UNITED STATES V. ALVAREZ-MACHAIN: DOUGLAS WAS RIGHT—*THE BILL OF RIGHTS IS NOT ENOUGH*

PHILLIP J. COOPER

When Justice William O. Douglas rose in Vanderbilt Hall at New York University one January evening in 1963 to deliver the fourth annual Madison Lecture, he was a man with a developing agenda and a growing intensity about the need to complete it. His speech was the sounding of an alarm and a call to action.

Douglas entitled his lecture, *The Bill of Rights is Not Enough*[1] and combined within it a wide range of thoughts and experiences that he had been developing over the years. It was an expression of his frustration with the nation's failure to maintain rights and liberties with all the vitality he was convinced was essential if the Bill of Rights was to be more than a ceremonial document to which Americans paid homage at appropriate patriotic celebrations. It had to be more, he said, not only because of the need to protect liberty in this country but also because the idea of protected freedoms was, for him, the most powerful foreign policy weapon the U.S. possessed in its effort to lead the nations emerging from colonialism in the shadow of its cold war contest with the Soviet Union.

Looking back at his clarion call three decades ago, it is surprising how much of his warning is valid in the very different world of the 1990s. Instead of watching new nations emerging from colonialism, we are now celebrating the emergence of new, hopefully democratic, regimes from countries formerly ruled by various types of authoritarian governments. With the Cold War over and the end of such oppressive regimes as the apartheid government of South Africa at hand, it is ironic that a Justice of the United States Supreme Court recently felt moved to cite a decision by the Court of Appeal of the Republic of South Africa[2]

1. William O. Douglas, *The Bill of Rights is Not Enough*, Speech delivered at the New York University Law Center (Jan. 30, 1963), *in* 38 N.Y.U. L. REV. 207 (1963).

2. S. v. Ebrahim, 1991 (2) S. Afr. L. Rep. 553 (Apr.-June 1991).

to underscore just how monstrous a decision our own Court had rendered in *United States v. Alvarez-Machain*.[3]

The Court in *Alvarez-Machain* reversed rulings by the District Court for the Central District of California and the Court of Appeals for the Ninth Circuit.[4] The District Court had dismissed kidnap and murder charges against Humberto Alvarez-Machain brought in connection with the death of U.S. Drug Enforcement Agency (DEA) Special Agent Enrique Camarena-Salazar and a Mexican colleague, Alfredo Zavala-Avelar. The basis for the denial of jurisdiction by the lower courts was that Alvarez-Machain had been kidnapped by U.S. authorities, in violation of international law, against the formal protests of the Mexican government, and in contravention of an extradition treaty between the two countries, in order to bring him to the United States for trial. Writing for a 6-3 majority, Chief Justice Rehnquist reversed the lower courts and found jurisdiction to try the defendant even as he admitted that the forcible abduction of a foreign national was "shocking"[5] and plainly illegal under international law.

There are many ways to view the Court's ruling in *Alvarez-Machain*, but, in light of the contemporary debate over the apparent breakdown in generally accepted concepts of law and human rights in emerging democracies around the world, and the strained relations between the U.S. and a number of developing countries, it is useful to consider them from the perspective of Justice Douglas's observations in comparable circumstances three decades ago. Not only is it true that this is another period much like the time when Douglas warned about the difficulties inherent in fostering and maintaining democratic societies, but also it is a time when the United States is experiencing a wave of doubts about and challenges to hard won civil rights and civil liberties victories at home. The issue is not so much one of narrow assertions of particular doctrines but a wider discussion of the status of powers and their limits on government, whether they are directed outward against citizens of other nations or inward against Americans. It is therefore particularly useful to consider Douglas's challenge both for the merits of his arguments and also because of the importance of the point at issue, the maintenance of liberty and democracy.

This Article investigates Douglas's argument that the *Bill of Rights is Not Enough*, not only because through it we can learn something about the dangers of decisions like *Alvarez-Machain*,

3. 112 S. Ct. 2188 (1992).

4. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990), *aff'd sub nom.* United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

5. 112 S. Ct. at 2196.

but also because it stands as a challenge. It is a challenge not only to the judges who came after him, but also to the people. For it is clear that while courts play a necessary role in the maintenance of freedom, they are not sufficient in themselves to accomplish the task. To Douglas, the Bill of Rights can live only in a society prepared to nurture it, and ours was then a society that appeared to lack that commitment at a time when it was most needed. In the wake of the acceptance of rulings like *Alvarez-Machain*, this is a period of similar or perhaps even greater danger.

I. DOUGLAS: THE BILL OF RIGHTS IS NOT ENOUGH

In order to understand Douglas's case and its application to *Alvarez-Machain*, one must have some sense of the forces shaping Douglas's thoughts as he prepared it, the general framework of the argument, the indictment against the judiciary, and the contemporary challenge to liberty.

A. *Reaching the Point of Alarm*

There is a certain irony in the fact that Douglas was the person ringing the alarm bell about freedom not only in the United States but also around the world. Douglas did not come to the Court with the adamant, and even absolute, views on rights and liberties for which he is known today.[6] He had been a teacher of corporate law, an expert on bankruptcy and corporate reorganization, and a Securities and Exchange Commissioner. He had never stood for election, like Justices Black or Murphy; served as a prosecutor, like Warren; or been a judge, like Rutledge and Brennan. He had never, like Felix Frankfurter, played a major role in civil rights organizations. Yet there were several factors that shaped him into the ardent advocate of liberty apparent in the Madison Lecture, including his predisposition to defend the weak, the influence of his early Court colleagues, his travels around the world during the 1950s, and his experiences during the period in which he was preparing his declaration on the Bill of Rights.

1. *Fanning the Flame*

Hugo Black wrote, "I suspect that [Douglas] must have come into this world with a rush and that his first cry must have

6. *See* L.A. Powe, Jr., *Justice Douglas, the First Amendment, and the Protection of Rights*, *in* HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS AT FIFTY YEARS (Stephen L. Wasaby ed., 1990); L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974).

been a protest against something he saw at a glance was wrong or unjust."[7] While he may not have been born an adamant defender of the disadvantaged, as Black suggested, he was well on the way to that commitment by the time he left the West Coast for law school.

His own early experiences prepared him to take on those who abused the weak, the poor, or the nonconformist. His physical weakness from a bout with infantile paralysis made him the object of ridicule by schoolmates and deprived him of the ability to compete with them on the athletic field. The loss of his father at an early age made life a struggle for the Douglases, though, as the family of a circuit riding minister, they had never been wealthy. The Douglas children had to work at a variety of odd jobs to make ends meet. In the process, the future Supreme Court Justice encountered a wide variety of people in the town and in the farm fields surrounding it. He saw a hypocrisy in those often considered the leaders of the community and developed an affinity for others often thought worthless or odd.

His reform impulses were nurtured first as a student and later as an academic during his years at Columbia and Yale. These universities were centers of the developing legal realist movement, and Douglas was perfectly at home within it. The legal realists rejected a narrow analytic interpretation of law and insisted that it was a broad part of social, political, and economic life. There was room for new approaches and socially constructive legal change.

As a young man on the way up, though, Douglas had a kind of love/hate relationship with the Establishment and he was, in some respects at least, clearly not a radical. He thoroughly enjoyed his Ivy League professional pedigree and was pleased to recall (complaining all the while) his Wall Street experience with the Cravath firm, one of the most prestigious of New York law firms. He also relished his developing national reputation and his consequent ability to build relationships with leading Washington insiders.

On the other hand, Douglas, the New Dealer and the SEC Commissioner, saw great need for change. As the nation's leading corporate coroner and market pathologist, Douglas observed at close quarters the destructive tendencies of those firms and individuals who pronounced themselves pillars of the economic community. As SEC Chair, Douglas was able to do battle with the malefactors he called "financial termites"[8] in defense of the

7. Hugo L. Black, *William Orville Douglas*, 73 YALE L.J. 915 (1964).
8. WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 8 (1948).

little guy, "the helpless, the suckers, the underdogs,"[9] and he loved it. Beyond that, particularly during the second New Deal, Douglas was an FDR insider who enjoyed being part of a tide of social and political change.

2. *A Postgraduate Education on Liberty*

Despite his background and inclinations, Douglas had little experience with constitutional rights and liberties issues, much less the law of nations. His early years on the Court, and, even more, the influence of his colleagues was important in intensifying his own commitment.

During his first few years on the bench, Douglas joined the Court in upholding a required flag salute and the pledge of allegiance,[10] the Japanese exclusion order,[11] a number of war related government actions, and the use of detectaphone surveillance of a suspect without a warrant.[12] Yet it is also clear that he was disturbed by some of the positions he had taken. In 1942 he joined Justices Black and Murphy in repudiating the earlier *Minersville* decision on the flag salute,[13] overturned the following year in *West Virginia Board of Education v. Barnette*.[14] While he joined the *Korematsu* decision upholding the exclusion of Japanese Americans from their homes on the West Coast, he wrote the Court's opinion in *Ex Parte Endo*,[15] holding that their incarceration in concentration camps, euphemistically called relocation centers, without due process of law was unconstitutional. By the late 1940s, Douglas had radically altered his views on search and seizure questions. In 1952, he specifically repudiated his earlier position and adopted an expansive view of the protections of the Fourth Amendment.[16]

People, as well as events, helped to shape Douglas. His associations with Hugo Black and Frank Murphy were particularly important, but Felix Frankfurter was also a significant force in an indirect sense. While the Black/Douglas relationship was important in many ways, it is clear that two influences were particularly

9. William O. Douglas, *Protecting the Investor*, 23 YALE REV. 521, 522 (1934) (on file with the William O. Douglas Papers, Library of Congress, Box 33b) [hereafter WODP].

