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United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment

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Abstract

This Comment argues that *United States v. Verdugo-Urquidez* signals an unwarranted limitation on constitutional protections which may present disturbing ramifications for aliens in U.S. courts. Part I of this Comment examines the line of cases that extend constitutional protections to citizens beyond U.S. borders and to aliens within U.S. territory. Part II discusses the factual and procedural background of the *Verdugo-Urquidez* case. Part III discusses the reasoning of the plurality, concurring, and dissenting opinions. Part IV analyses the plurality opinion and suggests that *United States v. Verdugo-Urquidez* reverses a trend extending constitutional protection outside the United States. This Comment concludes that *Verdugo-Urquidez* may foreshadow a limitation of constitutional protections for new classes of individuals.

UNITED STATES V. VERDUGO-URQUIDEZ: RESTRICTING THE BORDERS OF THE FOURTH AMENDMENT

INTRODUCTION

The fourth amendment to the U.S. Constitution proscribes unreasonable searches and seizures by U.S. government officials.¹ Traditionally, the fourth amendment applied to any search conducted by a U.S. agent.² The U.S. Supreme Court, however, recently decided that the fourth amendment does not govern an extraterritorial search of the property of an alien who lacks sufficient connection with the United States.³ The *United States v. Verdugo-Urquidez*⁴ decision abruptly halts the Court's trend toward extending constitutional protection extraterritorially.⁵

This Comment argues that *United States v. Verdugo-Urquidez* signals an unwarranted limitation on constitutional protections which may present disturbing ramifications for aliens in U.S. courts. Part I of this Comment examines the line of cases that extend constitutional protections to citizens beyond U.S. borders and to aliens within U.S. territory. Part II discusses the factual and procedural background of the *Verdugo-Urquidez* case. Part III discusses the reasoning of the plurality, concurring, and dissenting opinions. Part IV analyses the plurality opinion and suggests that *United States v. Verdugo-Urquidez* reverses a trend extending constitutional protection outside the United States. This Comment concludes that *Verdugo-*

1. U.S. CONST. amend. IV. The fourth amendment provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

2. See *infra* notes 6-66 (discussing traditional application of fourth amendment). See generally 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 1.1, at 7-8 (2d ed. 1987) (stating that "effect of the fourth amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority").

3. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

4. *Id.*

5. *Id.* at 1066; see Recent Development, *United States v. Verdugo-Urquidez*, 30 VA. J. INT'L L. 827 (1990).

Urquidez may foreshadow a limitation of constitutional protections for new classes of individuals.

I. HISTORY OF EXTENSION OF U.S. CONSTITUTION

The exclusionary rule states that evidence seized in violation of one's constitutional rights may not be admitted at trial against the victim of the constitutional violation.⁶ This rule was intended to deter law enforcement personnel from conducting searches that exceed constitutional norms and to protect individuals against illegal searches and seizures.⁷ The rule suppresses evidence procured in violation of a defendant's fourth,⁸ fifth,⁹ or sixth¹⁰ amendment rights.¹¹ In *Verdugo-*

6. *Weeks v. United States*, 232 U.S. 383 (1914); see *United States v. Calandra*, 414 U.S. 338, 354 (1974); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that evidence seized during warrantless search of defendant's home must be suppressed). The exclusionary rule prohibits unconstitutional government conduct by suppressing evidence obtained in an unconstitutional manner. *Id.* at 657. The rule preserves the "judicial integrity" of the courts by preventing their participation in police misconduct. *Id.* at 643. *But see United States v. Leon*, 468 U.S. 897, 909 (1984). (holding that exclusionary rule should not apply when police act in good faith reliance on invalid warrant). See generally 1 W. LAFAVE, *supra* note 2, at § 1.1; Annotation, *Modern Statutes of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R.2d 531 (1956).

7. *Weeks*, 232 U.S. at 391.

8. U.S. CONST. amend. IV; see *supra* note 1 (containing text of fourth amendment).

9. U.S. CONST. amend. V. The fifth amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

10. U.S. CONST. amend. VI. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his Defence.

Id.

11. *Weeks v. United States*, 232 U.S. 383 (1914); see *United States v. Calandra*, 414 U.S. 338, 347 (1974). The protections of the Bill of Rights only apply to state action. The activities of foreign governments and private citizens are not circum-

Urquidez, the U.S. Supreme Court considered whether the fourth amendment applies to searches outside the United States of a residence belonging to a non-resident alien who is involuntarily present in the United States.¹²

Before *Verdugo-Urquidez*, the U.S. Supreme Court never directly addressed the issue of whether aliens abroad enjoyed fourth amendment rights.¹³ Lower federal courts addressing this issue have applied two fundamentally different theoretical analyses.¹⁴ The first theory, the natural rights theory,¹⁵ fo-

scribed by the fourth amendment. See *United States v. Janis*, 428 U.S. 433, 455-56 n.31 (1976) ("It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act."); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1, at 1688-89 (2d ed. 1988); 1 W. LAFAVE, *supra* note 2, at § 1.6(g) at 139.

12. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1059-66 (1990).

13. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1217 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990); *United States v. Yunis*, 859 F.2d 953, 970 (D.C. Cir. 1988) (Mikva, J., concurring specially) (noting that "Supreme Court has never determined whether aliens are entitled to the protections of our Bill of Rights outside the United States"); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 721 comment b (1987) (stating that it has not been definitely adjudicated whether U.S. Constitution governs exercises of authority by United States in respect of aliens abroad).

14. See *infra* notes 15-29 and accompanying text (discussing two approaches). *But see Sami v. United States*, 617 F.2d 755, 773 n.34 (D.C. Cir. 1979) (applying third theory which called for contextual determination of alien's constitutional rights, with particular inquiry into status of both individual complaining and actor complained of); see also *Jean v. Nelson*, 727 F.2d 957, 973 (11th Cir. 1984) (stating, in dicta, that "aliens who are victims of unconstitutional government action abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States"), *aff'd*, 472 U.S. 846 (1985).

15. Evidence of the natural rights theory in U.S. history can be traced back as far as the Declaration of Independence. The Declaration of Independence states that "all [persons] . . . are endowed by their Creator with certain Unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence ¶ 2 (U.S. 1776), *reprinted in* 4 ELLIOT'S DEBATES 556 (2d ed. 1836). The Declaration of Independence was not suggesting, however, that slaves and Indians were included in the class of persons who enjoyed these unalienable rights. In introducing the Bill of Rights, James Madison stated that the Bill of Rights "expressly declare the great rights of mankind secured under this constitution." 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 440, 449 (J. Gales ed. 1834); see Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 676 (1986) (discussing Framers' intent to have Constitution's protection apply to all individuals) [hereinafter Note, *Unalienable Rights*]; see also Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1582, 1584-90 (1981); Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979); Note, *Searching the World Over: Applying the Exclusionary Rule to Searches of Aliens by U.S. Agents*, 7 LAW & INEQUALITY 489, 501 (1989) (asserting that natural rights theory of constitutional rights requires U.S. government to treat all people equally regardless of nationality) [hereinafter Note, *Searching the World*].

cuses on the activity of the U.S. government.¹⁶ The natural rights theory views the government as a creature of the Constitution, bound by it in all governmental activities.¹⁷ According to this theory, the U.S. government cannot infringe on certain universal and unalienable rights.¹⁸ The second, the compact or social contract theory, focuses on the relationship of the claimant to the United States.¹⁹ This theory views the Constitution as a social contract between the people of the United States and the U.S. government.²⁰ Under the social contract theory, only parties to the contract have enforceable rights and duties under it.²¹ Hence, only those individuals who have as-

16. See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1544 (D.C. Cir. 1984) (en banc) (applying natural rights theory and finding that U.S. government officers are creatures of law and bound to obey law); *United States v. Tiede*, 86 F.R.D. 227, 244 (U.S. Ct. Berlin 1979) (stating that U.S. public officials' actions are governed by, measured against, and must be authorized by Constitution).

17. *Tiede*, 86 F.R.D. at 244 (stating that "there has never been a time when United States authorities exercised governmental powers in any geographical area—whether at war or in times of peace—without regard for their own Constitution"); see Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1674 (1989) [hereinafter Note, *Extraterritorial Applicability*].

18. Note, *Unalienable Rights*, *supra* note 15, at 653; see Saltzburg, *The Reach of Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 747 n.30 (1980) (stating that "extraterritorial reach [of Bill of Rights] is coextensive with the protections they guarantee within the U.S. territory. Thus, the fourth and fifth amendments curb the search, seizure, and interrogation powers of U.S. officials abroad, even where the object of that protection is not a U.S. citizen"); Note, *Searching the World*, *supra* note 15, at 500.

19. *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (applying compact theory and asserting that non-resident aliens claiming injury from U.S. nuclear tests cannot appeal to protection of Constitution or laws of United States); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976) (accepting rule that non-resident aliens have no standing to sue in U.S. courts); see Note, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1914 (1985); see also Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 783-85 (1980).

20. FEDERALIST PAPERS No. 22 (Alexander Hamilton) (noting that foreign nationals abroad are neither parties nor beneficiaries of Constitution); see Stephan, *supra* note 19, at 783; see also B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

21. *League v. De Young*, 52 U.S. (11 How.) 184, 202 (1850) (stating that Constitution was made by, and for protection of people of United States); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (Marshall, C.J.) (noting that U.S. government is a government of the people—its powers are granted by them, exercised directly on them, and for their benefit); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793) (Jay, C.J.) (stating that Constitution is compact made by U.S. people to govern themselves in certain manner); see Stephan, *supra* note 19, at 782 (noting

sumed some duties under the Constitution can assert rights under the Constitution.

Natural rights theorists argue that the contractual approach is inconsistent with the historical application of constitutional rights to non-citizens.²² The contractual approach, they contend, grants rights to U.S. citizens only.²³ But because certain constitutional protections have historically been afforded to both legal²⁴ and illegal aliens²⁵ in the United States, citizenship cannot be used as a standard for applying constitutional protections.²⁶

Proponents of the compact theory criticize the natural rights theory for its overly expansive application of the Constitution.²⁷ They contend that if all persons possess natural and

that "foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

22. See *The Virginia Resolutions* (1800), reprinted in 4 ELLIOT'S DEBATES 528 (2d ed. 1836). James Madison, speaking against the Alien and Sedition Acts less than a decade after the adoption of the fourth amendment, stated that "it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection." *Id.* at 556.

23. See Saltzburg, *supra* note 18, at 747 n.29 (noting that it would be "odd" if founding fathers intended U.S. power to be exerted in foreign nations without constitutional limitations); Note, *Unalienable Rights*, *supra* note 15, at 653 (expressing view that only U.S. citizens are beneficiaries of social contract "takes a contract metaphor useful for describing the Framers' view of the proper basis for the creation of government, and attempts to use it as a rigid rule for limiting constitutional protection"); Brief for Respondent Verdugo-Urquidez at 24, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter Respondent's Brief].

24. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1885) (finding that fourteenth amendment provisions are universal in their application to all persons within U.S. territory); see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (finding that resident alien is person within meaning of fifth amendment); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (finding that resident aliens enjoy first, fifth, and fourteenth amendment rights); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 291 (1904) (noting that fifth and sixth amendments protect aliens once they are in United States); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (finding that persons within U.S. territory are entitled to protection guaranteed by fifth and sixth amendments).

25. See *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (holding that equal protection clause of fourteenth amendment bars states from denying public education to illegal aliens); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (noting that all aliens within jurisdiction of United States enjoy protections of fifth and fourteenth amendments).

26. See Note, *Unalienable Rights*, *supra* note 15, at 653; *supra* note 15 and accompanying text (discussing extension of constitutional protections to non-resident aliens).

27. Stephan, *supra* note 18, at 783; Reply Brief for United States at 5-6, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter U.S.

unalienable rights that cannot be arbitrarily violated by the government, then aliens injured by U.S. military operations, for example, would have a cause of action against the U.S. government.²⁸ Compact theorists argue that the natural rights theory ignores indications from the U.S. Supreme Court that aliens affected by the United States only have limited constitutional protections.²⁹

The U.S. Supreme Court has considered these theories in determining the scope of an alien's constitutional rights within and beyond U.S. borders. As early as 1886, in *Yick Wo v. Hopkins*,³⁰ the Court extended fourteenth amendment protection to aliens residing within the United States.³¹ Resident aliens were considered to be parties to the Constitution and entitled to its protection.³²

As a result of *Yick Wo*, aliens within the United States now enjoy a broad panoply of rights,³³ although they are not guar-

Reply Brief]. See generally Note, *The Constitutional Rights of Nonresident Aliens Prosecuted in the United States*, 3 *FORDHAM INT'L L.F.* 221 (1980).

28. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1065 (1990); *infra* notes 136-41 and accompanying text (discussing problems of judicially created cause of action).

29. See, e.g., *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (noting that alien becomes "invested with the rights guaranteed by the Constitution" only after entering United States and accepting some societal obligations); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (holding that alien does not become one of people protected by Constitution when attempting to enter United States illegally).

30. 118 U.S. 356 (1885).

31. *Id.* at 369. In *Yick Wo*, a San Francisco ordinance barred the operation of hand laundries in wooden buildings except with the consent of the Board of Supervisors. *Id.* at 357. The Board gave permits to all but one of the non-Chinese applicants, but to none of the nearly 200 Chinese applicants. *Id.* at 359. The Court held that although the ordinance was neutral on its face, there was discrimination in its administration, and this discrimination violated the Equal Protection Clause. *Id.* at 373.

32. See *id.*

33. Aliens within the United States generally enjoy the benefits of the first, fifth, sixth, and fourteenth amendments. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1989), *rev'd*, 110 S. Ct. 1056 (1990); see *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 (1976) (holding that barring alien from position in U.S. federal government was deprivation of liberty interest and alien was protected by fifth amendment's guarantee of due process); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (declaring that discrimination against aliens by states is inherently suspect, subject to strict scrutiny by courts, and only justified by compelling state interest); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (holding that resident alien is "person" within meaning of fifth amendment); *Bridges*, 326 U.S. at 161 (Murphy, J., concurring) (emphasizing that among protections enjoyed by resident aliens

anteed all constitutional protections.³⁴ Indeed, the Court has stated that all aliens are not necessarily classified or treated alike under all circumstances.³⁵ Nevertheless, some constitutional protections have been extended to aliens within the United States, and in those cases no distinctions have been made between those who reside in the United States legally or illegally.³⁶

Until the late nineteenth century, the Court implicitly adhered to a compact theory approach in defining the scope of constitutional protections granted to citizens and aliens.³⁷ The Court strictly construed the Constitution to find that it had no application outside the United States for any category of individual.³⁸ In deciding *In re Ross*,³⁹ the Court considered

are first, fifth, and fourteenth amendment rights); *Au Yi Lau v. Immigration & Naturalization Serv.*, 445 F.2d 217, 223 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971) (finding aliens within United States sheltered by fourth amendment in common with citizens).

34. See *Ambach v. Norwick*, 441 U.S. 68 (1979) (recognizing that aliens have limited equal protection rights where public function is involved); *Foley v. Connelie*, 435 U.S. 291 (1978) (finding exclusion of aliens from state police force did not violate equal protection clause of fourteenth amendment because police officers are within category of non-elective officers who participate in execution of laws); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (denying welfare benefits to some classes of aliens); see also Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

35. *Mathews*, 426 U.S. at 78. The Court said that

[t]he fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification.

Id.

36. *Verdugo-Urquidez*, 856 F.2d at 1222 (noting that aliens within United States generally enjoy first, fifth, sixth, and fourteenth amendments); see *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (implying that illegal aliens within United States have fourth amendment rights); *supra* notes 24 & 25 (discussing constitutional rights granted to legal and illegal aliens).

Even non-resident aliens have been granted constitutional rights against the taking of property within the United States without just compensation. See *United States v. Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (stating that friendly aliens are entitled to just compensation under fifth amendment).

37. See Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 19-21 (1985) (noting that historically Constitution did not protect citizens or aliens outside United States).

38. *In re Ross*, 140 U.S. 453, 464 (1891).

39. *Id.* In *Ross*, a U.S. seaman, stationed in Japan, was convicted by the U.S. consular tribunal of murder and sentenced to death, his sentence was later com-

whether a U.S. citizen in Japan should be granted the constitutional right to a grand jury proceeding and a trial by a petit jury.⁴⁰ The Court adopted a strict territorial approach to the Constitution by holding that constitutional protections do not apply to U.S. citizens outside the United States.⁴¹

During the first half of the twentieth century, the Court gradually expanded its strict territorial application of the Constitution in a series of cases known as the *Insular Cases*.⁴² In these cases, the Court concluded that inhabitants of lands possessed by the United States were protected by the Constitution if Congress had "incorporated" the territory into the United States.⁴³ In one of the *Insular Cases*, *Dorr v. United States*,⁴⁴ for example, the Court found that although the United States could deny a jury trial to a U.S. citizen living abroad, the United States could not deny that citizen a fair trial and fundamental due process.⁴⁵ Thus, the *Insular Cases* stand for the proposition that the Constitution is applicable outside the

mutated to life imprisonment by President Hayes. *Id.* at 454-55. Nearly ten years later, petitioner brought a habeas corpus action, contending that his trial before the U.S. consular tribunal in Japan violated his constitutional rights to indictment by grand jury and to trial by petit jury. *Id.* at 454.

40. *Id.* at 461.

41. *Id.* at 464. "The [U.S.] Constitution can have no operation in another country. When, therefore, the representatives or officers of [the U.S.] government are permitted to exercise authority of any kind in another country, it must be on conditions as the two countries may agree, the laws of neither one being obligatory upon the other." *Id.*

42. See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (holding that fifth amendment right to jury trial is inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (holding that right to indictment by grand jury is inapplicable in Philippines); *Rasmussen v. United States*, 197 U.S. 516 (1905) (holding that jury trial provision is applicable in Alaska); *Dorr v. United States*, 195 U.S. 138, 149 (1904) (holding that right to jury trial inapplicable in Philippines); *Hawaii v. Mankichi*, 190 U.S. 197, 218-19 (1903) (White, J., concurring) (holding that constitutional provisions on indictment by grand jury and jury trial do not apply in Hawaii); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that revenue clauses of Constitution are inapplicable to Puerto Rico).

43. See U.S. Brief, *supra* note 27, at 19 (citing *Examining Bd. of Engineers, Architects, and Surveyors v. Flores del Otero*, 426 U.S. 572, 599 n.30 (1976)). The Court in the *Insular Cases* distinguished between "incorporated" territories, or territories destined for statehood from the time of acquisition, and "unincorporated" territories, territories possessed not in anticipation of statehood. *Id.* The Court conferred a lesser degree of constitutional protection to "unincorporated" territories, and held that "only fundamental constitutional rights were guaranteed to the inhabitants" of "unincorporated territories." *Id.*

44. 195 U.S. 138 (1904).

45. *Id.* at 148; see Note, *Unalienable Rights*, *supra* note 15, at 655-56.

United States, but may be limited by territorial restrictions.⁴⁶

In 1950, the Court declined to extend the application of the Constitution to aliens outside the United States in the case of *Johnson v. Eisentrager*.⁴⁷ *Eisentrager* involved German nationals who had been prosecuted and convicted in China by a U.S. military commission.⁴⁸ They were charged with engaging in military activity against the United States after Germany's unconditional surrender but while the war against Japan continued.⁴⁹ The German nationals alleged that they had been denied their constitutional right to a jury trial.⁵⁰

The *Eisentrager* Court explained that the extent of an alien's relationship with the United States determines the scope of constitutional rights that an alien enjoys.⁵¹ For example, an alien with no relation to the United States is granted no constitutional protection.⁵² The Court reasoned from this premise that the rights granted to aliens increase as their relation to the United States increases.⁵³ The Court then stated that an alien's presence within its territorial jurisdiction is a particular relation which gives the judiciary the power to act.⁵⁴ Because the enemy aliens were not present within U.S. jurisdiction, the Court concluded that it was not required to extend the Constitution's protection to them.⁵⁵ Using a territorial ap-

46. See Note, *Unalienable Rights*, *supra* note 15, at 656 (asserting that *Insular Cases* hold that Bill of Rights applies to territories); Recent Development, *supra* note 5, at 830.

47. 339 U.S. 763 (1950).

48. *Id.* at 765-66.

49. *Id.* at 766.

50. *Id.* at 767.

51. *Id.* at 770 (noting that aliens are accorded ascending scale of rights as their identity with U.S. society increases).

52. See *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (noting that "Bill of Rights is a futile authority for the alien seeking admission for the first time to these [U.S.] shores An alien obviously brings with him no constitutional rights, Congress may exclude him in the first instance for whatever reason it sees fit").

53. *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950).

54. *Id.* at 771.

55. *Id.* at 785; see *United States v. Belmont*, 301 U.S. 324, 332 (1937) ("[U.S.] Constitution, laws and policies have no extraterritorial operation, unless in respect of [U.S.] citizens"); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (asserting that nonresident aliens claiming injury from U.S. nuclear tests "plainly cannot appeal to the protection of the Constitution or laws of the United States"); *Stephan*, *supra* note 19, at 782 ("foreign nationals abroad are neither parties to nor beneficiaries of the agreement between the federal government and its people embodied in the Constitution").

plication of the Constitution, the Court thus denied the right to a trial by jury to enemy aliens abroad.⁵⁶

Later, in *Reid v. Covert*,⁵⁷ the U.S. Supreme Court abandoned the strict territorial application articulated in *Ross* and granted constitutional protections to citizens accompanying the armed forces in foreign countries.⁵⁸ The Court found that the Constitution guarantees a trial by jury for a U.S. citizen accompanying the U.S. armed forces outside the United States.⁵⁹

Justice Black, writing for the plurality in *Reid*, dismissed the *Ross* case as "a relic from a different era."⁶⁰ Justice Black noted that a strict territorial approach had been directly repudiated by many federal courts, including several U.S. Supreme Court cases.⁶¹ The Court found that U.S. citizens abroad were protected by the Bill of Rights,⁶² finding the statute imposing

56. *Eisentrager*, 339 U.S. at 785. The Court held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Id.*

57. 354 U.S. 1 (1957).

58. *Id.* at 10-12. *Reid v. Covert* involved the power of Congress to expose U.S. citizens accompanying U.S. military forces outside the United States to trial by military tribunals under military regulations and procedures for offenses against the United States. *Id.* at 3. In *Reid*, two cases involving the wives of U.S. military officers who allegedly killed their husbands at military bases outside the United States were consolidated. *Id.* Mrs. Covert allegedly killed her husband, Sergeant Covert, at an Air Force base in England. *Id.* Mrs. Smith allegedly killed her husband, an Army officer, at a post in Japan. *Id.* at 4. Although a military tribunal in England found both guilty of murder pursuant to the Uniform Code of Military Justice, the Court held that a private U.S. citizen was entitled to a civil jury trial and could not constitutionally be tried by military authorities. *Id.* at 5; see *United States v. Conroy*, 589 F.2d 1258, 1264 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979) (finding fourth amendment protects U.S. citizens worldwide against unreasonable searches and seizures).

59. *Reid*, 354 U.S. at 18-19.

60. *Id.* at 12.

61. *Id.* (citing *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1921); *Downes v. Bidwell*, 182 U.S. 244, 277 (1900); *Mitchell v. Harmony*, 55 U.S. (13 How.) 115, 134 (1851); *Best v. United States*, 184 F.2d 131, 138 (1st Cir. 1950); *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), *rev'd on other grounds sub. nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Turney v. United States*, 115 F. Supp. 457, 464 (Ct. Cl. 1953)).

62. *Reid v. Covert*, 354 U.S. 1, 5 (1957). The Court reversed the military tribunal's decision and rejected the idea that "when the United States acts against citizens abroad it can do so free of the Bill of Rights." *Id.* Justice Black, writing for the plurality, asserted that

[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the

trial by court martial unconstitutional.⁶³

The application of the Constitution thus evolved from a strict territorial approach for both citizens and aliens⁶⁴ to an extraterritorial application for citizens accompanying the armed forces outside the United States.⁶⁵ The *Reid* decision has since been applied to U.S. citizens outside the United States.⁶⁶ Many federal courts took the next step and extended fourth amendment rights to aliens subjected to U.S. government action outside the United States.⁶⁷ In *United States v.*

limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Id. at 5-6 (footnotes omitted).

63. *Id.* at 34-35. Traditionally, the options available in situations such as the *Reid* case were to try the defendant by court martial or deliver the defendant to the local authorities for prosecution under local law. See *Wilson v. Girard*, 354 U.S. 524 (1957).

64. See *In re Ross*, 140 U.S. 453, 464 (1891) (stating that Constitution ordains and establishes government for United States and not for other countries).

