Summer 1996

Should the End Justify the Means - United States v. Mattta-Ballestros and the Demise of the Supervisory Powers

C. Douglas Ferguson

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Recommended Citation
Should the End Justify the Means - United States v. Mattta-Ballestros and the Demise of the Supervisory Powers

Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law and Commercial Regulation: http://scholarship.law.unc.edu/ncilj/vol21/iss3/2
Should the End Justify the Means? United States v. Matta-Ballesteros and the Demise of the Supervisory Powers

I. Introduction

The end justifies the means. That appears to be the message sent by the Ninth Circuit in United States v. Matta-Ballesteros1 and other recent decisions refusing to utilize the powers of the federal courts to discourage misconduct by U.S. law enforcement agents and federal prosecutors.2 When the end achieved is the trial of suspected drug dealers and murderers in the United States, the means of bringing such suspects to justice can now involve covert operations by U.S. agents to kidnap them and spirit them away from their homes in foreign countries.3

Frustrated with the diplomatic and legal hurdles involved in extraditing suspected criminals from their countries of refuge, law enforcement agents have begun resorting to less traditional means of bringing suspected criminals to justice in the United States.4 In some cases, including that of Matta-Ballesteros, such non-traditional means allegedly have included torture with electric stun guns, extensive beatings, and secretly arranged flights under the cover of night.5 Even full-scale military invasion has been utilized to capture one political leader suspected of participating in drug trafficking.6

Toward the middle of this century, the federal courts, following the example set by the U.S. Supreme Court in McNabb v. United States,7 appeared somewhat less willing to sanction conduct by law enforcement agents or prosecutors that the courts deemed to be uncivilized or outrageous.8 Exercising what became known as their supervisory powers, the federal courts dismissed some cases rather than preside

---

1 71 F.3d 754 (9th Cir. 1995).
3 See United States v. Alvarez-Machain, 504 U.S. 655 (1992); United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), cert. denied, 498 U.S. 878 (1990). While the federal agents involved in the abductions have admitted to participating in the kidnappings themselves, they have denied beating or torturing the suspects. See, e.g., 71 F.3d 754.
7 318 U.S. 332 (1943).
8 See infra notes 112-33 and accompanying text.
over proceedings in which evidence or defendants had improperly been brought before them.9

Recently, however, the federal courts once again have taken their cue from the Supreme Court in pulling back from the liberal exercise of their supervisory powers.10 Where international abductions by federal agents are involved, the result has often been increased tensions between the United States and other countries.11 In addition, with no reason to fear reprisals by the courts in the form of dismissals, federal agents have been written virtual blank checks to continue unorthodox and internationally condemned methods of bringing suspects to justice.

This Note explores the Ninth Circuit's decision in Matta-Ballesteros, in which the court refused to exercise its supervisory powers to dismiss a case involving the international abduction of a suspected drug trafficker by U.S. Marshals.12 Part II details the facts and holding of the case, including a noteworthy argument by the concurrence.13 Contrary to the majority, Judge Noonan indicated his belief that Matta-Ballesteros—but for a minor technicality—was a case that ordinarily would have cried out for dismissal. Part III traces the history of the federal courts' supervisory powers and explores other pertinent background law.14 Part IV analyzes the Matta-Ballesteros decision itself, determining the case's significance in light of the background law.15 Finally, this Note concludes in Part V that, even considering the technicality raised by Judge Noonan, the Ninth Circuit should have used the opportunity presented by Matta-Ballesteros to exercise its supervisory powers and dismiss the case.16 This Note also concludes that the trend toward more restrictive use of supervisory powers has the potential to exacerbate international relations precisely at a time when cooperation among countries in crime prevention and punishment is imperative.17

---

9 See, e.g., McNabb, 318 U.S. at 341; Ballard v. United States, 329 U.S. 187 (1946); United States v. Hale, 422 U.S. 171, 181 (1975). See also Burton v. United States, 483 F.2d 1182, 1187 (9th Cir.), aff'd on reh'g, 483 F.2d 1190 (9th Cir. 1973), for a listing of more than thirty cases in which the lower federal courts have exercised their supervisory powers.

10 See infra notes 134-55 and accompanying text.

11 The decision in Alvarez-Machain, for example, sparked protests not only from Mexico—the country from which the suspect was abducted—but from other countries around the world, including long-time friends of the United States, such as Canada, Switzerland and Australia. See United States v. Alvarez-Machain, 504 U.S. 655 (1992); Jonathan A. Bush, Essay, How Did We Get Here? Foreign Abduction After Alvarez-Machain, 45 STAN. L. REV. 939, 941-42 & n.12 (1993).

12 Matta-Ballesteros, 71 F.3d at 760-61.

13 See infra notes 18-111 and accompanying text.

14 See infra notes 112-227 and accompanying text.

15 See infra notes 228-63 and accompanying text.

16 See infra part V.

17 See infra part V.
II. Statement of the Case

A. Facts

Juan Ramon Matta-Ballesteros, a Honduran, became involved in a marijuana and cocaine trafficking enterprise with seven Mexican nationals in 1982 or 1983. The enterprise, which was centered in Guadalajara, Mexico, included several marijuana ranches in various Mexican locations. Together with Miguel Angel Felix-Gallardo, one of the seven Mexican nationals, Matta-Ballesteros was directly involved in importing large amounts of cocaine into the United States.

In September 1984, members of the enterprise—not including Matta-Ballesteros—met and discussed several large seizures of marijuana and cocaine that had been made by the United States Drug Enforcement Administration (DEA). The suggestion was made at the September meeting that the DEA agent responsible for the seizures should be “picked up.” This suggestion was repeated at two subsequent meetings—at which Matta-Ballesteros was present—held one month later in Guadalajara. By December 1984, the drug traffickers had identified Special Agent Enrique Camarena as the DEA agent responsible for the seizures, and one of the enterprise members indicated that he would “take care of” him. Camarena disappeared after he left the DEA office in Guadalajara on February 7, 1985. It was later determined that Camarena had been taken to a house at 881 Lope del Vega, in Guadalajara, where he was tortured, interrogated, and killed.

An investigation conducted at Lope del Vega determined that Matta-Ballesteros had been at the house some time after January 1985. In addition, Matta-Ballesteros was seen leaving a hotel in Guadalajara on February 12, 1985. Matta-Ballesteros was subsequently detained by police in Colombia on charges unrelated to

---

18 Matta-Ballesteros, 71 F.3d at 760.
19 Id.
20 Id. Matta-Ballesteros and Felix-Gallardo grossed over $5 million a week at one point during their operations. Id.
21 Id. at 760-61.
22 Id.
23 Id. at 761.
24 Id. This statement was attributed to Ernesto Fonseca-Carillo, the Mexican national who identified Camarena. Id.
25 Id. Earlier that month, four of the Mexican nationals had met again to discuss picking Camarena up to find out what he knew concerning the enterprise and who was cooperating with him. Id.
26 Id. This determination was made from “[o]ut of court statements, audiotapes and physical evidence, including hair, carpet fibers, sheet fabric and rope strands . . . .” Id.
27 Id. The house was recarpeted in January 1985, and hairs consistent with those of Matta-Ballesteros were found in the guest house and bedroom. Id.
28 Id.
Camarena’s murder on April 29, 1985. The police then took him to Bogota to be interviewed by DEA agents, where he denied participating in Camarena’s murder but said that he did know of it. Although the United States attempted to extradite Matta-Ballesteros on an unrelated criminal complaint filed in the Southern District of New York, the extradition was unsuccessful, and Matta-Ballesteros returned to Honduras.

Just before dawn on April 5, 1988, four U.S. Marshals and Honduran Special Troops abducted Matta-Ballesteros from his home in Tegucigalpa, Honduras. His hands were bound, a black hood was placed over his head, and he was thrust on the floor of a car driven by one of the Marshals. The Marshal then drove Matta-Ballesteros to a U.S. Air Force Base in Honduras, where he was placed on a plane and flown to the United States, via the Dominican Republic. Matta-Ballesteros was detained in the federal penitentiary at Marion, Illinois. Although Matta-Ballesteros alleged that—at the direction of the U.S. Marshals—he was beaten and burned with a stun gun during the trip to the Air Force Base and during the subsequent flight, the government denied these charges. However, the United States did admit to participating in the abduction from Honduras.

