United States v. Best: International Violation Schmiolation—The *Ker-Frisbie* Doctrine Trumps All

I. OVERVIEW

Violation of recognized international law is no defense to a court's jurisdiction, even where forcible abduction of an alien citizen is at issue.[1] On May 16, 2001, approximately sixteen nautical miles east of St. Croix, U.S. Virgin Islands, the U.S. Coast Guard sighted a wooden cargo vessel, the CORDEIRO DE DEUS.[2] Because the vessel was within the twenty-four nautical mile "contiguous zone" of the United States, and on a known drug smuggling route, the Coast Guard attempted to make radio contact with the vessel.[3] When radio contact failed, a four-person boarding team left the Coast Guard vessel with the instructions "to ask right of visit questions of the crew and to seek consent to board the vessel."[4] The boarding team's interpreter attempted to question the crewmembers in both English and Spanish, but the crew appeared to understand neither language.[5] Finally, a crewmember produced a small Brazilian flag from inside the vessel, and, thereafter, the interpreter communicated with the crewmembers through the usage of Spanish and

1. *See* United States v. Best, 304 F.3d 308, 316 (3d Cir. 2002).
2. *Id.* at 309.
3. *Id.* It is important to note that the vessel was wholly outside U.S. territorial waters. *See id.* The "contiguous zone" refers to the zone up to "twelve miles from the baseline from which the breadth of the territorial sea is measured." *Id.* at 309 n.1 (citing Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612, 516 U.N.T.S. 205, 220). The contiguous zone exists so that nations may "punish infringement of the . . . laws and regulations committed within [their] territory or territorial sea." *Id.* at 309 n.1 (citing Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999)).
4. *Id.* at 309-10.
5. *Id.* at 310.

hand signals.[6] The boarding team was given permission to board and Best, the defendant, was identified as the vessel's captain.[7] When asked about their cargo and destination, the crewmembers indicated they were on their way to Martinique to purchase cigarettes.[8] However, a subsequent safety inspection by the boarding team revealed Chinese nationals hiding in the cargo hold of the vessel.[9]

The Coast Guard escorted the ship to St. Croix where members of the Immigration and Naturalization Services (INS) interviewed the crewmembers and the Chinese nationals.[10] On May 19, 2001, a grand jury indicted Best for "conspiring to bring illegal aliens to the United States" and "bringing illegal aliens to the United States."[11] Best subsequently moved to dismiss the indictment due to lack of personal jurisdiction, arguing that his capture occurred on the high seas, in violation of international law.[12] The district court agreed, relying on the fact that the United States never obtained prior consent from Brazil to seize the defendant.[13] The United States appealed.[14] The United States Court of Appeals for the Third Circuit *held* no exceptions to the *Ker-Frisbie* doctrine on jurisdiction applied and, thus, jurisdiction could not be challenged on the basis that the defendant's presence before the court was unlawful. *United States v. Best*, 304 F.3d 308, 316 (3d Cir. 2002).

II. BACKGROUND

The *Ker-Frisbie* doctrine first materialized in American jurisprudence more than 100 years ago and has remained essentially unchanged since.[15] The doctrine is named after the two cases giving rise to the rule, *Ker v. Illinois* and *Frisbie v. Collins*.[16] Essentially, the doctrine

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6. *Id.* Portuguese, which is commonly spoken in Brazil, has many words similar to Spanish. *Id.* Although the crew "produced paperwork from Brazil and one document that contained a stamp from Suriname," the Coast Guard felt as though no positive identification of the nationality of the vessel could be made, especially as there were "no markings of a homeport." *Id.*

7. *Id.*

8. *Id.*

9. *Id.* A total of thirty-three Chinese nationals were found aboard the CORDEIRO DE DEUS. *Id.*

10. *Id.*

11. *Id.* (citing 8 U.S.C. §§ 1324(a)(1)(A)(i), 1324(a)(1)(A)(v)(I) (2000)).

12. *Id.*

13. *Id.* at 310-11.

14. *Id.* at 311.

15. *See* Timothy D. Rudy, *Did We Treaty Away* Ker-Frisbie*?*, 26 ST. MARY'S L.J. 791, 802-03 (1995).

16. *Id.* at 802 (citing Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952)).

is a modern-day version of the Roman maxim *mala captus bene detentus*, meaning that an *unlawful* capture may still result in a *lawful* detention.[17] Over the years, the *Ker-Frisbie* doctrine has come to stand for the proposition that, regardless of citizenship, a defendant cannot challenge a federal court's jurisdiction "on the grounds that his presence before the Court was unlawfully secured."[18] This doctrine, as the *Frisbie* Court recognized, "rest[s] on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[19] However, neither of the namesake cases, *Ker* or *Frisbie*, specifically addressed a challenge to personal jurisdiction on the basis of a violation of international law.[20]

A. Ker

Ker involved the forcible abduction of a defendant who had been tried and convicted in an Illinois state court for larceny and then fled to Peru.[21] The United States and Peru were party to an extradition treaty, and, initially, the provisions of the treaty were followed.[22] However, once the U.S. messenger arrived in Peru, he forcibly arrested Ker and placed him aboard a U.S. ship instead of handing over the extradition warrant to Peruvian authorities.[23] Once Ker was returned to the United States, he challenged his abduction as a violation of the extradition treaty and

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17. *Id.*

18. United States v. Winter, 509 F.2d 975, 985-86 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975). The Supreme Court has never specifically held that the doctrine applies in federal courts but loewer federal courts have so held. Rudy, *supra* note 15, at 803; *see, e.g.*, United States v. Romero-Galue, 757 F.2d 1147, 1150-51 n.10 (11th Cir. 1985).