65. *Reid*, 354 U.S. at 35.

66. Since *Reid*, there has been a trend toward greater constitutional protection abroad for citizens. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990) (recognizing implicitly that *Reid* applies not only to U.S. citizens accompanying armed forces outside United States but also to other U.S. citizens by stating that “[s]ince respondent is not a United States citizen, he can derive no comfort from the *Reid* holding”); *Verdugo-Urquidez*, 856 F.2d 1214, 1235 (Wallace, J., dissenting) (noting that *Reid* speaks only of extraterritorial rights of U.S. citizens), *rev’d*, 110 S. Ct. 1056 (1990); see also *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960). The *Reid* Court held that a dependent of a U.S. serviceman or civilian defense employee is protected by article III and the fifth and sixth amendments. Therefore, the dependent could not be convicted outside the United States without a trial by jury for a non-capital offense committed abroad. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 721 comment b (1987) (stating that “constitution governs the exercise of authority by the United States government over United States citizens outside United States territory”); Note, *Searching the World Over*, *supra* note 15, at 495 (stating that U.S. “courts will apply the exclusionary rule to evidence seized from United States citizens by United States agents on foreign soil”); Note, *Aliens Fourth Amendment Rights Against Government Searches Abroad—United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989), 64 WASH. L. REV. 701 705 (1989) (stating that *Reid* is sound precedent for proposition that Constitution protects citizens against U.S. governmental action outside United States); Note, *Fourth Amendment Constraints on United States Law Enforcement Agents Acting on Non-resident Aliens and Their Property Abroad*, 23 COLUM. J.L. & SOC. PROBS. 27, 35 (1986) (noting that *Reid* involved U.S. citizens abroad).

67. See, e.g., *Cardenas v. Smith*, 733 F.2d 909, 916-17 (D.C. Cir. 1984). The court suggested that the trend to relax the rigid standing requirements for non-resident aliens may indicate that non-resident aliens can invoke greater constitutional protection. *United States v. Demanett*, 629 F.2d 862, 866 (3d Cir. 1980), *cert. denied*,

Verdugo-Urquidez, the U.S. Supreme Court was presented squarely with this question.

II. UNITED STATES V. VERDUGO-URQUIDEZ

A. Factual Background

In *United States v. Verdugo-Urquidez*, the Supreme Court considered the extraterritorial application of the fourth amendment.⁶⁸ The U.S. Drug Enforcement Administration (the "DEA") filed a sealed complaint against Mr. Verdugo-Urquidez with the U.S. District Court for the Southern District of California.⁶⁹ The district court issued an arrest warrant for Mr. Verdugo-Urquidez.⁷⁰ The United States charged Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico,⁷¹ with criminal narcotics violations⁷² and murder.⁷³

450 U.S. 910 (1981) (assuming that fourth amendment protected both citizens and aliens aboard vessel on high seas); *United States v. Cortes*, 588 F.2d 106, 110-11 (5th Cir. 1979) (noting that once aliens become subject to liability under U.S. law they have right to fourth amendment protection); *United States v. Tiede*, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (finding that alien civilians charged with non-military offenses must be provided with same constitutional safeguards in U.S. court in Berlin that are provided to civilian defendants in any other U.S. court).

68. 110 S. Ct. 1056, 1059 (1990).

69. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1215-16 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990). The charges included "numerous narcotics and narcotics-related criminal violations including conspiracy to import multi-ton quantities of marijuana into the United States, possession with intent to distribute multi-ton quantities of marijuana, and engaging in an on-going criminal enterprise." *Id.* at 1215.

70. See *id.* at 1216; *United States v. Verdugo-Urquidez*, No. 86-0107 (Crim.) (S.D. Cal. Feb. 5, 1987), *reprinted in* Petition for Writ of Certiorari, at 82a, *United States v. Verdugo-Urquidez*, 109 S. Ct. 1741 (1989) (No. 88-1353) [hereinafter *Certiorari Petition*].

71. See U.S. Reply Brief, *supra* note 27, at 4 n.3. Mr. Verdugo-Urquidez asserted that at the time of the search, he was a "legal resident of the United States, Alien Registration Number A19-978-670." Respondent's Brief, *supra* note 19, at 3 n.2. The U.S. government contended that this was the first time that Mr. Verdugo-Urquidez made such a claim. *Id.* at 4 n.3. The U.S. government also pointed out that "although [Mr. Verdugo-Urquidez] apparently received a green card in 1970, . . . nothing in the record [suggested] that he had remained a resident alien since that time." *Id.*

72. *Verdugo-Urquidez*, 856 F.2d at 1215.

73. *Id.* The DEA contended that Mr. Verdugo-Urquidez participated in the torture and murder of DEA Special Agent Enrique Camarena Salazar. *Id.* Mr. Verdugo-Urquidez has since been convicted for his role in Agent Camarena's death and he was sentenced to life imprisonment plus 240 years. See Feldman, *Camarena's Killer Gets 240 Year Prison Term*, L.A. Times, Oct. 29, 1988, pt. 2, at 1, col. 1; see also Lieberman, *Camarena Case Spotlight Shifts to L.A. Unit Tactics*, L.A. Times, May 7, 1990, at A1, col. 5.

Unable to locate Mr. Verdugo-Urquidez in the United States to execute the arrest warrant,⁷⁴ DEA agents contacted the U.S. Marshal Service (the "Marshal Service").⁷⁵ The Marshal Service in turn contacted Mexican law enforcement officials, who advised the Marshal Service that Mr. Verdugo-Urquidez could be arrested by Mexican Federal Judicial Police (the "MFJP") in Mexico.⁷⁶ After receiving the U.S. warrant for Mr. Verdugo-Urquidez's arrest,⁷⁷ Mexican officers arrested Mr. Verdugo-Urquidez in Mexico and took him to the Marshal Service.⁷⁸ At the United States-Mexico border, the Marshal Service took custody of Mr. Verdugo-Urquidez, placed him under arrest, and subsequently delivered him to the DEA.⁷⁹

Without seeking prior approval from any other U.S. authorities, the DEA sought the Mexican government's permission to search Mr. Verdugo-Urquidez's Mexicali home.⁸⁰ The day after Mr. Verdugo-Urquidez's arrest, four DEA agents drove to Mexicali, Mexico, and met with ten to fifteen Mexican officers.⁸¹ Together, they searched both of Mr. Verdugo-Urquidez's residences in Mexico.⁸² The search disclosed a

74. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

75. *Id.* The DEA contacted the U.S. Marshal Service to determine whether Mexican authorities could apprehend Mr. Verdugo-Urquidez at his Mexicali residence and deliver him to the United States for trial. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Six Mexican officers stopped Mr. Verdugo-Urquidez in San Felipe, Baja California, Mexico while Mr. Verdugo-Urquidez was driving his car. *Id.* The officers arrested, handcuffed, and took Mr. Verdugo-Urquidez to the Mexico-United States border. *Id.* The Mexican officers never explained where they were taking Mr. Verdugo-Urquidez or why they arrested him. *Id.*

79. *Id.* The DEA in turn delivered Verdugo-Urquidez to the Metropolitan Correctional Center in San Diego, California. *Id.*

80. *Id.* at 1216 n.2; *United States v. Verdugo-Urquidez*, No. 86-0107 (Crim.) (S.D. Cal. Feb. 5 1987), *reprinted in* Certiorari Petition, *supra* note 70, at 85a. The district court noted that "[p]rior to leaving the DEA office in Calexico, Bowen [the Resident Agent in Charge of the DEA office in Calexico] did not contact the United States Attorney's Office in San Diego or the Department of Justice Office in Washington, D.C. in order to obtain authorization for the searches or to seek legal advice as to their legality." *Id.* The DEA's express purpose in conducting searches of both Mr. Verdugo-Urquidez's residences was to obtain evidence to use against him in the pending U.S. prosecution. *Id.* at 82a-83a; *see Verdugo-Urquidez*, 856 F.2d at 1225.

81. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1226 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990); *Verdugo-Urquidez*, No. 86-0107 (Crim.) (S.D. Cal. Feb. 5, 1987), *reprinted in* Certiorari Petition, *supra* note 70, at 85a.

82. *Verdugo-Urquidez*, 856 F.2d at 1216-17. The search occurred on the night of

tally sheet reflecting quantities of marijuana that Mr. Verdugo-Urquidez allegedly smuggled into the United States.⁸³ Before trial, Mr. Verdugo-Urquidez sought to suppress this evidence.⁸⁴

B. Procedural Background

In the U.S. District Court for the Southern District of California, Mr. Verdugo-Urquidez moved to suppress all of the evidence obtained from his home on the grounds that the evidence was seized in violation of his fourth amendment rights.⁸⁵ The district court granted Mr. Verdugo-Urquidez's motion, concluding that the fourth amendment applied to searches conducted abroad.⁸⁶ The district court found that the DEA agents had failed to justify searching Mr. Verdugo-Urquidez's premises without a warrant.⁸⁷ The district court also held that even if a warrant were not required for this search, the search was, nevertheless, unreasonable.⁸⁸

On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the district court.⁸⁹ The court relied

January 25-26, 1986. *Id.* at 1226-27. At approximately 3:00 a.m. or 4:00 a.m. on January 26, while DEA agents were sorting through several files that they found in a cabinet in the back portion of Mr. Verdugo-Urquidez's Mexicali house, a Mexican official placed documents in a briefcase and handed the briefcase to a DEA agent. *Id.* at 1227.

83. *Id.* at 1217.

84. See *infra* notes 85-108 and accompanying text (discussing procedural history of case).

85. *United States v. Verdugo-Urquidez*, No. 86-0107 (Crim.) (S.D. Cal. Feb. 5, 1987), reprinted in *Certiorari Petition*, *supra* note 70; see *Respondent's Brief*, *supra* note 23, at 2.

86. *Verdugo-Urquidez*, No. 86-0107(Crim.) (S.D. Cal. Feb. 5, 1987), reprinted in *Certiorari Petition*, *supra* note 70, at 81a. The court found that the DEA's conduct was unreasonable because the search was unconstitutionally general, the agents were not limited by any precise written or oral descriptions of the type of documentary evidence sought, the search occurred after 10 p.m., and the DEA failed to leave a contemporaneous inventory of the evidence seized. *Id.* at 102a.

87. *Id.* at 93a-101a. The district court held that the agents were required to secure a warrant before conducting the searches. *Id.* at 100a. The court explained that the Mexican Constitution "seems to require . . . a warrant similar to that required by the Fourth Amendment." *Id.* at 93a-94a.

88. *Id.* at 101a-102a.

89. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1230 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990). The Ninth Circuit found that the search violated the Warrant Clause of the fourth amendment, and thus it never reviewed the district court's alternative holding that the search was unreasonable even if no warrant were required. *Id.*

on the natural rights theory to explain the constitutional rights of aliens, and on *Reid v. Covert* to apply these rights outside the United States.⁹⁰ The court stated that all persons possess inalienable natural rights that are not subject to government violation.⁹¹ The Ninth Circuit concluded in *Verdugo-Urquidez* that non-resident aliens have a fourth amendment right to challenge U.S. government actions abroad.⁹²

The court found support in *Immigration and Naturalization Service v. Lopez-Mendoza*⁹³ for the proposition that illegal aliens present within the United States have fourth amendment rights.⁹⁴ In *Lopez-Mendoza*, illegal aliens sought to invoke the exclusionary rule in civil deportation hearings.⁹⁵ The Court held that deportation hearings are not criminal proceedings,⁹⁶ and application of the exclusionary rule was therefore inappropriate.⁹⁷ The Court suggested, however, that fourth amendment protections apply to aliens in criminal proceedings.⁹⁸ The court of appeals in *Verdugo-Urquidez* therefore reasoned that if illegal aliens within the United States possess fourth amendment rights, an alien like Mr. Verdugo-Urquidez, who is involuntarily present in the United States should also possess

90. *Id.* at 1218-20. The Ninth Circuit based its holding partly on the *Reid* Court's grant of extraterritorial protection to U.S. citizens abroad. *Id.* at 1218; see *supra* notes 57-66 and accompanying text (discussing *Reid*).

91. *Verdugo-Urquidez*, 856 F.2d at 1219-20.

92. *Id.* at 1218.

93. 468 U.S. 1032 (1984).

94. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1223 (9th Cir. 1988) (discussing *Lopez-Mendoza*), *rev'd*, 110 S. Ct. 1056 (1990).