10. Minersville v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

11. Korematsu v. United States, 319 U.S. 432 (1943).

12. Goldman v. Unites States, 316 U.S. 129 (1942), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

13. Jones v. Opelika, 316 U.S. 584 (1942), *rev'd*, 319 U.S. 103 (1943).

14. 319 U.S. 624 (1943).

15. *Ex parte* Mitsuye Endo, 323 U.S. 283 (1944).

16. *See* On Lee v. United States, 343 U.S. 747 (1952).

formative in these early years.[17] The first was Black's passionate commitment to First Amendment freedoms. Then there was Black's equally strong conviction that the due process clause of the Fourteenth Amendment incorporated the Bill of Rights protections against the states which he expressed so forcefully in his *Adamson v. California* dissent.[18]

The *Adamson* case was important for Douglas in other respects, however, for it was there that Frank Murphy had a particular influence. Murphy and Wiley Rutledge clearly thought that the due process clause incorporated all of the protections of the Bill of Rights and more. In his *Adamson* dissent (joined by Rutledge), Murphy added: "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights."[19] That was a position Douglas himself reached years later.[20]

Murphy was also an influence on Douglas in the area of search and seizure.[21] Douglas adopted Murphy's argument that the Fourth Amendment supported a right to privacy much broader than most justices were prepared to acknowledge. Perhaps more important, though, was the fact that Murphy was willing to make the kinds of arguments about fairness and justice that Douglas was predisposed to favor. By the 1950s, one found more of the flavor of Murphy in Douglas's opinions than many of those who commented on his apparent conservatism at the time of his nomination to the Court would have imagined.[22] While the personal relationship between Murphy and Douglas was often a rocky one,[23] Murphy did have an important impact.

Frankfurter was significant largely because of his opposition to Douglas's increasingly expansive views on critical issues of constitutional rights and liberties. Frankfurter came to be Douglas's arch enemy (his claim in the second volume of his autobiography to the contrary notwithstanding).[24] Frankfurter's criticisms

17. This relationship is considered in detail in HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION (1992).

18. 332 U.S. 46, 69-92 (1947)(Black, J., dissenting).

19. *Id.* at 124 (Murphy, J., dissenting).

20. WILLIAM O. DOUGLAS, THE COURT YEARS 54-55 (1980).

21. *See* Wolf v. Colorado, 338 U.S. 25 (1949). Douglas acknowledged that Murphy was right about the need for the exclusionary rule long before the Court reached that conclusion. *See* WODP, *supra* note 9, at Box 179.

22. There was little active opposition to Douglas's nomination except for those who expressed concern that he had been too close to Wall Street and had shown little evidence of a commitment to civil liberties.

23. SIDNEY FINE, FRANK MURPHY, THE WASHINGTON YEARS 254-55 (1984).

24. DOUGLAS, *supra* note 20, at 22.

of incorporation and First Amendment issues, among others, seemed to intensify Douglas's own inclinations in favor of broad protections for rights and liberties.

3. *A Passport Marked "Citizen of the World"*

Another dramatic influence, and one very apparent in the *Bill of Rights is Not Enough*, was Douglas's extensive travel abroad. Indeed, he found it essential to understand the relationship between liberty at home and human rights in the larger global community.

Douglas had not travelled abroad or even been much concerned with foreign policy by the time he came to the Court. Although he tried to join the military during World War I, he never left Walla Walla, Washington, until after the conflict ended. But the groundwork was being laid for his future travels by the time of his first year on the Court.

Although he became in some respects famous as a loner whose creed was that "he had but one soul to save,"[25] Douglas had a number of important friendships. As a boy, he was particularly close to Elon Gilbert and Douglas Corpron. The latter was particularly influential over the years in Douglas's life,[26] and, indeed, had a good deal to do with the beginning of the Justice's international travels. A medical missionary in China, Corpron wrote long letters to Douglas describing the changing character of Asia before and after the war.[27] His letters detailing the arrival of the Japanese and his stories of the upheavals during the postwar years fascinated Douglas. It was already clear by 1940 that Douglas had come to understand how narrow his own perspective had been and how important it was to see American problems in the context of a changing world community. His comments to Corpron then mirror the reaction of many Americans to situations around the world today. He wrote:

> The tale you relate is almost incredible to one who lives peacefully in the country and intensely only in the world of ideas. It is hard to visualize the structure of civilization completely shattered as you have seen it. But your moving narration brings the tragedy home in poignant fashion.[28]

His travels, which began in 1949, took him around the world, but he developed an abiding interest in the Middle East, the Indian Subcontinent, and Asia in particular. These were parts of the world where he saw the most dramatic change and the great-

25. Interview with Cathleen Douglas-Stone, in Boston, Mass. (Nov. 14, 1986).
26. WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 393-94 (1974).
27. *See* WODP, *supra* note 9, at Box 316.
28. Letter from William O. Douglas to Dr. Douglas S. Corpron (June 3, 1940)(on file with the WODP, *supra* note 9, at Box 316).

est struggle for influence in the shaping of developing nations. He financed the trips through a combination of speaker's fees and preparation of books and articles.[29]

His travels posed risks as well as opportunities. After his return from a visit to Iran in 1950, he immediately began planning a hiking trip to the Himalayas for the following summer.[30] Corpron tried to talk Douglas out of the venture on grounds that that part of the world was unstable and extremely dangerous. In the end, though, he supported the idea because the trip would intensify Douglas's growing interest in the global community and because his friend was uniquely situated to meet with people abroad and convey important messages about international concerns to Americans.[31]

There were political dangers as well, in some respects more ominous than the disorder that concerned Corpron. When Douglas returned from his trip to Indo-China in the fall of 1951, he responded to a reporter's question by suggesting that the United States should recognize the government of the Peoples' Republic of China.[32] That produced congressional attacks that were used the next year as part of the first attempt to impeach him. It also led to a parting of the ways between Douglas and Harry Truman.

Truman was livid. He wrote to Douglas:

> As long as I am president, if I can prevent it, that cut throat organization will never be recognized by us as the Government of China and I am sorry that a justice of the Supreme Court has been willing to champion the interest of a bunch of murderers by a public statement.[33]

Douglas answered with regret that his letter and his statement had created such tension. However, he disagreed with Truman about our policy toward China.

He warned the President: "Your view is an understandable one. It is today perhaps the popular view. But my travels in Asia during the last three summers have convinced me that there is only tragedy to our country if it is maintained." He concluded:

---

29. *See* WILLIAM O. DOUGLAS, STRANGE LANDS AND FRIENDLY PEOPLE (1951); BEYOND THE HIGH HIMALAYAS (1952); RUSSIAN JOURNEY (1956); WE THE JUDGES (1956); WEST OF THE INDUS (1958); and EXPLORING THE HIMALAYAS (1958). Justice Douglas also wrote a host of articles, particularly in the early years of his travels for *Look* magazine.

30. Letter from William O. Douglas to Dr. Douglas Corpron (Nov. 16, 1950)(on file with the WODP, *supra* note 9, at Box 316).

31. Letter from Douglas S. Corpron to William O. Douglas (June 16, 1951)(on file with the WODP, *supra* note 9, at Box 316).

32. See *Fool Statements*, TIME, Sept. 10, 1951, at 23; *Douglas: A Different Kind of Judge*, U.S. NEWS & WORLD REP., Sept. 14, 1951, at 50.

33. Letter from Harry S. Truman to William O. Douglas (Sep. 13, 1951)(on file with the Harry S. Truman Library, Independence, Mo., President's Secretary Files).

> These are times that try the souls of all of us. I have returned from Asia full of fear. The world you and I love is shrinking each year, Mr. President. I have been to Asia three summers now and each year I have found that the influence of the West has grown smaller and smaller. The trend against us is alarming. I have returned this time with fear in my heart for the country I love. The red tide rolls on and on in Asia; the bulk of the people of the world are slowly lining up against us; we rather than Russia are tragically coming to be the symbol of their enemy. The day may not be far distant when we are left in all our loneliness with our atomic bombs.[34]

It was the sounding of an alarm and a call to action.

Douglas was concerned that Americans did not understand that they could lead only by example. The United States could not be the leader of the free world if it refused to protect liberty within its own borders and respect the sovereignty and legitimate concerns of people in developing countries. It failed, according to Douglas, on two critical counts. It denied equality to a wide range of Americans on the basis of race, gender, wealth, and religion, but even more obvious were the abuses of liberty at home and foreign policy problems abroad that came from the anti-Communist hysteria.

Douglas wrote Black from Hobart, Tasmania: "I get a lot of questions—quite a few—concerning Senator McCarthy. I find myself in great difficulty explaining what is happening."[35] He complained to Earl Warren: "I sure get a lot of questions on McCarthy everywhere I go. He's done all of us a lot of damage."[36]

The Red Scare brought two types of difficulties apparent to foreign observers. The obvious problem was the wide range of First Amendment violations. The related concern was that in their attempt to "get" the Communists, investigators were taking too many short cuts through due process protections. The answer to international political competition with the Soviets was, according to Douglas, to demonstrate in practice the powerful constitutional ideals for which America stands.[37] He wrote: "The contest is on for the uncommitted people of the earth.