19. *Frisbie*, 342 U.S. at 522.

20. Aaron Schwabach & S.A. Patchett, *Doctrine or Dictum: The* Ker-Frisbie *Doctrine and Official Abductions Which Breach International Law*, 25 U. MIAMI INTER-AM. L. REV. 19, 22 (1993). The doctrine was not extended to include violations of international law until the Supreme Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). *Id.*

21. *Ker*, 119 U.S. at 437-38.

22. *Id.* at 438. The governor of Illinois requested a warrant for Ker's extradition that was subsequently issued by the President of the United States. *Id.* The warrant was given to a messenger, Henry G. Julian, with directions to present the warrant to Peruvian authorities and return Ker to the United States. *Id.*

23. *Id.* Ker was forcibly abducted and placed, initially on the United States vessel ESSEX in Callao and then transferred once at port in Honolulu, again by force, to the vessel the CITY OF SYDNEY, where he remained until the ship arrived at the port of San Francisco. *Id.* Ker's abduction and stay aboard the ships lasted from March 1 until July 9. *Id.* at 438-39. At no point during these four months was Ker allowed to seek assistance in obtaining release from custody, pending hearing. *Id.* at 439.

without due process of law.[24] Justice Miller, writing for the United States Supreme Court, addressed the due process violation by stating "for mere irregularities in the manner in which [a defendant] may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment."[25] Thus, because Ker could not show a constitutional or other lawful violation by his being brought into court, the court rejected the due process claim.[26] Further, and most importantly, although Ker's arrest "was a clear case of kidnapping within the dominions of Peru," the Court declined to address whether such action should deprive a state court of jurisdiction.[27] Instead, the Court made the following statement:

> There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court.[28]

However, the authorities referenced by Justice Miller were factually distinguishable from the *Ker* case and only two of the authorities concerned abductions implicating a violation of international law.[29] Thus, the common law basis for the *Ker* opinion, and the *Ker* opinion itself, left open the question of valid jurisdiction in the face of a violation of international law.[30]

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24. *Id.*

25. *Id.* at 440.

26. *Id.*

27. *Id.* at 443-44.

28. *Id.* at 444. Thus, this statement by the Court, which was the starting point for the idea that became the *Ker-Frisbie* doctrine, is nothing more than dictum. *See* Schwabach & Patchett, *supra* note 20, at 22.

29. *See* Schwabach & Patchett, *supra* note 20, at 27. The authorities cited by Justice Miller include: *Ex parte Scott*, 109 Eng. Rep. 166 (K.B. 1829); *Regina v. Lopez*, 169 Eng. Rep. 1105 (1858); *State v. Smith*, 17 S.C.L. (1 Bail.) 283 (1829); *State v. Brewster*, 7 Vt. 118 (1835); *In re Dows'*, 18 Pa. 37 (1851); *State v. Ross*, 13 Iowa 467 (1866); and *Richmond v. United States*, 13 U.S. (9 Cranch) 102 (1815). *Ker*, 119 U.S. at 444. The two cases which addressed international abductions were *Brewster* and *Richmond*. *See* Schwabach & Patchett, *supra* note 20, at 27. However, neither court made specific reference to international law in their holdings.

30. The Court did, however, give the instruction to state courts to look at the jurisdictional issue "as a question of common law, *or of the law of nations*, of which that court is bound to take notice." *Ker*, 119 U.S. at 444 (emphasis added). Thus, the *Ker* opinion specifically directs courts to look at general principles of international law when determining whether jurisdiction is valid.

B. Frisbie

The second half of the *Ker-Frisbie* doctrine did not appear until sixty-six years later in *Frisbie v. Collins*.[31] In *Frisbie*, a Michigan court convicted the defendant, Collins, of murder and sentenced him to life in prison.[32] The manner in which Collins was brought to trial—forcible seizure from his Chicago home—was a major point of contention, as Collins alleged that his capture was in violation of the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act.[33] The district court denied his habeas corpus petition, holding that Collins could be tried in Michigan regardless of how he was brought to trial.[34] The appellate court reversed, holding that the Federal Kidnapping Act overruled earlier rulings of the Court, which had allowed obtaining jurisdiction by force, including *Ker v. Illinois*.[35] The United States Supreme Court disagreed, however, holding that the Federal Kidnapping Act did not preclude a state court from trying a defendant due to a potential illegal capture.[36] More importantly, the Court ruling reaffirmed its decision in *Ker*.[37] Due process, according to the *Frisbie* Court, is satisfied when a defendant is made aware of the charges against him and tried in accordance with the Constitution and its protections.[38] However, it is not clear how, or if, the Court's affirmation in *Frisbie* extended the doctrine to breaches of international law.[39]