95. *Lopez-Mendoza*, 468 U.S. at 1034.

96. *Id.* at 1038.

97. *Id.* at 1040-50.

98. *Id.* at 1050. Eight out of nine justices in *Lopez-Mendoza* suggested that the fourth amendment applies to illegal aliens. See *Verdugo-Urquidez*, 856 F.2d at 1223. A plurality of the Court stated, "We do not condone any violations of the Fourth Amendment that may have occurred in the arrest[] of . . . Lopez-Mendoza Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." *Lopez-Mendoza*, 468 U.S. at 1050. In their dissenting opinions, four other justices also expressed the view that illegal aliens have fourth amendment rights. See *id.* at 1051 (Brennan, J., dissenting) (stating that "[i]n this case, federal law enforcement officers arrested [Lopez-Mendoza and Sandoval Sanchez] in violation of their Fourth Amendment rights"); *id.* at 1055 (White, J., dissenting) (stating that illegal aliens often do not challenge fourth amendment violations because aliens are removed from United States once U.S. government improperly obtains illegal evidence against them); *id.* at 1060 (Marshall, J., dissenting) (recognizing fourth amendment rights of illegal aliens).

these rights.⁹⁹

The Ninth Circuit majority rejected the compact theory¹⁰⁰ espoused by the dissent,¹⁰¹ and found that fourth amendment protection extended to the government's search of Mr. Verdugo-Urquidez's Mexicali residence.¹⁰² The court described the case as a "joint venture"¹⁰³ in which the DEA controlled the operation.¹⁰⁴ In the absence of a search warrant or exigent circumstances, the search was therefore unlawful.¹⁰⁵ Consequently, the Ninth Circuit reasoned that the District Court properly suppressed the evidence obtained in the search.¹⁰⁶ The U.S. government petitioned the U.S. Supreme Court to review the decision under a writ of certiorari.¹⁰⁷ The Supreme Court granted the petition for the writ of certiorari.¹⁰⁸

99. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1224 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

100. *Id.* at 1218-21 (acknowledging that U.S. Supreme Court has used compact theory to explain aspects of federalism, but not to define extraterritorial reach of Constitution).

101. *Id.* at 1231-36 (Wallace, J., dissenting). The dissent relied on *Curtiss-Wright* and *Eisentrager* to argue that the government is not restrained by the Constitution when it acts against aliens outside the United States. *Id.*

102. *Id.* at 1227.

103. *Id.* at 1228. The court noted that U.S. authorities planned and instigated the search to obtain evidence for the U.S. trial, that the U.S. agents' activity took place before, during, and after the search. *Id.* The court also noted that the Mexican authorities informed U.S. agents before the search that the United States could keep evidence seized. *Id.* Finally, the court said that U.S. agents not only asked for assistance from Mexican authorities but asked for permission to conduct their own operation. *Id.*; see *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) (finding joint venture where U.S. agents' role was not subordinate to rule of foreign police); *United States v. Emery*, 591 F.2d 1266, 1267-68 (9th Cir. 1978). The *Emery* Court found that there was a joint venture where U.S. agents informed foreign authorities of a possible drug smuggling transaction in foreign territory, planted undercover U.S. agent in the foreign territory, coordinated surveillance of the suspected site, and gave prearranged signal for the foreign police to move in and make the arrest. *Id.* at 1268.

104. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1228 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

105. *Id.* at 1230.

106. *Id.*

107. See *United States v. Verdugo-Urquidez*, 109 S. Ct. 1741 (1989).

108. *Id.*

III. THE REASONING OF THE SUPREME COURT

A. The Plurality Opinion

The plurality opinion of Chief Justice Rehnquist, joined by Justices White, O'Connor, and Scalia, reversed the decision of the U.S. Court of Appeals for the Ninth Circuit.¹⁰⁹ The plurality concluded that the fourth amendment does not apply to searches conducted abroad by U.S. agents of the property of an alien who lacks sufficient connection to the United States.¹¹⁰

The plurality, relying primarily on *Eisentrager* and the *Insular Cases*, considered the extraterritorial application of the fourth amendment and focused on three factors.¹¹¹ The plurality first looked at the significance of the location of the constitutional violation.¹¹² The plurality then focused on the historical significance of the words "the people" as used in the fourth amendment.¹¹³ Finally, the plurality established the requirement that a defendant have voluntary, sufficient connection with the United States.¹¹⁴

The plurality began its analysis by stressing that the place where an alleged constitutional violation occurs is significant.¹¹⁵ To illustrate this point, the Court contrasted the fourth and fifth amendments.¹¹⁶ While a fourth amendment violation occurs wherever the unreasonable governmental intrusion takes place, a fifth amendment violation occurs only at trial.¹¹⁷ Thus, if the United States violated Mr. Verdugo-Urquidez's fourth amendment rights, the violation occurred

109. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1066 (1990).

110. *Id.* at 1060-66.

111. *See infra* notes 112-43 and accompanying text (discussing three factors plurality considered).

112. *Verdugo-Urquidez*, 110 S. Ct. at 1060.

113. *Id.* at 1060-66; *see infra* notes 120-25. For the text of the fourth amendment, *see supra* note 1.

114. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 & 1066 (1990).

115. *See id.* at 1061; *United States v. Calandra*, 414 U.S. 338, 354 (1974). The Court emphasized that a violation of the fourth amendment "is fully accomplished" wherever the unreasonable governmental intrusion takes place.

116. *Verdugo-Urquidez*, 110 S. Ct. at 1060 (characterizing fifth amendment privilege against self-incrimination as fundamental trial right of criminal defendants).

117. *Id.* The plurality noted, however, that the fifth amendment was not at issue in this case. *Id.*; *see Kastigar v. United States*, 406 U.S. 441, 453 (1972) (noting that conduct by U.S. law enforcement officials prior to trial may impair fifth amendment right, but constitutional violation occurs only at trial). For the text of the fifth amendment, *see supra* note 9.

“solely” in Mexico.¹¹⁸ The U.S. Constitution, therefore, could not apply to Mr. Verdugo-Urquidez in light of his attenuated relationship to the United States.¹¹⁹

In its interpretation of the history of the fourth amendment,¹²⁰ the plurality found significance in the textual reference to “the people” in the fourth amendment as opposed to “persons” in the fifth and sixth amendments.¹²¹ In drawing this “people-person distinction,” the plurality opined that the Framers did not use different words merely to avoid redundancy in the text.¹²² Rather, the plurality determined that the Framers used “the people” to provide protection only to “the people” of the United States.¹²³ Mr. Verdugo-Urquidez, therefore, could be given protection only if he was one of “the people” of the United States.¹²⁴ The plurality concluded that the fourth amendment was never intended to restrain the actions of the federal government outside the United States.¹²⁵

The plurality found additional support for denying the extraterritorial application of the fourth amendment in *Johnson v. Eisentrager*.¹²⁶ In *Eisentrager*, the Court held that enemy aliens arrested and imprisoned outside the United States after World War II could not obtain writs of habeas corpus in U.S. federal

118. *Verdugo-Urquidez*, 110 S. Ct. at 1060; see *United States v. Leon*, 468 U.S. 897, 906 (1984) (“wrong condemned by the [Fourth] Amendment is ‘fully accomplished’ by the unlawful search or seizure itself”); see also *Calandra*, 414 U.S. at 354 (“wrong [condemned by fourth amendment] is fully accomplished by the original search without probable cause”).

119. *Verdugo-Urquidez*, 110 S. Ct. at 1066.

120. *Id.* at 1061 (finding no indication that framers of U.S. Constitution understood fourth amendment as restraint on U.S. government’s action against aliens outside United States).

121. *Id.* at 1060-61. The plurality noted that “the people” seems to have been a term of art employed in the preamble to the U.S. Constitution and in the first, second, fourth, ninth, and tenth amendments to refer to a class of persons who are part of a national community or who have otherwise developed sufficient connection with the United States to be considered a part of the United States. *Id.* at 1061. “Person,” on the other hand, was used in the fifth and sixth amendments to regulate criminal procedure. *Id.*

122. *Id.* at 1060 (quoting *Amicus Curiae* Brief of American Civil Liberties Union, at 12 n.4, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353)).

123. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990).

124. *Id.* This conclusion is grounded in the theory that the Constitution is a social contract or compact that protects only those who are parties to it. See *supra* notes 19-29 and accompanying text (discussing social contract or compact theory).

125. *Id.* at 1061.

126. 339 U.S. 763 (1950).

courts.¹²⁷ The *Verdugo-Urquidez* plurality reasoned that if the fifth amendment, which addresses the relatively universal category of "persons," does not extend outside the United States,¹²⁸ there is great reason to find that the fourth amendment, limited only to "the people," also does not apply beyond the United States.¹²⁹

Furthermore, the plurality found that the history of the fourth amendment suggests that the Framers sought to restrict searches and seizures occurring in domestic and not foreign matters.¹³⁰ The plurality found that the fourth amendment's historical background did not suggest that it was intended to restrain the actions of the federal government against aliens in foreign territory or in international waters.¹³¹

Additionally, the plurality distinguished Mr. Verdugo-Urquidez from the category of aliens who enjoy certain constitutional rights by establishing a sufficient connection test.¹³² Accordingly, Mr. Verdugo-Urquidez was entitled to fourth amendment protection only if he attained a sufficient connection with the United States.¹³³ The plurality found that Mr. Verdugo-Urquidez did not have sufficient connections.¹³⁴ The plurality's basis for this finding was the involuntary nature of Mr. Verdugo-Urquidez's presence in the United States as well

127. *Id.* at 784. For a discussion of *Eisentrager*, see *supra* notes 47-56 and accompanying text.

128. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990) (claiming that *Eisentrager* stands for proposition that aliens are not entitled to fifth amendment rights outside United States).

129. *Id.* The plurality states that "[i]f such is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.'" *Id.*

130. *Id.* at 1061.

131. *Id.* at 1061-62; see *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801) (involving seizure of French vessels during "undeclared war" with France in 1798 and 1799). The plurality cited *Talbot*, stating that the Court "never suggested that the Fourth Amendment restrained the authority of Congress or of U.S. agents to conduct operations" against foreign nationals. *Verdugo-Urquidez*, 110 S. Ct. at 1062.

132. *Verdugo-Urquidez*, 110 S. Ct. at 1064.

133. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, J., dissenting), *rev'd*, 110 S. Ct. 1056 (1990). Judge Wallace stated that "some measure of allegiance to the United States, as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials." *Id.*

134. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990).

as the location of the search outside the United States.¹³⁵

The plurality also reasoned that the application of the fourth amendment to searches conducted abroad could have serious consequences for U.S. agents conducting activities beyond U.S. borders.¹³⁶ Moreover, the plurality was concerned that applying the fourth amendment in situations where the U.S. government employed armed forces outside its borders would disrupt the ability of the political branches to respond to foreign situations involving national interest.¹³⁷

Furthermore, the plurality was concerned that granting Mr. Verdugo-Urquidez fourth amendment protection in this case would provide aliens who had no prior connection to the United States with a cause of action for alleged violations occurring in foreign countries.¹³⁸ The plurality noted that recognizing such a cause of action would raise serious separation of powers problems by entangling the judiciary in the powers of the executive and the legislature.¹³⁹ The plurality pointed out that situations involving foreign searches of non-resident aliens would likely involve "special factors counselling hesitation," and the courts, therefore, could not create a cause of action.¹⁴⁰ Nevertheless, the U.S. government would still be required to make a case-by-case inquiry into the availability of

135. *Id.* (rejecting Justice Stevens' assertion that "lawful but involuntary" presence was sufficient to satisfy "substantial connection" test); see *Verdugo-Urquidez*, 856 F.2d at 1238 (Wallace, J., dissenting) (finding that "[a]bsent an intention to form bonds with the United States, no constitutional compact can be fairly implied"). *But see Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The *Mathews* Court noted that

[t]here are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

Id. (citations omitted).

136. *Verdugo-Urquidez*, 110 S. Ct. at 1066; see *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

137. *Verdugo-Urquidez*, 110 S. Ct. at 1065.

138. *Id.* (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). A *Bivens* action is a judicially created remedy that allows an injured party to claim damages from U.S. officials for violations of the Constitution. *Id.*

139. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1065 (1990).

