

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUMBERTO ALVAREZ-MACHAIN,
Plaintiff-Appellee/Cross-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR REHEARING AND REHEARING EN BANC
FOR THE UNITED STATES OF AMERICA

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Nos. 99-56762, 99-56880

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Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 35-1, the United States of America respectfully petitions this Court to rehear the case en banc.

REASONS EN BANC REVIEW IS WARRANTED

1. The panel's September 11 decision threatens to impair the ability of federal officials to arrest perpetrators of serious federal crimes who are harbored by a foreign country. In permitting plaintiff to pursue his false arrest tort claim against the United States, the panel held that the DEA does not have authority to arrest suspected felons outside of the United States, without obtaining the express permission of the host country.

Although it recognized that the criminal statute under which plaintiff was charged expressly applies to acts taken abroad, and that DEA's arrest authority is broadly written

to encompass all of the crimes subject to its enforcement, the panel elected to “suppose” Congress did not actually intend for federal law enforcement officers to arrest someone outside the United States without obtaining the express consent of the host country. Justifying its rejection of Congress' clear intent to permit federal officials to arrest parties abroad, the panel observed, “[i]f this assertion [of the DEA's arrest authority] is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community.”

The court of appeals' ruling is wrong, ignores the clear intent of Congress, and creates a dangerous precedent. It also conflicts with Ninth Circuit precedent. In United States v. Chen, 2 F.3d 330, 333 (9th Cir. 1993), cert. denied, 511 U.S. 1039 (1994), this Court held that the INS has arrest authority outside the borders of the United States. The Chen Court explained that when a criminal statute applies extraterritorially, it could “infer from the broad language [authorizing the Attorney General to enforce immigration laws] that Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States.” Ibid. (emphasis added). That same rationale applies here. The panel ruling simply cannot be squared with Chen, and rehearing en banc is required to resolve this conflict.

2. Furthermore, the Federal Tort Claims Act (FTCA) requires the dismissal of plaintiff's claim. The alleged false arrest occurred in Mexico. Accordingly, the claim is barred under 28 U.S.C. § 2680(k), which bars “[a]ny claim arising in a foreign country.”

The panel attempted to avoid the FTCA's foreign country exception by citing the acts of the DEA officials in the United States. None of the command decisions made by the DEA in the United States, however, were tortious. It is not a tort to plan to procure the arrest of a person indicted for a felony. The only reason the panel deemed the arrest tortious was that there was no Mexican arrest warrant, *i.e.*, that the arrest was unlawful under Mexican law. That rationale conflicts with United States v. Spelar, 338 U.S. 217, 220-221 (1949), in which the Court held that liability under the FTCA cannot be predicated upon a violation of foreign law. Thus, the panel's ruling is contrary to Spelar and, for this additional reason, warrants en banc review.

3. Finally, this Court should also grant the petition for rehearing *en banc* filed by Jose Francisco Sosa concerning the Alien Tort Statute claim against him. The panel ruling has the perverse effect of holding monetarily liable a person who served this country by assisting in the rendition of an indicted alleged torturer. The arrest deemed by the panel to be a violation of the “law of nations” was in fact authorized by federal statute. Moreover, there is no “specific, universal, and obligatory” right, enforceable in federal court against a transborder arrest authorized by the United States government. The international agreements cited by the panel do not address transborder arrest and are not self-executing. The panel erroneously transformed non-binding, non self-executing documents into binding obligatory rights that are actionable in federal court. That ruling also warrants review by this Court sitting en banc.

STATEMENT

1. Plaintiff Humberto Alvarez-Machain was indicted for the torture and murder of a DEA agent in Mexico. The DEA attempted to obtain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. See Alvarez-Machain v. United States, 504 U.S. 655, 657 n.2 (1992). After those negotiations proved unsuccessful, DEA approved the use of Mexican nationals to take custody of Alvarez-Machain in Mexico and transport him to the United States. Thereafter, several Mexican nationals, acting at the behest of the DEA, seized plaintiff from his office in Mexico, and in less than 24 hours transported him to the United States.

Alvarez-Machain claimed that his seizure from Mexico was contrary to international law and a U.S. treaty with Mexico, and that he therefore could not be tried in the United States. This claim was ultimately rejected by the Supreme Court. The Court held that Alvarez-Machain's arrest “was not in violation of the Extradition Treaty.” Alvarez-Machain, 504 U.S. at 670. Further, the Court concluded that, whether or not the arrest was in violation of international law, Alvarez-Machain could be tried in this country.

