended that the FBI not attempt the proposed operation without the consent of the asylum state, the Bahamas.34

C. Reasoning of the 1980 Opinion

1. Implications for Criminal Prosecution of Defendant

Assistant Attorney General Harmon began his examination of the criminal jurisdiction issue by noting that the manner in which a defendant is brought within the jurisdiction of a court does not ordinarily diminish the court's power over the defendant.35 This rule, the Ker-Frisbie doctrine, originated in 188636 and had been recently reaffirmed by the Supreme Court in Gerstein v. Pugh.37 Before it was reaffirmed, however, the Court of Appeals for the Second Circuit raised serious questions about the doctrine's viability.38 Assistant Attorney General Harmon believed that some of those questions remained, notwithstanding the Supreme Court's subsequent reaffirmation of the Ker-Frisbie doctrine in Gerstein.39 Because Vesco was indicted in the Second Circuit and would be tried there, the law in that jurisdiction was important to the goals of the 1980 Opinion.40

The 1980 Opinion noted that in United States v. Toscanino,41 the Second Circuit opened two avenues of attack on the Ker-Frisbie doctrine.42

29. 1980 Opinion, supra note 13, at 543.
30. Id. at 544-47.
31. Id. at 547-49.
32. Id. at 549-56.
33. Id. at 556.
34. Id.
35. Id. at 544 n.1 and accompanying text (citing Frisbie v. Collins, 342 U.S. 519, 522 (1952)).
38. United States v. Toscanio, 500 F.2d 267 (2d Cir. 1974).
40. Id. at 544, 547.
41. 500 F.2d 267.
42. The defendant in Toscanino alleged that he was kidnapped from Uruguay by U.S. agents, brought to Brazil where he was tortured and interrogated for an extended period, and then put on a commercial flight to the United States where he
First, the court held that the doctrine was inconsistent with modern notions of due process.\textsuperscript{43} The Second Circuit examined the development of due process law and concluded that "a court must now 'divest itself of jurisdiction over the person where it has been acquired as a result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.'"\textsuperscript{44} If Toscanino's allegations of kidnapping and torture proved true, the court held, due process violations inhered not only in the alleged brutality of the arrest, but also in the violations of international law involved in the abduction.\textsuperscript{45} Analogizing from the rule which excludes illegally seized evidence from trial, the court reasoned that freeing the defendant would deny the government the fruits of its misconduct and would deter illegal behavior by police and prosecutors.\textsuperscript{46}

The second avenue of attack against the \textit{Ker-Frisbie} doctrine did not depend upon constitutional issues. The Second Circuit held that it could rely on its "supervisory power over the administration of criminal justice in the district courts" to dismiss the case against the defendant.\textsuperscript{47} Dismissal would be warranted "to prevent the district courts from becoming 'accomplices in wilful disobedience of law.'"\textsuperscript{48} Toscanino thus held that dismissal may be warranted in fugitive snatching cases, either as a requirement of due process, or as a discretionary tool to prevent district courts from aiding in government misconduct.

Assistant Attorney General Harmon next analyzed the Second Circuit's application of the \textit{Ker-Frisbie} doctrine in United States \textit{ex rel. Lujan v. Gengler}.\textsuperscript{49} In \textit{Lujan}, the Second Circuit narrowed the grounds on which forcibly abducted defendants might rely in raising due process defenses against the court's jurisdiction.\textsuperscript{50} Only the kind of treatment that "shocks the conscience," as alleged in Toscanino, gives rise to due process arguments for dismissal.\textsuperscript{51} The court in \textit{Lujan} concluded that the

\textsuperscript{43} United States v. Toscanino, 500 F.2d at 274.
\textsuperscript{44} \textit{Id.} at 275.
\textsuperscript{45} 1980 Opinion, \textit{supra} note 13, at 545 (citing Toscanino, 500 F.2d at 275-76 (government misconduct included violation of international legal obligations)).
\textsuperscript{46} 500 F.2d at 275.
\textsuperscript{47} 1980 Opinion, \textit{supra} note 13, at 545 n.4 (citing Toscanino, 500 F.2d at 276).
\textsuperscript{48} 500 F.2d at 276.
\textsuperscript{49} 510 F.2d 62 (2d Cir.), \textit{cert. denied}, 421 U.S. 1001 (1975).
\textsuperscript{50} In \textit{Lujan}, the defendant alleged that he was lured under false pretenses from Argentina to Bolivia where he was arrested by Bolivian police allegedly in the employ of the United States. Bolivian police and U.S. agents then took him to the airport and put him on a flight for New York, where he was arrested by federal authorities at the airport. 510 F.2d at 63. Neither the Argentine nor Bolivian governments protested the alleged abduction to the U.S.
\textsuperscript{51} \textit{Lujan}, 510 F.2d at 65.
defendant did not make such allegations.\textsuperscript{52}

In the 1980 Opinion, Assistant Attorney General Harmon found the dicta in \textit{Lujan} regarding international law more significant than the court's narrowing of \textit{Toscanino}'s due process holding. In dicta, the \textit{Lujan} court reserved the question of whether a violation of international law might require dismissal of the indictment.\textsuperscript{53} It was unnecessary for the court to decide this question in \textit{Lujan} because the abduction did not violate international law.\textsuperscript{54}

Thus, according to Harmon, \textit{Toscanino} and \textit{Lujan} left open the possibility that a Second Circuit court would dismiss the case where the defendant was brought before the court in violation of international law.\textsuperscript{55} \textit{Gerstein v. Pugh} reaffirmed the \textit{Ker-Frisbie} doctrine, but only with respect to due process arguments against invalid interstate arrests in the United States.\textsuperscript{56} In the Second Circuit, according to Harmon, a defendant may still argue that an arrest in violation of international law justifies dismissal of the indictment, either to vindicate the defendant's due process rights or to prevent the government from using district courts to assist official misconduct.\textsuperscript{57} Thus, it was necessary to determine whether the operation violated international law to assess the "litigation risks" involved in prosecuting the defendant in the Second Circuit.\textsuperscript{58} If Vesco's abduction from the Bahamas violated international law, the trial court might dismiss the case against him, pursuant to \textit{Toscanino} and \textit{Lujan}.\textsuperscript{59}

\textsuperscript{52} \textit{Id.} at 66.

\textsuperscript{53} \textit{Id.} at 68. In characterizing \textit{Lujan}, the 1980 Opinion noted that prosecutorial violation of international law may require dismissal of the indictment "either because such illegal government conduct constitutes a violation of due process or because a federal court should, as a matter of judicial administration, refuse to be a party to official misconduct." 1980 Opinion, \textit{supra} note 13, at 545 (citing \textit{Lujan}, 510 F.2d at 68). In fact, the \textit{Lujan} court did not specify why a violation of international law warranted dismissal of the indictment. The 1980 Opinion seems to have inferred the due process and supervisory powers rationales from \textit{Lujan}, probably because they were cited by the court in \textit{Toscanino} as possible grounds for dismissal of the indictment. \textit{See} 1980 Opinion, \textit{supra} note 13, at 545 n.4 and accompanying text.

\textsuperscript{54} 510 F.2d at 67.

\textsuperscript{55} 1980 Opinion, \textit{supra} note 13, at 547.

\textsuperscript{56} \textit{Id.} at 549.

\textsuperscript{57} \textit{Id.} at 549.

\textsuperscript{58} \textit{Id.} at 549.

\textsuperscript{59} Assistant Attorney General Harmon noted that other circuit courts continued to cling to the \textit{Ker-Frisbie} doctrine.

Harmon approved this judicial stance as a matter of policy, calling it "dictated by logic and precedent": "It is our opinion that even where an abduction is a technical violation of international law, a federal district court should not divest itself of jurisdiction over the fugitive's criminal prosecution." \textit{Id.} at 546.

The argument for this position is that non-consensual extraterritorial arrests violate international law because they breach the asylum state's integrity. This wrong is not vindicated by dismissal of the indictment against the defendant, but by compensating the asylum state. At the same time, the defendant does not have a sufficient interest in the territorial integrity of the asylum state to claim that its violation merits dismissal of the indictment against him. \textit{See} \textit{Id.} at 546 n.10 and accompanying text.
2. International Law Implications

In assessing the international law implications of the proposed operation, Assistant Attorney General Harmon focused on two sources of legal obligation: treaties and customary international law. The relevant treaties to be considered in the Vesco operation were the extradition treaty between the United States and the Bahamas\(^{60}\) and the United Nations Charter. The extradition treaty would not divest a U.S. court of its jurisdiction over the defendant, Harmon argued, because the treaty did not make its extradition mechanism the exclusive means to obtain custody of a fugitive.\(^{61}\) In the absence of such a provision, the mere existence of an extradition treaty does not imply that the signatories are limited to the procedures therein.\(^{62}\) While the U.N. Charter implicitly prohibits non-consensual, extraterritorial arrests,\(^{63}\) Harmon argued that the "broad sweep and hortatory tone" of the Charter's language indicates that the U.S. did not intend to limit the criminal jurisdiction of its courts by signing it.\(^{64}\) Thus, abduction of Vesco would not violate the extradition treaty with the Bahamas because the treaty lacks an explicit provision making it the exclusive mechanism for apprehending fugitives, and while the abduction would violate the U.N. treaty, that instrument is not of sufficient legal effect in the United States to impair the jurisdiction of U.S. courts.

Turning to customary international law, Harmon found that it would be violated by the proposed operation. Forcible abduction, when followed by even a \textit{pro forma} protest by the asylum state, is an impermissible violation of the principle of territorial integrity under customary international law.\(^{65}\) The violation of international law involved in abducting Vesco would "significantly heighten the litigation risks" in the Second Circuit.\(^{66}\) Presumably, such a violation would not "heighten litigation risks" in any other circuit because other circuits continued to follow the \textit{Ker-Frisbie} corollary that violation of international law will not


\(^{62}\) \textit{Id.} at 547. \textit{But see} United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990) (extradition treaty between U.S. and Mexico construed to constitute exclusive mechanism for rendering fugitives; abduction of Mexican national by paid agents of U.S. government, followed by protest by Mexican government, violated treaty and could be remedied only by return of fugitive to Mexico).

\(^{63}\) 1980 Opinion, \textit{supra} note 13, at 548. Such arrests violate the pledge in the U.N. Charter to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state . . . ." U.N. \textsc{Charter} art. II, para. 4. The U.N. resolution condemning the Israeli apprehension of Adolph Eichmann in Argentina "is construed . . . to be a definitive construction of the United Nations Charter as proscribing forcible abduction in the absence of acquiescence by the asylum state." 1980 Opinion, \textit{supra} note 13, at 548. \textit{See also} authorities cited, \textit{id.} at 548 n.15.

\(^{64}\) 1980 Opinion, \textit{supra} note 13, at 548-49.

\(^{65}\) \textit{Id.} at 549 (citing \textit{Lujan}, 510 F.2d at 67).

\(^{66}\) \textit{Id.} at 549.
impair the jurisdiction of a U.S. court. Only the Second Circuit, where Vesco would be tried, recognized dismissal because of a violation of international law in securing the defendant.