34. Letter from William O. Douglas to Harry Truman (Sept. 25, 1951)(on file with the Harry S. Truman Library, Independence, Mo., President's Secretary Files).

35. Letter from William O. Douglas to Hugo Black (Aug. 24, 1954)(on file with the Hugo L. Black Papers, Library of Congress, Box 59).

36. Letter from William O. Douglas to Earl Warren (Aug. 28, 1954)(on file with the Earl Warren Papers, Library of Congress, Box 350).

37. *See* Douglas, *Democracy Charts Its Course*, 1 U. FLA. L. REV. 133 (1948); *Dialectical Materialism*, VITAL SPEECHES, Apr. 15, 1949, at 359-63; *America's Power of Ideals*, 19 SOC. RES. 269-76 (1952); *The Power of Righteousness*, NEW REPUBLIC, Apr. 28, 1952, at 9-13; *Communists Here and Abroad*, U.S. NEWS & WORLD REP., Dec. 4, 1953, 110-12.

These ideals express the one true advantage we have over communism in that contest."[38]

B. *Setting the Stage*

By the beginning of the 1960s, Douglas had begun work on a number of projects that sought to treat the problems of the time in greater depth than he had in the journalistic pieces. The Madison Lecture was one of these. That lecture was shaped in part by the other pieces that he was developing during those years.

1. *A Part of the Mission*

It was clear that Douglas was not merely talking about a theoretical debate during those years, but setting an agenda for action.[39] His lectures and writings sought to mobilize opinion and effort. He sounded the alarm about complacency and isolation made more comfortable by materialism and pressure for conformity well before the same themes took hold on the nation's campuses.

Thus, Douglas was pleased when his 1960 Edge Lectures at Princeton, later published as *America Challenged*,[40] led to the creation of the Parvin Foundation, an organization dedicated to achieving the aims advanced in his address. Douglas worked with the Foundation and with the Center for the Study of Democratic Institutions on a variety of educational programs designed to enhance literacy in developing nations and improve educational exchanges in order to provide a better foundation for political participation.[41] They also sponsored international conferences known as the *Pacem in Terris* convocations, after Pope John's encyclical of the same title, which brought together a wide range of international figures to discuss issues of world peace.[42] Indeed Douglas, along with his Center colleague Robert Hutchins, tried to engineer informal talks over the spreading conflict in

38. WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE 12 (1958).

39. As Judge Hans Linde, a former Douglas clerk, observed: "Douglas was not primarily a theorist. His speeches and writings on world affairs are filled with contemporary examples, economic statistics, quotations from statesmen, p[s]ychologists, scientists, and writers. He meant the propositions for concrete application." Hans Linde, Douglas as Internationalist, Paper presented at the William O. Douglas Conference 4 (Apr. 1989) (on file with author).

40. WILLIAM O. DOUGLAS, AMERICA CHALLENGED (1960).

41. Like the earlier China statement, this activity produced difficulties. Douglas's involvement with these organizations was later a part of the serious effort to impeach him launched by then Congressman Gerald Ford, with the help of FBI Director J. Edgar Hoover. *See* SPECIAL SUBCOMM. OF HOUSE JUDICIARY COMM., 91ST CONG., 2D SESS., FINAL REPORT ON H.R. RES. 920 (Comm. Print 1970).

42. *See generally* WODP, *supra* note 9, at Box 582.

Southeast Asia between Hanoi and Washington to take place in conjunction with the 1967 *Pacem in Terris II* convocation in Geneva.[43]

2. *The Origins of the Madison Lecture*

While all of this was in progress, Douglas was also busily writing *The Living Bill of Rights*,[44] *The Newly Emerging Nations: The Case For Democracy*,[45] *Democracy's Manifesto*,[46] *The Society of the Dialogue*,[47] *The Anatomy of Liberty*,[48] and *The Bill of Rights Is Not Enough.* Although Douglas delivered his Madison Lecture in January of 1963, he had already generated a first draft a year earlier. He worked on it on and off throughout the year, borrowing liberally from projects that he had recently completed and others that were in progress.[49]

The first draft of the Madison Lecture began with an admonition about the need to think of the difficulties associated with the application of the idea of a Bill of Rights in countries emerging from colonial rule. After he had written half a dozen pages, however, the essay underwent a significant change and became almost exclusively a critique of domestic American violations of the basic premises of the Bill of Rights. It was transformed over the course of the revisions into something more clearly directed to two audiences, one at home and another in the international community. On the one hand, it sharpened the effort to address varying cultural and political settings by expanding consideration of the problems that he observed as they appeared in specific foreign contexts. On the other hand, the piece became more critical and the criticisms were aimed far more directly at the Court itself than the early renderings.

---

43. For a discussion of these events and the explanation as to why the efforts were unsuccessful, see Harry S. Ashmore, Report on Pacem in Terris II (Center for the Study of Democratic Institutions, Santa Barbara, Cal.), 1967 (on file with the WODP, *supra* note 9, at Box 582.

44. WILLIAM O. DOUGLAS, THE LIVING BILL OF RIGHTS (1961).

45. This piece was prepared in 1961 for *Great Ideas Today* (on file with the WODP, *supra* note 9, at Box 863).

46. WILLIAM O. DOUGLAS, DEMOCRACY'S MANIFESTO (1962).

47. Manuscript Drafts on file with the WODP, *supra* note 9, at Box 869.

48. WILLIAM O. DOUGLAS, THE ANATOMY OF LIBERTY (1963).

49. In particular, the discussion of the developing nations was informed by *The Newly Emerging Nations: The Case For Democracy*, prepared in 1961. It was an extensive consideration of both the practical and theoretical problems of building representative democracies that would honor emerging nations including a contemplation of the dangers of majorities who would violate human rights just as those same destructive tendencies operated in our own society. To that was added the more specific criticisms of rights violations in the U.S. that Douglas had developed in THE RIGHT OF THE PEOPLE, *supra* note 38, at 61-70.

C. *The Argument*

What had begun more or less as a stream-of-consciousness essay became something more by the time the *Bill of Rights is Not Enough* was ready. It became an argument in three broad parts that warned, criticized, and challenged not only those in positions of power but also the society as a whole. It celebrated the Bill of Rights but demanded that the appreciation accorded it be informed and committed. It took on the Court for its failure to support the Bill of Rights. Finally, it challenged Americans to accept a positive responsibility as well as implementing the more common negative definition.

1. *The Challenge*

For Douglas, the celebration of the Bill of Rights was wholly appropriate but it was decidedly inappropriate to celebrate the document as little more than a historic artifact. Rather, the task was to understand and maintain the vitality of the Bill of Rights as a living force in this society and around the world. He began by asking about the turbulent and often disappointing regimes that appeared in the wake of decolonialization. Why was it that movements that began to achieve liberty and equality ended up violating both principles? The trouble, he said, was the problem that lies within us, the tendency of majorities to abuse fundamental freedoms.[50] As a constitutional or structural tool for legally defining the nature and limits of power, the Bill of Rights is a useful device, but, like all such instruments, it cannot stand alone. He wrote: "Constitutions may be undone by erosion through judicial constructions. They are undone by timid popular protests when encroachments are first made on the liberty of a people. They are also undone by sudden convulsions in public affairs."[51]

A fearless judiciary is important to challenge abuses of power and invasions of liberty. In a democratic government, it has the particular task, among others, of maintaining the "system of the dialogue."[52] That is, it must keep the mechanisms of communication and debate open and stop efforts by either the elite or the mass public to stifle unpopular messages. However, he warned, "An independent judiciary construing and enforcing a Bill of Rights does not of course always have the final say. A judiciary—no matter how well insulated from popular pressures—could not withstand for long an executive or a legislative power that had the consensus of the nation behind it."[53]

50. Douglas, *supra* note 1, at 207.
51. *Id.* at 210.
52. *Id.* at 212.
53. *Id.* at 209.

In order for a nation to maintain constitutional liberty, it must be mature enough to understand that the Bill of Rights is something more than a legal document. If it is to be potent it must "become so much a way of life that no force can uproot it."[54] Further, he wrote, "A Bill of Rights sets the ideal to which on occasion the people can be summoned."[55]

However, that stage of development cannot be achieved unless the society accepts two premises. First, he said, "a Free Society requires a rule of law."[56] The ability of the society as a whole to recognize that support for a rule of law places limits upon itself as well as upon the political elite is a hard won stage of political sophistication.

Ultimately, Douglas said, the Bill of Rights will continue to function effectively only if the society operates on the basis of the system of the dialogue. For even those societies, including our own, which loudly proclaim the rule of law are often quick to dispense with it if there are serious threats to accepted views or "sudden convulsions in public affairs."[57] Only a polity willing to protect the liberty of those whose ideas seemed most dangerous could be truly said to have a system of the dialogue in which conflict could be resolved through debate and democratic process.