On remand, Alvarez-Machain was tried in the federal court. At the close of the government's case, the district court granted Alvarez-Machain's motion for acquittal.

2. After he was acquitted, Alvarez-Machain brought this civil action asserting tort claims against the United States, DEA officials and a Mexican citizen. Alvarez-Machain

sought to hold the United States liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674 (FTCA). He sought to hold the individual federal defendants liable under common law, the Alien Tort Statute, 28 U.S.C. § 1350 (ATS),¹ and the Constitution.

The district court, pursuant to 28 U.S.C. § 2679, substituted the United States as defendant on the common law tort and ATS claims brought against the individual federal defendants, dismissed the constitutional claims, and granted the United States' motion to dismiss in part.

Thereafter, the district court granted the United States' motion for summary judgment. The court, however, held the Mexican national defendant, Jose Francisco Sosa, liable under the ATS. The court concluded that plaintiff's transborder arrest and his detention in transit violated “specific, universal and obligatory” norms of international law.

3. Plaintiff Alvarez-Machain and defendant Sosa both appealed.

On September 11, 2001, a panel of this Court issued its judgment, affirming in part and reversing in part.

¹ The Alien Tort Statute, 28 U.S.C. § 1350, provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

a. The panel held that Alvarez-Machain could sue the United States for false arrest. The government argued that the arrest could not be a “false arrest” because the arrest was authorized under federal law. The government's brief explained that the criminal statutes at issue expressly applied to acts occurring abroad, that the DEA's arrest authority was broad, and that Congress even authorized use of the military to assist in the rendition of a suspect (which, given 18 U.S.C. § 1385, could only have meaning if it applied to arrests outside of the United States). The panel rejected the government's position, remarking that “[i]f this assertion is an accurate statement of United States law, then it reinforces the critics of American imperialism in the international community.” The panel rather elected to “suppose that Congress intended for federal law enforcement officers to obtain lawful authority, which for example, here might be a Mexican warrant, from the state in which they sought to arrest someone.” Because the DEA did not obtain an arrest warrant from a Mexican court, the panel concluded that Alvarez-Machain's false arrest claim was actionable against the United States.

b. In concluding that Alvarez-Machain could pursue his claim that he had been falsely arrested in Mexico, the panel also rejected the argument that the claim was precluded by the FTCA's exception for “[a]ny claim arising in a foreign country.” 28 U.S.C. § 2680(k). The panel held this exception inapplicable because the seizure was planned by DEA officials in the United States.

c. The panel also affirmed the judgment in favor of Alvarez -Machain against Sosa under the ATS. The panel explained that because “Alvarez's abduction occurred pursuant to neither the laws of Mexico nor to the laws of the United States,” his “kidnaping” was actionable under the ATS.

ARGUMENT

I. The Panel Ruling That Federal Law Enforcement Officials Are Required To Obtain Express Consent Of A Foreign Country Before Arresting A Person Outside Of The United States Is Wrong, Conflicts With Prior Ninth Circuit Decisions, And Creates A Dangerous Precedent.

A. The panel recognized that plaintiff could not pursue his false arrest tort claim against the United States if the arrest in Mexico was authorized by federal statute. The panel concluded that the arrest in Mexico was unlawful because it found that DEA lacks statutory authority to arrest a person outside of the United States without the host country's express permission. Under Ninth Circuit precedent, however, an agency's arrest authority is presumed to reach to the full extent of the underlying substantive criminal law the agency is charged with enforcing. Thus, a law enforcement agency's arrest authority applies outside the borders of the United States if the criminal statutes apply to extraterritorial acts. See United States v. Chen, 2 F.3d 330, 333 (9th Cir. 1993), cert. denied, 511 U.S. 1039 (1994). Contrary to Chen, the panel here simply elected to suppose that Congress would not have wanted the DEA to be able to arrest a person in a foreign country without that country's permission. The panel explained that if the DEA possesses the power to arrest a person in Mexico, without that country's permission, then “it reinforces the critics of American imperialism in the international community.”

