FREEDOM WATCH

Imperial justice

Court rules might is right in kidnap case

by Harvey Silverglate

Crime is contagious. . . . [T]o declare that the Government may commit crimes in order to secure the conviction of a private criminal . . . would bring terrible retribution. Against that pernicious doctrine this [Supreme] Court should resolutely set its face.
— Justice Louis Brandeis, dissenting in *Olmstead v. United States* (1928)

The Bush administration and its Department of Justice have joined the ranks of kidnappers that Bush himself calls "terrorists" and "international outlaws."

Even the US Supreme Court, running with the gang on June 15 and giving the US-orchestrated kidnapping of a Mexican doctor a cover of respectability, conceded in its majority and including Bush appointees David Souter and Clarence Thomas. The dissenters were Justices John Paul Stevens, Sandra Day O'Connor, and Harry Blackmun.

In its attempt to present vigilante justice as something the civilized world might accept, the Court started its opinion with this relatively modest formulation of the question: "The issue in this case is whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts."

What the Court omitted were the facts that left much of the civilized world gasping:

First, it was the DEA and its parent, the Department of Justice, that arranged the kidnapping by agreeing

In a companion case that same year, *United States v. Rauscher*, the defendant's presence was obtained via the extradition treaty between the United States and England, with the court insisting that the treaty's provisions be followed to the letter and the defendant be tried only for the offense for which extradition was sought and obtained.

The precedent seemed to be, therefore, that if the government seeks a fugitive, it must do so in accordance with the extradition treaty — which would probably rule out government-hired bounty hunters.

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It was only after World War I that extradition treaties began to take a prominent role "as an inducement to peaceful relations and friendly cooperation between states," according to a 1974 treatise cited by Justice Stevens. They were "to protect the sovereignty and territorial integrity of

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A kidnapping like that of

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adviser to the State Department under Reagan, testified at a congressional hearing in 1985 that such fugitive seizures were out of the question: "Can you imagine us going into Paris and seizing some person we regard as a terrorist?" He was addressing some of the more macho members of the committee, who supported a bill seeking to extend the territorial reach of the US legal system. "How would we feel," he said, "if some foreign nation — let us take the United Kingdom — came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia. . . ?"

In 1989, however, Bush's attorney general, William P. Barr, reversed the longstanding position of the American government, and issued an opinion concluding that the president has the authority to override international law in this area. With the Justice Department harking back to the Wild West, the Supreme Court was not far behind.

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It's ironic that, as Justice Stevens suggests in his dissenting opinion, the Supreme Court is turning away from the rule of law just when other nations are beginning to adopt the American model.

Stevens notes a 1991 decision by the Court of Appeal of the Republic of South Africa that, citing US Supreme Court precedents, held that the prosecution of a defendant kidnapped by South African agents from a foreign country had to be dismissed. Stevens writes: "The Court of Appeal of South Africa — indeed, I suspect, most courts throughout the civilized world — will be deeply disturbed by the monstrous decision the Court announces today."

His supposition was supported more quickly than he might have imagined.

The day after the Supreme Court's "monstrous" decision was released, it was noted at the Ottawa extradition hearing of a Canadian citizen whose return was being sought by the US Department of Justice to stand trial in a drug prosecution in California.

When the Canadian judge took the bench that morning to resume the proceedings, he scanned the courtroom, spotted the defendant, and commented that he was relieved to see the defendant in court that day. "I guess the Americans have not yet kidnapped you," observed the judge.

The two American agents sent to observe the Canadian proceedings may well have flinched; perhaps the Canadian defendant did, too, knowing that even if he won the extradition hearing, he could still be carted off.

Canada, presumably because it shares a long border with the US, was concerned enough to have filed a friend-of-the-court brief in the Alvarez-Machain case, supporting the position of the defendant and Mexico. It took the unequivocal position that the American-Canadian extradition treaty is "the exclusive means for a requesting government to obtain . . . [the] removal" of a person from Canadian territory.

Of course, given the current American administration and current Supreme Court, the Canadian government's views don't matter much.

Does Bush's New World Order mean treaties with foreign governments may be disregarded at will? We'll find out when the government responds to Mexico's request, lodged with the State Department, for the extradition of the two DEA operatives involved in the abduction of Alvarez-Machain, to face kidnapping charges themselves in Mexico. If extradition is refused — as it almost certainly will be — we will see whether the Mexican government has the nerve to try abduction.

It most likely doesn't, since the American lesson seems to be that might makes right, and right now we've got the might. But we may not always have the might, and, indeed, there are many in the world who may now be tempted to resume the kidnappings of American citizens that so plagued the nation during the '70s and '80s.

America, in its supreme arrogance, may yet learn why Justice Stevens, in his dissenting opinion, quoted Thomas Paine: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."