In the Madison Lecture, Douglas repeatedly cautioned that the desired end required a high level of political development, because "[i]t is not an instinct born in man."[58] In fact, the natural disposition is to silence the unpopular speaker and refuse to hear threatening ideas. He added, as he said so often, "Nothing is more dangerous than an idea and its expression."[59]

However, the fact that a society seems to have internalized the Bill of Rights and is in many respects politically mature is no assurance that it will remain so. Ironically, sophisticated societies contain subtle but powerful forces that undermine both the rule of law and the freedom it protects.[60] In an age when the number of newspapers is declining and the broadcast media respond to merchandisers in designing programming, it is not surprising that the press frequently does not stand against the passions of the day. Government officials who should guard against the worst tendencies of the majority, too often enforce its will. Social institutions, like churches or the bar, and the leaders of prestige orga-

54. *Id.* at 210.
55. *Id.* at 211.
56. *Id.* at 210.
57. *Id.*
58. *Id.*
59. *Id.* at 213.
60. *Id.* at 213-15.

nizations too seldom provide support for the isolated, the feared, or the despised.[61]

In the early portion of the paper, Douglas concentrated largely on a wide variety of examples of these difficulties in the developing countries. By the conclusion of this first section of the paper, it was clear that the true target of the criticism was the nation that so loudly proclaimed its own commitment to a Bill of Rights, the United States.

2. *The Judicial Default*

For Douglas, where the Bill of Rights protections could rely on a broad stable social consensus on the value of liberty, the potent and independent judiciary was a critical, if limited, guarantor of freedom. He argued that "[w]hen the courts give way, the default is apt to be complete."[62] In his judgment, the Court had indeed given way. There were three counts to his indictment.

First, Douglas asserted that "the courts have diluted the specific commands of the Constitution."[63] There were two critical operating premises for Douglas. To him, the Bill of Rights was not limited to the words of the first ten amendments but included all the constitutional provisions that specifically concerned the liberties of the people. He had explained in an earlier work that, in his understanding, the Bill of Rights included the Civil War Amendments and the Nineteenth Amendment as well.[64] His Bill of Rights included the Ninth and Tenth Amendments in addition to the first eight. For Douglas, equality was an essential element of liberty. Hence, the Fourteenth Amendment's equal protection clause was covered as well as the due process clause. He also insisted upon protection for what his judicial hero Louis Brandeis had called "the right to be let alone."[65]

The other premise was that some rights, particularly those associated with the First Amendment, were put in the form of absolute commands because they were preferred freedoms.[66]

Douglas argued that the Court had not applied these protections as vigorously or broadly as was necessary. For example, the Court had recently rejected claims that protections associated with due process, such as Fourth Amendment prohibitions of unreasonable searches and seizures and the Sixth Amendment right

61. *Id.* at 216.
62. *Id.*
63. *Id.*
64. *See generally* DOUGLAS, *supra* note 44.
65. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See* DOUGLAS, *supra* note 38, at 88-89.
66. Douglas, *supra* note 1, at 217.

to counsel, applied in administrative proceedings.[67] For Douglas, abuse of power remained just that whether the perpetrator was an administrator or a police officer. While he recognized that one of the interests that led to the writing of the Constitution was the need to create a more effective and efficient government, he nevertheless insisted that the Bill of Rights had a contrary purpose. The authors of those amendments "wanted to take government off the backs of the people" and to do so in part by making it "difficult for police, prosecutors, judges, legislatures, governors, and Presidents to do anything to the citizens."[68]

The judicial default extended to those liberties he considered preferred freedoms as well as for the other elements of the Bill of Rights. He had seen a variety of rulings in 1961 that had caused him to conclude that the Court was a long way from a willingness to protect the freedoms of belief, speech, and association, particularly where the dreaded words "subversive" or "communism" were involved.[69]

The second count of his indictment went further. Douglas charged that "[t]he second default is in the refusal of the courts to apply the federal standard of Due Process to the States."[70] Although the Court had long since applied the First Amendment to the states through the due process clause of the Fourteenth Amendment, other Bill of Rights protections had an uncertain status.[71]

Finally, the courts, according to Douglas, had abdicated their responsibilities by interpreting various judge-made rules so as to close the courthouse doors to worthy litigants raising important constitutional questions. He challenged the Court's use of exhaustion, abstention, political question, and standing doctrines to hide from what he considered absolutely appropriate issues for a Court that would be faithful to its charge to protect the Bill of Rights.

It is one thing to ensure that disputes brought to the Court are proper cases and controversies, but, he said, in an obvious play on Frankfurter's words, it is quite another to use court ac-

67. *See* Frank v. Maryland, 359 U.S. 360 (1959); Abel v. United States, 362 U.S. 217 (1960); Hannah v. Larche, 363 U.S. 420 (1960).

68. Letter from William O. Douglas to William R. Johnson (Apr. 24, 1960), *in* THE DOUGLAS LETTERS 158 (Melvin I. Urofsky ed., 1988).

69. Douglas dissented in Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961); Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); and Scales v. United States, 367 U.S. 203 (1961).

70. Douglas, *supra* note 1, at 218.

71. Under Betts v. Brady, 316 U.S. 455 (1942), which remained controlling precedent until 1963, states were not obligated to provide counsel at public expense in any but capital offense cases. However, after the Madison lecture was delivered, Gideon v. Wainwright, 372 U.S. 335 (1963), overturned this decision.

cess rules "as a thicket behind which the judiciary retreats."[72] Anticipating language like that he would use in one of his last dissents,[73] Douglas insisted:

> The citizen should know that in the courts one can get justice, no matter how discriminatory government officials may be. When the judiciary is no longer "the great rock" in the storm . . . , when the courts are niggardly in the use of their power and reach great issues only timidly and reluctantly, the force of the Bill of Rights in the life of the nation is greatly weakened.[74]

3. *The Positive and Negative Obligation*

Douglas closed his essay with a plea for a restoration of the spirit and vitality of the Bill of Rights which, he asserted, would contribute to our ability to function effectively in the global community. To do that, he argued, we must recognize that the Bill of Rights has both a negative and a positive character.[75] It consists of a list of restraints but it also implies an obligation to advance the liberties it proclaims. He called for action by the courts and society.

As to the judiciary, if it is to truly honor the Bill of Rights, Douglas argued that it should promote the "society of the dialogue" by protecting the liberties on which it depends, preserve the spirit of justice by actively contemplating whether its rulings serve that end, and maintain the vitality of the Bill of Rights by recognizing the changing character of the threats to liberty posed in contemporary society and addressing them forthrightly when they are presented in litigation. Clearly, in Douglas's view, the judiciary had not yet met those challenges.

II. From Old Abuses to New: The *Alvarez-Machain* Case

Much has changed since Douglas began his piece in 1962. Most of the incorporation process was completed during his tenure. He announced the right to privacy that the Court had not confronted in *Poe v. Ullman*[76] four years later in his opinion for the Court in *Griswold v. Connecticut*.[77] First Amendment rulings in the 1960s moved in the direction he thought essential.[78] He participated in a host of rulings on constitutional criminal proce-

72. Douglas, *supra* note 1, at 224.
73. Warth v. Seldin, 422 U.S. 490, 519 (1975) (Douglas, J., dissenting).
74. Douglas, *supra* note 1, at 232.
75. *Id.* at 240-42.
76. Poe v. Ullman, 367 U.S. 497 (1961).
77. 381 U.S. 479 (1965).
78. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

dure that moved down what he considered the right path. The Court ultimately applied some of the protections against administrative abuses that he had sought.[79] Both the Court and the Congress took a more active role in enforcement of constitutional prohibitions against discrimination.

In addition to these advances, Douglas also saw backsliding and threats to the hard won victories. He witnessed the tragedy of Vietnam, the backlash against civil rights advances, and the election of Richard Nixon (a man he despised), in some measure at least because of some of the Court's criminal justice decisions. Douglas watched a changing Court engage in what he saw as a retreat in a variety of areas.

In short, while he would grant that there have been advances, Douglas would hold that we have not yet recognized the full power and promise of the Bill of Rights. If he had been here to watch the celebration of its bicentennial and the battle for its principles in emerging democracies, Douglas would still admonish us that the *Bill of Rights Is Not Enough.* Were he to read the Court's opinion in *United States v. Alvarez-Machain*, he would offer it as exhibit A in support of his claim.

A. *The* Alvarez-Machain *Case*

Dr. Humberto Alvarez-Machain was working in his office in Guadalajara, Mexico, about 8:00 p.m. on the evening of April 2, 1990, when a half dozen armed men took him captive and hustled him off, eventually placing him on a small plane bound for El Paso, Texas. The next day at a Texas airport Alvarez-Machain was turned over to DEA agents who took him to California to face an indictment for, *inter alia*, kidnapping and murder.

The events that led to this dramatic DEA action began years earlier. The United States and Mexico concluded negotiations on a new extradition treaty in 1978, announcing formal notice of ratification in January of 1980.[80] The two governments also moved forward with cooperative efforts to stem the tide of illegal drugs moving from or through Mexico to the United States. It was the kidnapping and murder of U.S. DEA Agent Enrique Camarena and one of his Mexican colleagues in the midst of that anti-drug campaign that brought the U.S. and Mexico into contention.

American authorities immediately launched "Operation Leyenda" to identify and prosecute Camarena's killers. By early

79. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967); See v. Seattle, 387 U.S. 541 (1967).