Matta-Ballesteros made an unsuccessful petition for a writ of habeas corpus in the Seventh Circuit, and was later convicted in the Northern District of Florida of various narcotics charges and escape from custody. The convictions were upheld on appeal in the Eleventh Circuit. Following the decision by the Eleventh Circuit,
Matta-Ballesteros was brought before the Central District of California to face charges related to the kidnapping and murder of Camarena.\(^{42}\)

**B. The Central District of California**

Matta-Ballesteros was charged, tried, and convicted in the Central District of California of: "(1) committing, aiding and abetting or conspiring to commit a violent act in support of an enterprise engaged in racketeering . . .; (2) conspiracy to kidnap a federal agent . . .; and (3) participating in the kidnapping of a federal agent . . ."\(^{45}\) He was acquitted of charges related to the murder of Camarena itself.\(^{44}\)

During the course of his trial, Matta-Ballesteros challenged the district court's jurisdiction over him, most notably arguing that "the shocking nature of his abduction and mistreatment require[d] dismissal."\(^{46}\) Although Matta-Ballesteros brought in photographs, reports from eyewitnesses, and expert testimony in an attempt to prove he had been tortured during the trip from Honduras, the district court determined that Matta-Ballesteros had failed to make "a strong showing of grossly cruel and unusual barbarities."\(^{47}\) Thus, the district court refused to dismiss the case.\(^{48}\)

**C. The Court of Appeals for the Ninth Circuit**

Matta-Ballesteros appealed his convictions to the Court of Appeals for the Ninth Circuit, where he once again raised jurisdictional challenges along with several other issues.\(^{49}\) Regarding the jurisdic-

\(^{42}\) Matta-Ballesteros, 71 F.3d at 761-62.
\(^{43}\) Id. at 762 (citations omitted).
\(^{44}\) Id.
\(^{45}\) Id.
\(^{46}\) It was reported in the Seventh Circuit decision that a physician examining Matta-Ballesteros "found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back." Matta-Ballesteros v. Henman, 896 F.2d 255, 256 (7th Cir. 1990), cert. denied, 498 U.S. 878 (1990). The physician testified that "these injuries were consistent with those which could have been caused by a stun gun." Id.
\(^{47}\) Matta-Ballesteros, 71 F.3d at 764 (citing United States v. Lovato, 520 F.2d 1270, 1271 (9th Cir. 1975)), cert. denied, 423 U.S. 985 (1975). In reaching this conclusion that Matta-Ballesteros had not been treated cruelly, the district court also considered the testimony of two United States Marshals who contradicted the testimony of Matta-Ballesteros. Id. The district court held that the "[d]efendant's allegations of mistreatment, even if taken as true, [did] not constitute such barbarism as to warrant dismissal of the indictment under the caselaw." Id. (citation omitted).
\(^{48}\) Id.
\(^{49}\) United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995). In addition to his jurisdictional challenges, Matta-Ballesteros argued that the district court erred in that: (1) his conviction was not supported by the evidence, id. at 765, (2) the jury had access to extraneous evidence, id. at 766-66, (3) the district court had made improper evidentiary rulings, id. at 766-70, and (4) the joint trial with several other codefendants had resulted in prejudice against him, id. at 770-71. Although these challenges all were rejected by the court of appeals, id. at 765-71, this Note will focus only on issues surrounding the jurisdictional challenges.
tion of the district court to hear his case, Matta-Ballesteros argued that "extradition treaties between Honduras and the United States prohibit[ed] his prosecution" and he repeated his argument regarding the shocking nature of his treatment.\(^5\) The government countered that Matta-Ballesteros was collaterally estopped from raising his jurisdictional challenges because "that issue has already been fully and fairly litigated as to him in two other federal circuits in cases where he challenged jurisdiction on the same grounds ..."\(^5\) The Ninth Circuit reviewed the jurisdictional challenges de novo.\(^5\)

1. The Majority

The majority opinion, written by Judge Poole, quickly dispensed with the government's argument that Matta-Ballesteros was collaterally estopped from raising his jurisdictional challenges in the Ninth Circuit.\(^5\) After pointing out that the government had cited no authority to demonstrate that the jurisdictional decisions of the Seventh and Eleventh Circuits should have a preclusive effect in the Ninth Circuit, the majority stated that only collateral attacks to final judgments were precluded, not independent jurisdictional challenges.\(^5\) Determining that "[n]one of [the] cases [cited by the government] stand for the proposition that there is collateral estoppel effect as to the litigation of similar jurisdictional issues in unrelated cases,"\(^5\) the majority moved on to address Matta-Ballesteros's arguments.

\(a.\) The U.S.-Honduras Extradition Treaties

First, the Ninth Circuit addressed Matta-Ballesteros's claim that extradition treaties between Honduras and the United States precluded his prosecution.\(^5\) Examining the Supreme Court's decision in United States v. Alvarez-Machain,\(^5\) the court noted that although the decision relied upon by Matta-Ballesteros did hold that international treaties

\(^5\) Id. at 762. Matta-Ballesteros relied on the Supreme Court's decision in United States v. Alvarez-Machain, 504 U.S. 655 (1992), to make his argument regarding the extradition treaties between the United States and Honduras. Matta-Ballesteros argued that Alvarez-Machain declared treaties to be self-executing, granting individuals such as himself the right to enforce them. Id.

\(^5\) Id. at 762 n.2 (citing United States v. Matta, 937 F.2d 567 (11th Cir. 1991); Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.), cert. denied, 498 U.S. 878 (1990)).

\(^5\) Id. (citing United States v. Walczak, 783 F.2d 852, 854 (9th Cir. 1986)).

\(^5\) Id. at 762 n.2.

\(^5\) Id. The majority noted that all of the cases cited by the government involved collateral attacks to adverse jurisdictional judgments. Id. (citing Insurance Corp of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.9 (1982); Durfee v. Duke, 375 U.S. 106, 112 (1963); United States v. Borneo, Inc., 971 F.2d 244 (9th Cir. 1992); United States v. Van Cauwenbergh, 984 F.2d 1048 (9th Cir. 1991)).

\(^5\) Id.

\(^5\) Id. at 762.

bestow rights on individuals, it also held that such rights could be enforced only where they were stated expressly in the treaty under consideration. Thus, the Ninth Circuit held, "[w]here the terms of an extradition treaty do not specifically prohibit the forcible abduction of foreign nationals, the treaty does not divest federal courts of jurisdiction over the foreign national."

With the holding of *Alvarez-Machain* in mind, the Ninth Circuit moved on to analyze the extradition treaties between the United States and Honduras. Upon examining the treaties, the majority found that "[t]he treaties between the United States and Honduras contain preservations of rights similar to those which Alvarez-Machain held did not sufficiently specify extradition as the only way in which one country may gain custody of a foreign national for purposes of prosecution." Thus, the court held, even though Matta-Ballesteros had been abducted from Honduras, "[n]othing in the treaties between the United States and Honduras authorize[d] the dismissal of the indictment against Matta-Ballesteros."

### b. Due Process Objections

Once it had determined that the extradition treaties should have no effect on the court's jurisdiction, the Ninth Circuit addressed Matta-Ballesteros's second jurisdictional challenge involving the allegedly "shocking nature" in which he was abducted and treated by U.S. Marshals. First, the majority noted that long-standing Supreme Court precedent, dating from an 1886 decision in *Ker v. Illinois* and a 1952 decision in *Frisbie v. Collins*, precluded due process objections to the manner by which a defendant is brought to trial. The majority argued that because the rule in *Ker* was reaffirmed in *Alvarez-Machain*, "attempts to expand due process rights into the realm of foreign abductions... have been cut short."

The Ninth Circuit, in applying the "Ker-Frisbie doctrine," specifically rejected the reasoning in *Toscanino v. United States*, a Second Circuit opinion that had fashioned an exception to *Ker-Frisbie*.

---

58 *Matta-Ballesteros*, 71 F.3d at 762.
59 *Id.* (citing *Alvarez-Machain*, 504 U.S. at 664-66). The Ninth Circuit went on to argue that *Alvarez-Machain* thus holds that "in the absence of express prohibitory terms, a treaty's self-executing nature is illusory." *Id.*
60 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952)).
65 *Id.* at 763 (citing *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974)).
66 500 F.2d 267 (2d Cir. 1974).
allowing for dismissal in the event that a due process violation had occurred prior to trial. While the court in *Toscanino* had relied on several Supreme Court decisions that it believed supported its divergence from *Ker-Frisbie*, the Ninth Circuit noted that Supreme Court cases decided since *Toscanino*, including *Alvarez-Machain*, had "consistently reaffirmed the Ker-Frisbie doctrine . . . ."

c. *The Supervisory Powers*

Thus rejecting any due process objections to jurisdiction that could be made along the lines of *Toscanino*, the Ninth Circuit next addressed the issue of supervisory powers directly. The majority, citing Ninth Circuit and Supreme Court precedent, first established that

we have inherent supervisory powers to order dismissal of prosecutions for only three legitimate reasons: (1) to implement a remedy for the violation of a recognized statutory or constitutional right; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) to deter future illegal conduct.

