Selective Application of the Fourth Amendment: United States v. Verdugo-Urquidez

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THE SELECTIVE APPLICATION OF THE
FOURTH AMENDMENT: UNITED
STATES V. VERDUGO-URQUIIDEZ

The Fourth Amendment of the United States Constitution guarantees "the people" the right to be free from unreasonable and unwarranted searches and seizures. The amendment includes a reasonableness clause and a Warrant Clause, both of which are designed to protect individuals' interests in the privacy of their possessions and homes. Courts measure the reasonableness of a search by weighing the government's interest in effective law enforcement against the individual's privacy expectation. The Warrant Clause of the Fourth Amendment is one element in determining the reasonableness of a search and seizure. The Warrant Clause mandates that absent exigent circumstances, a neutral magistrate may issue a search warrant only if there is probable cause to believe that the objects described in the officer's affidavit will be found at the search area. A Fourth Amendment analysis

1. U.S. Const. amend. IV. This amendment provides:
   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.

2. Johnson v. United States, 333 U.S. 10, 14 (1948) (holding that where a policeman entered and searched an individual's home without probable cause or a search warrant, the Fourth Amendment guarantees the right to privacy of one's home and belongings and only a judicial determination of the reasonableness of the search can infringe that right).

3. See United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (holding that reasonableness depends on all circumstances surrounding search and seizure); Terry v. Ohio, 392 U.S. 1, 24 (1968) (holding that a policeman can stop and frisk an individual, without probable cause or a warrant, if he has a reasonable suspicion that crime is afoot and that the individual may be armed).

4. See Mincey v. Arizona, 437 U.S. 385, 392 (1978) (holding that warrants are not required when safety concerns are at issue); Chimel v. California, 395 U.S. 752, 762-63 (1969) (holding that warrants are not required for searches of persons or surrounding areas incident to a lawful arrest); Schmerber v. California, 384 U.S. 757, 770 (1966) (holding that warrants are not required when there is possible imminent destruction of evidence); Preston v. United States, 376 U.S. 364, 367 (1964) (same).

5. U.S. Const. amend. IV; see Illinois v. Gates, 462 U.S. 213, 238 (1983) (holding that "[t]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place").

An arrest is constitutionally valid only if there exists "probable cause to make it—whether at that moment the facts and circumstances within [the officer's] knowledge and of which they
need only be applied if United States officials have conducted a search and seizure and if the individual whose property was seized is entitled to constitutional protection.6

As a component of the Bill of Rights, the Fourth Amendment reflects the Framers' aversion towards general warrants and writs of assistance that were commonly issued under pre-revolutionary English rule.7 While the determination of whether a Fourth Amendment violation has occurred focuses on the actions of the government's agents, courts must also decide whether individuals merit this constitutionally mandated warrant protection.

The United States Supreme Court has held that the Constitution is applicable extraterritorially.8 Similarly, the Supreme Court has held that the natural rights guaranteed under the Bill of Rights may extend to non-United States citizens.9 Legal and illegal aliens have been found to possess rights against discrimination10 and arbitrary searches and seizures,11 as well as

6. Weeks v. United States, 232 U.S. 383, 393-94 (1914) (holding that evidence a state police officer seized in an unwarranted search and turned over to a United States Marshal must be excluded from use in a federal trial).

7. William J. Cuddihy, Fourth Amendment (Historical Origins) in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 761 (Leonard W. Levy et al. eds., 1986). The general warrant was open-ended and allowed the bearer to search for a person or thing at his discretion, without delineating the specifics of either the person or object sought. The Fourth Amendment's warrant and reasonableness requirements theoretically preclude a general targeting of innocent individuals based on political or personal prejudice.

8. Reid v. Covert, 354 U.S. 1, 5-8 (1957) (holding that when a United States citizen is tried in a military court outside the United States, the limitations imposed on the government by Article III, Section 2 and the Fifth and Sixth Amendments of the Constitution protect that citizen). "[C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home." Id. at 7.

9. See cases cited infra notes 10-12.

10. See Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding that children of illegal aliens cannot be discriminated against under the Equal Protection Clause of the Fourteenth Amendment with regard to access to free public education); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (holding that a resident alien has a right to due process under the Fifth Amendment in an attempt by United States officials to exclude his re-entrance into the United States).