3. Civil Liability

Assistant Attorney General Harmon also concluded that the proposed operation would make the U.S. and its agents liable to civil suits for torts committed in Vesco’s abduction. This conclusion was underpinned by a far more significant one: the U.S. in general, and the FBI in particular, lack authority under U.S. law to violate international law under any circumstances.

Harmon began by noting that Ker v. Illinois explicitly left open the question of whether civil liability would attach to U.S. agents carrying out an illegal arrest. Thus, he looked to the governing statute, the Federal Tort Claims Act (FTCA), to determine whether, and to what extent, the government would be liable for the proposed operation.

The FTCA preserves sovereign immunity for constitutional and common law torts committed in the course of an arrest, but only if the government acts within the limits of its authority and in good faith. Good faith requires that the agents must believe in the validity and necessity of the operation, and in the necessity for carrying it out in the manner in which it was executed. Harmon concluded that the good faith requirements would be met in the Vesco case. Therefore, the only relevant inquiry was whether the proposed operation fell within the limits of the FBI’s authority. If it did not, as Harmon ultimately concluded, the United States and its agents would face civil liability for constitutional and common law torts committed in the operation.

Harmon began his analysis of FBI authority by citing the general principle that “law enforcement officers [act] beyond the outer limits of their authority when they act beyond their jurisdiction.” The FBI’s jurisdiction is defined in the agency’s general enabling statute at 28

67. See supra note 59.
68. 1980 Opinion, supra note 13, at 555.
69. Id. at 550 (citing Ker v. Illinois, 119 U.S. at 444).
72. Id. at 551 (citing Norton v. United States, 581 F.2d 390, 393 (4th Cir.), cert. denied, 439 U.S. 1003 (1978) and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1348 (2d Cir. 1972)).
73. Id.
74. 1980 Opinion, supra note 13, at 553 (“There is ample probable cause and a number of outstanding bench warrants.”).
75. Mr. Harmon examined separately the question of civil liability for violations of international law. He concluded that here the fugitive would have no independent cause of action because the duty breached ran to the asylum nation, not to the fugitive. Id. at 554. For an analogous reasoning for not divesting court of criminal jurisdiction where prosecution has violated international law, see supra note 59.
76. 1980 Opinion, supra note 13, at 551 n.25 and accompanying text.
Although section 533(1) does not explicitly place geographical limits on the FBI's authority to conduct investigations and make arrests, such limitations must be implied.\(^{78}\)

In reaching that conclusion, Harmon followed two lines of analysis. First, section 533(1) does not authorize non-consensual extraterritorial arrests. A law implicitly authorizes all actions that are "necessary and reasonable" to effectuate the statute's purpose.\(^{79}\) If an action is not both necessary and reasonable in relation to the statute, Harmon argued, it is not authorized by it.

The proposed operation easily met the necessity, but not the reasonableness, requirement. Vesco was an indicted felon and the extradition procedure had proven incapable of reaching him.\(^{80}\) To carry out its statutory mission to "detect and prosecute crimes against the United States,"\(^{81}\) the FBI would have to abduct Vesco without the consent of the Bahamian government. But such arrests violate international law and have been widely condemned by jurists and academics, according to Harmon. They "undermine the international order and breed disrespect for the traditional means of fostering cooperation and arbitrating disputes . . . [and] denigrate the rule of law in the name of upholding it."\(^{82}\) Because such arrests would be unreasonable under international law, Harmon concluded it is not reasonable to infer that they are authorized by the statute.\(^{83}\) While necessary, the operation would be unreasonable and therefore unauthorized by the statute.

Second, Harmon concluded, section 533(1) cannot authorize the FBI to conduct non-consensual extraterritorial arrests because the United States itself lacks authority to act in foreign countries without their consent. The de jure authority of the United States ends where the de jure authority of another sovereign begins.\(^{84}\) The United States can act legally in a foreign country only when that country consents to the exercise of U.S. power within its borders. Harmon found support for this proposition in Chief Justice Marshall's reasoning in The Schooner Exchange v. M'Faddon:\(^{85}\)

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source,

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\(^{77}\) Id. at 551. Section 533(1) provides, "[t]he Attorney General may appoint officials . . . to detect and prosecute crimes against the United States . . . ." 28 U.S.C. § 533(1) (1988).

\(^{78}\) 1980 Opinion, supra note 13, at 555.

\(^{79}\) Id. at 552.

\(^{80}\) Id.

\(^{81}\) 28 U.S.C. § 533(1).

\(^{82}\) 1980 Opinion, supra note 13, at 552 nn.27-8 and accompanying text.

\(^{83}\) Id. at 552.

\(^{84}\) Id. "The F.B.I.'s power cannot extend beyond those of the United States. The de jure authority of the United States is necessarily limited by the sovereignty of other nations." Id.

\(^{85}\) 11 U.S. (7 Cranch) 116 (1812).
would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced to the consent of the nation itself. They can flow from no other legitimate source.86

Thus, the United States cannot make its own laws a legitimate source of authority when it acts within the jurisdiction of another sovereign without the consent of that sovereign. Therefore, the U.S. could not legally arrest Vesco in the Bahamas without the consent of the Bahamian government. As a matter of U.S. constitutional law, Harmon concluded, the United States lacked the authority to arrest Vesco without Bahamian consent.

Having concluded that the FBI enabling statute did not and could not authorize non-consensual extraterritorial arrests,87 Assistant Attorney General Harmon went on to find that common law and constitutional tort actions would lie against the U.S. and its agents in the wake of the proposed operation.88 Although “obvious logistical problems” would make it difficult for the captured fugitive to file suit in the state of former asylum, Harmon concluded that a civil action could be maintained in the United States.89

4. Criminal Liability

Harmon found that the abducting agents would face criminal charges in the asylum state.90 The U.S. would not extradite its agents to an asylum state such as the Bahamas to face prosecution for an operation which they were told by their superiors to carry out. However, those agents should stay out of third countries which have extradition treaties with the Bahamas.91

D. Conclusion and Recommendations of 1980 Opinion

Assistant Attorney General Harmon concluded that the FBI should not undertake the proposed operation without the asylum state’s consent.92

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87. Id. at 553.
88. Id. at 553-56. A plaintiff with close ties to the United States could recover for the constitutional tort of violation of his Fourth Amendment rights, id. at 554, and the common law torts of false imprisonment, false arrest, and assault and battery. Id. at 554-55. While only a U.S. citizen or defendant with a strong tie to the United States may assert a constitutional tort, any person, regardless of nationality, could pursue a common law action. Cf. id. at 555.
89. Id. at 555.
90. Id. at 556. The events surrounding United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), support Harmon’s conclusion in this regard. In that case, the Mexican government has requested the arrest and extradition of DEA agents and expatriate Mexicans who were involved in kidnapping the defendant.
92. 1980 Opinion, supra note 13, at 556.
First, the violation of international law involved could jeopardize successful criminal prosecution of Vesco in the Second Circuit. Second, because the FBI would be acting outside the scope of its authority, the United States and its agents could be subject to a civil suit. Third, the United States could face an “embarrassing extradition request” if the asylum nation chose to prosecute the abductors. Finally, Harmon raised a foreign policy consideration he had otherwise ignored in the rest of the opinion: “[I]n the current international climate, this country can ill afford an operation that would permit others to argue that the United States does not respect international law.”

II. The 1989 Opinion

A. Background

Sometime in 1987, the Criminal Investigative Division of the FBI asked the Bureau’s Office of Legal Counsel to examine the implications of various extraterritorial operations involving the seizure of specific suspects. As a result of that inquiry, the FBI’s Office of Legal Counsel requested that the Justice Department’s Office of Legal Counsel reexamine the 1980 Opinion. According to Bush Administration officials, the initial FBI inquiry was prompted by the passage of two laws conferring extraterritorial law enforcement authority on the FBI: the Comprehensive Crime Control Act of 1984 and the Omnibus Diplomatic Security and Anti-terrorism Act of 1986. Both of these statutes, however, have been construed to require the consent of the host government for extraterritorial operations. The FBI review of extraterritorial authority has also been described by Administration officials as motivated by the general need to fight political and “narco-” terrorism free of the constraints imposed by the 1980 Opinion. Nonetheless, the Administration refused to characterize the 1989 Opinion as a change of policy, prefer-
ring instead to call it a “legal analysis” of FBI authority under domestic law. The motivations prompting the FBI inquiry, the 1989 Opinion concluded that non-consensual extraterritorial arrests are authorized under U.S. law.

The Bush Administration will not release the opinion itself. Therefore, for the structure and reasoning of the opinion, this Note will rely on the prepared Congressional testimony of William P. Barr, the Assistant Attorney General in charge of the Office of Legal Counsel of the Justice Department. This section will focus on the parts of Barr’s statement most likely to track the 1989 Opinion: his critique of the 1980 Opinion and his legal justification for reaching the conclusion that non-consensual extraterritorial arrests are authorized under U.S. law.

B. Overview of the 1989 Opinion
Assistant Attorney General Barr followed four lines of reasoning to reach the conclusion that non-consensual extraterritorial arrests are authorized under U.S. law. First, the 1980 Opinion failed to consider the controlling legislative and executive acts doctrine by which a constitutionally authorized act by either branch supplants international law norms. Second, the FBI’s enabling statutes authorize non-consensual, extraterritorial arrests. Third, even without statutory authorization, the legal power to conduct such arrests inheres in the President’s general constitutional authority to enforce the law. Finally, Barr concluded, the violation of international law norms is part of the natural process of making international law. Thus, the President’s constitutionally granted foreign policy power authorizes him to make international law by breaking it.

at 42, 46 (testimony of William P. Barr) (“There was broad consensus within the administration that the 1980 Opinion was fundamentally flawed . . . .”).
101. Statement of William P. Barr, supra note 19, at 3-4; see Statement of Abraham D. Sofaer, supra note 5, at 1.
102. Statement of William P. Barr, supra note 19, at 4-5, 7-8, 9.
103. See supra note 16.
104. See Statement of William P. Barr, supra note 19, at 4-6.
105. See id. at 6-8.
106. Id. at 9-10.
107. Id. at 11-12.
108. Id. The 1989 Opinion apparently did not address the Ker-Frisbie doctrine in detail. Barr stated in his testimony that he agreed with the 1980 Opinion’s conclusion that the jurisdiction of a U.S. court would be unaffected by the due process or prosecutorial improprieties of fugitive snatching. Id. at 3 n.1. But as noted here, the 1980 Opinion expressed concerns about the continued viability of the Ker-Frisbie doctrine in the Second Circuit, even though, as a matter of policy, it argued that the doctrine should be upheld. The 1980 Opinion’s assessment of the doctrine’s viability is critiqued and its current status examined at infra notes 144-58 and accompanying text.
C. Reasoning of the 1989 Opinion

1. The Controlling Executive or Legislative Act Doctrine

A legislative or executive act that violates international law is legal under U.S. domestic law, according to the 1989 Opinion, provided it falls within the constitutional authority of the branch undertaking the action.\textsuperscript{109} Any act within that authority constitutes a controlling executive or legislative act and may supplant international law.\textsuperscript{110} Assistant Attorney General Barr found authority for this proposition in three nineteenth century United States Supreme Court cases.