Reviewing the district court’s decision not to dismiss for an abuse of discretion, the majority determined that Matta-Ballesteros’s abduction met none of these criteria.

While the majority condemned the actions of the U.S. Marshals, it stated that it could find no constitutional or statutory rights that were

---

67 Matta-Ballesteros, 71 F.3d at 763 & n.3. Toscanino also involved an international abduction. *Id.* at 763; see also infra note 168 and accompanying text.

68 *Id.* at 763 & n.3 (citing United States v. Russell, 411 U.S. 423, 431-432 (1973); Rochin v. California, 342 U.S. 165, 172 (1952); McNabb v. United States, 318 U.S. 332 (1943)). The majority noted that *Toscanino* granted dismissal in an exercise of its supervisory powers, *id.*, however this appears to have been an alternative holding. See *Toscanino*, 500 F.2d at 276; see also infra note 169 and accompanying text.

69 Matta-Ballesteros, 71 F.3d at 768 n.3. The Ninth Circuit also noted that the Supreme Court has held that "a defendant’s body is not a suppressible fruit, and the illegality of a defendant’s detention cannot deprive the government of the opportunity to prove his guilt." *Id.* (citing United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975)).

70 *Id.* at 763-65.

71 *Id.* at 763 (citing United States v. Hasting, 461 U.S. 499, 505 (1983); United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991); United States v. Gatto, 763 F.2d 1040, 1044 (9th Cir. 1985)).

72 *Id.* (citing United States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991)).

73 *Id.*

74 *Id.* at 763. The Ninth Circuit noted that: Although they are members of the Executive Branch, Marshals serve a very special purpose within the judiciary, because their "primary role and mission [is] to provide for the security and to obey, execute, and enforce, all orders of the United States District Courts, the United States Courts of Appeals, and the Court of International Trade."

*Id.* (quoting 28 U.S.C. § 566(a) (1988)).
THE DEMISE OF SUPERVISORY POWERS

violated by the abduction.75 Furthermore, the court found no illegal conduct by the Marshals that the court could attempt to deter by invoking its supervisory powers.76 Thus, relying on a prior Ninth Circuit decision in United States v. Valot,77 the majority held that the only way it could exercise its supervisory powers to dismiss the case against Matta-Ballesteros was if the defendant could show governmental misconduct "of the most shocking and outrageous kind."78

Reviewing the decision of the district court for "clear error" on this point,79 the majority found that Matta-Ballesteros’s allegations of mistreatment did not "constitute such barbarism as to warrant dismissal of the indictment under the caselaw."80 The court pointed out that because Matta-Ballesteros’s allegations of torture were disputed by the testimony of the U.S. Marshals and because his expert testimony was inconclusive, the district court’s finding that he had not been tortured was reasonable.81 Thus, the majority held, "much as we may want to dismiss this case through an exercise of our supervisory powers, to do so would be unwarranted. The district court did not abuse its discretion in refusing to exercise such powers."82 Retaining jurisdiction, the Ninth Circuit moved on to address the specifics of Matta-Ballesteros’s other appeals.83

2. The Concurrence

Judge Noonan’s concurring opinion, focusing on the availability of the court’s supervisory powers, took issue with the majority’s understanding of caselaw and its characterization of Matta-Ballesteros’s abduction.84 The concurrence can be divided into four parts: first, Judge Noonan differentiated Matta-Ballesteros from the precedent relied on by the majority;85 second, he argued that international abduction

---

75 Id. at 763-64. The majority noted that while it "may have a suspicion of Matta-Ballesteros’s inhumane treatment, and the evidence reasonably could support a finding that he was tortured, it could also support the conclusion of the district court." Id. at 764.
76 Id. at 764. The Ninth Circuit noted that even if it labeled the abduction a "kidnapping," the Marshals’ conduct would not violate constitutional or statutory provisions in light of Alvarez-Machain or international law. Id. at 764 n.5.
77 625 F. 2d 308, 310 (9th Cir. 1980).
78 Matta-Ballesteros, 71 F.3d at 764 (citing Valot, 625 F.2d at 310; United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981); Leiterman v. Rushen, 704 F.2d 442, 443 (9th Cir. 1983)).
79 Id. (citing Fielding, 645 F.2d at 724).
80 Id. (citing United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975)).
81 Id.
82 Id. at 764-65. The court noted, however, that civil damages might be available to Matta-Ballesteros. Id. at 765 n.6 (citing Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971)).
83 Id. at 765. Matta-Ballesteros’s substantive appeals will not be discussed in this Note. See supra note 49.
84 Id. at 772-75 (Noonan, J., concurring).
85 Id. at 772-73 (Noonan, J., concurring).
was an illegal act; third, Judge Noonan made the case for the Ninth Circuit's ability to exercise its supervisory powers in situations similar to Matta-Ballesteros's; and fourth, he argued that the intervening Eleventh Circuit decision that occurred after Matta-Ballesteros's abduction prevented the Ninth Circuit from exercising its supervisory powers in this case.

a. Setting the Case Apart

Judge Noonan—by limiting the cases to their facts—differentiated the precedent relied on by the majority from the facts of Matta-Ballesteros. First, the concurrence argued that Ker v. Illinois was not controlling because that case "involve[d] the kidnapping by a private citizen of a defendant residing in a foreign country and wanted for an offense against the statute of a particular state . . .". The concurrence next argued that Frisbie v. Collins should not control because it involved "the kidnapping of a defendant from one state of the United States by police officers of another one of the states . . .". Then the concurrence said United States v. Alvarez Machain should not control because that case "turn[ed] on the alleged violation of a treaty between the United States and the foreign country from which the defendant was removed . . .". Judge Noonan then argued that the Seventh Circuit's decision in Matta-Ballesteros v. Henman should not control because Matta-Ballesteros's case did not "turn on the Fourth Amendment rights of the abducted defendant." Finally, the concurrence argued, United States v. Toscanino should not control because that case "turn[ed] on the due process rights of the abducted defendant . . .". Thus, Judge Noonan wrote, "[t]his case is not to be decided by stray dicta from the above cases; for what a court does not have before it a court does not authoritatively address."*

b. International Abduction Equals Illegal Kidnapping

After clearly labeling Matta-Ballesteros's abduction as a kidnapping, Judge Noonan explored domestic and international law in an

---

86 Id. at 773-74 (Noonan, J., concurring).
87 Id. at 774-75 (Noonan, J., concurring).
88 Id. at 775 (Noonan, J., concurring).
89 Id. at 772-73 (Noonan, J., concurring).
90 Id. at 772 (Noonan, J., concurring) (citing Ker, 199 U.S. at 436) (emphasis added).
91 Id. (Noonan, J., concurring) (citing Frisbie, 342 U.S. at 72) (emphasis added).
92 Id. (Noonan, J., concurring) (citing Alvarez-Machain, 504 U.S. at 655). Judge Noonan also argued that Alvarez-Machain should not control because that case involved an "alleged violation of international customary law." Id.
93 Id. (Noonan, J., concurring) (citing Matta-Ballesteros v. Henman, 896 F.2d at 262).
94 Id. (Noonan, J., concurring) (citing Toscanino, 500 F.2d at 267; Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975)).
95 Id. (Noonan, J., concurring).
effort to demonstrate that the U.S. Marshals’ actions were illegal and that they should not be condoned by the court in any way. Judge Noonan cited one Ninth Circuit case indicating that “[k]idnapping committed in a foreign country becomes an offense against federal law when the victim is transported by the kidnappers into the United States” and that “[t]he kidnapping continues as long as the victim is not released by the abductors.”

He also pointed to Article 9 of the Universal Declaration of Human Rights and United Nations Security Council Resolution 579, both of which he said indicated international condemnation of kidnapping. Judge Noonan continued that the motive of the kidnappers was irrelevant, arguing that the fact that the abductors were U.S. law enforcement officers in this case only “doubles the horror of their activities.” Concluding his scrutiny of the abduction, Judge Noonan noted that “[w]e are then confronted with a kidnapping, and we as judges are asked to be part of the kidnapping . . . . The federal courts are inextricably tied to the kidnapping because federal trial was the reason for abducting him.”

c. The Ninth Circuit’s Supervisory Powers

Rather than become a party to illegal actions, such as kidnapping, Judge Noonan argued that the federal courts have the option to dismiss prosecutions in order to deter such actions. Citing the Supreme Court decision in McNabb v. United States, the concurrence pointed out that such an exercise of supervisory powers does not

---

96 Id. at 773-74 (Noonan, J., concurring). Before exploring various statutes and treaties, Judge Noonan contributed his own opinions of kidnapping. Id. at 773 (Noonan, J. concurring). Judge Noonan noted that, although the manner in which Matta-Ballesteros was treated after the abduction was disputed, that dispute was not altogether important because kidnapping in itself is a violent attack upon a human person—a sudden invasion of personal security, a brutal deprivation of personal liberty. Kidnapping in itself is a cruel act, and the cruelty is magnified when the victim’s home is the place where the violent assault upon his liberty is made. Id. (Noonan, J., concurring).