Some of the earliest challenges to the *Ker-Frisbie* doctrine occurred during the Prohibition Era shortly after the passage of the Eighteenth Amendment.[40] The United States, in its war on alcohol, began searching and seizing British ships, carrying liquor cargo, which were "hovering" just outside the territorial waters of the United States.[41] In *Ford v. United States*, the defendants were captured approximately twenty-five miles off

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31. 342 U.S. 519, 522 (1952).
32. *Id.* at 520.
33. *Id.* (citing 18 U.S.C. § 1201 (2000)).
34. *Id.*
35. *Id.* (citing *Ker*, 119 U.S. at 436).
36. *Id.* at 522-23.
37. *Id.* at 522. Justice Black, writing for the Court, stated, "This Court has never departed from the rule announced in *Ker v. Illinois*, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" *Id.* (Internal citation omitted).
38. *Id.*
39. *But see* Schwabach & Patchett, *supra* note 20, at 37-38 (stating that it is possible to extend the Court's approval of jurisdiction, notwithstanding federal statutory violation, to cover a possible violation of international law).
40. *See id.* at 38-39.
41. *Id.* at 38.

the coast of San Francisco and subsequently convicted of conspiracy to violate the National Prohibition and Tariff Acts.[42] The defendants challenged the conviction, alleging they had been arrested outside the limits of U.S. jurisdiction, pursuant to a treaty entered into by the United States and Britain.[43] Writing for the Court, Chief Justice Taft stated the holding of *Ker* did not apply to the instant case to give the court jurisdiction regardless of the method of capture because, in *Ker*, a treaty of the United States was not directly involved.[44] Despite this the conviction was upheld, because the defendants had not properly raised the issue at trial.[45] The Court saw the issue raised by the defendants as purely jurisdictional, rather than going directly to innocence or guilt.[46]

In *Cook v. United States*, the treaty at issue in *Ford* once again came before the Court.[47] In *Cook*, a British vessel, MAZEL TOV, was approached by the U.S. Coast Guard approximately 11.5 miles off the U.S. coast and searched.[48] Unmanifested liquor was discovered aboard the ship and Cook, the ship's master, was subjected to penalty by the Collector of Customs.[49] Cook alleged that the treaty entered into by the United States and Britain prohibited the United States from securing jurisdiction over the vessel and persons aboard the MAZEL TOV because the ship was seized outside the treaty's "four league" provision.[50] The Supreme Court agreed, holding that the United States "lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority."[51] The Court further distinguished *Cook* from previous cases such as *Richmond* by highlighting that the claim was based on

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42. 273 U.S. 593, 600-01 (1927).

43. *See id.* at 604. The treaty allowed the United States to board private British vessels at no "greater distance from the coast of the United States its territories or possessions than can be traversed in one hour" by the suspect vessel. *Id.* at 608. The exact location and speed of the vessel upon seizure was disputed and the Court deferred to the judgment of the trial court. *Id.* at 605.

44. *Id.* at 605-06. Arguably, however, a treaty was at issue in the *Ker* decision. *See* Ker v. Illinois, 119 U.S. 436, 441-43 (1886). However, the *Ker* court brushed aside the existence of the extradition treaty between the United States and Peru because the "treaty was not called into operation," "relied upon," or "made the pretext of [Ker's] arrest." *Id.* at 443.

45. *See Ford*, 273 U.S. at 606.

46. *Id.* ("The issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence. It only affected the right of the court to hold their persons for trial.").

47. 288 U.S. 102, 107 (1933).

48. *Id.*

49. *Id.* at 107-08.

50. *Id.* at 108-10. Both the treaty and the Tariff Act provide that the Coast Guard is to search only those vessels within four leagues (twelve miles) of the coast of the United States. *Id.* at 107.

51. *Id.* at 121.

treaty law as opposed to the law of nations.[52] This distinction, however, is curious in light of the fact that general international law principles and treaties are given the same weight in the United States.[53]

C. Treaty Exception

In *United States v. Postal*, the United States Court of Appeals for the Fifth Circuit squarely addressed the issue of whether a court is divested of jurisdiction over crewmembers aboard a vessel seized beyond the limitations set out in treaties signed by the United States and a foreign country.[54] In *Postal*, crewmembers, purportedly of Australian national origin, aboard a vessel of Grand Cayman registry, were approached by a U.S. Coast Guard cutter and "ordered . . . to heave to and stand by for boarding."[55] Two boardings of the vessel ensued, one within the twelve-mile limit provided by the treaties and one outside the limit.[56] The Coast Guard discovered marijuana upon the second boarding and the crewmembers were subsequently convicted of conspiring to import, possession, and intent to distribute marijuana.[57] The defendants appealed their conviction on numerous grounds, one of which was that the second boarding by the United States Coast Guard occurred outside the jurisdiction of the United States.[58] The Fifth Circuit initially cited the *Ker-Frisbie* doctrine in its discussion of a possible treaty violation, stating a mere breach of international law will not divest the court of jurisdiction over the defendants unless codified into a treaty.[59] The court went further, however, to explain that not every treaty entered into by the United States

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52. *Id.* at 122.