80. TREATY OF EXTRADITION, May 4, 1978, U.S.-United Mexico States, 31 U.S.T. 5059, T.I.A.S. No. 9656.

1985, indictments had been obtained against 21 people in connection with the crime and the U.S. moved to the next phase: the attempt to bring the defendants to the U.S. for trial. Negotiations in 1989 between DEA and Mexican officials failed. The DEA then solicited assistance from Mexicans who would abduct suspects and bring them to the U.S. for as much as $50,000 plus expenses. In all, three defendants were kidnapped and brought to stand trial in the U.S. District Court for the Central District of California, including Alvarez-Machain.

Conflict between the two governments began almost immediately. Roughly two weeks after the Alvarez-Machain kidnapping, the Mexican government formally demanded a complete explanation of the events and the U.S. role in them. It also set out to find the Mexican nationals who were involved in the operation. For its part, U.S. officials brought seven of those who had cooperated in the Alvarez-Machain capture and their families to the United States. It had paid $20,000 for the kidnapping but doled out an additional $6,000 per week for support to those brought from Mexico to protect them from arrest and prosecution at home. The Mexican government promptly demanded their return and warned that cooperation in anti-drug efforts between the two countries depended upon the U.S. response.

On May 16 and again on July 19, 1990, Mexico formally protested the U.S. action in diplomatic notes.[81] In its first formal protest, Mexico called for the return of Alvarez-Machain and insisted:

> The Government of Mexico considers that the kidnapping of Dr. Alvarez-Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries.[82]

It observed that it had already tried and sentenced a number of defendants in the Camarena murder and intended to do the same with others properly charged in the case. The second protest formally demanded extradition of those involved in the kidnapping of Alvarez-Machain and the other suspects.[83]

The United States rejected the Mexican protests and went forward with its prosecution of the defendants on racketeering, kidnapping, and murder charges. Alvarez-Machain moved to dismiss the charges, claiming that the court lacked jurisdiction since he was before the court only because of an illegal kidnap-

81. *Caro-Quintero*, 745. F. Supp. at 604.
82. *Id.*
83. *Id.*

ping under international law, in violation of the U.S.-Mexican extradition treaty over the protest of Mexico, and contrary to several provisions of U.S law, including the due process clause of the Fifth Amendment.[84]

B. *The Challenge in the District Court*

By the time Judge Rafeedie got the *Alvarez-Machain* case, he had already been contemplating the issues the case was to raise. He had presided in an earlier case involving one of those captured and brought to the U.S. for trial. That defendant was convicted and Rafeedie sentenced him to four consecutive 60 year terms plus a concurrent life term.[85] However, the judge was displeased by the quality of argument on the issue of the kidnapping of these defendants and he gave the matter a great deal of thought.[86] The *Alvarez-Machain* case brought the matter to a head.

Alvarez-Machain argued that the dismissal motion should be granted because: (1) there was a violation of the due process clause under the Fifth Amendment; (2) he had been kidnapped in violation of the U.S/Mexico extradition treaty; (3) the kidnapping violated the Organization of American States (OAS) and United Nations (UN) Charters; and (4) the court had a responsibility to reject cases brought in such a manner under its so-called supervisory power.[87] Rafeedie concentrated on the treaty claim, concluding that there had been a violation of that treaty by the United States, which had been formally protested by the Mexican government, and that the appropriate remedy for such a breach was the return of the Mexican national involved.

Because he found a clear violation of the treaty, Rafeedie gave relatively brief treatment to the due process, OAS and UN treaty, and supervisory power issues. He divided the treaty issue itself into three elements: standing, applicability, and remedy.

Judge Rafeedie noted that standing can sometimes be an important issue in treaty-related cases because many do not address individuals at all, but states as states; some cases require implementing legislation in order to be used by an individual; and most grant standing to individuals only as a derivative matter where the state has chosen to invoke their provisions.[88] With respect to the extradition treaty before the court, Rafeedie concluded: "This Court holds that it is for the state, and not the individual,

84. *Id.*
85. United States v. Verdugo-Urquidez, 939 F.2d 1341, 1343-44 (9th Cir. 1991).
86. *Id.* at 1343.
87. *Caro-Quintero*, 745 F. Supp. at 601.
88. *Id.* at 607-08.

to initially protest and thereby raise a claim that the method of securing a person's presence violates an extradition treaty. The individual's standing to raise this claim is purely derivative of that of the state."[89] However, in this case, Mexico had done precisely that and in the most formal and forceful manner, not once but twice. In so doing, it had plainly conveyed standing to Alvarez-Machain.

The court then arrived at the core issue, a question of first impression, with respect to the treaty itself. The United States government argued that it was not responsible for the abduction because it did not actually send Americans into Mexico to do the kidnapping.[90] The court quickly disposed of that idea, finding that, by any reasonable assessment, the United States government was plainly responsible for the kidnapping and that it was clear that the DEA was not merely acting alone as a renegade agency in the matter but representing the government.[91] That said, the government made three arguments. First, it claimed that the requirements of the treaty were not involved because the United States had never chosen to trigger it by submitting a formal extradition request to the Mexican government. Second, even if the treaty were applied, it contained no express prohibition against the kidnapping of suspects to stand trial elsewhere. Finally, even if the treaty had been breached, the court had no authority to deny jurisdiction in light of the Supreme Court's 1886 opinion in *Ker v. Illinois*.[92]

The *Ker* decision was at the heart of the government's argument. In that case, Henry Julian, a private detective, was hired to take extradition papers prepared by the U.S. government to Peru and, at the conclusion of the proceedings, to accompany Frederick Ker on the return trip to Chicago where he was to face trial on charges of larceny and embezzlement. When he arrived in Lima, Julian found the Peruvian capitol in turmoil. Chilean forces occupied the city. He did not submit the extradition papers he carried to anyone, but merely asked the assistance of Chilean troops to help him take Ker prisoner and place him on board the Essex which was bound for Hawaii. On his arrival in Honolulu, Julian had Ker moved to another ship bound for San Francisco. In the meantime, the Governor of Illinois issued a formal extradition request to permit removal of Ker as soon as he arrived in California under the custody of Frank Warner. The

89. *Id.* at 608.
90. *Id.* at 609.
91. *Id.*
92. 119 U.S. 436 (1886).

Governor of California complied and Ker was returned to Illinois.

The Supreme Court found in *Ker* that the U.S. courts had jurisdiction despite the fact that "it was a clear case of kidnapping within the dominions of Peru."[93] The government of Peru did not object to the proceedings and the Court underscored the fact that the kidnapping was "without any pretense of authority under that treaty or from the Government of the United States."[94] As Judge Rafeedie observed: "The extradition treaty simply had no bearing on the acts of Julian as an individual, and therefore has no application to the facts of the abduction."[95]

Had the Peruvians objected or had Ker's presence been the result of official U.S. government action, the situation would have been very different as indicated in a related case decided on the same day that the *Ker* ruling was delivered, *United States v. Rauscher*.[96] In that case the Supreme Court accepted a claim by a defendant extradited from Britain to the United States that the American government was prohibited from extraditing him to face trial for one charge only to charge him with different offenses upon his arrival. This principle, known as the doctrine of specialty, permitted a claim by an individual to stand even though both nations cooperated in his extradition.

The government in the *Alvarez-Machain* case did not contest these conclusions about *Ker* or *Rauscher* but insisted that there was no extradition because the U.S. did not make a formal request triggering the treaty. Though he considered the government's arguments carefully, Rafeedie responded to them succinctly:

> The government's contention in the present case that a state violates an extradition treaty when it prosecutes for a crime other than that for which the individual was extradited (the doctrine of specialty), but not where a state unilaterally flouts the procedures of the extradition treaty altogether and abducts an individual for prosecution on whatever crimes it chooses, is absurd.[97]

Moreover, it simply is beyond imagination that a party to a treaty may unilaterally determine whether and when the treaty applies. If that were acceptable, the treaty would be meaningless, for it would have force only when both parties were in agreement. The court concluded:

---

93. *Id.* at 443.
94. *Id.*
95. *Caro-Quintero*, 745 F. Supp. at 611.
96. 119 U.S. 407 (1886).
97. *Caro-Quintero*, 745 F. Supp. at 610.

> It is axiomatic that the United States or Mexico violates its contracting partner's sovereignty, and the extradition treaty, when it unilaterally abducts a person from the territory of its contracting partner without the participation of or authorization from the contracting partner where the offended state registers an official protest.[98]

Even if the treaty was triggered *ipso facto* by the kidnapping, the government claimed that there is nothing in the treaty to prohibit the American action. The court held that "[i]n the present case, the United States acted unilaterally, without participation or consent of the Mexican Government, and the Mexican government has registered an official protest to these actions. Given these facts, the United States has violated the extradition treaty between the United States and Mexico."[99]

The court found that Articles 5, 8, and 9 specifically argued against the government's position. The thesis was that the entire treaty would be pointless if the United States could, regardless of the position of its treaty partner, simply declare that the treaty authorized it to violate international law and the sovereignty of its treaty partner in order to achieve the purpose that the treaty was specifically designed to serve and for which it mandated alternative means. With respect to the particular provisions, the court found that under the terms of several clauses, each state retained the ability to refuse permission to the other state to take a suspect. Specifically, Article 9 authorizes either state to refuse to surrender a defendant if it promises to take appropriate legal action under its own law. Mexico had done precisely that with other suspects in the Camarena murder and promised to do the same with the people who had been wrongfully taken from its jurisdiction. Other provisions, not applicable to this particular case, authorized a state to refuse to surrender a suspect where it determines that the proposed prosecution in the other country is political or where it may involve the imposition of the death penalty for offenses for which defendants may not meet that end in the other country. These provisions would be meaningless if either state could simply seize anyone it chose.