97 Id. (Noonan, J., concurring) (citing United States v. Garcia, 854 F.2d 340, 343 (9th Cir. 1988)).


99 Matta-Ballesteros, 71 F.5d at 773 (Noonan, J., concurring).

100 Id. (Noonan, J., concurring). Judge Noonan wrote that “[i]f agents of the mightiest power on earth are unrestrained from kidnapping by legal authority . . . the freedom of individuals throughout the world is at the mercy of a decision made by an official of the United States Department of Justice.” Id. (Noonan, J. concurring).

101 Id. at 774 (Noonan, J., concurring).

102 Id. (Noonan, J., concurring) (citing United States v. Hasting, 461 U.S. 499, 505 (1983)).

103 318 U.S. 332 (1943).
have to be linked to any constitutional or statutory violation.\textsuperscript{104} Further, Judge Noonan noted, none of the cases relied on by the majority addressed the supervisory powers issue directly.\textsuperscript{105} Rather, he argued, the Ninth Circuit precedent relied on by the majority were due process cases or were distinguishable on their facts.\textsuperscript{106} Thus, Judge Noonan wrote, "[n]o precedent stands in the way of [the Ninth Circuit's] use of supervisory powers here."\textsuperscript{107}

d. The Problem of the Intervening Decision

Although it appeared that all roadblocks to an exercise of the Ninth Circuit's supervisory powers had been removed by the concurrence's opinion, Judge Noonan noted that this was not quite the case.\textsuperscript{108} In an argument that took two paragraphs and cited no supporting authority, the concurrence said that one insurmountable hurdle prevented the Ninth Circuit from being able to dismiss the case: "[a] decision of another federal court has broken the confinement caused by the abduction."\textsuperscript{109} Because Matta-Ballesteros had not raised the issue of supervisory powers in the Eleventh Circuit case in which he was convicted of various narcotics charges and escape, Judge Noonan argued that he had waived this argument altogether.\textsuperscript{110} Thus, he concluded, Matta-Ballesteros "stands before [the Ninth Circuit] not as the victim of an abduction (which he once was) but as a lawfully-held prisoner. Accordingly, we need not dismiss the case."\textsuperscript{111}

\textsuperscript{104} Matta-Ballesteros, 71 F.3d at 774-75 (Noonan, J., concurring) (citing McNabb, 318 U.S. at 340).
\textsuperscript{105} Id. at 775 (Noonan, J., concurring).
\textsuperscript{106} Id. (Noonan, J., concurring) (citing United States v. Valot, 625 F.2d 308 (9th Cir. 1980) (utilizing a Toscanino due process argument); United States v. Fielding, 645 F.2d 719 (9th Cir. 1981) (involving no showing of U.S. involvement in an abduction); United States v. Toscanino, 500 F.2d 267, 269 (2d Cir. 1974) (utilizing a due process argument and not involving direct U.S. participation in an abduction)).
\textsuperscript{107} Id. (Noonan, J., concurring). Judge Noonan, after dispensing with the authority utilized by the majority, argued that although the court could only exercise supervisory powers over its own business and only for a recognized purpose, id. (Noonan, J., concurring) (citing United States v. Simpson, 927 F.2d 1088, 1091 (9th Cir. 1991)), the Ninth Circuit would be doing just that by dismissing the case against Matta-Ballesteros in order to deter illegal conduct by U.S. Marshals. Id. (Noonan, J., concurring) (citations omitted). The concurrence argued: "[w]hen an agency whose primary mission is to obey our orders, and whose functions do not include overseas abductions, undertakes to kidnap from abroad a person for production in trial in a federal court, this action becomes our business." Id. (Noonan, J., concurring).
\textsuperscript{108} Id. (Noonan, J., concurring).
\textsuperscript{109} Id. (Noonan, J., concurring).
\textsuperscript{110} Id. (Noonan, J., concurring) (citing United States v. Matta, 987 F.2d 567 (11th Cir. 1991)).
\textsuperscript{111} Id. (Noonan, J., concurring).
III. Background Law

A. The History of Supervisory Powers

The supervisory powers of the federal courts were established in the 1943 decision of the Supreme Court in *McNabb v. United States*.\(^{112}\) Decided at a time when the Court's interest in protecting the integrity of the judiciary may have been at an all-time high,\(^{113}\) the *McNabb* decision appeared to address many of Justice Brandeis's concerns that had been uttered in several previous dissenting opinions.\(^{114}\) Justice Brandeis's dissent in *Olmstead v. United States*\(^{115}\) is perhaps the one most often quoted as setting the stage for the *McNabb* decision.\(^{116}\)

Arguing that the end should not justify the means when criminal conduct on the part of law enforcement officers is involved,\(^{117}\) Justice Brandeis said the courts should deny their assistance to such officers in order to maintain the purity of the judiciary.\(^{118}\)

Justice Brandeis's view was accepted by the majority of the Supreme Court in *McNabb*, a case involving the prolonged detention and multiple interrogations of three suspects accused of murdering a federal agent.\(^{119}\) After police had questioned the suspects—both individually and separately—for many hours over the course of three days, the government attempted to use their admissions against them

\(^{112}\) 318 U.S. 332 (1943).


\(^{114}\) Disturbing law enforcement practices, such as prolonged interrogations, wiretappings and entrapments had recently been brought to the attention of the courts. Id. at 1441-44. In addition, *McNabb* was decided shortly after the Supreme Court began adopting and enforcing rules of evidence, criminal procedure, and civil procedure. Id. at 1444-45.


\(^{118}\) *Olmstead*, 277 U.S. at 485 (Brandeis, J., dissenting). Justice Brandeis argued: Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to 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 Court should resolutely set its face.

*Id.* at 485 (Brandeis, J., dissenting).

\(^{119}\) Beale, *supra* note 113, at 1443 (citing *Casey v. United States*, 276 U.S. 413, 425 (1928) (Brandeis, J., dissenting)).

in federal court. The admissions, which were "the crux of the Government's case," had been elicited without having a lawyer present and without taking the suspects before a magistrate.

The defendants attempted to have their admissions excluded on Constitutional grounds, but the Supreme Court held that it was unnecessary for the Court to reach the Constitutional issue in order to keep out the admissions: "[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." Thus, the Court held, because "[t]he principles governing the admissibility of evidence in federal criminal trials ha[d] not been restricted ... to those derived solely from the Constitution," it could keep out the admissions simply due to the misconduct of the officers involved.

While the McNabb case involved an exercise of the Court's supervisory powers to exclude evidence obtained in connection with an illegal act committed by law enforcement officers, the federal courts also have exercised their supervisory powers to ensure that correct procedures are used by the courts themselves. Ballard v. United States, involving the Court's dismissal of a case in which women had been intentionally excluded from the jury pool, was one such case. Although Congress had not specifically mandated that women be permitted to serve on juries, the Ballard Court determined that because juries were intended to be "a cross-section of the community" and because women were eligible to serve on juries in the state involved:

We conclude that the purposeful and systematic exclusion of women from...

---

120 Id. The type of interrogations utilized by the police in McNabb commonly was known as "the third degree." See Beale, supra note 113, at 1442.
121 McNabb, 318 U.S. at 338.
122 Id. at 336.
123 Id. at 340.
124 Id. at 341. The Court also noted that authority to formulate rules of evidence "not limited to the strict canons of evidentiary relevance" had existed "from the very beginning of its history." Id.
125 Id. at 341-42. The Court pointed out that by failing to promptly bring the suspects before a committing authority, such as a magistrate, the officers likely had broken federal and state laws. Id. at 342 (citations omitted).
128 Id. at 189-90.
129 Id. at 191.
130 Id.
the panel in this case was a departure from the scheme of jury selection which Congress adopted and that... we should exercise our power... over the administration of justice in the federal courts... to correct an error which permeated this proceeding.\textsuperscript{131}

In deciding to dismiss the case, the Court indicated in \textit{Ballard} that it had exercised its supervisory powers, not only to protect the rights of the individual defendant, but to protect “the democratic ideal reflected in the processes of our courts.”\textsuperscript{132}

Although the federal courts have used their supervisory powers multiple times since the early Supreme Court cases,\textsuperscript{133} the recent trend has been toward restricting the use of the supervisory powers.\textsuperscript{134} In \textit{United States v. Payner},\textsuperscript{135} for example, the Court announced that the supervisory powers could not be utilized to make an end-run around Constitutional limitations, especially where the result would mean suppressing reliable evidence.\textsuperscript{136} Thus, where the defendant did not have standing to assert the Fourth Amendment rights of a third party in order to exclude some incriminating documents,\textsuperscript{137} the Court held that it would not be proper for the Court to use its supervisory powers to circumvent the standing limitation.\textsuperscript{138}

\textit{United States v. Hastin}\textsuperscript{139} appeared to join the trend away from a liberal exercise of supervisory powers. In that case, which—in the same vein as \textit{Ballard}—involved a challenge to a procedural error in a lower court,\textsuperscript{140} the Court held that the supervisory powers should not be exercised to correct “harmless error.”\textsuperscript{141} After determining that a prosecutor’s error—which possibly had impinged upon the respondent’s Fifth Amendment rights—could not have changed the outcome of the trial, the Supreme Court reasoned that “the goals that are

\textsuperscript{131} Id. at 195 (citing Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); McNabb v. United States, 318 U.S. 332 (1943)).