53. Schwabach & Patchett, *supra* note 20, at 40 (citing Edwin D. Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L. L. 231, 241 (1934)).

54. 589 F.2d 862, 865 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979).

55. *Id.* at 865-66. The Grand Caymans are a territory of the United Kingdom, a party to both the Convention on the High Seas and the Convention on the Territorial Sea and Contiguous Zone. *Id.* at 868 n.8. Treaties entered into by the United Kingdom apply to its territories, unless expressly declared to the contrary. *Id.* Thus, the provisions of the Conventions are equally applicable to the vessel in question. *Id.*

56. *Id.* at 866-67.

57. *Id.* at 865, 867.

58. *See id.* at 870.

59. *Id.* at 873, 875. The court also noted that the *Ker-Frisbie* doctrine has been criticized "on the basis that courts should not implicitly sanction violations of international law." *Id.* at 873 n.16 (citing Dickinson, *supra* note 53, at 231; *Draft Convention on Jurisdiction with Respect to Crime*, art. 16, *reprinted in* 29 AM. J. INT'L L. 439, 442 (Supp. 1935); Felice Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265, 265 (1953); Austin W. Scott, Jr., *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91 (1953)).

will be held to limit the jurisdiction of the courts.[60] Instead, pursuant to Article Six of the United States Constitution, only "self-executing treaties" can prohibit courts from exercising otherwise valid jurisdiction over property and individuals.[61] The Fifth Circuit held that article six of the Convention on the High Seas was not self-executing and, therefore, presented no bar to the United States asserting jurisdiction over the defendants.[62]

In essence, the Fifth Circuit solidified an exception to the *Ker-Frisbie* doctrine which had been building since the Supreme Court's decisions in *Cook* and *Ford*.[63] This exception was recently reaffirmed and further explicated in *United States v. Alvarez-Machain*.[64] In *Alvarez-Machain*, a Mexican physician was kidnapped from his office in Guadalajara and flown to the United States to stand trial for participating in the murders of a U.S. Drug Enforcement Administration agent and a Mexican pilot.[65] Alvarez-Machain challenged his indictment, stating that U.S. courts did not have proper personal jurisdiction over him, and alleged violation of the extradition treaty between the United States and Mexico.[66] The majority held the language and history of the treaty did not, in any way, alter the *Ker-Frisbie* doctrine.[67] Additionally, the Court held the application of general international law did not require the treaty to be read such that only those methods of gaining custody of a foreign

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60. *Id.* at 875.

61. *Id.* Article Six states, in relevant part, that treaties entered into "under the Authority of the United States [to] be the supreme Law of the Land." *Id.* However, for a treaty to have full force and effect, it must be either self-executing or given effect by legislation. *Id.*

62. *Id.* at 876. Article six of the Convention on the High Seas, if self-executing, would foreclose jurisdiction on vessels flown under another nation's flag unless an exception found in the treaty was proven. *Id.* at 877. The Fifth Circuit rejected the notion that the United States would enter into a treaty which would circumscribe its domestic and criminal laws such as this and, thus, held that the treaty was not self-executing. *Id.* at 878.

63. *Id.* at 875-76.

64. 504 U.S. 655 (1992).

65. *Id.* at 657.

66. *Id.* at 658 (citing Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059). Alvarez-Machain relied on article nine of the treaty, which provides:

> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

Id. at 663 (citing Extradition Treaty, *supra*, art. 9, 31 U.S.T. at 5065).

67. *Id.* at 665.

national outlined in the treaty were valid.[68] The majority opinion of *Alvarez-Machain* was later cited as standing for the proposition that, in order for a defendant to successfully rely upon an extradition treaty to divest jurisdiction, the treaty must affirmatively state that citizens of a signator country will not be seized by another signator country.[69]

Unlike other opinions regarding the application of the *Ker-Frisbie* doctrine to seizing foreign nationals, the *Alvarez-Machain* opinion generated a zealous dissent.[70] Justice Stevens, joined by Justices Blackmun and O'Connor, characterized the majority's holding as "monstrous" and a violation of both the territorial integrity of Mexico and international humanitarian law.[71] According to Justice Stevens, the majority completely missed the issue presented in the case and erred by not recognizing the difference between abductions by private individuals and abductions by officers of the U.S. government.[72] As the majority presented the issue, precedent such as *Ker* and *Cook* overwhelmingly favored a finding of jurisdiction, but, as stated by the dissent, "it is not, however, the question presented for decision today."[73] Although the extradition treaty contained twenty-three articles and an appendix detailing all offenses that the signators considered "extraditable," the dissent pointed out that the majority read the extradition process as merely elective, so that it could be ignored should a signator country decide that extradition is not convenient or expedient.[74] The majority opinion, according to Justice Stevens, invalidly took into account the Executive Branch's desire to punish the defendant for the brutal murder of an agent of the U.S. government and set a dangerous precedent that other countries might follow.[75] The dissent, as impassioned as it was, is one of few instances where the *Ker-Frisbie* doctrine has been questioned, and then, only as applied to the facts of the particular case.[76]

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68. *Id.* at 668-69 ("[T]o infer from this Treaty and its terms that it prohibits all means of gaining the presence of an individual outside of its terms goes beyond established precedent and practice.").