Once it was clear that this defendant had a basis for asserting a claim, that the treaty applied, and that the United States had violated it, the remedy in international law was clear. American courts have, in other instances, already concluded that the wrongfully taken defendant is to be returned to the home country.[100] Therefore, Rafeedie found that "[t]he remedy in the pres-

98. *Id.*
99. *Id.* at 614.
100. United States v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974); *Rauscher*, 119 U.S. at 407.

ent case is the immediate return of Dr. Machain to the territory of Mexico."[101]

Since the court found that the treaty issue provided more than sufficient grounds for the ruling, it did not consider the arguments that the government's action violated the UN or OAS charters, although it seemed clear that it had breached both documents. Neither was it necessary to address the claim that the court was free to deny jurisdiction on its supervisory power. However, Judge Rafeedie said that the courts should not allow themselves to be made a party to illegal conduct by the government,[102] and that they do possess supervisory power over litigation sufficient to "preserve judicial integrity and deter illegal conduct."[103] Rafeedie recalled Judge Oakes' conclusion on the subject:

> [W]e can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power.... To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for the law.[104]

C. *The Ninth Circuit Support*

Rafeedie rendered his *Alvarez-Machain* opinion in August of 1990, at which time *United States v. Verdugo-Urquidez*[105] was before the U.S. Court of Appeals for the Ninth Circuit. The Court determined that these issues were ripe for *de novo* review in the *Verdugo-Urquidez* case and followed Rafeedie's analysis in the *Alvarez-Machain* opinion. Not surprisingly, another panel[106] of the Ninth Circuit affirmed Rafeedie in a per curiam opinion based upon its *Verdugo-Urquidez* decision when the *Alvarez-Machain* ruling reached it.

The Ninth Circuit began from the premise that under the Supremacy Clause of the U.S. Constitution, constitutions are

---

101. 745 F. Supp. at 614.

102. McNabb v. United States, 318 U.S. 332, 345 (1943) (stating that courts should not permit themselves to "be made [an] accomplice[s] in willful disobedience of law") (alteration in original).

103. *Id.* at 615 (quoting United States v. Hasting, 461 U.S. 499, 505 (1983), *cert. denied*, 469 U.S. 1218 (1985).

104. United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).

105. 939 F.2d 1341 (9th Cir. 1991).

106. *Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd*, 112 S. Ct. 2188 (1992).

"supreme law" and are binding. The government's primary argument was that *Ker* held that courts could not deny jurisdiction even if the basis for the defendant's presence was illegal. The appellate court rejected that broad claim noting that "*Ker* stands only for the proposition that a private kidnapping does not violate an extradition treaty. It does not address the question of a kidnapping authorized by the United States government."[107] In other cases in which the Supreme Court had addressed jurisdiction following illegal action by the government, though not involving extradition, the Court had rejected the government's assertions.[108] The Ninth Circuit recalled first that in *Ford v. United States*[109] the Court rejected the claim that an illegal seizure of a vessel by the Coast Guard that allegedly violated a treaty between the U.S. and Britain did not affect U.S. court jurisdiction. It was, however, unnecessary for the Court to determine whether there was a treaty violation in that case because the issue had been waived at trial. Second, citing *Rauscher*, the Court concluded that "[i]t is manifestly untrue that a court may never inquire into how a criminal defendant came before it."[110] In fact, it said that "under *Rauscher*, it matters very much how a defendant happened to come before the court."[111]

Reaching the actual terms of the treaty, the Ninth Circuit also found the government's argument absurd.[112] As an example of the implications of the government's case, the court observed:

> To give but one example of how the government's theory would work in practice, Iraq could kidnap the President of the United States without violating the United States/Iraq Extradition Treaty, April 23, 1936, 49 Stat. 3380, notwithstanding the fact that if Iraq followed the procedures set forth in that treaty, it would be most unlikely to succeed in obtaining custody over our Chief Executive.[113]

It agreed that in addition to the overall purpose of the treaty, Articles 5, 8, and 9 provide clear authority for declaring a treaty violation under the facts of this case.[114] It cannot seriously be maintained that Mexico (or the United States) only wished to preserve the right not to have its citizens *formally* extradited. What possible purpose would such a provision serve? Article 9 only makes sense as a blanket reservation of each nation's sover-

107. *Verdugo-Urquidez*, 939 F.2d at 1346.
108. *See, e.g.*, Ford v. United States, 273 U.S. 593 (1927); *Rauscher*, 119 U.S. at 430.
109. 273 U.S. 593 (1927).
110. *Verdugo-Urquidez*, 939 F.2d at 1348.
111. *Id.*
112. *Id.* at 1350.
113. *Id.*
114. *Id.*

eign interest in subjecting its own citizens to its own courts, limited only by its own purely discretionary power to deliver such citizens to the other nation upon a proper request.[115]

The court found that the government's argument that it could circumvent the treaty simply by refusing to file an extradition request "makes no sense whatsoever,"[116] that "[i]t would elevate form over substance to hold that this protection of each sovereign nation's right to insist on strict compliance with the treaty may be circumvented if the other party simply chooses not to invoke the treaty at all."[117]

Finally, the Ninth Circuit concluded that the international law problems with the government's position were numerous. American officials had previously recognized the illegality under both international law and extradition treaties of this kind of behavior. The court cited Secretary of State George Schultz's comments regarding a hypothetical kidnapping of a Canadian by Florida officials. Schultz had stated that this would be "a violation of the treaty and of international law, as well as an affront to [Canada's] sovereignty."[118]

III. The Supreme Court Reversal

Because this was a case of first impression, with a 6-3 vote reversing two consistent lower courts rulings, with only a partial dissent in one of the two court of appeals panels to consider the matter, Justice Rehnquist's opinion for the majority had to be seen as extremely brief, only about seven pages on the merits. That brief treatment was all the more surprising in light of the Court's acceptance of the charges by the respondents and the *amici*, including the government of Mexico, that the government's actions were "shocking" and may have been "in violation of general international law principles."[119]

A. *The Rapid Response of the Majority*

The first half of the Court's consideration of the merits merely provides a summary of the holdings in the *Ker* and *Frisbie v. Collins*[120] cases. *Frisbie* was a 1952 opinion upholding jurisdiction over defendants who had been kidnapped by officials of one

115. *Id.*
116. *Id.* at 1351.
117. *Id.*
118. The court drew this information from *Contemporary Practice of the United States Relating to International Affairs*, 78 Am. J. Int'l L. 207, 208 (1984).
119. *Alvarez-Machain*, 112 S. Ct. at 2196.
120. 342 U.S. 519 (1952).

state from another. Of course, the *Frisbie* case had not involved a treaty and was therefore inapposite to *Alvarez-Machain.*

Since Rehnquist concluded that the "only differences between *Ker* and the present case [we]re that *Ker* was decided on the premise that there was no governmental involvement in the abduction . . . and Peru, from which Ker was abducted did not object to his prosecution,"[121] the court's task was at an end if it found that the treaty does not prohibit respondent's abduction. The Court simply concluded that the treaty says nothing about abduction.

Rehnquist implicitly accepted the legitimacy of abduction by acquiescence of the parties—the subject had been discussed between the U.S. and Mexico in 1906, and had been the focus of proposals by an advisory panel in 1935, but had not been made part of the 1978 treaty.[122] The Court dismissed the argument over international law on grounds that, although it might be obvious that violations of territorial sovereignty are clearly illegal, there is no authority which speaks directly to such behavior in the context of extradition.[123]

B. *Douglas's Successor Leads the Dissent*

Justice Stevens, interestingly the man who filled the seat left vacant by Douglas, issued a scathing dissent (joined by Justices Blackmun and O'Connor) in three parts. First, the dissenters argued that the Court was simply wrong on the treaty issue. They stated that there is no way to reconcile the overall purpose of the treaty or Articles 3, 5, 6, 7, 8, and 9, with a conclusion that one treaty partner was left free simply to kidnap someone and ignore the treaty.[124] The dissenters point out that under the majority's logic, it would be equally permissible under the treaty "[i]f the United States, for example, thought it more expedient to torture or simply to execute a person rather than to attempt extradition,"[125] since these options were not explicitly prohibited by the Treaty. Stevens pointed out that no one could seriously believe that a nation would enter into an agreement intended to protect its own sovereignty as well as improve cooperation with its treaty partner, and then accept such implications.[126] At a minimum such treaties by definition "imply a mutual undertaking to respect the territorial integrity of the other contracting party."[127]

121. *Alvarez-Machain*, 112 S. Ct. at 2193.
122. *Id.* at 2194-95.
123. *Id.* at 2196-97.
124. *Id.* at 2198 (Stevens, J., dissenting).
125. *Id.* at 2199.
126. *Id.*
127. *Id.*

Besides, Stevens observed, there was no small amount of irony involved in the fact that "the United States has attempted to justify its unilateral action based on the kidnaping, torture, and murder of a federal agent by authorizing a kidnaping of respondent, for which the American law enforcement agents who participated have now been charged by Mexico."[128]