While in some areas of the law there is a presumption against extraterritorial application of the law,² that presumption does not apply to criminal statutes if the legislation implicates concerns that are not inherently domestic.³ Here, the statute under which Alvarez-Machain was charged expressly applies to acts outside of the United States. See 18 U.S.C. § 1201(a)(4), (e) (prohibiting kidnaping of internationally protected federal employees outside the United States). Accordingly, any presumption against extraterritoriality is irrelevant here. The only question here is whether DEA can enforce this statute in the locus where it expressly applies.

In addition to the crime under which plaintiff was charged, numerous other statutes enforced by federal law enforcement agencies explicitly apply to conduct outside of the United States, and they may also be implicated by the panel's ruling. See, e.g., 18 U.S.C. § 1119 (murder of United States national in foreign country); 18 U.S.C. § 2332b (foreign terrorist activity); 18 U.S.C. § 175 (extraterritorial use of biological weapons); 18 U.S.C. §§ 351, 1751 (extraterritorial crimes committed against high government officials); 18

² See EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

³ See United States v. Cotten, 471 F.2d 744, 750-751 (9th Cir.), cert. denied, 411 U.S. 936 (1973); United States v. Corey, 232 F.3d 1166, 1169 (9th Cir. 2000). See also United States v. Bowman, 260 U.S. 94 (1922); United States v. Vasquez-Velasco, 15 F.3d 833, 838-839 (9th Cir. 1994)

U.S.C. § 1956 (extraterritorial money laundering); 18 U.S.C. § 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. § 1116(c) (attacks on diplomats); 18 U.S.C. § 1203(b)(1) (hostage-taking); 49 U.S.C. § 1472(1) (carrying weapons or explosives aboard aircraft); 50 U.S.C. § 424 (extraterritorial jurisdiction over crimes relating to releasing national security information). In order for federal law enforcement officials to fully execute these criminal statutes, their arrest authority must have an equivalent extraterritorial scope.

The DEA's statutory arrest authority is very broad. A DEA agent is empowered by statute to “make arrests without warrant * * * for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed * * * a felony.” 21 U.S.C. § 878(3). There is no basis for reading this expansive arrest authority as limited to the borders of the United States. To do so would render the DEA powerless whenever the suspect is not in the United States, as will frequently be the case when criminal laws apply to extraterritorial conduct. See Cotten, 471 F.2d at 751 (“[t]he effective operation of government cannot condone the hiatus in the law that a contrary construction would cause”).

In Chen, this Court held that INS has arrest authority outside the borders of the United States. The Court explained that when “Congress intended [a substantive criminal statute] to apply extraterritorially,” it could “infer from the broad language [authorizing the Attorney General to enforce immigration laws] that Congress intended to grant the

Attorney General the corresponding power to enforce the immigration laws both within and without the borders of the United States.” 2 F.3d at 333 (emphasis added).

Likewise, here, in order to enforce the many criminal laws that apply extraterritorially, the DEA's “exercise of [extraterritorial power] may be inferred” because it is consistent with – indeed necessary to – “Congress' * * * legislative efforts to eliminate the type of crime involved.” United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir.), cert. denied, 498 U.S. 826 (1990).

The statute that Alvarez-Machain was indicted for violating not only explicitly applies extraterritorially in certain circumstances (18 U.S.C. § 1201(e)), it also authorizes the Attorney General to seek military assistance in those circumstances (18 U.S.C. § 1201(f)) to enforce the statute. Given the strict constraints upon domestic use of the military (see 18 U.S.C. § 1385), such authority would serve no purpose if Congress had not conferred extraterritorial law enforcement powers upon federal law enforcement agencies.

Under governing Ninth Circuit precedent, these factors compel the conclusion that DEA has arrest authority outside of the United States. The panel ruling is in conflict with that precedent by, in essence, demanding an express grant of extraterritorial arrest authority. That ruling conflicts with prior Ninth Circuit precedent and warrants en banc review.

B. The panel's ruling also warrants en banc review because it establishes a dangerous precedent that threatens to impair the ability of federal officials to arrest perpetrators of serious federal crimes who are harbored by foreign countries.