\textsuperscript{132} Id. at 195.

\textsuperscript{133} \textit{See} Bloom, supra note 126, at 474 n.76 (citing more than twenty-five federal court decisions in which the supervisory powers have been utilized).


\textsuperscript{135} 447 U.S. 727 (1980).

\textsuperscript{136} \textit{See id.} at 794-35.

\textsuperscript{137} \textit{Id.} at 731-32. The documents, which incriminated the defendant, had been taken from a briefcase of the defendant’s banker and photocopied without the banker’s permission. \textit{Id.} at 729. The district court found that the United States, acting through a private investigator, had “knowingly and willfully participated in the unlawful seizure of [the banker’s] briefcase ....” \textit{Id.} (citation omitted).

\textsuperscript{138} \textit{Id.} at 735.

\textsuperscript{139} 461 U.S. 499 (1983).

\textsuperscript{140} \textit{Id.} at 503. The respondents complained that the prosecutor, by commenting to the jury on the fact that the respondents had not testified, had violated their Fifth Amendment right against self-incrimination. \textit{Id.}

\textsuperscript{141} \textit{Id.} at 506.
implicated by supervisory powers are not . . . significant in the context of this case . . . .” 142 This was true, the Court held, even if the intent of reversing the case was to deter improper conduct by the prosecutors in the future. 143

Although Hastig did appear to narrow the supervisory powers, it also indicated that such powers still were available to the federal courts. 144 The Court noted that “in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.” 145 In addition, the Court cited three specific instances in which the supervisory powers may be exercised: “[T]o implement a remedy for violation of recognized rights . . . ; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ; and finally, as a remedy designed to deter illegal conduct.” 146

The restrictions on supervisory powers imposed by Hastig were echoed by the Court of Appeals for the Ninth Circuit when it decided United States v. Simpson. 147 The Ninth Circuit, which had exercised its supervisory powers on numerous occasions in the past, 148 declined to exercise its supervisory powers in Simpson to allow the dismissal of an indictment where the district court judge merely disapproved of the government’s investigatory tactics. 149 Noting that the district court had not found that an illegal act had been committed by government

142 Id. The Court argued that one purpose of the supervisory powers—protecting the integrity of the judicial process—carried less weight in the event of harmless error because “it is the essence of the harmless error doctrine that a judgment may stand only when there is no ‘reasonable possibility that the [practice] complained of might have contributed to the conviction.’” Id. (alteration in original) (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

143 Id. The Court noted that “means more narrowly tailored to deter objectionable prosecutorial conduct,” such as disciplinary proceedings by the Department of Justice, are available. Id. at 506 & n.5.

144 Id. at 505.

145 Id.

146 Id. (citations omitted).

147 927 F.2d 1088, 1090 (1990).

148 See, e.g., United States v. Gonsalves, 781 F.2d 1319, 1320 (9th Cir. 1986), vacated and remanded, 464 U.S. 806 (1989); Burton v. United States, 483 F.2d 1182, 1187 (9th Cir.), aff’d on reh’g, 483 F.2d 1190 (9th Cir. 1973); Guam v. Camacho, 470 F.2d 919, 920 (9th Cir. 1972). Although vacated in light of Hastig, the court’s decision in Gonsalves had set a high water mark for the ability of the Ninth Circuit to exercise its supervisory powers in order “to do justice in particular fact situations that do not lend themselves to rules of general application.” Gonsalves, 691 F.2d 1310, 1316 (1982). This rather broad standard for utilizing the supervisory powers was subsequently discarded in favor of the three limited situations specified by Hastig. See Simpson, 927 F.2d at 1090; see also supra text accompanying note 146.

149 Simpson, 927 F.2d 1088. In Simpson, the FBI paid a prostitute and heroin user to convince the defendant to sell heroin to an undercover agent. Id. at 1089. The process of “convincing” the defendant included becoming romantically involved with him. Id. In addition, the prostitute engaged in several criminal activities while she was on the federal payroll, including heroin use and shoplifting. Id.
agents themselves during the course of the investigation, the Ninth Circuit held that "[u]nless the law enforcement officers break the law, the court has no authority to sanction them." Thus, the court reasoned, the first instance in which supervisory powers may be exercised, "to implement a remedy for the violation of a recognized statutory or constitutional right," did not exist in this case.

The Ninth Circuit also found that the second instance in which supervisory powers may be utilized, "to preserve judicial integrity by ensuring that [a conviction] rests on appropriate considerations validly before" a jury, also did not exist in the Simpson case. The court noted that "[t]he supervisory power comprehends authority for the courts to supervise their own affairs, not the affairs of the other branches ...." Determining that the out-of-courtroom conduct in this case was the business of the executive branch and not of the judiciary, the Ninth Circuit held that dismissal would be improper.

In addition, the Simpson court concluded, although "[t]he supervisory power may also be used to deter future illegal conduct," there was no illegal conduct of the government that could be deterred in this case.

B. The Ker-Frisbie Doctrine and Due Process Rights

1. The Origins

The Ker-Frisbie doctrine, often cited for the proposition that the manner in which a defendant is brought to trial should not preclude jurisdiction, is an outgrowth of the Supreme Court's 1886 decision in Ker v. Illinois. In Ker, the defendant was abducted from Lima, Peru, and taken to the United States by Henry Julian, a private "messenger" appointed by the President to seek the defendant's extradition. Although Julian had the necessary papers to secure the extradition of the defendant, he did not do so. Instead, he "forcibly and violently arrested" the defendant, placed him on a U.S. ship, and transported him to San Francisco. When the Court addressed the issue of the defendant's abduction, it held that the

150 Id. at 1090.
151 Id.
152 Id. at 1090-91 (quotations omitted).
153 Id. at 1091.
154 Id. at 1091.
155 Id. Although the prostitute had indeed engaged in illegal conduct, the Ninth Circuit held that her conduct could not be attributed to the government. Id.
156 See Bush, supra note 11, at 945.
157 119 U.S. 436 (1886).
158 Id. at 438.
159 Id.
160 Id.
manner in which the defendant was brought to trial did not infringe upon his Fourteenth Amendment due process rights. In addition, the Court held that the defendant was not entitled to asylum in Peru by virtue of a treaty between that country and the United States.

The rule announced in Ker was reaffirmed in 1952 by Frisbie v. Collins. In Frisbie, a habeas corpus case, the defendant was living in Chicago when Michigan police "forcibly seized, handcuffed, black-jacked and took him to Michigan." Although the defendant sought his release from Michigan state prison on the assertion that the nature of his abduction violated the Due Process Clause of the Fourteenth Amendment and the Federal Kidnapping Act, the Supreme Court denied his claim. Noting that the Federal Kidnapping Act did not expressly prohibit a state from prosecuting persons "wrongfully brought to it by its officers," the Court held that the rule in Ker remained intact.

2. The Exception

The United States Court of Appeals for the Second Circuit parted ways with the long-standing Ker-Frisbie doctrine when it decided United States v. Toscanino. Relying on a series of Supreme Court cases that had expanded Fourth Amendment and due process rights since the decision in Frisbie, the Second Circuit held that abducting a defendant overseas and forcibly bringing him before a court violated the Fourth Amendment and international laws, especially where torture was involved. Thus, the Court fashioned an exception to the Ker-

---

161 Id. at 440. The Court noted that as long as the defendant was "regularly indicted by the proper grand jury in the [s]tate court, has a trial according to the forms and modes prescribed for such trials, and . . . in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled," due process has been met. Id.

162 Id. at 442.


164 Id. at 520.

165 Id. at 523.

166 Id. at 522-23.

167 500 F.2d 267 (2d Cir. 1974).