The first two of the cases, according to Barr, establish the general principle that international law is defeasible by the acts of sovereign nations. In \textit{Schooner Exchange v. M'Faddon},\textsuperscript{111} Chief Justice Marshall "opined" that the implied immunity of a French warship under international law from U.S. judicial process within the territory of the United States could be destroyed by "the sovereign [i.e., the United States] . . . either by employing force, or by subjecting such vessels to the [jurisdiction of its] ordinary tribunals."\textsuperscript{112} In other words, although the ship was protected by international law, the United States could defeat the protection by force, or by judicial process ultimately backed by force. In \textit{Brown v. United States},\textsuperscript{113} Chief Justice Marshall observed that international law is a "guide . . . addressed to the judgement of the sovereign," which can be disregarded at will.\textsuperscript{114} Its only weight derives from the immorality and public criticism attendant in disregarding it.\textsuperscript{115} Barr noted that Marshall made no distinction between violations of international law that occur within U.S. territory and the violation of international law that occurs by "infring[ing] on the territorial sovereignty of foreign nations" by abducting fugitives.\textsuperscript{116} Barr inferred that these cases support U.S. authority to violate international law in all cases, including fugitive abduction.

Finally, in \textit{The Paquete Habana},\textsuperscript{117} the Supreme Court distilled these general principles into a definite legal rule: the controlling executive and legislative act doctrine. Simply put, "in the exercise of his constitu-

\begin{footnotesize}
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\item[109.] \textit{See Statement of William P. Barr, supra} note 19, at 4-5.
\item[110.] \textit{Id.}
\item[111.] 11 U.S. (7 Cranch) 116 (1812). The 1980 Opinion cited \textit{The Schooner Exchange} to support the proposition that the United States cannot legitimately exercise its sovereignty within the jurisdiction of another nation without that nation’s consent.
\item[112.] \textit{Statement of William P. Barr, supra} note 19, at 5 (quoting \textit{The Schooner Exchange}, 11 U.S. at 146).
\item[113.] 12 U.S. (8 Cranch) 110, 128 (1814).
\item[114.] \textit{Statement of William P. Barr, supra} note 19, at 5 (quoting \textit{Brown}, 12 U.S. at 128).
\item[115.] \textit{Id.}
\item[116.] \textit{Id.} at 6. Of course, the Court in \textit{The Schooner Exchange} and in \textit{Brown} was not considering the latter issue. It is also worth noting that in both cases the Supreme Court held that the violation of international law was improper. The language relied upon by Barr was dicta. \textit{See} infra note 180 (\textit{Brown}) and text accompanying note 212 (\textit{The Schooner Exchange}).
\item[117.] 175 U.S. 677 (1900).
\end{enumerate}
\end{footnotesize}
tional authority, the President may depart from international law by a 'controlling executive . . . act.'

International law, which is totally defeasible by sovereign power, cannot make illegal under domestic law executive or legislative acts authorized by the Constitution. Therefore, even though fugitive snatching violates international law, it is legal under U.S. law if duly authorized by Congress or the President.

2. FBI Enabling Statutes

The FBI's general enabling statutes, according to Barr, "carry into execution the President's core executive law enforcement power . . . ." This power "intersects with [the President's] constitutional responsibilities in the field of foreign relations" where extraterritorial action is concerned. Citing Justice Jackson's famous concurring opinion in the Steel Seizure case, Barr argued that the broad terms of the statute should be read with deference to executive prerogative in the core areas of law enforcement and foreign affairs. Because the President has "authority to override customary international law" when he acts within his constitutional sphere, that power should not be restrained by a restrictive reading of the statute.

Therefore, the statutes should be read to authorize non-consensual extraterritorial arrests in violation of international law.

3. The President's Inherent Law Enforcement Power

According to Assistant Attorney General Barr, the 1980 Opinion failed to recognize that "[q]uite apart from the question of whether the FBI has statutory authority to override customary international law," the President may order it to do so pursuant to his "inherent constitutional

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118. Statement of William P. Barr, supra note 19, at 6 (quoting The Paquete Habana, 175 U.S. at 700).
119. In addition to 28 U.S.C. § 533(1), considered in the 1980 Opinion, the 1989 Opinion also considered 18 U.S.C. § 3052 as one of the FBI's general enabling acts. This law, 62 Stat. 817 (1948), as amended by 64 Stat. 1239 (1951), should have been considered in the 1980 Opinion as one of the FBI's general enabling acts. It provides:

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

120. Statement of William P. Barr, supra note 19, at 8.
121. Id.
122. Id. (citing Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").
123. Statement of William P. Barr, supra note 19, at 8.
power to authorize law enforcement activities."124 That power derives from the President's "general executive authority under Article II and his constitutional responsibility to 'take care that the laws be faithfully executed.'"125 This inherent law enforcement power allows the President to violate international law, under the controlling act doctrine, without congressional authorization.126

According to Barr, the principle of inherent law enforcement power was established in In Re Neagle.127 In Neagle, the Supreme Court held that the President's constitutional duty to execute the laws is not limited to the terms of statutes or treaties but "extends also to the 'rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.'"128 Where this general law enforcement authority "intersects" with the President's foreign affairs power, the result is a strong independent basis of "legislative" power.129 Pursuant to this independent authority, the President may "direct Executive Branch agents to carry out arrests that contravene customary international law and other international law principles which our legislature has not acted upon to make part of our domestic law."130 Barr thus implied that customary international law is not really a part of U.S. law without statutory enactment and that the President is free to disregard such law when exercising his independent powers.

According to Barr, the three general lines of reasoning— the controlling executive acts doctrine, the breadth of FBI authority pursuant to its general enabling acts, and the President's inherent law enforcement authority—converged in the Eleventh Circuit's decision in Garcia-Mir v. Meese.131 The Eleventh Circuit Court of Appeals held that the Attorney General was authorized to detain Cuban refugees indefinitely, even though such detention violated customary international law and was not specifically authorized by statute.132 The Attorney General's detention order constituted a controlling executive act which, according to the court, supplanted international law.133 The court rejected the Attor-

124. Id. at 9.
125. Id.
126. Id. at 4-5.
127. 135 U.S. 1 (1890).
128. Statement of William P. Barr, supra note 19, at 9 (quoting In Re Neagle, 135 U.S. at 64-67). The court held in Neagle that the Attorney General did not need statutory authorization to order U.S. Marshals to protect a Supreme Court justice.
129. Statement of William P. Barr, supra note 19, at 9-10. Barr cited John Jay to support the principle that the President has lawmakers when acting within his own constitutional sphere. The FEDERALIST No. 64, at 394 (C. Rossiter ed. 1961) ("[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature . . . .").
132. Id. at 1454-55.
ney General's argument that 8 U.S.C. section 1227(a) contained authority for the detentions and found instead that the Attorney General's inherent constitutional power to order the detentions in violation of international law was sufficient on its own account. Nonetheless, Assistant Attorney General Barr argued that the statute itself authorized the detentions. The detention statute, he argued, is analogous to the broad FBI enabling statutes.  

But such authority may be implied because the statute operates in a sphere of independent executive power. According to Barr, Garcia-Mir illustrates that the President has the authority to violate international law when he operates "in an area such as law enforcement, where [he] has constitutional authority and his agents have broad statutory authority."  

4. The Nature of International Law

Finally, according to Assistant Attorney General Barr, the President's power to violate customary international law can be inferred from the very nature of that law. Customary international law is a set of principles which exists by the consensus of nations and evolves with their practices. Each nation has the power to create a new rule or principle by acting in the world arena, although it is liable for breaching existing customary law until the norm inherent in its action becomes accepted by the community of nations. In giving the President foreign affairs powers, the Constitution granted the authority to participate in the formation and evolution of international law. Thus, the President must have authority under domestic law to exceed the current limits of international law.

III. Analysis

The Analysis portion of this Note is divided into three sections. The first critiques the 1980 Opinion's evaluation of the Ker-Frisbie doctrine and assesses the current viability of that doctrine. The second examines the authority of the President under domestic law to order forcible apprehension of fugitives in violation of international law. The final section examines the policy implications that follow from the legal conclusions reached in the first two sections of the analysis.

134. See id. at 10-11.
135. Id.
136. Id. at 11.
137. Id.
138. Id.
139. Id. at 11-12.
140. Id. at 12.
141. See infra notes 144-58 and accompanying text.
142. See infra notes 159-296 and accompanying text.
143. See infra notes 297-313 and accompanying text.
A. The Current Status of the Ker-Frisbie Doctrine

As the 1980 Opinion pointed out, Toscanino laid two independent foundations for divestment of a court's jurisdiction over a defendant forcibly abducted in violation of international law. The first rested on modern notions of due process,144 and the second on an appellate court's supervisory power over district courts.145 Mistreatment of the defendant and violation of international law could justify dismissal of the indictment as a matter of due process or judicial administration.

The due process rationale of Toscanino, which focused on the alleged mistreatment of the defendant, was progressively restricted in subsequent Second Circuit cases, beginning with United States ex rel Lujan v. Gengler, to include only severe mistreatment.146 In three cases since Toscanino, the Supreme Court has further restricted Toscanino by reaffirming the due process aspects of Ker-Frisbee.147 The Supreme Court rejected any due process analogy, such as that made by the Second Circuit in Toscanino, between the rationale of the exclusionary rule of evidence and a rule favoring dismissal of charges because of government misconduct.148 The Toscanino exception to the Ker-Frisbie rule provides that only government conduct which "shocks the conscience" justifies dismissal. While this exception has become an accepted part of the Ker-Frisbie doctrine,149 it has never been used.150

The supervisory powers strand of Toscanino and the part of the decision concerned with violations of international law have technically survived. The international law issue was tacitly reserved in dicta in Lujan, as noted by the 1980 Opinion.151 It was explicitly reserved in the concurring opinion of Judge Oakes in United States v. Lira,152 decided a few months after Lujan and a few days after Gerstein v. Pugh, the first recent Supreme Court case upholding the Ker-Frisbie rule.153 Judge Oakes took note of the Supreme Court's decision in Gerstein but observed that appellate courts may still "wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory

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144. 500 F.2d at 275.
145. Id. at 276.
146. 510 F.2d 62 (1975). See also United States v. Reed, 639 F.2d 896 (2d Cir. 1981).
149. Cf. supra note 1 (Toscanino exception incorporated into Restatement § 433(2)).
151. See supra note 53 and accompanying text.
153. 420 U.S. at 119.
power... over district courts." Although this line of attack on Ker-Frisbie has technically survived, it has never been used or espoused by any federal court since Lira. Even in Lira, the reasoning was contained only in a concurring opinion.