140. *Cf. Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing to create *Bivens* remedy for allegedly unconstitutional termination of Social Security disability benefits); *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983) (refusing to create *Bivens* rem-

such an action.¹⁴¹

Finally, the plurality contended that applying the fourth amendment to aliens abroad would require the legislative and executive branches of the U.S. government to determine what might be reasonable in searches and seizures abroad.¹⁴² The plurality, therefore, declined to place restrictions on the power of U.S. agents to conduct searches and seizures outside the United States where the political branches have declined to act through diplomatic understanding, treaty, or legislation.¹⁴³

The Supreme Court found the Ninth Circuit's reliance on *Immigration and Naturalization Service v. Lopez-Mendoza* misplaced.¹⁴⁴ The court of appeals relied on *Lopez-Mendoza* as support for the proposition that the fourth amendment rights reserved to "the people" are possessed by undocumented aliens within the United States.¹⁴⁵ The plurality, however, rejected the Ninth Circuit's application of the *Lopez-Mendoza* holding.¹⁴⁶ The plurality stated that *Lopez-Mendoza* did not encompass the issue of whether the fourth amendment extended to illegal aliens in the United States.¹⁴⁷ According to the Court, *Lopez-*

edy against U.S. military officers for allegedly unconstitutional treatment of soldiers, based upon special circumstances inherent in military context).

141. *Verdugo-Urquidez*, 110 S. Ct. at 1065.

142. *Id.* at 1065-66 (noting that applying fourth amendment to extraterritorial searches would "plunge [executive and legislative branches] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad").

143. *Verdugo-Urquidez*, 110 S. Ct. at 1066.

144. *Id.* at 1064-65; see *Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (holding that fourth amendment exclusionary rule does not apply in deportation proceeding); see also *supra* note 96 (noting that eight of nine justices and the Solicitor General in *Lopez-Mendoza* believed that illegal aliens have fourth amendment rights when in United States). Courts, therefore, deem an alien's presence within the United States as sufficient justification to demand an alien's amenability to U.S. laws and in return U.S. courts extend protections under those laws. *Lopez-Mendoza*, 468 U.S. at 1052 (Brennan, J., dissenting); see *Plyler v. Doe*, 457 U.S. 202, 211 n.10, 215 (1982) (aliens in United States are subject to U.S. criminal and civil laws and consequently afforded certain constitutional protections).

145. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1224 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

146. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064-65 (1990). The Court further stated that Mr. Verdugo-Urquidez had no voluntary connection to the United States and therefore was not among the people protected by the Constitution. *Id.* at 1064. The plurality distinguished *Lopez-Mendoza* because the aliens seeking constitutional protection in that case were in the United States voluntarily and thus had accepted societal obligations. *Id.* at 1065.

147. *Id.* at 1064.

Mendoza only addressed whether the fourth amendment's exclusionary rule applied to civil deportation proceedings rather than criminal proceedings.¹⁴⁸

Further, the Court explicitly rejected the Ninth Circuit's interpretation of *Reid v. Covert* as standing for the proposition that the fourth amendment constrains U.S. federal officials wherever and against whomever they act.¹⁴⁹ The Court contended that the Ninth Circuit's "global" application of the Constitution was inconsistent with the *Insular Cases*.¹⁵⁰ In the *Insular Cases*, the Court noted that some but not all constitutional provisions apply to U.S. governmental activity in places where the United States has sovereign power.¹⁵¹ The Court reasoned that because the United States exercises no sovereign power in Mexico, there was little basis for applying the Constitution to the search of Mr. Verdugo-Urquidez's Mexicali residence.¹⁵²

B. *The Concurring Opinions*

1. Concurring Opinion of Justice Kennedy

Although Justice Kennedy agreed that no fourth amendment violation occurred in *Verdugo-Urquidez*, he explicitly rejected the plurality's use of the "people-person" distinction.¹⁵³ Justice Kennedy also doubted the validity of a strict interpretation of the Constitution as a social compact.¹⁵⁴ Instead, Justice

148. *Id.*

149. *Id.* at 1063; see *supra* notes 57-63 and accompanying text (discussing *Reid* case).

150. *Verdugo-Urquidez*, 110 S. Ct. at 1062; see *supra* notes 42-46 and accompanying text (discussing *Insular Cases*). See generally Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926); Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

151. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1062 (1990) (citing *Insular Cases*).

152. *Id.*

153. *Id.* at 1066-67 (Kennedy, J., concurring). Justice Kennedy stated, "I cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach." *Id.* at 1067.

154. *Id.* at 1066-67 (Kennedy, J., concurring); 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 153-62 (1987) (reprint of 1st ed. 1833). Justice Story cast considerable doubts on the validity of the compact theory in stating that "there is very strong negative testimony against the notion of [the Constitution]

Kennedy suggested that a case-by-case analysis should apply in cases of extraterritorial searches.¹⁵⁵ The analysis would focus on which constitutional guarantees should apply in light of the particular circumstances and practical considerations of the case.¹⁵⁶ Justice Kennedy stated that restrictions on the activities of U.S. agents concerning aliens outside the United States should be based on the Constitution's general principles.¹⁵⁷

In applying this approach, Justice Kennedy considered the alienage of Mr. Verdugo-Urquidez,¹⁵⁸ the location of the search,¹⁵⁹ and the nature of the warrant requirement.¹⁶⁰ After noting that Mr. Verdugo-Urquidez was an alien, and that the warrant requirement should not apply in Mexico, Justice Kennedy found no fourth amendment violation.¹⁶¹

Finally, Justice Kennedy considered whether Verdugo-Urquidez's due process rights had been violated.¹⁶² Because the court where Verdugo-Urquidez would be prosecuted was

being a compact . . . founded upon the known history of the time, and the acts of ratification, as well as upon the antecedent articles of confederation." *Id.* § 158.

155. *Verdugo-Urquidez*, 110 S. Ct. at 1067 (Kennedy, J., concurring).

156. *Id.* (Kennedy, J., concurring) (citing Justice Harlan's concurrence in *Reid*). Justice Harlan stated that constitutional protections do not necessarily apply in all circumstances in every foreign country. *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

157. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1067 (1990) (Kennedy, J., concurring) (stating that constitutional protections must be interpreted "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad").

158. *Id.* at 1066 (Kennedy, J., concurring) (observing that in cases involving application of Constitution, Court has considered whether person claiming its protection is citizen or alien); see *Reid*, 354 U.S. 1; *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

159. *Verdugo-Urquidez*, 110 S. Ct. at 1067-68 (Kennedy, J., concurring).

160. *Id.* at 1067 (Kennedy, J., concurring) (citing Justice Harlan's concurrence in *Reid*). Justice Harlan stated: "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world [T]here are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place." *Reid*, 354 U.S. at 74 (Harlan, J., concurring); see *supra* notes 57-63 and accompanying text (discussing *Reid* case).

161. *Verdugo-Urquidez*, 110 S. Ct. at 1067-68 (Kennedy, J., concurring). Justice Kennedy noted that, "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.*

162. *Id.* at 1068 (Kennedy, J., concurring).

established under article III of the U.S. Constitution, all trial proceedings would be governed by the Constitution.¹⁶³ Thus, the dictates of the due process clause of the fifth amendment would protect Mr. Verdugo-Urquidez.¹⁶⁴ Justice Kennedy, therefore, concluded that Mr. Verdugo-Urquidez's due process rights were not violated by the search.¹⁶⁵

2. Concurring Opinion of Justice Stevens

Justice Stevens disagreed with the plurality's definition of "the people" and found that "the people" included aliens lawfully present in the United States.¹⁶⁶ Justice Stevens concluded, however, that while Mr. Verdugo-Urquidez was one of "the people" entitled to fourth amendment protection, he was not entitled to the protection of the Warrant Clause.¹⁶⁷ Justice Stevens focused instead on the reasonableness of the search,¹⁶⁸ and concluded that it was reasonable because it was conducted by the United States in cooperation with Mexican authorities.¹⁶⁹

163. *Id.* (Kennedy, J., concurring).

164. *Id.* (Kennedy, J., concurring).

165. *Id.* (Kennedy, J., concurring) (noting that court where Mr. Verdugo-Urquidez would be prosecuted is established under article III of Constitution, all trial proceedings are governed by Constitution, and dictates of Due Process Clause of fifth amendment protect him).

166. *Id.* (Stevens, J., concurring).

167. *Id.* Justice Stevens found that the Warrant Clause was inapplicable to foreign searches because U.S. magistrates have no power to authorize such searches. *Id.* A search warrant is "[a]n order in writing, issued by a justice or other magistrate, in the name of the state, directed to . . . [an] officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of crime, or things otherwise criminally possessed . . ." BLACK'S LAW DICTIONARY 1350 (6th ed. 1990); see FED. R. CRIM. P. 41(a), 18 U.S.C. app. (1988) (limiting magistrates and judges to issuing warrants for searches within their district).

168. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1068 (1990) (Stevens, J., concurring).

169. *Id.* (Stevens, J., concurring). *But see* *United States v. Conroy*, 589 F.2d 1258, 1265 (5th Cir.) (noting that "mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality even though the search would be valid under local law"), *cert. denied*, 444 U.S. 831 (1979).

C. The Dissenting Opinions

1. Dissenting Opinion of Justice Brennan

Justice Brennan, joined by Justice Marshall, dissented from the plurality's holding.¹⁷⁰ Justice Brennan rejected the contours of the "sufficient connection" test adopted by the plurality.¹⁷¹ He contended that the plurality failed to recognize the reciprocal nature of the U.S. government's ability to impose its criminal law on others.¹⁷²

Justice Brennan suggested that the principles of mutuality and fundamental fairness¹⁷³ required that the "connection" of the U.S. government to the criminal defendant was the appropriate focus of the sufficient connection test.¹⁷⁴ Justice Brennan disagreed with the Court's finding that an alien must be voluntarily present in the United States.¹⁷⁵ He argued that an alien present in the United States awaiting criminal prosecution in a U.S. federal court accepted ample societal obligations to satisfy the plurality's sufficient connection test.¹⁷⁶

Additionally, Justice Brennan criticized the plurality's limitation on the class of persons who may assert fourth amendment protections.¹⁷⁷ Justice Brennan redefined the term "the people" as "the governed."¹⁷⁸ His definition recognized the natural rights theory, but also required that Mr. Verdugo-Urquidez have some connection with the United States or that

170. *Verdugo-Urquidez*, 110 S. Ct. at 1068 (Brennan, J., dissenting).

171. *Id.* at 1070 (Brennan, J., dissenting). For a discussion of the plurality's sufficient connection test, see *supra* notes 132-35 and accompanying text.

172. *Id.* at 1069-70 (Brennan, J., dissenting) (stating that "Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law").

173. Justice Brennan noted that "[m]utuality is essential to ensure the fundamental fairness that underlies our Bill of Rights." *Id.* at 1071. He further observed that respecting the rights of foreign nationals encourages other nations to respect the rights of U.S. citizens. *Id.*

174. *Id.* at 1070-71 (Brennan, J., dissenting) (stating that "[r]espondent is entitled to the protections of the Fourth Amendment because our government has treated him as a member of our community for the purposes of enforcing our laws").

175. *Id.* at 1070 n.5 (Brennan, J., dissenting). Justice Brennan noted that this requirement had been previously rejected by the Court. *Id.*; see *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

176. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1070 (1990) (Brennan, J., dissenting).

177. *Id.* at 1073 (noting that fourth amendment focuses on what U.S. government can and cannot do, rather than against whom U.S. government action may be taken).

178. *Id.* at 1072 (Brennan, J., dissenting).

the United States have some connection with Mr. Verdugo-Urquidez.¹⁷⁹ Justice Brennan, therefore, stopped short of adopting the proposition that constitutional rights must be accorded to persons everywhere.¹⁸⁰

In support of this alternative definition of "the people," Justice Brennan argued that the Bill of Rights did not bestow rights upon individuals, but acknowledged the existence of rights that inhered in each person.¹⁸¹ He concluded that the Bill of Rights, rather than establishing new rights applicable only to citizens, prohibited the U.S. government from infringing on these pre-existing rights and liberties.¹⁸²

Further, Justice Brennan argued that the drafting history of the fourth amendment did not support the plurality's interpretation of the term "the people."¹⁸³ Rather, Justice Brennan found that the fourth amendment was grounded in the natural rights theory.¹⁸⁴ Justice Brennan contended that the conduct of the U.S. government in *Verdugo-Urquidez* ignored the notion of fundamental fairness.¹⁸⁵ According to Justice Brennan, when the United States imposed a societal obligation to com-

179. *Id.* (Brennan, J., dissenting); see *supra* note 15 and accompanying text (discussing natural rights theory).

180. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1072 (1990) (Brennan, J., dissenting).

181. *Id.* at 1073 (Brennan, J., dissenting); see Respondent's Brief, *supra* note 23, at 16.

182. *Verdugo-Urquidez*, 110 S. Ct. at 1073 (Brennan, J., dissenting).

183. *Id.* at 1073-74 (Brennan, J., dissenting). First, the drafters of the fourth amendment rejected limiting the applicability of the fourth amendment to "citizens," "freemen," "residents," or "American people." *Id.* at 1073. Second, during Congressional and Senate consideration, no speaker or commentator even referred to the term "the people" as a limitation. *Id.* at 1074. Finally, none of the cases relied on by the plurality purports to read the phrase "the people" as limiting the protection to those with "sufficient connection" to the United States. *Id.*

184. *Id.* at 1072-74 (Brennan, J., dissenting). The natural rights theory permeates early U.S. political documents. See, e.g., The Declaration of Independence (U.S. 1776), reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 251-55 (1971). See generally B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON* 170 (1968); II J. KENT, *COMMENTARIES ON AMERICAN LAW* (1827).

185. *Verdugo-Urquidez*, 110 S. Ct. at 1071 (Brennan, J., dissenting) (noting that fundamental fairness and ideals underlying Bill of Rights compel conclusion that fourth amendment protects those subject to U.S. criminal laws). Justice Brennan observed that the behavior of U.S. law enforcement agents abroad sends a strong message about the rule of law to individuals everywhere. He noted that "[i]f we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness." *Id.*

ply with U.S. criminal law on Mr. Verdugo-Urquidez, the United States became obliged to respect certain correlative rights, among them Mr. Verdugo-Urquidez's fourth amendment rights.¹⁸⁶

Justice Brennan recognized the strong probability that cases would come before the federal courts involving international criminal conspiracy.¹⁸⁷ In these cases citizens and foreign nationals may be co-defendants, charged under the same statute for the same illegal conduct.¹⁸⁸ Where the U.S. government holds foreign co-defendants to the same standard of conduct, Justice Brennan argued that withholding the use of the exclusionary rule from aliens and granting it to citizens sets up an unacceptable double standard of justice.¹⁸⁹

Finally, Justice Brennan disagreed with the plurality's opinion that the Warrant Clause was only applicable to domestic searches.¹⁹⁰ He recognized that there is no statutory authority for the issuance of a warrant for a foreign search, and even if such a warrant were issued, it would have no force in the country where the search occurred.¹⁹¹ Justice Brennan, nevertheless, concluded that the Warrant Clause must be applied to both domestic and foreign searches to assure determination by a neutral, detached magistrate.¹⁹²

186. *Id.* at 1070-71 (Brennan, J., dissenting).

187. *Id.* (Brennan, J., dissenting).

188. *Id.* (Brennan, J., dissenting); see *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1215 (9th Cir. 1988) (noting that Mr. Verdugo-Urquidez was awaiting trial on twenty counts of forty-one-count indictment returned against him and thirty-eight other defendants), *rev'd*, 110 S. Ct. 1056 (1990).

189. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1071 (1990) (Brennan, J., dissenting); see *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 721 (1987). The Restatement (Third) states that

the provisions of the United States Constitution safeguarding individual rights generally control the United States government in the conduct of its foreign relations as well as in domestic matters, and generally limit governmental authority whether it is exercised in the United States or abroad, and whether such authority is exercised unilaterally or by international agreement.

Id.

190. *Verdugo-Urquidez*, 110 S. Ct. at 1075-76 (Brennan, J., dissenting); see *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 721 (1987).

191. *Verdugo-Urquidez*, 110 S. Ct. at 1077 (Brennan, J., dissenting).

192. *Id.* at 1076 (Brennan, J., dissenting); see *Steagald v. United States*, 451 U.S. 204, 222 (1981) (stating that "inconvenience incurred by the police [in obtaining warrant] is simply not that significant").

2. Dissenting Opinion of Justice Blackmun

Although Justice Blackmun adopted Justice Brennan's definition of "the people" as "the governed," he rejected Justice Brennan's suggestion that the fourth amendment potentially governs every action by U.S. officials abroad that can be characterized as a search or seizure.¹⁹³ Rather, Justice Blackmun found that an alien is only entitled to fourth amendment protection when a U.S. official exercises sovereign authority over him.¹⁹⁴ Justice Blackmun, therefore, contended that because U.S. officials exercised sovereign authority over Mr. Verdugo-Urquidez and held him accountable for violations of U.S. law, he was treated as one of "the governed" and entitled to fourth amendment protection.¹⁹⁵

In finding that the Warrant Clause was not applicable to foreign searches,¹⁹⁶ Justice Blackmun considered whether probable cause existed to render the search of Mr. Verdugo-Urquidez's home reasonable.¹⁹⁷ Unconvinced that this issue had been properly addressed, Justice Blackmun would have vacated the judgment of the court of appeals and remanded the case for further proceedings.¹⁹⁸

IV. *THE PLURALITY'S DECISION IN VERDUGO-URQUIDEZ IS MISGUIDED*

The *Verdugo-Urquidez* plurality primarily relied on three factors in holding that Mr. Verdugo-Urquidez, a non-resident alien involuntarily present in the United States, was not protected by the fourth amendment.¹⁹⁹ The plurality's opinion is misguided for several reasons. The opinion relies on the significance of the "people-person distinction," yet the plurality admitted that the distinction is inconclusive.²⁰⁰ Moreover, the unilateral focus of the plurality's sufficient connection test is

193. *Verdugo-Urquidez*, 110 S. Ct. at 1077 (Blackmun, J., dissenting).

194. *Id.* at 1077-78 (Blackmun, J., dissenting).

195. *Id.* at 1078 (Blackmun, J., dissenting).

196. *Id.* (Blackmun, J., dissenting).

197. *Id.* (Blackmun, J., dissenting).

198. *Id.* (Blackmun, J., dissenting).

199. *See supra* notes 111-43 and accompanying text (discussing three factors relied on by plurality).

200. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 (1990); *see infra* notes 203-17 and accompanying text (discussing "people-person distinction").

inconsistent with the principles of mutuality and fundamental fairness.²⁰¹ Furthermore, the plurality's reliance on the *Insular Cases* and *Johnson v. Eisentrager* is misplaced and its interpretation of these cases is inconsistent with the Court's *Reid v. Covert* decision.²⁰²

Substantial support existed for the extension of the protection of the fourth amendment to Mr. Verdugo-Urquidez. Instead, the plurality adopted a constitutional standard that permits U.S. agents to disregard the rights of non-resident aliens abroad who lack sufficient connections to the United States.

A. *The Plurality's Sufficient Connection Test Is Flawed*

The plurality formulated the sufficient connection test to determine who falls within the category of "the people" deserving of fourth amendment protection.²⁰³ This test, however, is flawed because it is erroneously based on the premise that an important distinction exists between the terms "the people" and "persons." Furthermore, the plurality failed to define clearly the terms "connection" and "sufficient."²⁰⁴ Moreover, the plurality's emphasis on an individual's connec-

201. See *Verdugo-Urquidez*, 110 S. Ct. at 1071-72 (Brennan, J. dissenting). In several cases, however, the Court applied a connection test which had a unilateral focus to determine whether the U.S. federal securities laws applied in foreign countries. *International Inves. Trust v. Cornfeld*, 619 F.2d 909 (2d Cir. 1980) (finding in case where U.S. nationality of issuer and consummation of transaction in United States were factors strongly supporting application of U.S. securities laws to foreigners who purchased U.S. securities); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), cert. denied, 423 U.S. 1018 (1975). In *Bersch*, the court held that the federal securities laws were applicable to the sales of securities to U.S. residents in the United States whether or not acts of material importance occurred in the United States. *Id.* at 993. The court held further that the securities laws applied to U.S. residents abroad only if acts of material importance occurred in the United States and significantly contributed to losses. *Id.* Finally, the court found that the federal securities laws did not apply to losses from sales of securities to foreigners outside the U.S. where acts in the United States did not directly cause such losses. *Id.*; *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1336-37 (2d Cir. 1972) (sustaining subject matter jurisdiction over transaction in securities of foreign issuer consummated outside United States where many acts of deception occurred in United States).

202. See *infra* notes 239-57 and accompanying text (discussing apparent retreat to territorial approach to constitutional protection).

203. *Verdugo-Urquidez*, 110 S. Ct. at 1061.

204. *Id.* at 1061; see *supra* notes 132-35 and accompanying text (discussing plurality's sufficient connection test).

tion to the United States is inappropriate.²⁰⁵

The test assumes that reference to “the people” in the fourth amendment, as opposed to “persons” in the fifth and sixth amendments, signifies an intent to limit the reach of the fourth amendment. Yet the plurality explicitly admits that the significance of this textual reference is inconclusive.²⁰⁶

Indeed, the Supreme Court has implicitly rejected a textual approach to fourth amendment analysis. In *Katz v. United States*,²⁰⁷ the FBI gathered evidence against Katz by attaching an electronic listening and recording device to the outside of the telephone booth from which he routinely placed calls.²⁰⁸ The Court rejected the government’s argument that use of the device did not constitute a search because the device did not physically enter the telephone booth.²⁰⁹ In *Katz*, the Court abandoned the textual theory that property law controls fourth amendment analysis.²¹⁰ Rather, the Court concluded that “the fourth amendment protects people, not places” against unreasonable searches and seizures.²¹¹

Nevertheless, the plurality relies on this distinction to formulate the sufficient connection test.²¹² It seems doubtful that the drafters of the Bill of Rights meant to distinguish people

205. See *infra* notes 214-29 and accompanying text (discussing plurality’s unilateral focus in evaluating Mr. Verdugo-Urquidez’s “connection” to United States).

206. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 (1990).

207. 389 U.S. 347 (1967). In *Katz*, a bookmaker was convicted of conducting gambling activities across state lines in violation of a federal statute. *Id.* at 348.

208. *Id.*

209. *Id.* at 352.

210. *Id.* at 352-53. Previously, the Court had developed a body of case law supporting a textual approach to the fourth amendment through a property law analysis. See *Silverman v. United States*, 365 U.S. 505, 511-12 (1961) (holding that use of “spike mike” to listen to conversations inside house constituted search because spike mike physically intruded on petitioner’s property); *Goldman v. United States*, 316 U.S. 129, 134-36 (1942) (finding that placement of dictaphone on outside of wall did not constitute search because there was no physical trespass by dictaphone); *Olmstead v. United States*, 277 U.S. 438, 457, 464, 466 (1928) (holding that fourth amendment is limited to searches and seizures of tangible property and absence of penetration of such property forecloses further inquiry).

211. *Katz v. United States*, 389 U.S. 347, 351 (1967).

212. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 (1990). In discussing the drafting of the fourth amendment, the plurality found that the purpose of the fourth amendment was to restrict searches and seizures conducted by U.S. agents in the United States. The plurality found no historical evidence to support the proposition that the fourth amendment was intended to restrain U.S. agents acting against aliens outside the United States. *Id.* at 1061-62.

and persons.²¹³ Even if the drafters did intend to distinguish between people and persons, the *Katz* Court rejected a strict territorial interpretation in an effort to accomplish the fourth amendment's ideals.

Additionally, the plurality's sufficient connection test unilaterally focused on an individual's connection to the United States without regard for the U.S. government actions taken against the individual.²¹⁴ In adopting this unilateral focus, the plurality implicitly adhered to compact theory principles.²¹⁵ The basic principle of the compact theory is that only the parties to the Constitution have enforceable rights under it.²¹⁶ Similarly, under the plurality's sufficient connection test only persons who reside in the United States or who have developed sufficient connection to the United States are protected by the fourth amendment.²¹⁷ The plurality, therefore, considered only Mr. Verdugo-Urquidez's connections to the United States without regard for the connection of the United States with Mr. Verdugo-Urquidez.

The Supreme Court had used the compact theory in *Ross* to explain that the Constitution does not apply to the extraterritorial acts of the federal government.²¹⁸ However, in light of the historical background of the Bill of Rights²¹⁹ and *Reid v.*

213. See 1 ANNALS OF CONGRESS 440-66 (J. Gales ed. 1834). In introducing the Bill of Rights in the House of Representatives on June 8, 1789, James Madison stated that "[i]t may be said, in some instances, [the Bill of Rights does] no more than state the perfect equality of mankind. This to be sure, is an absolute truth, yet it is not absolutely necessary to be inserted at the head of the Constitution." *Id.* at 454. Further, Mr. Madison speaks throughout of the liberty of the people or the rights of the people as if people were merely the plural of person. See *id.* at 448-55.