Second, Justice Stevens contended that the Court was simply wrong in its conclusion that there was no authority in extradition law that addressed implied constraints on jurisdiction under treaties.[129] He pointed out that that was precisely the situation at issue in *Rauscher* decided the same day as *Ker*. The United States had a comprehensive extradition treaty with Great Britain like the one with Mexico at issue here, and, like the Mexican agreement, there was no provision that "purport[ed] to place any limit on the jurisdiction of the demanding State after acquiring custody of the fugitive . . ."[130] However, Stevens observed, "[T]his Court held that he could not be tried for any offense other than murder," the charge under which he had been extradited.[131]

Moreover, in addition to domestic law constraints, Stevens observed, there is clear international consensus "that condemns one Nation's violation of the territorial integrity of a friendly neighbor. It is shocking that a party to an extradition treaty might believe that it has secretly reserved the right to make seizures of citizens in the other party's territory."[132] That point was made by Justice Story as long ago as 1824 when he wrote that "[i]t would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws."[133] Stevens went on to observe that Story's comments remain applicable today and pointed to work by Louis Henkin,[134] discussing the relationship between Story's position and the contemporary Restatement of Foreign Relations.[135] Stevens also noted the fact that it was the same position taken as late as 1985 by Abraham Sofaer as Legal Advisor to the State Department. Sofaer had said:

> Can you imagine us going into Paris and seizing some person we regard as a terrorist . . . ? [H]ow would we feel if some

128. *Id.*
129. *Id.* at 2200.
130. *Id.*
131. *Id.*
132. *Id.* at 2201.
133. *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824).
134. Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992).
135. *Alvarez-Machain*, 112 S. Ct. at 2202.

> foreign nation—let us take the United Kingdom—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, . . . because we refused through the normal channels of international, legal communications, to extradite that individual?[136]

Third, the majority never fully addressed the implications of its use of the *Ker* doctrine. Rehnquist merely asserted that if the Court found no violation of the treaty, then "the rule in *Ker* applies, and the court need not inquire as to how respondent came before it."[137] However, Stevens asserted that before one could apply *Ker* it was necessary to come to grips with the central differences between *Alvarez-Machain* and *Ker*, the fact that it was the government in *Alvarez-Machain* that had done the kidnapping and not some third party. In ignoring that distinction, he said, the Court sanctions conduct "expressly authorized by the Executive Branch of the Government which unquestionably constitutes a flagrant violation of international law . . . ,".[138]

This critical distinction was clearly recognized in *Ker*, although because of the facts of that case, it was unnecessary for the Court to articulate fully what would have happened had the government been the kidnapper. However, focussing on precisely that distinction from *Ker*, Justice Brandeis rejected an attempt by the government to enforce jurisdiction over a seized vessel taken beyond U.S. territorial waters in a later case.[139]

Stevens ended with three broad admonitions. The first went to the Court's "admittedly 'shocking' disdain for customary and conventional international law principles . . . ."[140] The second addressed the majority's insensitivity to the principles that we espouse at home. It is true that the government was zealously seeking to address a brutal murder, but the whole purpose of the rule of law is to withdraw from government the idea that ends justify the means. Further, whatever the Executive may do in such circumstances, it is "precisely at such moments that we should remember and be guided by our duty 'to render judgment evenly and dispassionately according to law' ".[141] His final point was that the Court's failure to do that and its willingness to sanction the kind of behavior described in the *Alvarez-Machain* case

136. *Id.* at 2201 (quoting Sofaer's testimony in *Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees: Hearings Before the Subcomm. on Security and Terrorism of the Comm. on the Judiciary*, 99th Cong., 1st Sess. 63 (1985)).

137. *Id.* at 2193.

138. *Id.* at 2202.

139. Cook v. United States, 288 U.S. 102, 120-22 (1933).

140. *Alvarez-Machain*, 112 S. Ct. at 2205.

141. *Id.*

"sets an example that other tribunals in other countries are sure to emulate."[142]

To emphasize that point as well as its irony, Stevens concluded by pointing out that the Court of Appeal of the Republic of South Africa had only the preceding year addressed precisely the issue raised in this case and, substantially on the basis of its understanding of American and international law, had ruled in the opposite direction. The South African case, *S. v. Ebrahim*,[143] involved the abduction of a member of the African National Congress (ANC) from Swaziland by agents of the South African government to face treason charges. The court held, *inter alia*, that the distinction between a kidnapping by the government and someone else was crucial because it was a clear violation of international law.[144] In such circumstances, the Court ruled, courts may conclude that they have no jurisdiction or simply state that they "declin[e] to exercise it because of an inherent discretion to prevent abuse."[145] That was particularly appropriate, as in the case of Swaziland, where South Africa has a treaty. According to the Court, to do otherwise "would be to sanctify international delinquency by judicial condonation. There is an inherent objection to such a cause, both on grounds of public policy pertaining to international ethical norms and on the ground that it imperils and corrodes the peaceful co-existence and mutual respect of sovereign nations."[146]

IV. THE MISTAKES OF *ALVAREZ-MACHAIN*

There are many difficulties in the Supreme Court's opinion in *Alvarez-Machain*, matters of both omission and commission. Indeed, the Court implied a great deal more than it actually said. The opinion presents three sets of bad judgments: (1) the obvious problems in what the Court says; (2) the sub-silentio implications; and (3) the unanswered questions suggested but not resolved by the *Alvarez-Machain* ruling.

A. *The Obvious Problems*

The clear failings in Rehnquist's opinion are the patent misreading of the *Ker* opinion on which the Court rests its entire judgement, and its misinterpretation of the treaty. As is often true, Rehnquist is relying upon the pieces of a precedent that seem supportive and ignoring the full character and critical dis-

142. *Id.*
143. 1991 (2) S. Afr. L. Rep. 553 (Apr.-June 1991).
144. *Id.* at 556.
145. *Id.* at 557.
146. *Id.* at 556.

tinctions in those opinions. The situation in *Ker* is not the same as in *Alvarez-Machain*. The Court concluded that the "only differences"[147] between *Ker* and *Alvarez-Machain* were that the government was the kidnapper and the other government objected. It is difficult to imagine any differences or distinctions that should matter more.

It is equally difficult to fathom how the Court could blithely dismiss the idea that a treaty intended to protect the sovereign prerogatives and territorial integrity of the signatory states could be read to permit an admittedly gross violation of international law. Beyond that, the Court acted as if there were no language in the treaty that supported an inference of prohibition on kidnapping, and yet it gave no more than passing consideration to the provisions that were the center of the assessment by the lower courts. Because Mexico had been the victim of similar abuse in 1906 (never adjudicated by the Court), the Court suggests that Mexico's failure to include a provision prohibiting what is understood by every civilized nation to be patently illegal under the law of nations in a treaty negotiated more than half a century later somehow constitutes acquiescence in the abuse. That position is indefensible. Nor is it made more reasonable by the fact that the 1978 treaty did not include language from an advisory committee report issued in 1935.

The Chief Justice's affection for acquiescence theories to justify wide[-]ranging executive activities is well known.[148] The fact that the acquiescence doctrine has already been stretched too far in this country and applied to actions taken over American citizens abroad[149] does not justify the attempt to apply it to the citizens and governments of other nations when there is no serious evidence contemporary with the treaty negotiation itself to justify it.

B. *The Sub-Silentio Implications*

Because the district court relied upon its interpretation of the treaty to resolve the case, it was unnecessary to fully address the several other issues that were either explicitly or implicitly presented in *Alvarez-Machain*. However, the Supreme Court chose not only to disagree with the district court on the treaty, but also to "hold that . . . [Alvarez-Machain] may be tried in federal district court for violations of the criminal law of the United States."[150] In so doing, the Court implied several impor-

147. *Alvarez-Machain*, 112 S. Ct. at 2193.
148. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).
149. *See, e.g.*, Haig v. Agee, 453 U.S. 280 (1981).
150. 112 S. Ct. at 2190.

tant conclusions regarding concepts of due process and decisions about executive powers and limits under the Constitution.

First, the Court apparently rejects the due process arguments. Given the breadth of the Court's opinion, it is difficult to imagine what sort of behavior by government officials would ever be adequate to conclude that the defendant had been denied due process of law under the Fifth Amendment.

In that regard, Douglas might very well wonder what happened to the progress he thought had been made over two decades of development of protections associated with due process. The easy, and inapposite, application of 1886 and 1952 precedents to such a contemporary case, without regard for any of the intervening decisions on arrest, detention, right to counsel, and other issues that have been so much a part of contemporary jurisprudence is unacceptable. For example, the *Alvarez-Machain* Court reaffirms the *Frisbie* ruling which was regrettable when originally issued and incomprehensible in contemporary America.

The opinion also carries an implied assertion of executive authority to engage in kidnapping if, in the judgment of the President, such an action is warranted. In upholding the government's action in this case, the Court not only rejects the treaty argument but implies the power of the executive branch to try a person it has kidnapped. At a minimum, the ruling suggests no sanction if an executive engages in that sort of behavior. There is no investigation of the putative legal basis for such an executive action or any indication as to why it should be dignified by a grant of jurisdiction. Yet, it is one thing for prosecutors to fortuitously find a suspect in their custody and quite another to break the law in order to obtain that suspect.