168 Id. at 272-73 (citing Rochin v. California, 342 U.S. 165 (1952); United States v. Russell, 411 U.S. 423 (1973); Mapp v. Ohio, 367 U.S. 643 (1961); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961)). Although Rochin was decided two months prior to the Court's decision in Frisbie, id. at 273, the Second Circuit argued that the Rochin decision merely anticipated the later erosion of the Ker-Frisbie doctrine. Id.

169 Id. at 276. In Toscanino, the defendant, an Italian citizen, was abducted from his home in Montevideo, Uruguay, by a paid agent of the United States. Id. at 269. He allegedly was interrogated and tortured for three weeks in Brazil before he was transported to the United States. Id. The court stated:

[W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, which guarantees "the right of the people
Frisbie doctrine, calling for a court "to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."\(^\text{170}\)

Because the *Toscanino* court had relied heavily on the Supreme Court decisions in *Rochin v. California*\(^\text{171}\) and *United States v. Russell*\(^\text{172}\) to reach its conclusion, *Toscanino* has been interpreted as espousing a "shocks the conscience" test, defined by *Rochin*, and an illegal law enforcement test, defined by *Russell*.\(^\text{173}\) However, the Second Circuit soon limited *Toscanino* to the "shocks the conscience" test alone.\(^\text{174}\) In *Lujan v. Gengler*,\(^\text{175}\) the Second Circuit—faced with yet another international abduction—determined that this particular abduction did not rise to the "shocks the conscience" level defined by *Rochin* and echoed by *Toscanino*.\(^\text{176}\) In so doing, the court also seemed to indicate that illegal conduct on the part of law enforcement officers alone may not be enough to warrant a dismissal.\(^\text{177}\)

The Fourth Amendment exception *Toscanino* and *Lujan* have applied to the Ker-Frisbie doctrine has been recognized by the Ninth Circuit.\(^\text{178}\) However, in *United States v. Valot*,\(^\text{179}\) the Ninth Circuit indicated that such an exception will allow for dismissal of cases "only where the defendant alleges governmental conduct 'of the most shocking and outrageous kind.'"\(^\text{180}\) Similarly, in *United States v. Lovato*,\(^\text{181}\) the Ninth Circuit required the defendant to make a "strong
showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States.” Thus, where the defendant in Valot alleged that he had been illegally abducted from Thailand but did not allege any further mistreatment, the Ninth Circuit held that the Toscanino/Lujan exception was unavailable. And where the defendant in Lovato alleged only that Mexican Army personnel, acting as U.S. agents, had engaged in misconduct by delivering him to U.S. officers at the border, the Ninth Circuit refused to dismiss the case against him.

The Ninth Circuit also refused to apply the Toscanino/Lujan exception in United States v. Fielding. Although the defendant had alleged both an abduction and torture in that case, he was unable to demonstrate a link between his mistreatment by Peruvian officials and federal agents. The Ninth Circuit held that such a link was required in order for the exception to apply.

The Seventh and Eleventh Circuits, both of which presided over cases in which Matta-Ballesteros was a party, have rejected the Toscanino/Lujan exception. Matta-Ballesteros v. Henman was the first time in which the Seventh Circuit had squarely faced the issue of whether to adopt the Toscanino/Lujan exception. Although Matta-Ballesteros, in seeking habeas relief, argued that the Seventh Circuit should apply the exception to dismiss the charges against him, the Seventh Circuit declined to do so and rejected the Toscanino/Lujan exception outright in the process. In rejecting the exception, the Seventh Circuit argued that Toscanino “is of ambiguous constitutional origins,” and relied on Supreme Court cases reaffirming the Ker-

---

argument for dismissal. Id. at 1271. Thus, the Ninth Circuit focused on the Toscanino/Lujan exception and neglected to discuss whether its supervisory powers should be exercised in the case. Id.

182 Id. at 1271.
183 Valot, 625 F.2d at 309.
184 Id. at 309-10. Valot’s claim that an extradition treaty between the United States and Thailand was also dismissed by the court due to the participation of the Thai government in his removal to the United States. Id. at 310
185 Lovato, 520 F.2d at 1271.
186 645 F. 2d 719 (9th Cir. 1981).
187 Id. at 723-24. The district court had determined that although the defendant’s treatment in a Peruvian jail was outrageous, “there is no showing whatsoever that the United States participated in any of the conduct . . . .” Id.
188 Id.
189 See Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990), cert. denied, 498 U.S. 878 (1990); United States v. Matta, 937 F.2d 567 (11th Cir. 1991).
190 896 F.2d 255 (7th Cir. 1990), cert. denied, 498 U.S. 878 (1990).
191 Id. at 261.
192 Id. at 263.
193 Id. at 261. The court stated: “On its face, Toscanino purports to rely on the [D]ue [P]rocess [C]lause (of either the Fifth Amendment or the Fourteenth Amendment). Yet the Second Circuit relied for support on Mapp v. Ohio, 367 U.S. 643 (1961), a Fourth Amendment exclusionary rule case.” Id.

---
Frisbie doctrine.194 The Eleventh Circuit had already rejected the Toscanino/Lujan exception by the time it heard United States v. Matta.195 Thus, the court made quick work of Matta-Ballesteros’s appeal involving various narcotics and escape convictions that had been handed down in district court.196 The Eleventh Circuit merely referred to its decision in United States v. Darby197 and the reasoning of the Seventh Circuit in Matta-Ballesteros v. Henman as it refused to reverse the district court’s convictions.198

C. Treaties and Their Effect on International Abductions

1. United States v. Alvarez-Machain

While a past Supreme Court decision, in dicta, had indicated that the presence of an extradition treaty might operate as a possible second exception to the Ker-Frisbie doctrine preventing international abductions,199 the Supreme Court put this notion to rest in United States v. Alvarez-Machain.200 In that case, Dr. Alvarez Machain was kidnapped from his medical office in Guadalajara, Mexico, and flown by private plane to El Paso, Texas.201 Once there, he was arrested by DEA agents on charges that he had participated—with Matta-Ballesteros—in the murder of DEA agent Enrique Camarena.202

Although the district court and Ninth Circuit both held that they lacked jurisdiction to try the defendant because his abduction had violated an extradition treaty with Mexico,203 the Supreme Court determined that because the treaty had not specified extradition as the only means by which a country might gain custody of an individual, international abduction did not violate the treaty.204 Thus, the Court

---

194 Id. at 262-63.
195 937 F.2d 567 (11th Cir. 1991). See also United States v. Darby, 744 F.2d 1508, 1530-31 (11th Cir. 1984) (rejecting the exception).
196 United States v. Matta, 937 F.2d 567 (11th Cir. 1991).
197 744 F.2d 1508 (11th Cir. 1984).
198 United States v. Matta, 937 F.2d at 567-68. The Eleventh Circuit also noted that “[e]ven were we to recognize such an exception, Matta’s allegations of misconduct simply do not rise to the level of ‘brutal torture and incessant interrogation’ alleged in the Second Circuit’s opinion in United States v. Toscanino.” Id. at 568 (citing Toscanino, 500 F.2d at 267).
199 See Rudy, supra note 173, at 811 (citing United States v. Verdugo-Urquidez, 494 U.S. 259 (1990)).
201 Id. at 657.
202 Id. The district court determined that while DEA agents were not personally involved in the abduction of Alvarez-Machain, they were responsible for it. Id.
203 Id. at 658.
204 Id. at 664-65. Although the Court determined that an express violation of the treaty would have prevented it from finding jurisdiction, id. at 659-60, the Court found no such violation. Id. at 666. In addition, the Court held that no implied term should be read into the treaty prohibiting prosecution where the defendant’s presence is obtained by means other
held, the Ker-Frisbie doctrine still applied, and the fact that Alvarez-Machain had been abducted did not function to rob the courts of their jurisdiction over him.  

2. The United States-Honduras Extradition Treaties

Two treaties affect extradition between the United States and Honduras. The first treaty, signed by Honduras and the United States in 1909 and amended in 1927, provided for the extradition of "fugitives of justice" for any one of a list of enumerated crimes, including murder and "crimes against the laws for the suppression of the traffic in narcotic products." The U.S.-Honduras Treaty also contained a provision mandating that, despite its provisions for extradition, "neither of the Contracting Parties shall be bound to deliver up its own citizens." No mention was made in the U.S.-Honduras Treaty regarding international abduction as a method of obtaining jurisdiction over a fugitive.

The second treaty, signed in 1933 by the United States and numerous other countries, including Honduras, at the Conference of American States, also provided for the extradition of fugitives in a limited number of circumstances. Like the U.S.-Honduras Treaty, the Pan American Treaty contained a provision allowing a country to refuse extradition of its own citizens, and no mention of international abduction for jurisdictional purposes was made.