69. United States v. Noriega, 117 F.3d 1206, 1213 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

70. *Alvarez-Machain*, 504 U.S. at 670-88 (Stevens, J., dissenting). The decision also generated a great deal of response from the scholars and the legal community, mostly negative. *See, e.g.*, George B. Newhouse, Jr., *The Long Arm of the Law: The United States Has Statutory Authority to Pursue Terrorists Wherever They May Be Found Throughout the World*, 25 L.A. LAW. 32, 36-37 (Sept. 2002).

71. *Alvarez-Machain*, 504 U.S. at 682, 687.

72. *Id.* at 682.

73. *Id.*

74. *Id.* at 671-72, 674.

75. *Id.* at 686-87.

76. *See id.* at 682.

D. Toscanino *Exception*

Apart from the "treaty exception" to the *Ker-Frisbie* doctrine, another, very limited, exception has also been carved out.[77] After *Frisbie* was decided, courts and scholars questioned the validity of the doctrine, citing due process problems and concerns with illegal police conduct.[78] The decision in *United States v. Toscanino*, attempted to answer these fears by creating another exception to the doctrine.[79] In *Toscanino*, the defendant was kidnapped, tortured, and interrogated over a seventeen-day period.[80] Subsequently, he was drugged by Brazilian-American agents, placed aboard a flight to the United States, and arrested upon his arrival.[81] Toscanino appealed his narcotics conviction.[82] The United States Court of Appeals for the Second Circuit, noting the erosion of the *Ker-Frisbie* doctrine, held that the restricted version of due process found in the *Ker-Frisbie* doctrine must give way to "the expanded and enlightened interpretation [of due process] expressed in more recent decisions of the Supreme Court."[83] Thus, the "*Toscanino* Exception" was born.[84]

The "*Toscanino* Exception" was emasculated less than a year later, however, by the same court, in *United States ex rel. Lujan v. Gengler*.[85] The Second Circuit limited the holding of *Toscanino* to its very unusual and "shocking" set of facts.[86] Lujan, a citizen of Argentina, was lured to Bolivia where he was forcibly taken into custody by men hired by the U.S. government and flown to New York.[87] Lujan challenged his arrest as a violation of due process, consistent with the court's earlier decision in *Toscanino*.[88] The Second Circuit held that, because the government conduct "pales by comparison" to the egregious conduct in *Toscanino*, Lujan's claim did not "convert [his] abduction which is simply illegal into one which sinks to a violation of due process."[89] The court further

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77. *See* United States v. Toscanino, 500 F.2d 267, 277-78 (2d Cir. 1974).
78. *See* Gov't of the Virgin Is. v. Ortiz, 427 F.2d 1043, 1045 n.2 (1970); *Toscanino*, 500 F.2d at 272-74.
79. 500 F.2d at 275.
80. *Id.* at 269-70.
81. *Id.* at 270.
82. *Id.* at 271.
83. *Id.* at 275.
84. *See* Schwabach & Patchett, *supra* note 20, at 41-42.
85. 510 F.2d. 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).
86. *Id.* at 66.
87. *Id.* at 63.
88. *Id.*
89. *Id.* at 66.

explicitly stated that it, in no way, intended to subvert the *Ker-Frisbie* doctrine by its holding in *Toscanino*.[90]

The *Lujan* decision is not the only decision to question the soundness of the "*Toscanino* Exception."[91] The Supreme Court in *Alvarez-Machain* reaffirmed the application of the *Ker-Frisbie* doctrine to an abduction that was, arguably, both "shocking" and in violation of international law, seemingly disavowing the "*Toscanino* Exception."[92] Later, in *United States v. Matta-Ballesteros*, the United States Court of Appeals for the Ninth Circuit commented upon both the applicability of the *Ker-Frisbie* doctrine to cases in which the manner a defendant is brought before the court is questioned and upon the very limited holding and questionable precedential value of *Toscanino*.[93] In *Matta-Ballesteros*, a Honduran national was kidnapped from his home and flown to Illinois where he was subsequently tried and convicted on narcotics charges.[94] One of Matta-Ballesteros' challenges to his conviction was that his abduction was "shocking," invoking the "*Toscanino* Exception."[95] The court dismissed this allegation, noting that "[i]n the shadow cast by *Alvarez-Machain*, attempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino*, have been cut short."[96]

III. THE COURT'S DECISION

In the noted case, the Third Circuit found no exception to the *Ker-Frisbie* doctrine applicable and, therefore, a mere possible violation of international law was insufficient to divest the court of jurisdiction over the defendant.[97] The court began its analysis with a discussion of the evolution of the *Ker-Frisbie* doctrine and an examination of the possible exceptions available.[98] Noting that the district court appeared to have invoked the "treaty exception" to the doctrine, the court first addressed the district court's reference to "established international law of the high seas" before systematically breaking down the district court's argument

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90. *Id.* at 65.

91. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 668-70 (1992); United States v. Matta-Ballesteros, 71 F.3d 754, 763 (9th Cir. 1995), *cert. denied*, 519 U.S. 1118-19 (1997).