When the 1980 Opinion was written, it was reasonable to believe that abduction of a defendant in clear violation of international law might lead to dismissal of the indictment in the Second Circuit. Since Ker v. Illinois, no American court had heard a case involving an actual violation of international law where the asylum state protested the breach of its territorial integrity by abducting agents. The question was legally open. Because the proposed abduction of Vesco hypothesized a genuine violation of international law, including a protest by the asylum state, it was reasonable to suppose that the Second Circuit might dismiss the case in light of its recent decisions criticizing and narrowing the Ker-Frisbie doctrine. But the passage of time now indicates that the initial movement in the Second Circuit towards abandoning the doctrine has not continued there or anywhere else. As the law currently stands, it seems unlikely that any American court would depart from the Ker-Frisbie doctrine and dismiss an indictment on the grounds that forcible abduction of the defendant in defiance of international law violated the defendant's due process rights.

154. 515 F.2d at 73.
156. See Restatement, supra note 1, at § 432, reporter's note 3.
157. While the Ker-Frisbie doctrine remains as strong as ever, a new remedy has opened in an unanticipated quarter for at least some defendants abducted in violation of international law. In United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), the federal district court ordered the government to release a defendant whose kidnapping from Mexico was arranged by the U.S. Drug Enforcement Agency and officially protested by the Mexican government. The court held that the kidnapping violated the extradition treaty between the United States and Mexico and could be remedied only by returning the defendant to his home country. Id. at 614. The defendant's release has been stayed pending appeal of the district court's ruling that it lacked jurisdiction to try the defendant. Significantly, the district court rejected the defendant's claim that he should be released under the Toscanino exception to the Ker-Frisbie doctrine, finding that the defendant had not been subjected to "outrageous conduct" at the hands of the authorities. Id. at 605-06. Moreover, the court explicitly recognized the continued viability of the Ker-Frisbie doctrine. Id.
158. The Supreme Court's attitude on the subject may have been revealed in the recent case of United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 1058 (1990), a case arising out of the same events as United States v. Caro-Quintero. In Verdugo, the Court held that the exclusionary rule does not apply against evidence seized by U.S. officials in a foreign country in a manner that would have violated the Fourth Amendment if the defendant had been an American citizen or the seizure had occurred in the United States. The Court emphasized the need to allow U.S. authorities maximum freedom to carry out law enforcement and military activities abroad, the same policy justifications that would be offered in support of any official fugitive abduction scheme. Id. at 1056. To the extent that admission of evidence and maintenance of jurisdiction over defendants are analogous, the case indicates the Supreme Court may not be inclined to go back on the Ker-Frisbie rule.
B. Domestic Law Authority of the President to Order Forcible Apprehension of Fugitives in Violation of International Law

The primary disagreement between the 1980 and 1989 Opinions is their diametrically opposed conclusions on the domestic law authority of the FBI to abduct fugitives from overseas in violation of international law. The 1980 opinion found that authority lacking on two grounds. First, it applied a simple rule of statutory interpretation to conclude that the FBI's general enabling statutes do not authorize activities that violate international law. Second, it concluded that under U.S. law the United States cannot assert *de jure* authority in a foreign country without that country's consent. The 1989 Opinion considered these same issues but in reverse order. First, it concluded that the United States is generally authorized under its domestic law to violate international law through a "controlling legislative or executive act." That authority includes the power to act in other countries without their consent. Second, it argued that the FBI's general enabling statutes authorize non-consensual extraterritorial arrests because any broad grant of authority to the President in the area of law enforcement must implicitly carry the power to violate international law. Third, it argued that, even without statutory authorization, the President and high level executive officials can order, pursuant to the Chief Executive's inherent law enforcement powers, forcible apprehension of fugitives in violation of international law.

This section considers these issues in three sub-sections. The first examines the legal doctrines which empower the President and Congress to violate international law. It criticizes the conclusion of the 1980 Opinion that the United States does not have *de jure* authority under its own laws to act in foreign countries without their consent. The second sub-section looks at the specific question of whether Congress granted "snatching authority" to the FBI in its general enabling acts. Whether or not such authority was granted determines the scope of the agency's power to carry out such arrests as a matter of both foreign relations law, under the controlling acts doctrine, and constitutional law, under traditional separation of powers analysis. The sub-section concludes that Congress neither authorized nor explicitly forbade the FBI from carrying out non-consensual extraterritorial arrests. In light of that conclusion, the third sub-section assesses the authority of the President and executive officers to order fugitive snatching in violation of international law. It concludes that, under both the controlling acts...
doctrine and a separation of powers analysis, the President and lower officials have the power to order the forcible abduction of fugitives without express congressional authorization.

1. Domestic Law Authority of the U.S. To Act In Violation of International Law

a. Status of International Law in U.S. Law

The 1989 Opinion implied that customary international law is not a part of the law of the United States until enacted by statute.167 This conclusion is clearly erroneous. Customary international law and treaties are part of the domestic law of the United States.168 Although the Constitution explicitly incorporates only treaties into U.S. law,169 the Supreme Court has long recognized that customary international law is part of U.S. law.170 While experts offer many theories to explain how customary international law became a part of U.S. law, its incorporation was

167. See supra note 130 and accompanying text.
168. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). Three sections read together explain the general place of customary international law and international agreements as part of the law of the United States:
Section 111. International Law and Agreements as Law of the United States
(1) International law and agreements of the United States with other nations are law of the United States and supreme over the law of the several states.

Section 112. Determination and Interpretation of International Law: Law of the United States
(1) International law is determined and interpreted in the United States by reference to the sources of international law cited in § 102...

Section 102. Sources of International Law
(1) A rule of international law is one that has been accepted as such by the international community of states
(a) in the form of customary law;
(b) by international agreement; or
(c) by derivation from the general principles common to the major legal systems of the world.

169. U.S. CONST. art. VI, cl. 2 provides:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

170. The leading articulation of the principle that customary international law is part of U.S. law is found in The Paquete Habana, 175 U.S. 677, 700 (1900). The Court held that the breach of customary international law entitled Cuban plaintiffs to receive damages for seizure of their fishing boats by the U.S. Navy during the Spanish-American War: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination.” See also Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853, 873 n.90 and accompanying text (1987).
apparently an incident of independence from Great Britain and the assumption of sovereign status by the United States in the family of nations. 171

That customary international law is integrated into the substantive law of the United States implies a second principle: it may be "legally" repudiated only when Congress or the President exercises constitutional lawmaking authority. 172 Congress holds broad legislative power under the U.S. Constitution, 173 and the scope of its power to alter U.S. international law obligations is equally broad. 174 In contrast, the President is the "executive Power" by the terms of the Constitution. 175 The President's duty to "take care that the laws be faithfully executed" comprehends the obligation to obey and enforce customary international law. 177 If the President is to violate international law instead of execute it, the power to do so must stem either from a statute or, in the absence of one, from independent lawmaking powers inherent in the President's constitutional duties. 178 The President's power to violate international law without statutory authorization is thus co-extensive with the Presidency's constitutional sphere of independent action.

171. See Henkin, supra note 170, at 865-66 nn.60-62 and accompanying text, 868 nn.69-70 and accompanying text. See also Restatement, supra note 1, at § 111, comment b.

Customary international law and English common law were incorporated into U.S. law by similar means, which inevitably leads to analogies between the two. But there are important differences, particularly in the way they interact with statutes. In Anglo-American jurisprudence, common law is inferior to statutes. See Henkin, supra note 170, at 875-76. In contrast, customary international law (like treaties) is equal in status to statutes. Id. at 878. See also Restatement, supra note 1, at § 115, comment a. A statute will not supersede an existing rule of customary international law unless the statute evinces a "clear purpose" to do so or the rule and the statute cannot be "fairly reconciled." Id. at §§ 114, 115(1)(a). The deference courts owe to a rule of customary international law is thus greater than that owed to a rule of common law when a later-in-time statute is enacted dealing with the same matter. Moreover, it is possible that a rule of customary international law which develops later in time than a statute will supersede the statute, although no court has ever actually reached that result. Id. at § 115, comment d. See also id. at § 102, comment j. In contrast, common law by its very definition cannot supersede an earlier statute.

Professor Henkin advances arguments to support the proposition that customary international law should be superior to domestic legislative enactments. Henkin, supra note 170, at 877. The Constitutions of Greece, Italy and the Federal Republic of Germany give precedence to customary international law over domestic statutes. Id. at 877 n.101. France and the Netherlands give such precedence to treaties only. Id. at 871 n.78.

172. See Henkin, supra note 170, at 879, 881. Liability remains under international law for any breach, notwithstanding the legality of the action under U.S. law. See Restatement, supra note 1, § 115(1)(b) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.") See also id. at § 115, comment b.


174. See Henkin, supra note 170, at 879.

175. U.S. Const. art. II, § 1, cl. 1.

176. Id. at art. II, § 3.

177. See, e.g., Restatement, supra note 1, at § 111, comment c.

178. Henkin, supra note 170, at 879, 881.
b. The Later-in-Time, or "Controlling" Acts Doctrine

Although the Constitution does not declare a hierarchy of statutory law over international law, a clear rule that later-in-time statutes will supersede preexisting rules of international law has emerged by judicial construction. Early nineteenth century cases alluded to the principle, but it was not clearly stated until 1888 in Whitney v. Robinson.181 In that case, the Supreme Court held:

By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.182

Twelve years later, the principle that a later-in-time statute will supersede a treaty obligation of the United States was applied to customary international law in The Paquete Habana.183 With both customary international law and treaties, a statute will not supersede an international obligation unless the purpose of the legislature to breach the obligation

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179. See U.S. Const. art. I, § 8, cl. 10 (Congress' power to define and punish piracy and felonies committed on the high seas and offenses against the law of nations); id. at art. I, § 10, cl. 1 (forbidding states from entering into treaties, alliances or confederations); id. at art. II, § 2, cl. 2 (President's power to make treaties with advice and consent of Senate); id. at art. III, § 2, cl. 1 (extending judicial power of the United States to cases arising under treaties); id. at art. VI, § 2 (declaring supremacy of U.S. treaties over state law). See also Henkin, supra note 170, at 867 ("The Constitution expressly establishes neither the relation of treaties and customary law to each other nor that of either to the Constitution or to laws enacted by Congress.").

180. See The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations which is part of the law of the land."); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) ("This usage [of the law of nations] is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgement of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.").

Taken out of context, as it was in Assistant Attorney General Barr's testimony about the 1989 Opinion, the quote from Brown is frequently used to support the principle that the United States may disregard international law. In the context of Brown, however, such an interpretation is dubious. Chief Justice Marshall made the statement in the course of explaining why seizure of British property found in the U.S. during the War of 1812 could not be undertaken by the executive or the courts without legislative authorization. Id. at 129. Because the rule of customary international law that enemy property may be seized during time of war "was addressed to the judgement of the sovereign," Congress was the proper entity to make the policy decision of whether or not the right granted by international law should be exercised. Id. at 128. Chief Justice Marshall was not addressing the question of whether Congress or the President is empowered to violate international law. He was addressing the question of which branch should make the decision to exercise a right granted by international law. See also Henkin, supra note 170, at 867-68 n.67 (criticizing use of The Nereide to support the principle that Congress is empowered to violate international law).