1. In concluding that the FBI has extraterritorial arrest authority,⁴ the Office of Legal Counsel, like this Court in Chen, relied upon the agency's broad arrest authority and the fact the crimes subject to FBI enforcement have extraterritorial application. See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 1989 WL 595835 (1989). The OLC opinion explained, “[i]n order for the FBI to have the authority necessary to execute these statutes, its investigative and arrest authority must have an equivalent extraterritorial scope.” Id. at 167. That same rationale supports the DEA's arrest authority, as well. The panel's ruling to the contrary, thus, not only undercuts the DEA's authority, but also raises a cloud upon that of other law enforcement agencies.

⁴ Like the DEA, the FBI has authority to “make arrests without warrant for * * * any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.” 18 U.S.C. § 3052.

2. Unilateral extraterritorial arrests are rare. The norm, of course, is to seek extradition or other forms of cooperation from the host country. There are important and extraordinary cases, however, that require law enforcement action without the consent of the host country. There is sometimes a steep diplomatic price to be paid for asserting this extraterritorial power. Nonetheless, Congress has granted such arrest authority to the FBI and the DEA and they may employ the authority where our Nation's paramount interests so dictate, even where the host state has not granted its permission. See Douglas Kash, *Abducting Terrorists under PDD-39: Much Ado about Nothing New*, 13 Am. U. Int'l L. Rev. 139 (1997). There also may be some instances where a host country permits such an arrest, but will not publicly acknowledge its consent, as the panel here required. In either case, it is vital to effective law enforcement that the government retain the ability to act, when necessary, outside the borders of the United States. “Abrogation of a nation's ability to abduct suspects wanted for heinous crimes, such as terrorism, only invites more such acts with the perpetrators seeking sanctuary in some sympathetic, anti-American, anti-justice nation.” Id. at 155-156. “Due to modern political realities * * *, abductions are at times the only viable option to bring a suspect within the criminal jurisdiction of the United States.” Id. at 156. See also 131 Cong. Rec. 18,870 (1985) (Sen. Specter) (in enacting statute criminalizing murder of U.S. nationals abroad, explaining that “if the terrorist is hiding in a [foreign] country * * *, where the government* * * is powerless to aid in his removal, or * * * is unwilling, we

must be willing to apprehend these criminals ourselves and bring them back for trial”). The rule adopted by the panel, however, undercuts that necessary option.

The necessity of maintaining this extraterritorial arrest authority is highlighted by the recent tragic events of September 11. If, for example, the FBI had learned of the planned attacks and somehow had been able to secure the arrest of Bin Laden in Afghanistan before September 11, the panel's opinion could raise questions as to whether an extraterritorial arrest serving such vital U.S. national security interests would have given rise to civil liability under U.S. law.⁵ Because the panel's opinion creates a cloud of uncertainty regarding important law enforcement powers abroad, en banc review is fully warranted.

⁵ We do not suggest that the current efforts to bring the perpetrators of the September 11 attacks to justice are directly implicated by the panel's opinion. There are numerous differences between the two situations. For example, Congress has authorized the President to “use all necessary and appropriate force against those nations, organizations or persons [that the President determines were responsible for or aided the terrorist attacks of September 11].” See Pub. L. 107-40 (2001).

II. The Panel Erred In Holding That An Alleged False Arrest That Occurred In Mexico Is Not Barred By The FTCA's Foreign Country Exception.

The FTCA bars recovery for “[a]ny claim arising in a foreign country.” 28 U.S.C. § 2680(k). As a limitation on the “the scope of the United States' waiver of sovereign immunity,” this exception to liability under the FTCA must be strictly construed. See Smith v. United States, 507 U.S. 197, 201, 203-204 (1993). Here, the panel concluded that the alleged false arrest occurred in Mexico. Accordingly, any tort claim challenging the legality of that arrest in Mexico is barred by 28 U.S.C. § 2680(k).⁶

The panel attempted to avoid the FTCA's foreign country exception by citing this Court's “headquarter's claim” rule. Under that rule, a claim may be asserted, notwithstanding § 2680(k), if a culpable “act or omission” occurred in the United States, even if the “operative effect” of the act or omission took place in a foreign country. See Cominotto v. United States, 802 F.2d 1127, 1130 (9th Cir. 1986); Leaf v. United States, 588 F.2d 733 (9th Cir. 1978).