92. *Alvarez-Machain*, 504 U.S. at 669-70.

93. *Matta-Ballesteros*, 71 F.3d at 763 n.3.

94. *Id.* at 760-61.

95. *See id.* at 762.

96. *Id.* at 763 (internal citation omitted).

97. United States v. Best, 304 F.3d 308, 315-16 (3d Cir. 2002).

98. *Id.* at 311-14.

regarding treaties and Presidential Proclamation No. 7219 into a series of misplaced reliances.[99]

The Third Circuit approached the personal jurisdiction issue with an eye toward application of the *Ker-Frisbie* doctrine, initially detailing the impetus of the doctrine: "Jurisdiction over the person of a defendant 'in a federal criminal trial whether citizen or alien, whether arrested within or beyond the territory of the United States,' is not subject to challenge on the ground that the defendant's presence before the court was unlawfully secured."[100] The court went on to address the relationship between due process and the *Ker-Frisbie* doctrine, stating that the doctrine had survived scrutiny essentially intact.[101] Noting that, in the years since its inception, the *Ker-Frisbie* doctrine had encountered only two recognizable exceptions to the general rule, the court discussed each exception in turn.[102]

First, the court analyzed the "*Toscanino* Exception" to the *Ker-Frisbie* doctrine.[103] The "*Toscanino* Exception" held that the doctrine must yield to due process when conduct is so outrageous as to "shock the conscience."[104] Noting that the Second Circuit almost immediately limited the "*Toscanino* Exception," to the "shocking" facts of that case, which involved "torture, terror, [and] custodial interrogation," the court went on to explicate other decisions that commented upon the restricted nature of the exception and, at the same time, reaffirmed the *Ker-Frisbie* doctrine, such as *Alvarez-Machain* and *Matta-Ballesteros*.[105] As applied to the facts of the noted case, the Third Circuit found no correlation between the horrendous treatment of Toscanino and the relatively uneventful conduct surrounding the seizure of the CORDEIRO DE DEUS and its crew.[106] Thus, the court noted that, even if the "*Toscanino* Exception" were valid, it would be inapplicable to the facts at hand.[107]

Not finding a "*Toscanino* Exception" to the *Ker-Frisbie* doctrine, the court analyzed a second possible exception: violation of a treaty.[108] Noting that this exception gained prominence in the Prohibition Era, the Third Circuit focused its analysis on cases in which the United States

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99. *Id.* at 314-16.

100. *Id.* at 311 (citing United States v. Romero-Galue, 757 F.2d 1147, 1151 n.10 (11th Cir. 1985) (quoting United States v. Winter, 509 F.2d 975, 985-86 (5th Cir. 1975))).

101. *Id.* at 311-13.

102. *Id.* at 312-15.

103. *Id.* at 312-13.

104. *Id.* at 312 (quoting United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

105. *Id.* at 312-13 & n.4.

106. *Id.* at 313.

107. *Id.*

108. *Id.*

limited its own ability to claim jurisdiction over vessels outside the territorial waters of the United States.[109] Distilling the holdings of the various cases in which a treaty was called upon to prove an exception to the *Ker-Frisbie* doctrine, the court discussed the two separate issues relating to treaties: how a treaty becomes binding and how jurisdiction can be limited.[110] The court noted that the Fifth Circuit, in *United States v. Postal*, addressed the first issue as it explained that treaties become binding when "given effect by congressional legislation or are, by their nature, self-executing."[111] As to the second issue, pursuant to the decision in *Alvarez-Machain*, unless a treaty contains explicit reference to a prohibition against abduction of foreign nationals in any manner not consistent with the treaty, a country cannot be divested of jurisdiction over the individuals.[112] The court then addressed the issue of whether a treaty existed that might divest the United States of jurisdiction.[113]

Initially, the Third Circuit pointed out that the district court failed to make reference to the *Ker-Frisbie* doctrine, other than possibly by inference through its discussion of how *Alvarez-Machain* and other such cases were distinguishable from the present set of facts because none of those decisions dealt with an abduction on the "high seas."[114] The court summarily disposed of this proposition and moved quickly to consider the district court's claim that the seizure of the defendants violated "established international law of the high seas" before investigating the possible treaty violation.[115] Finding support from *Postal*, *Alvarez-Machain*, and *Cook*, the court concluded that precedent clearly dictated that a violation of general international law principles was insufficient to divest the court of jurisdiction over the defendant.[116] Following the disposition of the international law claim, the court finally considered the implicated treaties.[117]

In its opinion, the district court cited specific articles from three different treaties: article 24 of the Convention on the Territorial Sea and the Contiguous Zone, article 22 of the Convention on the High Seas, and article 33 of the United Nations Convention on the Law of the Sea

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109. *Id.*; *see* Ford v. United States, 273 U.S. 593, 600 (1927); Cook v. United States, 288 U.S. 102, 121 (1933).

110. *Best*, 304 U.S. at 313-14.

111. *Id.* (quoting United States v. Postal, 589 F.2d 862, 875 (1979)).

112. *Id.* at 314.

113. *Id.* at 314-15.

114. *Id.* at 314 & n.5.

115. *Id.* at 314.