Additionally, the Virginia Declaration of Rights of 1776 speaks generally of the rights of the people, but section 10, which states that general warrants "are grievous and oppressive" and may be fairly considered an antecedent of the fourth amendment, uses "person or persons." N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 79-105 (1937).

214. See *supra* note 201 and accompanying text (discussing unilateral focus of definition of connection in plurality's sufficient connection test).

215. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1061 (1990); see Recent Development, *supra* note 5, at 833.

216. See *supra* notes 19-29 and accompanying text (discussing social contract or compact theory).

217. *Verdugo-Urquidez*, 110 S. Ct. at 1061.

218. *In re Ross*, 140 U.S. 453 (1891).

219. See *supra* note 213 (discussing statements made at introduction of Bill of Rights to Congress). James Madison spoke out against the Alien and Sedition Acts less than a decade after the adoption of the fourth amendment and stated that

Covert,²²⁰ strict adherence to the compact theory is at least questionable. Moreover, the compact analysis fails to reconcile granting constitutional rights to aliens who are within the United States illegally with the denial of rights to aliens involuntarily present in the United States.²²¹

Justice Brennan recognized the flaws in the plurality's consideration of an individual's connection to the United States without regard for the actions of U.S. agents, and strict adherence to the compact theory.²²² For Justice Brennan, the sufficient connection test and the natural rights theory were not mutually exclusive.²²³ He criticized the plurality's unilateral focus, suggesting instead a bilateral approach.²²⁴ Implicitly accepting an inquiry into an individual's connection to the United States, Justice Brennan also required an inquiry into the connection of the United States to the individual.²²⁵

Moreover, Justice Brennan contended that the plurality ignored Mr. Verdugo-Urquidez's most obvious connection with the United States.²²⁶ Specifically, Mexican agents investigated Mr. Verdugo-Urquidez and forcibly took him to the United States under the direction of DEA agents.²²⁷ He was to be prosecuted for violations of U.S. law and would likely spend the rest of his life in a U.S. prison.²²⁸ Indeed, the plurality recognized the possibility of long term U.S. imprisonment but

"[a]liens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage." *Madison's Report on the Virginia Resolutions* (1800), reprinted in 4 ELLIOT'S DEBATES 556 (2d ed. 1836).

220. 354 U.S. 1 (1957).

221. See *supra* notes 25-60 (discussing constitutional protections granted to illegal aliens); *supra* notes 93-98 and accompanying text (discussing *Lopez-Mendoza*).

222. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1072 (1990) (Brennan, J., dissenting); see Note, *The Constitutional Rights of Nonresident Aliens Prosecuted in the United States*, 3 *FORDHAM INT'L L.F.* 221, 232 (1980) (suggesting that criminal defendants are parties to constitutional contract).

223. See *Verdugo-Urquidez*, 110 S. Ct. at 1070-74 (Brennan, J., dissenting).

224. See *id.* at 1070-71 (Brennan, J., dissenting).

225. *Id.* at 1068-75 (Brennan, J., dissenting). If the Constitution is viewed as a contract between the people and the government, Justice Brennan considered the government's imposition of its criminal laws on an individual as treating that individual as one of its people. *Id.* at 1075.

226. *Id.* at 1070 (Brennan, J., dissenting).

227. *Id.* (Brennan, J., dissenting).

228. *Id.* (Brennan, J., dissenting). In fact, Mr. Verdugo-Urquidez has been sentenced to life plus 240 years. Feldman, *Camarena's Killer Gets 240 Year Prison Term*, *L.A. Times*, Oct. 29, 1988, pt. 2, at 1, col. 1.

chose not to consider it.²²⁹

Justice Brennan relied on constitutional history to support his bilateral approach.²³⁰ He contended that the reach of the Bill of Rights should focus on the actions of the U.S. government, not on the residence or nationality of those whose rights have been allegedly violated.

Furthermore, the plurality's sufficient connection test fails to define clearly what factors are necessary to satisfy the sufficiency requirement.²³¹ At different points, the plurality noted particular connections that would satisfy its test.²³² The plurality suggested, for example, that an alien must be voluntarily present in the United States and must have accepted some societal obligations.²³³ Interestingly, none of the cases cited by the plurality require voluntary presence before granting constitutional protection.²³⁴ At another point, the plurality implied that if the places searched were in the United States, Mr. Verdugo-Urquidez would have been protected by the fourth amendment.²³⁵

Beyond an alien's voluntary presence in the United States or a search conducted in the United States, the plurality left scant guidelines to determine what other types of connections would be sufficient to satisfy its test.²³⁶ Indeed, in determining whether Mr. Verdugo-Urquidez's connections were sufficient, the plurality seemed unclear about the precise contours of the test.²³⁷

The plurality found that Mr. Verdugo-Urquidez's involun-

229. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990) (stating that "extent to which [Mr. Verdugo-Urquidez] might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide").

230. *See supra* notes 16-18 and accompanying text (discussing appropriateness of considering government's conduct under natural rights theory to determine whether constitutional protection should be granted); *supra* notes 217-26 and accompanying text (discussing flaws in strict compact theory analysis).

231. *See supra* notes 204-13 and accompanying text (discussing sufficient connection test).

232. *Verdugo-Urquidez*, 110 S. Ct. at 1064-65.

233. *Id.*

234. *Id.* at 1070 n.5 (Brennan, J., dissenting).

235. *Id.* at 1060; *id.* at 1067-68 (Kennedy, J., concurring).

236. *Id.* at 1064.

237. *See infra* notes 238-39 and accompanying text (discussing plurality's apparent use of "substantial" connection requirement for Mr. Verdugo-Urquidez rather than "sufficient" connection).

tary presence did not indicate any "substantial" connection with the United States.²³⁸ The significance of the plurality's use of the term substantial to fulfill the sufficient connection test is not addressed. Did the plurality impose a more burdensome standard of "substantial" rather than "sufficient" connection with the United States upon Mr. Verdugo-Urquidez, or did the plurality inadvertently use the word substantial? In light of the Court's reliance on the textual significance of people as opposed to persons in its fourth amendment analysis, it is difficult to understand the interchangeable use of the words sufficient and substantial.²³⁹

The plurality failed to define clearly its sufficient connection test. The vagueness of the plurality's sufficient connection test, therefore, bars its uniform application.

B. *The Plurality's Reliance on Eisentrager and the Insular Cases Is Misplaced*

In the *Insular Cases* and *Reid v. Covert*, the Supreme Court seemed to expand the scope of extraterritorial jurisdiction.²⁴⁰ *Verdugo-Urquidez*, however, appears to be a retreat to the nineteenth century concept of strict territoriality that was rejected in *Reid*.²⁴¹ The plurality distinguished the rationale in *Reid* from *Verdugo-Urquidez* by stating that *Reid* was only applicable to U.S. citizens.²⁴² The plurality instead relied on *Johnson v. Eisentrager*, a case decided seven years before *Reid*.²⁴³

The plurality's application of the holding of *Eisentrager*²⁴⁴ is misplaced for two reasons.²⁴⁵ First, *Eisentrager* concerned enemy aliens while Mr. Verdugo-Urquidez is a non-hostile alien.

238. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990).

239. *See supra* notes 120-25 and accompanying text (discussing plurality's "people-person distinction").

240. *See, e.g., Reid v. Covert*, 354 U.S. 1, 7-9 (1957) (extending Constitution's application to acts by U.S. government in foreign country against U.S. citizens); *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922) (stating that U.S. Constitution "is in force in Porto Rico [sic] as it is wherever and whenever the sovereign power of that government is exerted").

241. *See supra* notes 57-63 and accompanying text (discussing *Reid* case wherein U.S. Constitution was applied outside United States).

242. *Verdugo-Urquidez*, 110 S. Ct. at 1063.

243. *Id.*

244. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). For a discussion of the facts of *Eisentrager*, see *supra* notes 47-56 and accompanying text.

245. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990).

The defendants in *Eisentrager* were World War II war criminals imprisoned in Germany.²⁴⁶ The Court held that these non-resident enemy aliens did not have a constitutional right to a jury trial.²⁴⁷ The *Eisentrager* Court's distinction between non-hostile aliens and hostile aliens is significant. The *Eisentrager* Court indicated that the aliens' status as enemies of the United States accused of war crimes was a crucial factor affecting the decision to deny them constitutional rights.²⁴⁸ Second, the *Verdugo-Urquidez* case involved the right to be free from unreasonable searches and seizures, which might be regarded as quite distinct from the fifth amendment right to a jury trial that was at issue in *Eisentrager*.

Because the *Eisentrager* decision applied to hostile aliens, it did not necessarily bar the assertion of constitutional rights by aliens abroad.²⁴⁹ The plurality, however, declined to recognize the *Eisentrager* distinction between non-hostile and hostile aliens as significant.²⁵⁰ Perhaps the plurality viewed the metaphorical "War on Drugs"²⁵¹ as sufficiently similar to an actual

246. *Eisentrager*, 339 U.S. at 763; see *infra* notes 246-56 and accompanying text (discussing application of fifth amendment to war criminals).

247. *Id.* at 765-66.

248. *Id.* at 770. The Court stated that

[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights.

Id. The Court stated further that "courts in peace time have little occasion to inquire whether litigants before them are alien or citizen. It is war that exposes the relative vulnerability of the alien's status." *Id.* at 771. The Court further noted that "our law does not abolish inherent distinctions recognized throughout the world between . . . aliens of friendly and of enemy allegiance." *Id.* at 768-69. "The enemy alien is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources." *Id.* at 772-73.

249. See Note, *Unalienable Rights*, *supra* note 15, at 656 n.40; see also Note, *Searching the World*, *supra* note 15, at 496.

250. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990).

251. See, e.g., Kraus, *Helicopters for Mexico Draw Protests in Congress*, N.Y. Times, Oct. 29, 1990, at A5, col. 1 (noting that "[a]s part of its war on drugs, the Bush Administration is scheduled to begin delivering military helicopters to Mexico" to aid Mexican efforts to catch traffickers); Friedman, *Bush's Role in Drug War*, Newsday, May 8, 1988 (noting that President Bush admitted that "in some ways [the United States is] losing ground" in fighting the flow of drugs abroad).

For a compilation of recent legislation designed to eliminate the exclusionary rule to the warrant requirement in the drug setting, see Wisotsky, *Crackdown: The Emergency "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 895-907 (1987);

war to rely on *Eisenstrager*. Although real war may permit, and sometimes even require, a relaxation of restraints on governmental action,²⁵² war was not a factor in *Verdugo-Urquidez*. Nevertheless, by relying on *Eisenstrager* the plurality essentially treated Mr. Verdugo-Urquidez like a war criminal.

The plurality rejected the extraterritorial application of the fourth amendment by relying on the prior denial of fifth amendment rights to aliens outside the United States in *Eisenstrager*.²⁵³ In its analysis, the plurality also relied on the "inconclusive" "people-person distinction," noting that the fifth amendment refers to the relatively universal term of "person" while the fourth amendment only applies to "the people."²⁵⁴

The Court's reliance on the *Insular Cases* is similarly misplaced. Unlike the Court's decision in *Reid*, the Court in *Verdugo-Urquidez* did not limit the *Insular Cases* to their facts.²⁵⁵ In *Reid*, the Court explicitly stated that neither the *Insular Cases* nor their reasoning should be expanded.²⁵⁶ The *Insular Cases* exclusively addressed whether an alien accused of a crime enjoyed the protections of certain constitutional rights in criminal prosecutions brought by territorial authorities in territorial courts over which the U.S. government exercised sovereign power.²⁵⁷ The *Insular Cases*, therefore, should have little precedential value where the constitutional claim is made against U.S. agents rather than territorial agents.²⁵⁸

International Narcotics Control Act, 22 U.S.C. § 2291(a)(1)(D) (1988) ("Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of narcotic . . . drugs"); Stephan, *supra* note 19, at 784-85.

252. See, e.g., *United States v. Caltex Inc.*, 344 U.S. 149 (1952) (denying compensation to owners of oil installations destroyed by U.S. military to prevent them from falling into enemy hands); *Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining massive internment of Japanese-Americans). See generally Wisotsky, *supra* note 251 (claiming that courts are ignoring fourth amendment violations in drug cases as result of public sentiment that drug dealers should not go free on "legal technicalities"); Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1 (1987).

253. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1063 (1990); *Eisenstrager*, 339 U.S. 763.

254. *Verdugo-Urquidez*, 110 S. Ct. at 1063.

255. See *supra* notes 42-46 and accompanying text (discussing *Insular Cases*).

256. *Reid v. Covert*, 354 U.S. 1, 14 (1957) (stating that "it is our judgment that neither the cases nor their reasoning should be given any further expansion").

257. See *id.*

258. See *id.*; see also *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1062

C. *A Retreat to a Territorial Approach to Constitutional Protection*

In its territorial approach to the application of constitutional rights, *Verdugo-Urquidez* illustrates problems of both logic and policy. Although the fourth amendment contains no express or implied territorial limitations, the plurality attached importance to both the location of the place searched and the location of the accused at the time of the search.

1. Significance of the Location of the Constitutional Violation

The plurality emphasized that a fourth amendment violation occurs only at the location of the search.²⁵⁹ The plurality did not hold, however, that the fourth amendment does not apply simply because the search occurred outside the United States.²⁶⁰ Indeed, the plurality's analysis implied that an alien who had developed sufficient connection with the United States would be protected by the fourth amendment regardless of the location of the search.²⁶¹ The location of the government conduct, therefore, seems to have limited significance, yet the plurality relied on this factor extensively in its decision.

2. The *Verdugo-Urquidez* Plurality Requires Voluntary Presence

Furthermore, the plurality considered the location of the accused at the time of the search.²⁶² Mr. Verdugo-Urquidez was involuntarily present in the United States at the time of the search.²⁶³ In light of existing case law, one would expect that

(1990). The plurality focused, however, on the proposition that "not every constitutional provision applies to governmental activity even where the United States has sovereign power." *Id.* The plurality, therefore, reasoned that since no "fundamental" constitutional rights are guaranteed to inhabitants of unincorporated territories, which are ultimately governed by Congress, there is little support for the claim that the protections of the fourth amendment extend to aliens in foreign nations. *Id.* In its analysis, the plurality focused only on the identity of the alleged victims of the constitutional violation and not on the activities of the U.S. agents committing the violation. *Id.*

259. *Id.* at 1060. The plurality noted that "[f]or purposes of this case, therefore, if there was a constitutional violation, it occurred solely in Mexico." *Id.*

260. *See id.* at 1070 n.7 (Brennan, J., dissenting).

261. *Id.*

262. *Id.* at 1060.

263. *See id.* at 1057.

the plurality would consider his presence a connection with the United States.²⁶⁴ The plurality, however, refused to consider this connection relevant in its fourth amendment analysis.²⁶⁵ Instead, the plurality required for the first time that Mr. Verdugo-Urquidez's presence in the United States be voluntary.²⁶⁶

Implicit in the plurality's reasoning is the proposition that fourth amendment rights do not vest in an alien immediately upon entry. In creating this voluntariness requirement, however, the plurality failed to identify fully which rights vest in an alien immediately upon entry and which require more ties with the United States.²⁶⁷

D. *Plurality Implies Preferential Status for Illegal Aliens in the United States*

The requirement that an alien's connection to the United States be voluntary gives those unlawfully present in the United States greater constitutional protection than those lawfully but involuntarily present in the United States.²⁶⁸ The plurality rejected the applicability of *Immigration & Naturalization Service v. Lopez-Mendoza*, but seemed to consider that an illegal alien merited greater constitutional protection than Mr. Verdugo-Urquidez.²⁶⁹ In its analysis, the plurality assumed that illegal aliens had rights under the fourth amendment.²⁷⁰ In distinguishing the two categories of aliens, the plurality noted that illegal aliens entered the United States voluntarily, while Mr. Verdugo-Urquidez entered against his will.²⁷¹

264. *Id.* at 1070 n.5; see *supra* notes 24-26 and accompanying text (discussing extension of constitutional rights).

265. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990).

266. See *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (rejecting notion that individual's connection to United States must be voluntary or sustained to qualify for constitutional protection).

267. See *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990).

268. See *infra* notes 269-72 and accompanying text (discussing plurality's additional requirement of voluntary presence).

269. *Verdugo-Urquidez*, 110 S. Ct. at 1065.

270. *Id.* at 1065.

271. *Id.*; see Note, *Alien Membership in the Constitutional Compact: Fourth Amendment Reasonableness in Foreign Lands—United States v. Verdugo-Urquidez*, *B.Y.U. L. REV.* 319, 328 n.55 (1989) (noting that both illegal aliens in United States and aliens involuntarily present in United States should receive constitutional protections in criminal proceedings because they are amenable to U.S. criminal laws); *Jean v. Nelson*, 727

It is difficult to rationalize the preferential status given to illegal aliens. Illegal aliens have not necessarily made an express promise to give up any rights or accepted any "societal obligations." While it may be argued that illegal aliens have made an implied promise to obey U.S. law, the same implied promise is expected of criminal defendants like Mr. Verdugo-Urquidez.²⁷² Mr. Verdugo-Urquidez must accept the decision of a U.S. court and serve a prison term in the United States. Thus, Mr. Verdugo-Urquidez has been forced to accept certain obligations toward the United States.

E. Verdugo-Urquidez Creates a Double Standard of Justice

Withholding fourth amendment protections from non-resident aliens and granting them to citizens who are accused of the same illegal conduct creates an unacceptable double standard of justice.²⁷³ Justice Brennan stated in his dissent that U.S. agents acting in an unreasonable manner within or outside of the United States disregard values inherent in the Constitution.²⁷⁴

Justice Brennan suggested that mutuality instills the values of law and order.²⁷⁵ *Verdugo-Urquidez*, by extension, seems to encourage lawlessness. The immediate success of a particular law enforcement effort against a foreign national is not worth surrendering the U.S. principles of protection of human

F.2d 957, 973 (11th Cir.) (stating, in dicta, that "aliens who are the victims of unconstitutional government action abroad are protected by the Bill of Rights if the government seeks to exploit fruits of its unlawful conduct in a criminal proceeding in the United States"), *aff'd*, 472 U.S. 846 (1985).

272. *But see* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1065 (1990) (suggesting that illegal aliens have accepted societal obligations that Mr. Verdugo-Urquidez did not accept).

273. *Id.* at 1071 (Brennan, J., dissenting). As Justice Brennan noted, in cases of "international criminal conspiracy, citizens and foreign nationals may be co-defendants charged under the same statutes for the same conduct and facing the same penalties if convicted." *Id.*

274. *Id.* at 1072 (Brennan, J., dissenting); *see* Dolan, *Aliens' Fourth Amendment Right Against Government Searches Abroad—United States v. Verdugo-Urquidez*, 64 WASH. L. REV. 701, 716-18 (discussing benefits of single standard of criminal justice for citizens and aliens and noting that U.S. intervention in international arena includes responsibility to treat foreign nationals fairly).

275. United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1071 (1990) (Brennan, J., dissenting). Justice Brennan suggested that respect for the rights of foreign nationals encourages other nations to respect the rights of U.S. citizens. *Id.*

rights and respect for the citizens and governments of sovereign nations.

F. *Future Ramifications of United States v. Verdugo-Urquidez*

Although U.S. criminal laws may be extended beyond the borders of the United States,²⁷⁶ in *United States v. Verdugo-Urquidez* the U.S. Supreme Court decided that fourth amendment protections do not follow. A majority of the Justices in *Verdugo-Urquidez* agreed that U.S. agents do not need to obtain a search warrant to conduct an extraterritorial search of the property of a non-resident alien who lacks sufficient connection to the United States.²⁷⁷ The Court did not identify the connections necessary to satisfy its sufficient connection requirement.²⁷⁸ It found, however, that a non-resident alien involuntarily present in the United States while awaiting U.S. criminal prosecution did not have sufficient connection to grant fourth amendment protections against an extraterritorial search.

A majority of the Court dispensed with the warrant requirement for extraterritorial searches against non-resident aliens. Chief Justice Rehnquist and Justices White, O'Connor, and Scalia went a step further, suggesting that because these non-resident aliens were not part of "the people," they were not entitled to any fourth amendment protection. Consequently, extraterritorial searches of non-resident aliens' property may not require probable cause or reasonableness.

Justice Kennedy explicitly rejected the plurality's textual analysis of the fourth amendment. Rather, Justice Kennedy stated that non-resident aliens enjoy the protections of the Due Process Clause.²⁷⁹ Arguably, Justice Kennedy therefore would require that extraterritorial searches be reasonable in accordance with the Due Process Clause.

276. Note, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 *FORDHAM INT'L L.J.* 298, 309-11 (1989-90) (discussing application of U.S. criminal laws abroad).

277. The majority of the Justices in *Verdugo-Urquidez* agreed only to the principle that a warrant is not required for extraterritorial searches. For a discussion of each Justices opinion, see *supra* notes 130, 136, 161, 167 & 196 and accompanying text.

278. See *supra* notes 203-34 (discussing sufficient connection test).

279. The Due Process Clause of the fifth amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Justice Stevens in his concurrence and Justice Blackmun in his dissent stated that non-resident aliens are entitled to some fourth amendment protection. Both Justices stated that U.S. agents are not required to obtain a warrant to conduct extra-territorial searches, but the searches must be reasonable. Justice Blackmun would not consider whether the government's action in *Verdugo-Urquidez* was reasonable without further proceedings, while Justice Stevens found that the search was reasonable.

Perhaps the most disturbing result of this decision is the plurality's suggestion that only U.S. citizens and resident aliens were intended to benefit from the protections of the U.S. Constitution.²⁸⁰ Although it may be true that certain rights are only intended for citizens and non-resident aliens, the general law of nations is not similarly limited.²⁸¹

Prior to *Verdugo-Urquidez*, an alien's presence within the United States guaranteed the application of constitutionalized criminal investigative procedures.²⁸² In *United States v. Verdugo-Urquidez*, the Supreme Court limited the class of individuals that is protected by the fourth amendment. Indeed, the *Verdugo-Urquidez* decision results in the creation of a new category of individuals who are within U.S. territory but unable to claim full constitutional protections in criminal investigations.

It seems unlikely that the rationale employed in *Verdugo-Urquidez* would impact the constitutional protections granted to U.S. citizens abroad or legal aliens within the United States because they would still have sufficient connection to the United States. The rationale, however, could be used to limit the constitutional protections granted to other classes of individuals. For example, the Court could find that non-resident aliens are not entitled to fourth amendment protection against a search

280. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1060-64; See Case Comment, *United States v. Verdugo-Urquidez*, 84 AM. J. INT'L L. 747, 753 (1990).

281. For example, James Madison spoke in the Virginia ratifying convention about the importance of creating foreign diversity jurisdiction in federal courts so that foreign creditors could recover legitimate debts incurred in transactions with U.S. citizens. Speech of James Madison, reprinted in 3 ELLIOT'S DEBATES 583 (1836); Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1928). Indeed, the first Judiciary Act provided that aliens could sue in federal court for any tort under the law of nations. Judiciary Act of 1789, § 9, 1 Stat. 77 (codified at 28 U.S.C. § 1350 (1988)).

282. See Case Comment, *supra* note 280, at 753.

occurring within or outside the United States, because they are not part of "the people." The Court might also incorporate illegal aliens into the category of individuals lacking sufficient connection to the United States to be granted fourth amendment protection. Indeed, the plurality in *Verdugo-Urquidez* retracted slightly from its recent *Lopez-Mendoza* opinion,²⁸³ thereby leaving the question whether illegal aliens are entitled to fourth amendment protection in doubt. The *Verdugo-Urquidez* rationale could be used to support the proposition that illegal presence, like involuntary presence, is not the type of presence to indicate connection with the United States.

CONCLUSION

The United States should decide whether drug prosecutions require a relaxing of constitutional protections, and whether the U.S. "War on Drugs" warrants as much governmental disregard of individual rights as might be condoned during a real war. The U.S. Court of Appeals for the Ninth Circuit warned that "we also must take great pains to ensure that the Constitution does not become the first casualty in the 'War on Drugs.'"²⁸⁴ The Supreme Court did not heed this warning in *United States v. Verdugo-Urquidez*.

Mary Lynn Nicholas*

283. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1064 (1990) (stating that "a majority of justices assumed that the Fourth Amendment applied to illegal aliens in the United States" (emphasis added)).

284. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

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