181. 124 U.S. 190 (1888).

182. Id. at 194.

183. 175 U.S. 677, 700, 708 (1900).
is clear, and no other construction of the statute is "fairly possible."\textsuperscript{184}

The \textit{Paquete Habana} not only extended the later-in-time rule to a new object, customary international law, but it also added a new subject—the President. In what one commentator referred to as "opaque dictum,"\textsuperscript{185} and what anyone would agree was casual comment, the Court opined that customary international law applies in the absence of a "controlling executive \ldots\ act."\textsuperscript{186} Thus, the Court implied that a controlling executive act supersedes a rule of customary international law in the event of conflict.\textsuperscript{187} The timidity of the original statement of the doctrine is reflected in the Restatement (Third) of Foreign Relations Law of the United States. Sections 114 and 115, regarding the rule of decision to be applied in the event of a conflict between U.S. law and international law, refer only to the controlling effect of a later-in-time \textit{statute}.\textsuperscript{188} The power of the President to violate international law is not mentioned in the "black letter" sections or in the comments to those

\textsuperscript{184} RESTATEMENT, \textit{supra} note 1, at §§ 114, 115(1)(a).

Section 114. Interpretation of Federal Statute in Light of International Law or Agreement

Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.

Section 115. Inconsistency Between International Law or Agreement and Domestic Law: Law of the United States.

(1)(a) An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear, or if the act and the earlier rule or provision cannot be fairly reconciled.

\textit{See} Murray \textit{v. Schooner Charming Betsy}, 6 U.S. (2 Cranch) 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains \ldots").

\textsuperscript{185} Henkin, \textit{supra} note 170, at 863.

\textsuperscript{186} 175 U.S. at 700.

\textsuperscript{187} That the "controlling executive act" language is dictum is obvious from both the facts of \textit{The Paquete Habana} and the actual words of the quote. The full quotation is:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations \ldots

\textit{Id.} The reasoning that customary "international law is part of our law" was necessary to support the decision in the case and thus constitutes the holding. The Court decided that Cuban plaintiffs were entitled to damages for seizure of their fishing boats by the U.S. Navy, \textit{id.} at 714, because such seizure violated the rule of customary international law that fishing vessels "unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish are exempt from seizure as prizes of war." \textit{Id.} at 708. The rule of decision was thus supplied by customary international law and recognized as "part of our law" in the holding. There was no "controlling executive act" to overcome customary international law because the seizure was carried out by naval officers without higher authorization. \textit{Id.} at 712-13.

\textsuperscript{188} RESTATEMENT, \textit{supra} note 1, at §§ 115, 115(1)(a).
sections. The "President's power to supersede international law or agreement" is relegated instead to the Reporter's Note to Section 115. Regardless of its origin or wisdom, the current viability of the "controlling executive act doctrine" is nevertheless generally accepted. When acting within their constitutional spheres, both Congress and the President are empowered under U.S. law to pass statutes or take actions which violate international law.

c. Critique of the Two Justice Department Opinions' Analyses of U.S. Authority to Violate International Law

In light of the controlling acts doctrine, there can be little doubt that the 1980 Opinion incorrectly concluded that neither Congress nor the President has the power to authorize or execute law enforcement actions in other nations without their consent. While acting in another country without its consent clearly violates fundamental rules of international law protecting the sovereignty of states, there is no reason to believe that such actions receive particular disapproval under the U.S. legal system. Non-consensual extraterritorial arrests, like any violation of international law, are legal under U.S. law if they are within the constitutional powers of the branch authorizing the operation. Thus, if FBI agents were explicitly authorized by Congress to abduct fugitives from foreign countries, their statutory jurisdiction would incorporate that extraterritorial field of operation. The agents would be immune under the Federal Tort Claims Act against a suit by the abducted fugitive because they would have acted within their jurisdiction, and thus their authority, in undertaking the operation. While the Federal Tort Claims Act would protect them in the United States, it would not protect them against suit in international fora or the former state of asylum.

Assistant Attorney General Harmon relied on *The Schooner Exchange* v. *M’Faddon* in the 1980 Opinion to find an absolute limit on U.S. authority to assert jurisdiction in another country without its consent. In his 1989 congressional testimony, Assistant Attorney General Barr called that reliance "misplaced." Indeed, *The Schooner Exchange* occupies no place in the legal doctrine on the general authority of the United States to violate international law. The case is not cited in discussions of

189. *Id.* at § 115, reporter's note 3.
190. *Id.* at § 115, reporter's note 3.
191. *See id.* *See also L. Henkin, Foreign Affairs and the Constitution* 221-22, 460 n.61 (1972). *But cf.* Henkin, *supra* note 170, at 883 ("The Supreme Court has never addressed the validity of any claim of presidential power to order deviations from customary international law.").
194. *See Restatement, supra* note 1, at § 432(2) and comment b.
195. *See supra* notes 172-78 and accompanying text.
196. *Cf. supra* notes 72-83 and accompanying text.
198. 11 U.S. (7 Cranch) 116 (1812).
that topic in the Restatement (Third) of Foreign Relations Law of the United States,\textsuperscript{200} nor in any of the major constitutional and international law treatises and casebooks.\textsuperscript{201} The major significance of \textit{The Schooner Exchange}, rather, is as the leading case on the broad sovereign immunity of a state and its instrumentalities against the jurisdiction of the courts of another state.\textsuperscript{202} In this context, the quote from \textit{The Schooner Exchange} used by Assistant Attorney General Harmon does not bar the United States from acting in another country without its consent. It simply holds that the implied immunity of an official foreign entity within the jurisdiction of the United States may be defeated by the United States exercising official jurisdiction over the entity.\textsuperscript{203}

Reexamining the exact words of the quote from \textit{The Schooner Exchange} illustrates the difference between its use in the 1980 Opinion and its meaning in the context of the case:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.\textsuperscript{204}

In the 1980 Opinion, Assistant Attorney General Harmon used this language to reason that the United States, "an external source" of law in relation to the asylum state, the Bahamas, could not make its laws a legitimate source of authority in the Bahamas to kidnap a fugitive there. Any exception to the "full and complete power" of the Bahamas within its jurisdiction would have to stem from the consent of that government.\textsuperscript{205} While the bare words of the quote may support such an inter-

\begin{flushleft}
\textsuperscript{200} See, e.g., \textit{Restatement, supra} note 1, at Part I, Chapter 2 ("Status of International Law and Agreements in United States Law.").
\textsuperscript{202} See, e.g., Lilly, \textit{Jurisdiction Over Domestic And Alien Defendants}, 69 VA. L. REV. 85, 120 n.120 (1983). See also \textit{Restatement, supra} note 1, at Part IV, Chapter 5, Subchapter A, Introductory Note, n.1.
\textsuperscript{203} See 11 U.S. (7 Cranch) 116, 145:

\textit{It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction. Without doubt, the sovereign of the place is capable of destroying this implication.}

\textit{Id.} The Court held that \textit{The Exchange}, a French warship, was immune from judicial process in the United States because the U.S. Government had not expressly revoked the implied promise of sovereign immunity.
\textsuperscript{204} \textit{Id.} at 136.
\textsuperscript{205} See 1980 Opinion, \textit{supra} note 13, at 552-553.
\end{flushleft}
pretation, the facts are so distinguishable as to make Harmon’s reliance on the case unsound. In context, the quote means that France, “an external source” of law in relation to the United States, cannot infuse its instrumentalities, here the warship Exchange, with immunity from the territorial jurisdiction of the United States. Such an immunity, “an exception to the full and complete power” of the United States, may stem only from the implied consent of the United States. This consent may also be revoked.

The argument can be made that if The Schooner Exchange addresses the general power of the United States to violate international law, it does not diminish that power but, to the contrary, affirms it. The “external source” of law referred to in the language quoted can be construed as international obligation; the implication of sovereign immunity arises from a web of duties that sovereigns owe to each other. Such obligations among nations are the essence of international law. The implication of immunity, “a principle of public [international] law,” can be destroyed by the United States acting within its territorial jurisdiction. That the United States can do so legally does not argue for the strength of international law constraints on sovereign power; rather, it tends to show that the United States, exercising its sovereign power, can defeat immunities created by international law.

It is best to view The Schooner Exchange as neither a general endorsement of nor a prohibition against the violation of international law. It certainly does not stand for the view asserted by Assistant Attorney Gen-

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206. See Note, Extraterritorial Discovery: An Analysis Based on Good Faith, 83 COLUM. L. REV. 1320, 1321 n.n. 6-7 and accompanying text (1983). Because The Schooner Exchange stands for the “strict territoriality” principle, it was cited in American jurisprudence to prohibit extension of U.S. courts’ jurisdiction, in discovery for example, to a foreign state. That use of The Schooner Exchange, which is no longer good law, is analogous to the way Assistant Attorney General Harmon used it—if discovery is prohibited in foreign countries, so too is fugitive abduction.

207. See The Schooner Exchange, 11 U.S. (7 Cranch), at 143. After listing examples of official instrumentalities that enjoy an implied immunity when in the territory of a foreign sovereign, the Court summarized, “The preceding reasoning has maintained the proposition that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory . . . .” Id. Compare the language quoted by the Court from the 1980 Opinion: “All exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.” Id. at 136.

208. Id. at 136.
209. Id. at 146.
210. See, e.g., id. at 136.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

See also RESTATEMENT, supra note 1, at Part IV, Chapter 5, Subchapter A, Introductory Note.

eral Barr that the United States is generally empowered to violate international law. The holding of *The Schooner Exchange* was an effort to protect the implied immunity of a foreign warship, thus upholding customary international law against the jurisdictional pretensions of an American court.\(^\text{212}\) The rule of decision, as in *The Paquete Habana*, was supplied by international law. The case is not cited by authorities to support the power of the United States to violate international law, any more than it is cited to prohibit such violations.

In relying on sources such as *Brown v. United States*\(^\text{213}\) and *The Paquete Habana*,\(^\text{214}\) however, Assistant Attorney General Barr was squarely within the mainstream of American jurisprudence on the power of Congress and the President to violate international law.\(^\text{215}\) Given that legal doctrine, his congressional testimony indicates that the 1989 Opinion reached the correct conclusion regarding the authority of Congress and the President to violate international law through “controlling legislative or executive acts.” Courts will recognize the legality of such acts so long as they are undertaken pursuant to constitutional authority\(^\text{216}\) and the purpose of the act to violate international law is clear.\(^\text{217}\)

2. **Congressional Authorization for Fugitive Snatching**

\(\text{a. Interpretation of the FBI Enabling Acts}\)

Both the 1980 and the 1989 opinions claimed statutory approval for their point of view. The 1980 Opinion concluded that fugitive snatching was prohibited by the FBI’s general enabling act.\(^\text{218}\) The Opinion’s author argued that to read the act as authorizing fugitive snatching would be unreasonable in light of international law prohibiting the practice and the “substantial criticism” of legal authorities condemning it.\(^\text{219}\)

In describing the 1989 Opinion, however, Assistant Attorney General Barr interpreted the FBI enabling acts as “permitting” fugitive snatching and, at another point, he strongly implied that the acts constituted “statutory authority” for it.\(^\text{220}\)

\(^\text{212}\) Id. at 146.