D. The World View of International Abduction

than those established by the treaty. Id. at 667-69. The relevant portion of the treaty stated:

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 665 (citing Extradition Treaty, May 4, 1978, U.S.-United Mexican States, 31 U.S.T. 5059, 5065, T.I.A.S. No. 9656).

Id. The Court noted that "the Mexican government was made aware, as early as 1906, of the Ker doctrine, and the United States position that it applied to forcible abductions made outside of the terms of the United States-Mexico Extradition Treaty." Id. at 665. In addition, the Court noted that an official protest that had been made by the Mexican government would be better addressed by executive branch action than by the courts. Id. at 669-70 & n.16.

205 Id.

206 Id. The Court noted that the Mexican government was made aware, as early as 1906, of the Ker doctrine, and the United States position that it applied to forcible abductions made outside of the terms of the United States-Mexico Extradition Treaty. Id. at 665. In addition, the Court noted that an official protest that had been made by the Mexican government would be better addressed by executive branch action than by the courts. Id. at 669-70 & n.16.


207 U.S.-Honduras Treaty, supra note 206, art. II (21).

208 U.S.-Honduras Treaty, supra note 206, art. VIII.


210 Pan American Treaty, supra note 209, art. 2.
1. *International Law*

The Universal Declaration of Human Rights,²¹¹ adopted by the General Assembly of the United Nations (Declaration) in 1948, was intended to "promote friendly relations between nations" and to recognize "the inherent dignity" and "inalienable rights" of all people. ²¹² Although the Declaration was non-binding when it was originally passed and represented only the goal for "a common standard of achievement for all . . . Nations,"²¹³ much of the Declaration has been adopted by the United States in a binding treaty known as the International Covenant on Civil and Political Rights.²¹⁴

Several articles of the Declaration might be construed as affecting international abduction. Article 9 of the Declaration provides that "no one shall be subjected to arbitrary arrest, detention or exile."²¹⁵ In addition, Article 3 specifies that "[e]veryone has the right to life, liberty, and the security of person."²¹⁶ Finally, Article 12 provides that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation."²¹⁷

The United Nations Security Council has also adopted a resolution that might have some bearing on international abduction. Adopted unanimously in 1985 to promote "friendly relations and co-operation among States," Security Council Resolution 579 (Resolution) included abduction in a list of actions it condemned as acts of terrorism.²¹⁸ The Resolution equated abduction with hostage-taking, and called for "the immediate safe release of all hostages and abducted persons wherever and by whomever they are being held."²¹⁹ In addition, the Resolution affirmed "the obligation of all States in whose territory hostages or abducted persons are held urgently to take all appropriate measures to secure their safe release and to prevent the commission

²¹² *Id.* pmbl.
²¹³ *Id.*
²¹⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967) [hereinafter Covenant]. The Covenant entered into force for the United States on September 8, 1992. See Rudy, supra note 173, at 792 n.4. Timothy Rudy, Assistant Legal Counsel to the House Democratic Caucus, argued that the Covenant—if it is determined by U.S. courts to be self-executing—may have "treated away" the Ker-Frisbie doctrine due to its possible prohibition of abductions. *Id.* at 817-59.
²¹⁵ Universal Declaration of Human Rights, supra note 211, art. 9.
²¹⁶ *Id.* at art. 3.
²¹⁷ *Id.* at art. 12.
²¹⁹ *Id.*
of acts of hostage-taking and abduction in the future."220

2. The Ninth Circuit

The Court of Appeals for the Ninth Circuit has addressed the issue of international abduction in the context of federal kidnapping statutes.221 In United States v. Garcia,222 the defendants—a married couple—abducted two sisters who were visiting a carnival in Tijuana, Mexico, and transported them into the United States.223 The sisters were beaten, sexually assaulted, and held captive for several years.224

When the defendants were put on trial for the kidnapping, they attempted to argue that the kidnapping ended at the time the sisters were first abducted and transported into California and that the statute of limitations had expired.225 However, the Ninth Circuit held that the crime of kidnapping is a continuing offense that lasts until the victim is released.226 In addition, although the abduction itself had occurred in Mexico, the court held that—because the defendants had transported the sisters across an international boundary and into the United States—the kidnapping violated federal law.227

IV. Significance of United States v. Matta-Ballesteros

The Ninth Circuit's opinion in Matta-Ballesteros, while not quite sealing the coffin of the federal courts' supervisory powers, could signal their imminent demise if the case withstands further review. However, before the fallout from Matta-Ballesteros can be exactly resolved, it must first be determined what message the Ninth Circuit intended to send regarding their supervisory powers. Because the majority appeared to have difficulty separating the issue of supervisory powers from that of due process concerns, deciphering the message of Matta-Ballesteros may not be a simple task.

A. The Majority's Examination of the Treaty and Due Process Claims

The majority did have support for its decision to reject Matta-

---

220 Id.
221 United States v. Garcia, 854 F.2d 340 (9th Cir. 1988).
222 854 F.2d 340 (9th Cir. 1988).
223 Id. at 341.
224 Id. at 341-43.
225 Id. at 343.
226 Id. at 344 (citing 18 U.S.C. § 1201(a) (1994)).
227 Id. The pertinent portion of the statute states:

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when . . . the person is willfully transported in interstate or foreign commerce . . . shall be punished by imprisonment for any term of years or for life.

Ballesteros's appeal based on the U.S.-Honduras extradition treaty, especially in light of the Supreme Court's decision in United States v. Alvarez-Machain. If an extradition treaty does not specifically prohibit forcible abductions as an alternative to extradition, and if the treaty does not require a court to refuse jurisdiction in the event such an abduction has occurred, Alvarez-Machain mandates that the treaty may not be used to avoid a finding of jurisdiction.

As the Ninth Circuit noted, an examination of the extradition treaties between the United States and Honduras reveals a high degree of similarity with the Mexican extradition treaty discussed in Alvarez-Machain. All three treaties contain passages discussing extradition provisions, including reservations concerning the extradition of citizens, yet none of the treaties expressly prohibits abduction as an alternative to extradition. Thus, despite the fact that the decision in Alvarez-Machain resulted in widespread international condemnation, the Ninth Circuit had little choice but to conclude that the extradition treaties between the United States and Honduras could not be used to prevent a finding of jurisdiction.

The majority's application of the Ker-Frisbie rule to reject Matta-Ballesteros's Toscanino/Lujan due process appeal also appeared to be on the mark in light of Alvarez-Machain. The Alvarez-Machain decision based much of its reasoning on the Ker-Frisbie doctrine, and although the Court never addressed the Toscanino/Lujan exception expressly, its reaffirmation of the doctrine as applied to an international abduction has been interpreted as an implicit rejection of it.

---

228 See supra notes 56-62 and accompanying text.
229 504 U.S. 655 (1992); see supra notes 200-05 and accompanying text.
230 Alvarez-Machain, 504 U.S. at 664-65; see supra note 204 and accompanying text.
231 See supra notes 61-62 and accompanying text.
232 Compare text of treaty supra note 204 with text of U.S.-Honduras and Pan-American Treaties supra notes 206-10 and accompanying text.
233 See supra note 204; text accompanying notes 206-10.
234 See supra note 11. Some critics likened the decision in Alvarez-Machain to practices of terrorist states like Libya and Iran. Bush, supra note 11 at 941 & n.12. Even China, not noted for being a champion of human rights, blasted the decision. Id. at 942 & n.15.
235 See supra notes 64-69 and accompanying text. Although the majority indicated that Toscanino involved an exercise of the court's supervisory powers, Matta-Ballesteros, 71 F.3d at 763 & n.3; see supra note 68, this may have been a mischaracterization of the decision. Toscanino primarily based dismissal of jurisdiction on due process and Fourth Amendment concerns. Toscanino, 500 F.2d at 272-76; see supra notes 167-70 and accompanying text. The Second Circuit's discussion in Toscanino of whether it might exercise its supervisory powers to achieve the same result appeared to be only an alternative holding or dicta. See Toscanino, 500 F.2d at 276.
236 See supra note 205 and accompanying text. By referring to the Mexican government's knowledge of the Ker-Frisbie doctrine, the Court seemed to imply that if the Mexican government had wished to avoid an application of the doctrine to allow for abduction of its citizens, it should have worded its extradition treaty accordingly (i.e., expressly forbidding abductions as an alternative to extradition). See id.
Although arguably predictable in response to the Alvarez-Machain decision, the majority’s outright rejection of the Toscanino/Lujan exception in Matta-Ballesteros is significant. The Ninth Circuit previously had left the door open to the possibility that, in the event government agents were found responsible for conduct “of the most shocking and outrageous kind,” it might be willing to utilize the Toscanino/Lujan exception to grant a dismissal. However, in Matta-Ballesteros, the Ninth Circuit indicated it no longer considered Toscanino to be good law. Thus, this exception to the Ker-Frisbie doctrine likely will no longer be available to courts in the Ninth Circuit, even where there is a “strong showing of grossly cruel and unusual barbarities” committed by federal agents.