The rule of law is not a luxury; it is a necessity. We will probably be condemned to learn this the hard way. ❑

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WEINBERGER, at a press conference June 16, vows he is innocent.

Poetic justice

Former Defense secretary Caspar Weinberger's recent indictment in connection with Iran-contra activities is both delicious and ironic. It also raises some serious questions about civil liberties and politics.

The American right wing is crying "Foul!" Elliott Abrams, assistant secretary of State under Reagan, wrote a *Wall Street Journal* op-ed piece condemning the office of Iran-contra independent counsel Lawrence Walsh for its reckless use of the power to indict. Abrams quotes the late Supreme Court justice Robert Jackson as saying "the prosecutor has more control over life, liberty and reputation than any other person in America."

Walsh and his staff have indicted Weinberger because he not only refused to sing against his former boss in the Oval Office, but also refused to follow their suggestions in composing the score.

Yet the very tactics that permit such indictments were made respectable by Reagan's and Bush's Department of Justice and approved by the judges they appointed.

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unprecedented in US history — and comes just when other nations were beginning to adopt American-style rule of law.

ty statement that the seizure "may be . . . shocking" and "in violation of general international law." But what's a little shock among friends? In its War on Drugs, the US has a higher purpose, and never mind Brandeis on the contagion of crime.

The kidnapping victim is gynecologist Humberto Alvarez-Machain, a Mexican citizen seized in Mexico in April 1990, and forcibly brought to California to stand trial in a federal court for a crime he allegedly committed on Mexican soil.

Alvarez-Machain is charged with participating in the torture and murder of Enrique Camarena-Salazar, an American Drug Enforcement Administration (DEA) agent operating in Mexico as part of our nation's effort to enlist that country in solving our drug problem. According to the indictment, Alvarez-Machain's role was to administer stimulants to Camarena-Salazar so that he could undergo additional interrogation and torture by the agents of the Mexican drug lords who abducted him outside the American consulate in Guadalajara in 1985.

On June 15 the Supreme Court ruled that the executive branch of government may kidnap and the American judiciary may try such a foreign national, notwithstanding the 1978 treaty between the US and Mexico that provides a procedure for each country's obtaining the extradition of accused persons residing on the other's territory.

The court voted six to three, with the majority led by Reagan-appointed Chief Justice William H. Rehnquist to pay bounty hunters a $50,000 fee, plus all costs, then relocate them to the US and support them here at $6000 per week.

Second, the government of Mexico, relying upon the treaty, lodged a stiff diplomatic protest within days of the abduction, and demanded the return of Alvarez-Machain, pledging to try him in its own courts. (Skeptics should note that Mexico has already tried several members of the conspiracy to murder Camarena-Salazar. One of them, Rafael Caro-Quintero, a co-defendant of Alvarez-Machain in the federal prosecution, is serving a 40-year prison sentence in Mexico.)

Third, the defendant is a citizen of Mexico, not an American fugitive on the lam. As Justice Stevens put it in his vigorous dissenting opinion: "[This case] involves this country's abduction of another country's citizen."

Fourth, the case involves a charge for a crime that was committed entirely outside the territorial limits of the United States.

These factors make the Alvarez-Machain kidnapping utterly unprecedented in American history. To be sure, the American courts have sometimes gained jurisdiction over a hapless defendant's person by questionable means: in an 1886 Supreme Court case, *Ker v. Illinois*, the court allowed the state of Illinois to try a defendant who had been kidnapped from Peru and brought back forcibly to Chicago. However, Ker was not a Peruvian citizen, Peru did not lodge any protest, and Ker's crime was committed while he was in Illinois, from which he then fled.

states, and to restrict impermissible state conduct."

In the aftermath of World War II, the civilized world established international norms governing the minimum conduct expected of governments and individuals, and tried the Nazi leadership at Nuremburg for violating those principles. International legal codes and tribunals established by the United Nations have had the same goal — to increase the respect of the nations of the world for the rule of law, rather than the law of the jungle.

Both Ronald Reagan and George Bush have come up short on respect for international law.

Reagan sent troops into Granada to topple that nation's government and install a puppet, all in the name of fighting communism.

Bush sent troops to Panama to arrest Manuel Noriega for violating American drug laws while working outside the United States with American intelligence and drug-enforcement agencies. (Although the Noriega seizure was questionable in terms of international law, there was no protest from the Panamanian government, since Noriega was replaced by an American puppet regime.)

Yet the prospect of going into a friendly foreign country, with which the United States has an extradition treaty, and kidnapping a foreign national for a crime committed abroad was so far from acceptable that no American president — until Bush — claimed the right to do so.

Indeed, Abraham Sofaer, a former federal judge who became the legal

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