\(^\text{213}\) 12 U.S. (8 Cranch) 110 (1814).

\(^\text{214}\) 175 U.S. 677 (1900).

\(^\text{215}\) But see supra notes 180 & 187, criticizing the use of *Brown* and *The Paquete Habana*, respectively, as support for the power of Congress and the President to violate international law.

\(^\text{216}\) L. Henkin, *supra* note 191, at 221-22, 460 n.61.


\(^\text{219}\) 1980 Opinion, *supra* note 13, at 552. As discussed *supra* note 79 and accompanying text, Harmon relied on a general rule of statutory interpretation to conclude that the FBI’s enabling act did not authorize fugitive abduction. In doing so, he ignored the specific rule for construing statutes that conflict with international law: statutes will not be construed to violate international law unless they evince a clear purpose to do so and no other construction is fairly possible. See Restatement, *supra* note 1, at §§ 114, 115. Applying that rule to the vague language of the FBI’s enabling act would have easily supported the conclusion that Harmon was aiming for—that the statute did not authorize the violation of international law.

To some extent, the apparent disagreement between the two opinions is readily traced to misunderstanding. While they appear to clash on the question of statutory authorization, both opinions agreed that the FBI statutes did not, of their own force and effect, authorize the FBI to abduct fugitives. The 1980 Opinion held that the international law prohibition against fugitive snatching had to be implied in the vague language of the FBI statutes. That prohibition prevented the FBI, acting on its own power, from abducting fugitives. Assistant Attorney General Barr essentially agreed with this conclusion when he described the nature of the “permission” to violate international law granted by the FBI's enabling acts: “[T]he FBI's general enabling statutes should be construed as permitting the agency to take extraterritorial action . . . when the agency has been directed to do so by a ‘controlling executive act’ that supplants customary international law.” Thus, according to both opinions, the FBI cannot abduct fugitives on its own authority. According to the 1989 Opinion, however, it can abduct fugitives pursuant to an order from higher up in the Executive Branch—“a controlling executive act”—which is itself “authorized” by the broad terms of the statute.

Nonetheless, Assistant Attorney General Barr apparently understood the 1980 Opinion to say that the FBI statute absolutely forbids the President, and not just the FBI acting on its own authority, from ordering fugitive snatching. It was important for him to contradict that proposition; if the statute forbids fugitive snatching, the President may lack the independent power to order it in the face of a congressional negative. According to Justice Jackson’s widely cited concurrence explaining Executive authority in the Steel Seizure Case, when the President attempts to act on the basis of his own authority in the face of a congressional prohibition, his powers are at their “lowest ebb.”

The 1980 Opinion, however, never claimed that the FBI statute constituted a restraint on the President from ordering fugitive snatching. That limitation, rather, arose from some natural law restriction on extraterritorial jurisdiction “revealed” to the author of the 1980 Opinion from the words of The Schooner Exchange. This limitation supposedly extended to the United States generally, including Congress and the President; but, as noted above, this interpretation of The Schooner Exchange and the attendant doctrine of limited U.S. power has little foundation in U.S. law.

In attempting to rebut an argument that the 1980 Opinion did not actually make—that the FBI enabling acts forbid the President and high level executive officials from ordering fugitive snatching—Assistant Attorney General Barr reached several incorrect conclusions. He reasoned that the FBI statute “authorizes” and “permits” fugitive snatch-

221. 1980 Opinion, supra note 13, at 552.
222. Statement of William P. Barr, supra note 19, at 8 (emphasis added).
223. Id. at 7.
224. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
225. See supra notes 198-212 and accompanying text.
ing simply because it is a vague law enforcement act.\textsuperscript{226} Law enforcement is an area where the President has "broad authority."\textsuperscript{227} Barr implied that whenever Congress passes a vague act in an area where the President has broad authority, it has sanctioned the violation of international law.\textsuperscript{228} But the rule with respect to statutes and international law is clear: statutes do not authorize the violation of international law unless they evince a clear purpose to do so and no other construction is fairly possible.\textsuperscript{229} Because a vague statute cannot evince a clear purpose to violate international law, the President must rely on his own powers to order fugitive snatching.\textsuperscript{230} The authority to do so cannot be implied by a vague statute.

In sum, while Assistant Attorney General Barr referred to "statutory authority" and permission for fugitive snatching,\textsuperscript{231} he really established no more than that the silence of the FBI enabling acts is not a prohibition on the President. Mere silence does not constitute a Congressional restriction on a co-equal entity like the President where, as in foreign affairs and law enforcement, he has independent powers.\textsuperscript{232} However, the limits of international law on U.S. jurisdiction should be read into the statutory silence of the FBI enabling acts to constrain the agency, a subordinate executive entity, from abducting fugitives without higher authorization.

\begin{footnotesize}
\textsuperscript{226} Statement of William P. Barr, \textit{supra} note 19, at 8.
\textsuperscript{228} Statement of William P. Barr, \textit{supra} note 19, at 8.
\textsuperscript{229} This conclusion is both highly significant and erroneous. It is significant because the President's power is at its absolute maximum, legally and politically, when he acts pursuant to the express will of Congress. \textit{Youngstown Sheet and Tube Co. v. Sawyer}, 343 U.S. 579, 635 (Jackson, J., concurring). Especially in the area of foreign affairs, the Supreme Court has held that the President has broad powers pursuant to general enabling acts. \textit{See United States v. Curtiss-Wright Export Corp.}, 299 U.S. 304, 320 (1936). But this rule is not cited as supporting the President's authority to violate international law. \textit{See, e.g.}, L. Tribe, \textit{supra} note 201, at § 4-4; J. Nowack, R. Rotunda, J. Young, \textit{Constitutional Law}, § 6.2; L. Henkin, \textit{supra} note 191, at 209-10. That Congress allows the President broad discretion in foreign affairs does not necessarily mean it has given him its approval to violate international law.
\textsuperscript{230} \textit{Restatement}, \textit{supra} note 1, at §§ 114-115; \textit{See also} The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
\textsuperscript{231} \textit{See Youngstown Sheet and Tube Co. v. Sawyer}, 343 U.S. 579, 637 (Jackson, J., concurring):

When the President acts in the absence of either a congressional grant or denial of authority, he can only rely on his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

\textit{Id.}
\textsuperscript{231} Statement of William P. Barr, \textit{supra} note 19, at 8.
\textsuperscript{232} \textit{See Youngstown Sheet and Tube v. Sawyer}, 343 U.S. at 579 (Jackson, J., concurring).
\end{footnotesize}
b. The Congressional View of Fugitive Snatching

While Congress has neither authorized nor forbidden fugitive snatching in the FBI's general enabling acts, expression of legislative intent on the subject in other statutes may indicate whether Congress would support an interpretation of the acts as authorizing such conduct. Congress passed two criminal statutes in the 1980s explicitly conferring extraterritorial jurisdiction on U.S. courts for crimes committed against Americans and crimes significantly affecting the interests of the U.S. Government: the 1984 Act for the Prevention and Punishment of the Crime of Hostage Taking and the Omnibus Diplomatic Security and Antiterrorism Act of 1986. By declaring that certain crimes committed in foreign countries are prosecutable in the United States, both statutes authorize federal law enforcement activities overseas. It is significant that both statutes have been formally construed by the FBI as requiring the agency to obtain the cooperation and consent of the country in which such law enforcement activities are to be undertaken, even though neither statute expressly requires such consent by its terms. The legislative reports accompanying the two statutes do not shed light on the Congressional opinion of fugitive snatching. Although such reports are normally considered the most authoritative indicators of legislative intent, Congress included the 1984 Act for the Prevention and Punishment of the Crime of Hostage-Taking within an omnibus crime bill without any report language on the specific hostage taking provision. And while the House Report accompanying the Omnibus Diplomatic Security and Antiterrorism Act of 1986 did describe the extraterritorial jurisdiction provision generally, it said nothing about its implications for law enforcement generally or fugitive snatching specifically.

The fugitive snatching issue loomed large, however, in the hearings and floor debates on the Diplomatic Security and Antiterrorism bill. The bill, S. 1373, which eventually became the extraterritorial jurisdiction provision in the Omnibus Diplomatic Security and Antiterrorism

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235. Hearing Transcript, supra note 95, at 34 (testimony of Oliver B. Revell).
236. Id. at 35.

Act of 1986, originally contained language conferring jurisdiction over defendants "regardless of the manner in which the alleged offender was brought before the court." This language is essentially a statutory restatement of the *Ker-Frisbie* doctrine. The fact that the language was removed from the bill by the time it reached the Senate floor indicates that at least some Senators did not want to lend legislative support to the judicially created doctrine.

It is nevertheless hard to discern exactly what the legislative intent was in removing the *Ker-Frisbie* language. The main sponsor of the bill, Senator Specter, emphasized repeatedly during the floor debate that he approved of non-consensual extraterritorial arrests. Even though the bill as passed did not explicitly authorize such arrests, Senator Specter thought it should be read that way in light of the *Ker-Frisbie* doctrine. While this view of the legislation was expressly contradicted by Judge Sofaer, the Legal Advisor to the State Department, and was criticized on the Senate floor, the issue was never resolved explicitly, at least in a public agreement or understanding. The measure passed in an unrecorded voice vote.

That fugitive snatching was a major source of debate in the anti-terrorism bill, but was left officially unresolved and went unmentioned in the legislative reports, suggests a deliberate and negotiated decision to maintain silence. Indeed, there was little reason to decide whether the legislation authorized fugitive snatching. The Senators knew that if a fugitive is brought before an American court in violation of international law, the jurisdiction of the court is not impaired. Senator Specter and other supporters of fugitive snatching may have presumed or been assured by the Administration that if Congress refrained from explicitly authorizing fugitive snatching, the President could find it within his authority to order it anyway. Thus it is impossible to discern a definite "legislative intent" regarding fugitive snatching from the available information about Congress' recent consideration of bills authorizing extraterritorial law enforcement activities.