B. The Supervisory Powers: Majority vs. Concurrence

Although the majority adequately supported its decision not to dismiss jurisdiction on either the treaty or due process grounds, its support became shaky as the majority addressed the issue of its supervisory powers. In what should have been a discussion of a wholly separate ground for granting dismissal, the majority fell back on its reasoning for rejecting Matta-Ballesteros’s other arguments. This may be where the concurrence’s disagreement with the majority was the most compelling.

While the majority accurately cited United States v. Hasting and United States v. Simpson as cases defining the limits of the federal courts’ supervisory powers, its reasoning lost strength as it moved on to explore those limits. For example, the majority’s determination that no constitutional or statutory rights were violated by Matta-Ballesteros’s abduction may not be as clear cut as the majority indicated. Even though courts, applying the reasoning of United

---

237 See Rudy, supra note 173, at 814. Rudy argues that the Ker-Frisbie rule likely will withstand all attacks, whether prudential or constitutional, unless advocates “can fashion an argument based on binding international law.”

238 United States v. Valot, 625 F.2d 308, 309-10 (9th Cir. 1980)

239 See United States v. Valot, 625 F.2d 308 (9th Cir. 1980); United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975); supra notes 179-85 and accompanying text.

240 Matta-Ballesteros, 71 F.3d at 763. The Ninth Circuit noted 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.”

241 Lovato, 520 F.2d at 1271.

242 Matta-Ballesteros, 71 F.3d at 763. See supra notes 70-83 and accompanying text.


244 927 F.2d 1088 (9th Cir. 1991).

245 Matta-Ballesteros, 71 F.3d at 763-64; see supra notes 71, 139-55 and accompanying text.

246 Id. at 763-64; see supra note 75 and accompanying text.
States v. Garcia, would be reluctant to label abductions by federal agents as illegal kidnappings, there is still the question of international law.

As the concurrence noted, both the Universal Declaration of Human Rights and Security Council Resolution 579 contain provisions condemning acts of abduction. While these provisions were non-binding when they were adopted, portions of the Declaration, including its condemnation of abductions have since been adopted by the United States. Thus, the argument could be made that Matta-Ballesteros’s abduction violated international law, if not directly, than at least in spirit. As a result, the U.S. Marshals’ participation in the abduction should have prompted the court to exercise its supervisory powers to deter such illegal conduct in the future.

The majority’s reasoning lost additional strength when it cited United States v. Valo and United States v. Fieldini as authority supporting its decision not to exercise its supervisory powers. As the concurrence noted, both Valo and Fielding were framed in the due process terms of the Toscanino/Lujan exception. Thus, although these cases had their place in the majority’s decision not to apply that exception to the Ker-Frisbie doctrine, they were out of place in a discussion of the court’s supervisory powers.

The majority would have had a much stronger argument for its decision not to exercise its supervisory powers if it only had adhered to Supreme Court precedent defining the scope of the supervisory

---

247 854 F.2d 340 (9th Cir. 1988). See supra notes 221-27 and accompanying text.
248 Bush, supra note 11, at 959 & n.109. Applying the reasoning of Garcia to the Matta-Ballesteros case, one might argue that the U.S. Marshals’ abduction of Matta-Ballesteros became a violation of 18 U.S.C. § 1201 (1994) at the moment they crossed into the United States. See Garcia, 854 F.2d at 344; supra note 227 and accompanying text. Carrying the argument even further, the kidnapping—and the violation of the statute—would continue as long as Matta-Ballesteros remained captive in the United States. See Garcia, 854 F.2d at 344; supra note 226 and accompanying text. Bringing the argument to its logical conclusion, the U.S. courts would become participants in Matta-Ballesteros’s kidnapping if they played a part in extending his captivity. This argument has not been accepted by any court to date, however, and the U.S. government has indicated its belief that international abductions by U.S. agents do not violate any domestic laws. See Bush, supra note 11, at 959 n.109.
251 Both the majority and the concurrence noted that, due to the U.S. Marshals’ special relationship with the federal courts, their conduct in Matta-Ballesteros was especially troubling. See supra notes 74, 107 and accompanying text.
252 625 F.2d 308 (9th Cir. 1980).
254 See supra notes 78-79 and accompanying text.
255 See supra notes 106, 176-88 and accompanying text.
256 See supra notes 235-37 and accompanying text.
powers; it did not do so. Especially in light of the Court’s increasing reluctance to exercise its supervisory powers as evidenced by recent decisions, a more plausible argument could have been fashioned for why the supervisory powers should not have been exercised in this case. Perhaps that is what really motivated Judge Noonan to concur in the judgement rather than to dissent. Otherwise, it is difficult to explain Judge Noonan’s reasons behind his difficulty with the intervening Eleventh Circuit decision.

C. The Concurrence’s Concern with the Intervening Decision

In determining that Matta-Ballesteros had waived his supervisory powers claim by not raising it in the intervening Eleventh Circuit case, Judge Noonan apparently made the same mistake the government did in the outset of this case. Judge Noonan’s argument that “a decision of another federal court has broken the confinement caused by the abduction” might best be described as a legal fiction that, ironically, was dispensed with by the majority opinion.

The majority appeared to address Judge Noonan’s concerns when it held that only collateral attacks to final judgments were precluded, not independent jurisdictional challenges. Thus, the decision of the Eleventh Circuit should have no preclusive effect on the Ninth Circuit, since Matta-Ballesteros was not seeking to have his Eleventh Circuit convictions overturned. Judge Noonan’s anti-climactic conclusion to his otherwise eloquent defense of the supervisory powers may have been fitting, however. It merely served to compound the confusion other courts undoubtedly will face when they attempt to decipher the message sent by the majority in United States v. Matta-Ballesteros.

V. Conclusion

The Ninth Circuit’s decision in Matta-Ballesteros left some muddy waters in its wake for other federal courts that undoubtedly will test the

257 See supra notes 134-45 and accompanying text.
258 For example, the majority could have reasoned that—even if the court dismissed the case against Matta-Ballesteros—the end result would be returning him to prison in the Eleventh Circuit. Such an argument might negate some of the policy reasons behind the availability of the supervisory powers in that Matta-Ballesteros would remain imprisoned outside of his home country, and the deterrence effect on the U.S. Marshals would thus be diminished. This might be analogous to making the claim of “harmless error” that prevented an exercise of the supervisory powers in United States v. Hasting. See United States v. Hasting, 461 U.S. 499 (1983).
259 United States v. Mata, 937 F.2d 567 (11th. Cir. 1991); supra notes 108-11 and accompanying text.
260 See supra note 51 and accompanying text.
261 See Matta-Ballesteros, 71 F.3d at 775 (Noonan, J., concurring).
262 Id. at 762 n.2.
263 See id.
limits of their supervisory powers again in the future. Because the
majority hopelessly entangled due process considerations in its analysis
of the supervisory powers, it missed the opportunity to condemn an act
that clearly violated norms of international law. Further, the majority
passed up the chance to test the limits of its supervisory powers head
on, and to protect the integrity of the courts in the process.

The muddled opinion of Matta-Ballesteros may have an unintended
consequence, however. An argument, such as that fashioned by the
concurrence, might be made that—because the Ninth Circuit did not
squarely address the limits of its supervisory powers due to its
confusion regarding due process and treaty issues—the door still
remains open for courts to test the limits of their supervisory powers
in the future. Such courts would need to avoid the traps that ensnared
the majority in Matta-Ballesteros, however. They must face only those
restrictions on their supervisory powers that are imposed by the
Supreme Court, however extensive such restrictions may be, and not
those unnecessarily brought about due to confusion with other
potential jurisdictional challenges.

Regardless of how other courts eventually interpret the Ninth
Circuit’s decision, foreign countries would be well advised to rethink
their extradition treaties with the United States in light of Matta-
Ballesteros. As U.S. courts become less willing to refuse jurisdiction—be
it through an exercise of their supervisory powers or through other
exceptions to the Ker-Frisbie doctrine—it is clear that only express
provisions in treaties prohibiting abduction as an alternative to
extradition stand any chance of achieving dismissals in cases where
federal agents have acted improperly. Of course, such a reworking of
extradition treaties might come at the expense of additional restric-
tions on extradition—an unfortunate result in an age when interna-
tional cooperation in the war on crime is imperative. The alternative,
however—allowing U.S. agents to run roughshod over the rights of
their citizens—cannot be all that appealing.

C. DOUGLAS FERGUSON