116. *Id.*

117. *Id.* at 314-15.

(UNCLOS).[118] As to the first two treaties, the Third Circuit noted that because Brazil is not a signatory country to either, they cannot be considered as binding in any way upon the United States with respect to Brazil.[119] As to UNCLOS, the Third Circuit pointed out that, though signed by the United States, it has not been implemented by the "congressional legislation" necessary to bind the United States to its provisions.[120] Therefore, because no binding treaty exists between Brazil and the United States, the court found no valid treaty exception to the *Ker-Frisbie* doctrine.[121]

In addressing the defendant's final jurisdictional challenge, the Third Circuit reviewed Presidential Proclamation No. 7219, which the defendant alleged constituted a self-imposed limitation on the jurisdiction of the United States.[122] The proclamation defines the contiguous zone of the territorial waters of the United States as the area in which the United States could seize persons in violation of the laws of the United States and "punish infringement of . . . laws and regulations committed within its territory or territorial sea."[123] Although the district court seemed to endorse this view of limited jurisdiction, the Third Circuit rejected the defendant's contention, noting that the proclamation further provides that it shall not modify existing law.[124] Thus, the court found that Presidential Proclamation No. 7219 cannot be said to constitute an exception or limitation on the *Ker-Frisbie* doctrine.[125]

IV. ANALYSIS

The decision rendered by the Third Circuit in the noted case conforms with case law precedent.[126] Moreover, the judiciary protected the right of the U.S. government to bring persons to justice for violating the laws of the United States.[127] However, after comparing the decision rendered in the noted case with the district court's decision and the

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118. *Id.* (citing Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 24, 15 U.S.T. 1606, 1612-13, 516 U.N.T.S. 205, 220, 222; Convention on the High Seas, Apr. 29, 1958, art. 22, 13 U.S.T. 2312, 2318, 450 U.N.T.S. 82, 92-93; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 33, U.N. Doc. A/CONF.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982)).

119. *Id.* at 315.

120. *Id.*

121. *Id.*

122. *Id.* at 315-16 (citing Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999)).

123. *Id.* at 316.

124. *Id.*

125. *Id.*

126. *See id.* at 314.

127. *See id.* at 309 n.1.

dissent in *Alvarez-Machain*, one grows uneasy with the implications of upholding a doctrine promulgated over a century ago.[128] Furthermore, the court's conclusory dismissal of the defendant's claim that his seizure was in violation of generally recognized principles of international law should give one pause to consider the implications of such a statement by the U.S. judiciary.[129]

The Third Circuit, in the noted case, called upon a presidential proclamation to justify the seizure and detention of a vessel, and individuals contained therein, outside the territorial jurisdiction of the United States.[130] Specifically, the court cited, in a footnote, to Proclamation No. 7219, which states, in relevant part, that "[i]nternational law recognizes that coastal nations may establish" contiguous zones adjacent to its territorial waters in order to prevent violation of the nation's laws, including immigration laws.[131] Moreover, pursuant to the proclamation, those who break the coastal nation's laws "within [their] territory or territorial sea" may be punished in accordance with the coastal nation's laws.[132] However, the court first misinterpreted the proclamation and then misapplied it. As noted by the district court, the contiguous zone is an area outside the territorial waters of the United States and, as such, is an area where individuals may be seized to prohibit the violation of laws.[133] An individual may be punished only if laws are broken *within the territorial waters*.[134] Seizing and punishing are two different things, as are territorial and contiguous waters; therefore, the United States did not have valid jurisdiction over the defendant in the noted case.

Aside from the misinterpretation of the proclamation, the Third Circuit also failed to reconcile its adherence to the international law mentioned in the proclamation with its disavowal of international law principles in securing jurisdiction over the defendant.[135] The reason for

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128. *See id.* at 308; United States v. Best, 172 F. Supp. 2d 656 (D.V.I. 2001); United States v. Alvarez-Machain, 504 U.S. 655, 670-88 (1992).

129. *See Best*, 304 F.3d at 314. Only two paragraphs out of the court's seven-page opinion addressed the alleged violation of international law. *See id.* at 309-16.

130. *Id.* at 309 n.1 (citing Proclamation No. 7129, 64 Fed. Reg. 48,701 (Aug. 2, 1999)).

131. *Id.*

132. *Id.*

133. *Best*, 172 F. Supp. 2d at 663-64 (citing Proclamation No. 7129, 64 Fed. Reg. 48,701 (Aug. 2, 1999)).

134. *Id.* at 664.