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240. S. 1373, reprinted in *Terrorism Hearing*, supra note 239.
241. The language of the bill as it reached the Senate floor is found in 132 CONG. REC. S8437 (daily ed. June 25, 1986).
243. Id.
244. *Terrorism Hearings*, supra note 239, at 63.
246. Such understandings are usually memorialized in committee, conference or full House and Senate reports accompanying bills.
248. *Ibid.,* e.g., 132 CONG. REC. S8440 (daily ed. June 25, 1986) (Statements by Sena-
tor Eagleton, acknowledging viability of *Ker-Frisbie* doctrine while arguing against Senator Specter's contention that fugitive snatching was good policy for the U.S.).
3. Scope of Executive Authority to Order Fugitive Snatching

The preceding two sub-sections establish that (1) the President and Congress have general authority, under U.S. law, to violate customary international law when acting within their respective constitutional spheres, and (2) Congress has neither authorized nor forbidden the particular violation of international law contained in the act of fugitive snatching. Returning to Justice Jackson's exegesis of Presidential power in the Steel Seizure case, the fugitive snatching issue falls within the "zone of twilight": that interstitial space between the powers of the President and Congress, where the legislature has neither forbidden nor approved an action and the President asserts a claim to undertake it on the basis of his independent powers.\textsuperscript{249} In this context, the next sub-section examines the scope of the authority of the President and high officials to order fugitive snatching.

a. President's Power to Order Fugitive Snatching

The President clearly has strong independent powers in foreign\textsuperscript{250} and military affairs.\textsuperscript{251} The law enforcement power, incorporating powers of prosecution and pardon, is also within the sphere of the President's strongest independent powers.\textsuperscript{252} In these areas, under separation of powers doctrine, the President's powers are either completely his own or concurrent with those of Congress. In turn, under the controlling acts doctrine, the President is empowered to violate international law in the absence of explicit congressional direction only when he acts within his constitutional sphere.\textsuperscript{253} Thus, when the President violates international law, he is most likely to be acting precisely within one or all of the areas—foreign affairs, defense, or law enforcement—where he can legitimately claim constitutional authority to violate international law. In practical effect, under both separation of powers doctrine and the controlling acts doctrine, the President can usually be found to be within his authority in violating international law as long as Congress has not prohibited the particular action.\textsuperscript{254}

This principle applies easily to fugitive snatching. Whether the President sends the FBI to abduct an indicted criminal or merely a suspect, he exercises his powers as chief law enforcement officer. Because the operation is extraterritorial, it falls within the vast realm of foreign affairs, where the President is the "sole organ" of the United States.\textsuperscript{255} Further, in the increasingly common event that the military is involved in the law enforcement operation, the President may also draw upon his

\textsuperscript{249} See 343 U.S. at 637.
\textsuperscript{251} See, e.g., L. HENKIN, supra note 191, at 54-56.
\textsuperscript{252} See L. TRIBE, supra note 201, at § 4-11.
\textsuperscript{253} See Henkin, supra note 170, at 882.
\textsuperscript{254} Cf. L. HENKIN, supra note 191, at 209-10.
\textsuperscript{255} Curtiss-Wright, 299 U.S. 304, 319.
powers as commander-in-chief of the nation's defense.\textsuperscript{256} In short, in the absence of congressional prohibition, the President has clear authority, under current law, to order fugitive snatching.\textsuperscript{257}

b. 1989 Opinion's Maximization of Presidential Power

In reaching the legally correct conclusion that the President has constitutional authority to order fugitive snatching, the 1989 Opinion tended to maximize the already considerable concentration of power in the President with respect to law enforcement, foreign affairs, and defense. First, the opinion relied on a broad and largely discredited conception of the President's executive power as the basis of a broad power in foreign affairs.\textsuperscript{258} Second, it implicitly rejected the principle that customary international law is integrated into the law of the United States.\textsuperscript{259} Third, it concluded that the controlling executive authority for fugitive snatching need not come from the President himself, but may originate at the Cabinet level or lower.\textsuperscript{260}

(1). Executive Power as Basis of Foreign Affairs Power

The chief source of the President's power to order fugitive snatching, according to Assistant Attorney General Barr's description of the 1989 Opinion, is the "intersection" of the President's "inherent constitutional power to authorize law enforcement activities" with his power as the "sole organ" in foreign affairs.\textsuperscript{261} While this appears to conflate two distinct powers, it actually combines two long-standing doctrines by which the President's executive authority justifies far larger powers in foreign affairs than those enumerated in the text of the Constitution.\textsuperscript{262} These two executive power doctrines are based on two separate provisions of Article II of the Constitution. The first source is the grand opening of the Article, vesting in the President the "executive power" of the United States.\textsuperscript{263} The second is the clause imposing on the President the duty to "take Care that the Laws be faithfully executed."\textsuperscript{264} These phrases have each hatched a theory to expand the foreign affairs power.

The American author of the executive powers theory, Alexander Hamilton, argued that the language of the Constitution and the concept of executive power itself gave the President "congeries of independent, major, substantive powers 'to determine the condition of the nation' in its foreign relations."\textsuperscript{265} James Madison, in the partisan fashion of the

\begin{footnotes}
\footnote{256. U.S. Const. art. II, § 2, cl. 1.}
\footnote{257. Henkin, supra note 170, at 882.}
\footnote{258. See infra notes 261-75 and accompanying text.}
\footnote{259. See infra notes 276-81 and accompanying text.}
\footnote{260. See infra notes 282-96 and accompanying text.}
\footnote{261. Statement of William P. Barr, supra note 19, at 8-10.}
\footnote{262. See J. Nowack, R. Rotunda, J. Young, supra note 201, at § 6.2.}
\footnote{263. U.S. Const. art. II, § 1, cl. 1.}
\footnote{264. Id. at art. II, § 3.}
\footnote{265. L. Henkin, supra note 191, at 42-43.}
\end{footnotes}
day, immediately attacked this view as a monarchist import from Eng-
lend. In perhaps the most authoritative modern articulation of the
scope of Presidential power, the Steel Seizure case, Justice Jackson
sided with Madison over Hamilton, stating that the Executive Powers
clause was limited to the enumerated powers that followed it. To see
it as an open ended grant of all possible executive powers, as the
Truman Administration argued in the Steel Seizure case, smacked of the
"totalitarian" regimes of the day.

The "take care" clause strand of the President's law enforcement/
foreign affairs power, also relied upon by Assistant Attorney General
Barr, originated in 1889 in In re Neagle. Despite the age and other
questionable features of the case, Barr relied on it heavily. In particular,
he cited the following passage, in which the Court asked rhetorically:

Is this duty [to take care that the laws be faithfully executed] limited to the
enforcement of acts of Congress or of treaties of the United States
according to their express terms, or does it include the rights, duties and
obligations growing out of the Constitution itself, our international rela-
tions, and all the protection implied by the nature of the government
under the Constitution? [Emphasis in original]

Historically, this language has been used two ways. The first, that it
supports the President's authority unilaterally to enforce international
law, was not relied upon by Assistant Attorney General Barr and has no
application here. The second, that it justifies "inherent" Presidential
powers not enumerated in the Constitution, was embraced by Barr. As
to this second usage, Professor Laurence Tribe states that it "has not
regained the vigor it knew at the turn of the century," but "the continu-
ing failure to develop a more consistent and less easily manipulated
approach to congressional silence creates the risk that the legislative
reins on executive authority will grow ever looser, especially when held

266. Id. at 43.
267. 343 U.S. 579 (Jackson, J., concurring).
268. Id. at 641.
269. Id. at 640-41.
270. L. HENKIN, supra note 191, at 55-56, 308 n.52.
271. In Re Neagle, 135 U.S. 1, 64.
272. The reasons for Barr's avoidance of this usage are not as obvious as they may
seem. It has been used repeatedly by the President to justify unilateral foreign inter-
ventions on the grounds that they were necessary to "enforce" international law.
Thus, the doctrine could have served Barr well in justifying some extraterritorial
arrests but for the confusion it would have caused members of the Subcommittee
about which conception of "international law" was being enforced. According to
Professor Henkin, the argument that In Re Neagle justifies the use of Presidential
power unilaterally to "enforce" international law is
clever, but not compelling . . . surely, authority to see that the laws shall be
executed means that the President shall enforce the law of the United States
(including international law and obligations that constitute United States law)
where American law applies, that is, within the United States or in regard to the
United States Government or its citizens . . . .
by a Court that seems eager to indulge presidential aggrandize-
ment.” Thus, according to Tribe, *In Re Neagle* is not only old but
dangerous because it encourages an unlimited exercise of executive
power. That danger is arguably very present in fugitive snatching,
where the President would be utilizing executive authority in the wake of
congressional silence in an area at the intersection of law enforcement,
foreign affairs, and defense, where courts have historically deferred to
the President. Neither Congress nor the Courts act in such an area as
an effective check on the President’s power.

(2). The Weak Version of International Law

The second finding of the 1989 Opinion that tends to concentrate
power in the Executive is its implication that customary international
law is not integrated into the law of the United States without statutory
enactment. As a legal matter, this conclusion is simply erroneous. *The
Paquete Habana*, the very case relied upon by Barr to establish the
controlling executive act doctrine, establishes that customary interna-
tional law is equal in status to statutes and executive acts. Customary
international law need not be enacted to be binding because, like the
common law, it automatically became a part of the law of the United
States after American independence from Great Britain.

It is unlikely that Barr intended to say that customary international
law is completely ineffective without statutory enactment, although with-
out the 1989 Opinion one cannot know for sure. At many points in their
Congressional testimony, Administration officials indicated that the FBI
and officials below the “highest levels” of the Executive Branch could
not order or execute fugitive snatching. This testimony indicates
that, in the Administration’s view, international law operates as at least a
partial constraint on law enforcement activities.

(3). Authority of Executive Branch Officials Other Than the
President to Order Violation of International Law

The third finding of the 1989 Opinion that tends to concentrate
power in the Executive Branch is its apparent conclusion that a Presidential
order is not required for fugitive snatching. The authorization pro-

274. L. Tribe, *supra* note 201, at § 4-8 n.27 and accompanying text.
275. Id.
276. See Statement of William P. Barr, *supra* note 19, at 10 (“[T]his [law enforce-
ment and foreign affairs] authority carries with it the power to direct Executive
Branch agents to carry out arrests that contravene *customary international law and other
international law principles which our legislature has not acted upon to make part of our domestic
law.”) (emphasis added).
277. See *supra* notes 167-78 and accompanying text.
278. 175 U.S. 677 (1900).
279. Id. at 700.
280. See *supra* note 171 and accompanying text.
281. Hearing Transcript, *supra* note 95, at 35, 47-48 (testimony of Oliver B. Revell); id. at 52, 60 (testimony of William P. Barr).
The plan for fugitive snatching would originate in "the deputies committee" of the National Security Council. Before it could be executed, the plan would be presented to the Attorney General, who could then order the FBI to carry it out. As a "matter of policy," the President would probably be consulted, however, as a matter of law, neither his orders nor his advice are required.

The authority for the conclusion that a direct Presidential order is not required "legally" to violate international law apparently came from two sources, although one can only infer these sources from the strands of Barr's testimony. First, In Re Neagle recognized that the Attorney General has a delegated authority from the President to order any law enforcement measure within the President's power. Second, a far more recent precedent at the federal appellate level, Garcia-Mir v. Meese, recognized that the Attorney General may, on his own authority, order the indefinite detention of Cuban refugees in violation of international law. One can infer from Barr's testimony that, in his view, the two cases empower the Attorney General to order law enforcement actions which violate international law. Scrutinizing that conclusion in light of the cases shows that In Re Neagle is inapposite on its facts, but Garcia-Mir is viable law applicable to fugitive snatching.