In this sense, and given the potential breadth of application of this opinion, the Court should have recognized that its ruling was as much about constitutional powers and limits as jurisdiction and international law. The Court sub-silentio recognizes an authority under Article II of the U.S. Constitution to do that which is nowhere supported in our law and patently in violation of the law of nations. Yet, there was no argument in the majority opinion suggesting legislative acquiescence in this application of the treaty or arguing why it was unnecessary. There was not even a mention of the political question doctrine to explain avoiding the obvious implications of the Court's ruling. Furthermore, there is an implied assumption of presidential prerogative that simply cannot be confined within the limited explanation provided in the case.

The Chief Justice's willingness to support, almost without question, the use of presidential power, particularly in any matter that might have international dimensions, is well known and traceable at least to his efforts while a member of the Nixon Administration to justify the Cambodian incursion.[151] That he would support the domestic implications of such matters was clear from his willingness to cast the critical vote in the domestic surveillance case.[152] It was also clear in his development of the acquiescence doctrine in the Iran hostage case.[153] However, Rehnquist should have been forthright enough to address the executive powers and limits issues implicit in *Alvarez-Machain.*

C. *The Relevance of the Rule of Law: The Unanswered Issues*

There were two questions that were unanswered in the Court's opinion. The first was whether the Court could justify deciding contemporary cases with precedents that predated decades of change in the law. The second question seeks the meaning of the rule of law in light of the Court's support for what is admittedly a "shocking" and "monstrous" ruling. Brief reference was made to the first question above, but the second deserves further investigation since the dissenters attempted to address it but the majority refused to do so.

The dissent properly challenged the majority for failure to provide a "justification for disregarding the Rule of Law that this Court has a duty to uphold."[154] Stevens suggested that the *Alvarez-Machain* case presented this issue in two contexts, the domestic implications as to the proper response of the judiciary to an abuse of power and the international implications of the "monstrous" decision announced by the Court. He insisted: "[E]very Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character."[155]

With respect to the domestic issue, Stevens' challenge goes to the core meaning of the rule of law and the obligations of the courts to enforce it against our own government's actions in difficult situations. That was precisely the challenge Douglas had enjoined upon the justices and its failure to meet that challenge was explicitly the grounds for his indictment of the Court. On the

151. William H. Rehnquist, *The President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries, in* CONSTITUTIONAL LAW 301 (William Lockhart et al. eds., 1970).

152. Laird v. Tatum, 408 U.S. 1 (1972). It was no small issue during his confirmation hearings for Chief Justice that Rehnquist participated in the early phases of this litigation while a member of the Justice Department, and should therefore have excused himself once a member of the Court.

153. *Dames & Moore*, 453 U.S. 654 (1981).

154. 112 S. Ct. at 2205.

155. *Id.* at 2206.

domestic front, Stevens cited the well understood admonition of Justice Brandeis who warned:

> In a government of laws, existence of the government will be imperilled 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 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.[156]

Stevens could have cited premises produces elsewhere in our constitutional tradition which support the rule of law, beginning with Madison's admonition that we must "first enable the government to control the governed; and in the next place oblige it to control itself."[157] As the Court has said:

> Time has proven the discernment of our ancestors [who] foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. [The Constitution] is a law for rulers and people, equally in war and in peace, and covers with the shield of its protections all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."[158]

Further, the Court has reminded us that "[n]o Man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[159]

At the end of the day, our government, acting through the executive branch, stands guilty of kidnapping, a fact never challenged by the majority. The question remains as to what the ju-

156. *Id.* at 2205 n.33 (quoting Olmstead v. United States, 227 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

157. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

158. *Ex Parte* Milligan, 71 U.S. 2, 120 (1866).

159. United States v. Lee, 106 U.S. 196, 220 (1882).

diciary should do about it. Concluding that it should do nothing, the majority all but declares that the rule of law does not apply to the Executive Branch, or at least it does not apply when we feel the need to act out our anger in the face of a serious crime committed against an American official. The dissent properly contends that the judiciary has a duty to resist official law-breaking. Although the district court found it unnecessary to rule on the basis of supervisory power, it observed that courts should not permit themselves to "be made an accomplice in willful disobedience of law"[160] and recognized an obligation to "preserve judicial integrity and deter illegal conduct."[161] He recalled Judge Oakes's warning that "the Government in its laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interest of the greater good of preserving respect for law."[162]

Indeed the courts should do just that. It is true that it is difficult and sometimes impossible for the judiciary to actually prevent or force the executive branch to cease illegal behavior in the military or international sphere, but that does not mean that the judiciary should support it. One is reminded of Chief Justice Taney's opinion in *Ex Parte Merryman*,[163] in which he observed that although he had "exercised all the power which the constitution and laws confer upon me, [but] that power has been resisted by a force too strong for me to overcome."[164] Nevertheless, Taney directed that copies of all of the rulings and orders in the case be transmitted to the President so that it would "remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed.' "[165]

Unlike the situation often faced by the Court, in this instance, the judiciary is plainly in a position to block the course of executive action by refusing jurisdiction. It should do so. At a minimum, as the South African Court held, it should not "sanctify international delinquency by judicial condonation."[166]

The other dimension of the rule of law question is the international issue. The dissenters observed: (1) "every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character;"[167] (2) the opinion

160. *Caro-Quintero*, 745 F. Supp. at 615 (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).
161. *Id.* (citing United States v. Hasting, 461 U.S. 499, 505 (1983)).
162. United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975), *cert. denied*, 423 U.S. 847 (1975).
163. *Ex Parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).
164. *Id.* at 153.
165. *Id.*
166. *Ebrahim*, 1991 (2) S. Afr. L. Rep. at 553.
167. *Alvarez-Machain*, 112 S. Ct. at 2206.

"sets an example that other tribunals in other countries are sure to emulate;"[168] and (3) "most courts throughout the civilized world—will be deeply disturbed by the 'monstrous' decision the Court announces today."[169]

To most nations, this ruling will confirm a sense that the United States has an unbounded arrogance in which it believes itself justified in flaunting what is uniformly regarded as a fundamental principle of the law of nations. Further, its highest court has supported the government's behavior without any serious recognition of its implications for multilateral or international agreements, such as the UN and OAS charters as well as the many other bilateral agreements that have become increasingly common around the world. Finally, and perhaps of greatest contemporary significance, it is sadly apparent that the country which is so avidly seeking to encourage the emerging democracies to follow its constitutional tradition is once again more committed to its Constitution as an icon than as the central instrument of action.

V. DOUGLAS ON *ALVAREZ-MACHAIN*

One who has read Douglas's *The Bill of Rights Is Not Enough* cannot ignore how clearly the *Alvarez-Machain* opinion demonstrates his point. Douglas had in mind precisely the kind of example that is set internationally when the United States behaves as it has in this case. As he recognized in the *Bill of Rights is Not Enough*, emerging nations watch what we do, not what we say. They are not fooled or pleased by the sophistry of cute turns of interpretation which stand more on *ipse dixit* than solid argument and well-marshalled authority. Neither would he accept the implicit suggestion that the international and domestic elements of this dispute can be neatly isolated. He repeatedly tried to warn that what happens domestically is watched around the world and that what the U.S. does abroad has important consequences at home.

He would once again challenge the courts, particularly the Supreme Court, for failing to assert its independence and stand against temporary passions in defense of the long term constitutional and rule of law considerations at the heart of *Alvarez-Machain*. He would warn that if the Court cannot maintain its integrity under such circumstances, it may have little support when it tries to do so at another occasion. He would say that under these circumstances, the Bill of Rights and even the Constitution itself is not enough.

168. *Id.* at 2205-06.
169. *Id.* at 2206.

IV. THE BILL OF RIGHTS IS NOT ENOUGH AND *ALVAREZ-MACHAIN* IS TOO MUCH

Douglas was right, and his warnings were never more relevant than they are today as the United States purports to offer itself to emerging governments around the world as a model of constitutional democracy predicated on the rule of law and leadership in the international community. The *Alvarez-Machain* opinion demonstrates how dangerous it is for America to forget his message that the *Bill of Rights Is Not Enough.*

Furthermore, *Alvarez-Machain* was simply wrong on the law. The kidnapping plainly violated the law because of the illegal actions of the United States government, unlike the *Ker* case, against the official protests of the Mexican government. The decision was constitutionally wrong because the Court refused to apply any reasoned analysis to what would generally be regarded as a gross abuse of power and a violation of due process of law. Even if the ruling were technically defensible, based upon precedents such as *Ker* and *Frisbie* which the Court admits do not parallel this case, *Alvarez-Machain* is a bad decision because it upholds precedents which should be reversed because they encourage illegal behavior, the evidence of which is continuous and growing over the past decade.

Ultimately, the decision to uphold these actions sends all the wrong messages to emerging democracies around the globe and justifies the repressive behavior of existing regimes we should not wish to comfort. At a time when America and other nations are urging the adoption of western style constitutions with bills of rights, it is important to remember that it is not documents which preserve liberty and ensure the lawful use of power, but the mechanisms available to enforce their guarantees. No institution can protect those liberties unless the people themselves are willing to pay the price on a daily basis for maintaining freedom. Though great victories have been won through incredible displays of courage and personal commitment, those sacrifices will have a lasting legacy only if the dangers noted by Douglas are understood and met in the years to come.