135. *Compare Best*, 304 F.3d at 309 n.1 (citing Proclamation No. 7129, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (stating that "international law recognizes that coastal nations may establish" contiguous zones)), *with Best*, 304 F.3d at 314 (stating that a violation of international law does not constitute an exception to the *Ker-Frisbie* doctrine).

this inconsistency, while not apparent on the face of the opinion, can be attributed to the court's desire to uphold precedent and avoid the recognition of another possible exception to the *Ker-Frisbie* doctrine. Courts are loathe to upset precedential decisions, especially decisions of the United States Supreme Court.[136]

Another possible reason for this inconsistency is the desire to maintain precedent with a forward-looking view of the implications of holding otherwise. The district court, located in the Virgin Islands, rendered its decision on October 26, 2001.[137] The decision of the Third Circuit, located in Philadelphia, was rendered on September 18, 2002.[138] Two things are important to note: the locations of the courts and the timing of the respective opinions. At the time of the Third Circuit's opinion, only one year had passed since the September 11, 2001, attacks on New York City and Washington, D.C., and the U.S. war on terrorism was in full swing.[139] The mood of the court when viewing the issue presented in the noted case is arguably far different than the mood of a court located in the Virgin Islands. A court located miles from "ground zero" would certainly consider the need for the *Ker-Frisbie* doctrine in the coming months in order to bring to trial those viewed as responsible for the September 11 attacks. Regardless of the reasons behind this inconsistency, the disrespect for international law is apparent.[140]

Apart from the court's dismissal of international law as a reason for declining jurisdiction over the defendant, the court's reliance on the *Ker-Frisbie* doctrine's version of due process is equally troubling. Both *Ker* and *Frisbie* were decided prior to the expansion of this country's notion of due process and, consequently, did not consider factors that a court should now seriously analyze when justifying jurisdiction over an individual.[141] As the court in *Toscanino* pointed out, the doctrine's validity has been seriously questioned for this very reason.[142] Although

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136. *See* United States v. Alvarez-Machain, 504 U.S. 655, 668 n.15 (1992).

137. *Best*, 172 F. Supp. 2d at 656.

138. *Best*, 304 F.3d at 308.

139. *See* David E. Kaplan et al., *Run and Gun*, U.S. NEWS & WORLD REP., Sept. 30, 2002, *available at* 2002 WL 8431373.

140. *See Alvarez-Machain*, 504 U.S. at 687 (Stevens, J., dissenting) ("The way that we perform [our duty to render evenhanded judgments] in a case of this kind sets an example that other tribunals in other countries are sure to emulate.").

141. *See* United States v. Toscanino, 500 F.2d 267, 272-73 (1974) ("In an effort to deter police misconduct, [due process] has been extended to bar the government from realizing directly the fruits of its own deliberate and unnecessary lawlessness in bringing the accused to trial.").

142. *Id.*

Toscanino was limited to its very unique set of facts,[143] the idea behind the court's ruling is still valid. Due process, as described by the *Toscanino* court, requires that an illegal arrest be remedied because such an arrest violates the Fourth Amendment prohibition against unlawful searches and seizures.[144] A requirement that defendants be apprehended within the confines of constitutional protections does not place too heavy a burden upon the government. As stated by Judge Brandeis in his *Olmstead v. United States* dissent, "In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously."[145]

The court's adherence to the *Ker-Frisbie* doctrine is perhaps most troublesome because of the potential implications on international law and politics.[146] The doctrine, which, in effect, rationalizes the abduction of individuals in violation of both due process and international law, has the potential effect of putting U.S. citizens at risk at home and abroad, especially if this practice were instituted with any amount of regularity or against a powerful foreign national.[147] In addition, adherence to the doctrine to further the interest of the United States might have the unintended effect of alienating the United States from allies at a point in time when they are needed most.[148]

V. CONCLUSION

The Third Circuit's continued approval of the *Ker-Frisbie* doctrine and dismissal of the applicability of international laws to the United States is disquieting in light of recent international events. The defendant in the noted case, perhaps, got caught by a court merely trying to uphold a doctrine that needs to be kept in "reserve" in light of the U.S. involvement in a war of global proportions. In its effort to uphold the *Ker-Frisbie* doctrine, the Third Circuit clung to the precedent that created the doctrine and again upheld the restricted version of due process which

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143. *Best*, 304 F.3d at 312 (citing United States *ex rel.* Lujan v. Gengler, 510 F.2d 62, 63 (2d Cir. 1975)).

144. *Toscanino*, 500 F.2d at 275 n.4 (citing Henry v. United States, 361 U.S. 98, 100-01 (1959); Giordenello v. United States, 357 U.S. 480, 485-88 (1958); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921)).

145. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

146. *See* United States v. Alvarez-Machain, 504 U.S. 655, 687 (1992) (Stevens, J., dissenting) (noting that "the desire for revenge exerts 'a kind of hydraulic pressure . . . before which even well settled principles of law will bend'" (quoting Norton Securities Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting))).

147. *See* Rudy, *supra* note 15, at 838-39; Mark Brkljacic, Comment, *The Dangers of State Sponsored and Court Ratified Abduction*, 5 J. INT'L L. & PRAC. 117, 126 (1996).

148. *See* Rudy, *supra* note 15, at 838.

it entails. The arguments made against the continued application of the *Ker-Frisbie* doctrine are strikingly valid, yet they are not new. They continue to fall upon deaf ears, as they have for years. Perhaps the Supreme Court will soon have the chance to reexamine this doctrine. If so, hopefully the Court will remember: "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."[149]

Brandy Sheely*

149. THE COMPLETE WRITINGS OF THOMAS PAINE 588 (P. Foner ed., Citadel Press 1945).

* J.D. candidate 2004, Tulane University School of Law; B.A. 1999, Mississippi University for Women.