The issue in Neagle was whether the Attorney General had the power, without explicit authorization from Congress or the President, to assign U.S. Marshals to guard a Supreme Court Justice. The authority to violate international or domestic law was not an issue in the case. In contrast to fugitive snatching, the authority needed to guard a Supreme Court Justice did not have to be sufficiently strong to overcome an existing legal constraint. Fugitive snatching, on the other hand, violates a clear rule of international law which has been incorporated into U.S. law. It requires the exercise of independent legislative powers because existing rules of law, composed of international law incorporated into U.S. law, must be re-made. Not surprisingly, the authority required to order fugitive snatching is thus greater than that required to order guards for a Supreme Court Justice. The legal principles in Neagle cannot be fairly applied to the fundamentally different issues of fact and law involved in a fugitive snatching case.

Garcia-Mir, however, is the law, at least in the Eleventh Circuit, and, according to Professor Louis Henkin, it has greatly increased the scope

283. Id. at 61.
284. Id.
285. See id. at 60-61.
286. Id. at 60.
287. Id.
288. Id. at 9-10, relying on 135 U.S. 1, 67-68.
289. 788 F.2d 1446 (11th Cir. 1986), cert. denied, 479 U.S. 889 (1986).
290. Id. at 1454-55.
291. 135 U.S. at 67-68.
of executive branch authority to violate international law.\footnote{292} By holding that the Attorney General may, on his own account, order the indefinite detention of Cuban aliens in violation of international law, the court removed the requirement that violations of international law be undertaken only by an entity with constitutionally traceable legislative powers.\footnote{293} Moreover, the court ignored the requirement of the controlling executive act doctrine that the action be within the constitutional power of the President.\footnote{294} Immigration is not an area where the President may exercise independent law-making powers, according to Professor Henkin.\footnote{295} \textit{A fortiori}, the Attorney General cannot exercise such powers in an area not within the President's authority.

Notwithstanding the flaws of \textit{Garcia-Mir}, it controls the question of fugitive snatching in one of the circuits where it is likely to be an issue.\footnote{296} Professor Henkin's criticism that the case extends the controlling executive act doctrine beyond the constitutional limits of Presidential power will not help an abducted defendant. Fugitive snatching is at the confluence of core Presidential powers—law enforcement, defense, and foreign affairs. Even if \textit{Garcia-Mir} incorrectly articulated the Attorney General's power to violate international law regarding immigration, the controlling executive act doctrine as cryptically announced in \textit{The Paquete Habana} and understood by experts would support the President's power to order fugitive snatching. \textit{Garcia-Mir} simply expands this doctrine by holding that the Attorney General may order violations of international law, such as fugitive snatching, without authorization from the President.

C. Policy Implications of the 1989 Opinion

The 1989 Opinion fits squarely within a tradition of presidential power maximization. Assistant Attorney General Barr utilized the old executive powers doctrines to inflate the President's freedom of action in foreign affairs. By emphasizing the weakness of international law, he highlighted the power of the executive to override it. If international law is not really a part of U.S. law, then lower officials are capable of "controlling executive acts" that supersede it so long as they stay within broadly defined spheres of executive action.

1. Concentration of Foreign Affairs and Defense Powers in the President

There is little in the specific terms of Article II of the Constitution supporting the President's considerable powers in foreign affairs and defense. The powers the President has acquired in these areas over the last two hundred years, by practice and by judicial construction, have

\footnote{292} Henkin, \textit{supra} note 170, at 883-85.
\footnote{293} Id. at 884-85, nn.133-34 and accompanying text.
\footnote{294} Id. at 884 n. 30 and accompanying text.
\footnote{295} Id.
\footnote{296} The Eleventh Circuit, covering the states of Georgia, Florida and Alabama, hears many drug cases.
been inferred from the language of the Constitution. Theories relying upon the general executive power and "take care" clauses to find almost unlimited foreign affairs powers are notorious examples of this loose construction.\textsuperscript{297}

The 1989 Opinion reflects a current tendency to fuse the President's existing powers in foreign affairs, defense and law enforcement into a new, all-encompassing "external affairs" power. In his congressional testimony, Assistant Attorney General Barr justified construing the FBI's vague enabling acts to authorize the violation of international law by citing a general power in external affairs.\textsuperscript{298} The 1989 invasion of Panama similarly revealed a tendency to combine the President's independent powers, creating one great external affairs power. The oft-cited four goals of the invasion were a fascinating mix: "to protect American lives, support democracy, bring the fugitive Manuel Noriega to justice, and protect the integrity of the Panama Canal Treaties."\textsuperscript{299}

The first looks like commander-in-chief, the second and fourth like "sole organ" in foreign affairs, and the third like chief law enforcement officer.

Throughout the nation's history, Congress and the President have struggled for control of foreign affairs and defense. The Constitution explicitly grants these powers to both branches. While the President is commander-in-chief,\textsuperscript{300} only Congress can declare war.\textsuperscript{301} The President proposes weapons programs, but Congress decides whether to pay for them.\textsuperscript{302} The President negotiates treaties, but the Senate must ratify them.\textsuperscript{303} In law enforcement, however, the President's independence inheres in the concept of the rule of law. The legislature makes laws and therefore should not execute them. Congress cannot interfere in the particulars of law enforcement. Thus, when the President utilizes his law enforcement power to justify foreign intervention and military action, he has removed himself as far as possible from congressional scrutiny. The infusion of foreign military acts with a law enforcement justification protects the President's freedom of action to the greatest extent possible.

\textsuperscript{297} See U.S. CONST. art. II, § 1, cl. 1; id. at § 3.
\textsuperscript{298} Barr quoted Justice Jackson's concurrence in the Steel Seizure case: "I should indulge the widest latitude of interpretation to [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 645. In making that statement, Justice Jackson was referring specifically to the President's powers as commander-in-chief, and he followed the statement with a passionate argument for limiting those powers by maintaining the separation of the President's military and civilian roles. Id. at 645-46.
\textsuperscript{299} Letter from President Bush to The Speaker of the House of Representatives and the President Pro Tempore of the Senate (Dec. 21, 1989).
\textsuperscript{300} U.S. CONST. art. II, § 2, cl. 1.
\textsuperscript{301} Id. at art. I, § 8, cl. 11.
\textsuperscript{302} See id. at art. II § 3; art. I, § 8, cl. 1.
\textsuperscript{303} Id. at art.II, § 2, cl. 2.
In 1878, in the Posse Comitatus Act, Congress addressed the danger that the President might combine his power as chief law enforcement officer with his power as commander-in-chief. The statute forbids the use of the military for general law enforcement purposes without express authorization from Congress or reliance on a provision of the Constitution. Because the President ordered Noriega and other fugitives arrested "in the course of carrying out the military operation in Panama," the Posse Comitatus Act was not violated. The use of the military for law enforcement purposes in this instance was subsumed within the President's role as commander-in-chief of the nation's defense. Still, the principle behind the statute and the facts of the Panama invasion seem to clash. The statute stands for the principle that Congress should control the use of the military, and the President should not be allowed to use his general law enforcement powers to deploy it without constraint. The Panama invasion, carried off with barely a peep from Capitol Hill, showed that the President could unilaterally order the largest military operation (at that time) since the Vietnam War and justify it by saying, among other things, that it was necessary to bring a fugitive to justice.

2. Changing the Rules of the Game

The final proposition of Assistant Attorney General Barr's congressional testimony was that the President has the authority, under his constitutional foreign affairs power, to participate in the process of making customary international law by violating it. This principle was also reflected in the testimony of the State Department's Legal Advisor, Judge Abraham Sofaer. Judge Sofaer argued that political terrorism in the 1980s, and the need to respond to it, were changing the concept of justified self-defense under international law. The U.S. attack on Libya in 1986, for example, was viewed by many nations at the time as an infraction of international law, but it has been increasingly accepted since then as an act of self-defense, according to Judge Sofaer.

While Judge Sofaer seemed more comfortable with justifications that operated within the boundaries of the international legal system, Assistant Attorney General Barr took a more aggressive approach. Fugitive snatching was justified to bring to trial "a terrorist . . . basking in some safe haven, enjoying the payoff that he received for blowing Americans out of the sky." The kind of "moral equivalence" contained in

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305. Id.
308. Statement of Abraham D. Sofaer, supra note 5, at 11.
309. Id.
310. Hearing Transcript, supra note 95, at 43 (testimony of William P. Barr).
international law rules of reciprocity did not appeal to him.\textsuperscript{311} Fugitive snatching by the United States, as opposed to Iran, for example, is good because "the purpose of law ultimately is to protect innocent people from predators. And the people we're fighting are ruthless predators."\textsuperscript{312} Thus, fugitive snatching will become an accepted practice under international law, in this view, when the world recognizes that it is necessary in order to achieve substantive justice for injured innocent parties.

3. \textit{Opposite Ends of the Eighties}

The final proposition of the 1980 Opinion was that the United States, in the international climate of the day, could "ill afford" to be seen as an international law-breaker.\textsuperscript{313} The statement may be an oblique reference to the overriding contemporary importance of bringing international pressure to bear on the government of Iran for its role in taking and holding American hostages at the U.S. Embassy. The United States could not label Iran an international outlaw if it acted like one itself by abducting Robert Vesco from the Bahamas.

The view in 1990 is much different. The decade has seen acts of terrorism against U.S. citizens that have undoubtedly traumatized the American public. Some involved mass bloodshed, like the bombing of the Marine barracks and U.S. embassy in Beirut, the Rome airport attack, and the obliteration of Pan Am Flight 103. Others, equally as shocking, have involved only a few victims, such as the shootings of Leon Klinghoffer and Navy diver Charles Stetham. To many people, including some in the Justice Department, it may not appear reasonable in 1990 to be constrained by international law in the effort to bring those responsible for such acts to justice.

Given the different purposes and contexts of the two opinions, their different legal conclusions are not surprising. Simply put, kidnapping Robert Vesco hardly seemed worth the trouble it would have caused the United States internationally in the political climate of 1980. The 1989 Opinion clearly had a different kind of target in mind. Congressional testimony by Administration officials repeatedly emphasized threats posed by narcotics traffickers and political terrorists. Against those kinds of targets, fugitive snatching may seem worth the risks.

\textbf{Conclusion}

Ordering the abduction of fugitives is a violation of international law that, nonetheless, clearly falls within the President's authority under domestic law.\textsuperscript{314} There is no constitutional bar on the power of Congress or the President to authorize extraterritorial actions that violate

\begin{flushleft}
\textsuperscript{311} \textit{Id.} at 50.
\textsuperscript{312} \textit{Id.} at 51.
\textsuperscript{313} 1980 Opinion, \textit{supra} note 13, at 556.
\textsuperscript{314} See Henkin, \textit{supra} note 170, at 882.
\end{flushleft}
international law. But when violating international law, Congress and the President should be bound by the limits the Constitution imposes on them generally. The executive authority to violate international law should extend no further than the President's constitutional powers, and it should not be extended to lower executive officials who lack an independent constitutional basis for their authority.

There are limits, however, to how far the law will constrain Presidential power. The President's powers in law enforcement, military matters, and foreign affairs are likely to support, legally, nearly any violation of international law that the President might undertake. The absence of political control by Congress, or a rights-based control by the courts,315 leaves the President with virtually unlimited power to act beyond U.S. borders.

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