The Supreme Court has explained, however, that the foreign county exception must be viewed together with 28 U.S.C. § 1346 which “waives the sovereign immunity of

⁶ Recognizing that the DEA's operations abroad may give rise to tort claims that are barred by § 2680(k), Congress has granted the Attorney General the discretion to pay such claims. See 21 U.S.C. § 904.

the United States for certain torts committed by federal employees 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'” Smith, 507 U.S. at 200 (quoting 28 U.S.C. § 1346(b)) (emphasis in original). Here, the tortious “act” indisputably “occurred” in Mexico, and falls within the foreign country exception.

Moreover, none of the command decisions made in the United States, cited by the panel, were tortious. It is not a tort to procure the arrest of someone who has been indicted for a felony. The only reason the panel deemed the arrest tortious was that there was no Mexican arrest warrant, *i.e.*, that the arrest was unlawful under Mexican law. It is established, however, that liability under the FTCA cannot be predicated upon a violation of foreign law. See United States v. Spelar, 338 U.S. 217, 220-221 (1949) (Congress was “unwilling to subject the United States to liabilities depending upon the laws of a foreign power”). The panel's ruling cannot be squared with the foreign country exception, is inconsistent with Spelar and warrants en banc review.

III. The Panel Erred In Holding That A Transborder Arrest Authorized By The U.S. Government Was Actionable Under The Alien Tort Statute.

The panel erred in holding Sosa liable under the ATS for abducting and detaining Alvarez-Machain. That ruling was also predicated upon the panel's holding that the arrest was not authorized under U.S. law. As we discussed above, that premise is erroneous.

Moreover, under the panel's analysis, plaintiff's transborder arrest and arbitrary detention claims against Sosa are only actionable because the seizure and detention

occurred without the consent of Mexico. Thus, these ATS claims in reality turn upon an alleged infringement against Mexican sovereignty. As the Supreme Court recognized with respect to plaintiff's seizure, see Alvarez-Machain v. United States, 504 U.S. at 669, such matters must be resolved as matters of State-to-State relations and not by a federal court. There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate.⁷ That State-to-State remedial regime is by agreement of the States involved, however, and does not entitle a plaintiff to an individual remedy.

The panel ruling to the contrary cannot be squared with prior Ninth Circuit precedent demanding that, to be actionable under the ATS, a right must be “specific, universal, and obligatory.” In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). To support its ruling, the panel cites an international agreement that was never ratified by the United States and a variety of agreements that, while discussing the general right to freedom of

⁷ One State-to-State remedy for a transborder arrest is the return of the arrested party. See Restatement (Third) of Foreign Relations Law § 432 & cmt. c (1986). A second is negotiation and/or agreement to a treaty to resolve the dispute. A third is for the offended State to “receive reparation from the offending [S]tate.” Ibid. See also Security Council Resolution concerning Adolf Eichmann, U.N. Doc. S/4349 (23 June 1960).

movement, do not address transborder arrest and, in any event, are not self-executing. The panel erroneously transformed these non-binding, non self-executing documents into binding obligatory rights that are actionable in federal court. It is well established, however, that when a treaty is non-self-executing, it “addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court.” Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

In its opinion, the panel admits that “no international human rights instruments refers to transborder abduction specifically.” The lack of such a specifically recognized right should preclude the finding that the right is “specific, universal, and obligatory.”

Finally, the panel's finding that Sosa's seizure amounted to arbitrary detention erroneously focuses upon Mexican domestic law. The lack of a Mexican warrant does not render plaintiff's detention by persons acting on behalf of DEA “arbitrary.” Prior to his detention, a federal grand jury determined that there was probable cause to believe that Alvarez-Machain had committed a felony. While the panel believed that the DEA should have obtained permission from Mexico before seizing Alvarez-Machain, the acts taken pursuant to a federal indictment “were pursuant to law” and cannot be deemed “arbitrary” and actionable under the ATS. See Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-1384 (9th Cir. 1998).

CONCLUSION

For the foregoing reasons, the case should be reheard by the Court sitting en banc.

Respectfully submitted,

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OCTOBER 2001

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 40-1, the attached petition is proportionally spaced, has a typeface of 14 points or more and contains 4106 words (which does not exceed the applicable 4,200 word limit).

ROBERT M. LOEB
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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2001, I served copies of the foregoing “PETITION FOR REHEARING AND REHEARING EN BANC FOR THE UNITED STATES OF AMERICA” upon the Court and the following opposing counsel of record by FedEx overnight delivery:

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ADDENDUM
(Panel Opinion)