11. See Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) (holding that Mexican citizens subject to deportation proceedings have Fourth Amendment protections at the time of their arrest); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that a Mexican citizen's Fourth Amendment right to be free from unreasonable searches and seizures was violated when authorities searched his car twenty miles from the Mexican border without probable cause or consent, when he was working in the United States with a valid work permit); Au Yi Lau v. United States Immigration & Naturalization Serv., 445 F.2d 217, 223 (D.C. Cir.) (holding that "aliens in this country are sheltered by the Fourth Amendment in common with citizens"), cert. denied, 404 U.S. 864 (1971).
guarantees of freedom of speech\textsuperscript{12} and a right to public education.\textsuperscript{13} Before \textit{United States v. Verdugo-Urquidez},\textsuperscript{14} however, the Court had not determined whether the Constitution protected nonresident aliens, held in the United States on federal criminal narcotics charges, from unwarranted searches and seizures performed outside the United States.

In \textit{Verdugo-Urquidez}, the Court held that a nonresident alien incarcerated in the United States on federal criminal narcotics charges for a crime committed outside of the United States was not a “person” under the Fourth Amendment.\textsuperscript{15} Mexican police kidnapped Verdugo-Urquidez and transported him to the United States border where United States Drugs Enforcement Agency (DEA) officers arrested him.\textsuperscript{16} Subsequent to the arrest, DEA agents, in conjunction with Mexican officials, searched two of Verdugo-Urquidez’s Mexican residences without obtaining a United States search warrant.\textsuperscript{17}

Verdugo-Urquidez challenged the admissibility of the evidence seized in the search, arguing that, without a warrant, any evidence found in either of his residences should be suppressed. The United States District Court for the Southern District of California held that the Fourth Amendment controlled in a search conducted as a “joint venture”\textsuperscript{18} by United States and Mexican agents. Accordingly, the court concluded that the exclusionary rule barred the admission of the seized drugs.\textsuperscript{19} A divided Court of Appeals for the Ninth Circuit affirmed, reasoning that the Constitution extended to an official extraterritorial government action and guaranteed protections to individuals directly “governed” by the United States.\textsuperscript{20} First, the Court noted that Verdugo-Urquidez was a target of a United States investigation. Second, they pointed out that Verdugo-Urquidez was in custody in the United States at the time of the search and that he was subject to full adversarial proceedings. The appellate court determined, therefore, that Verdugo-Urquidez was effectively under the domain of the United States government, one of the “governed,” and entitled to constitutional protection.\textsuperscript{21}

\textsuperscript{12} Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding that an alien resident is accorded First Amendment rights to freedom of speech and press).
\textsuperscript{13} Plyler v. Doe, 457 U.S. 202 (1982).
\textsuperscript{14} 110 S. Ct. 1056 (1990).
\textsuperscript{15} \textit{Id.} at 1066.
\textsuperscript{16} \textit{Id.} at 1059.
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988), \textit{rev’d} 110 S. Ct. 1056 (1990); see also \textit{infra} notes 112-24 and accompanying text.
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 1230.
\textsuperscript{21} \textit{Id.}
The United States Supreme Court overruled the court of appeals in a plurality opinion written by Chief Justice Rehnquist. The Court held that the Fourth Amendment does not protect nonresident aliens from unwarranted searches and seizures and that the Constitution does not apply extraterritorially in a criminal prosecution. Relying on the text of the Constitution, Chief Justice Rehnquist maintained that the Framers had not intended to include nonresident aliens in the compact of the Constitution and that Verdugo-Urquidez had not established a sufficient connection to the United States to warrant constitutional protection. He asserted that to hold otherwise would hamper the execution of foreign policy and international law enforcement. Accordingly, the Court effectively limited the scope of the Fourth Amendment to apply solely intraterritorially and exclusively to those individuals in contract with the Constitution. Thus, the Court now allows for unwarranted and, foreseeably, unreasonable searches whenever the action is conducted outside United States borders against non-United States citizens.

A recent trend in Fourth Amendment jurisprudence limits the class of protected parties while at the same time reduces constraints on government agents conducting evidentiary searches. Verdugo-Urquidez continues that trend and in part reflects the political climate of the late 1980s. President Bush's "war on drugs" suggests that the executive branch wishes to allow federal prosecutors broad investigative authority in criminal prosecutions. The Supreme Court has responded by expanding the exceptions to the application of the Fourth Amendment and by maintaining a deferential posture towards the executive in its execution of foreign policy.

This Note examines the state of the law prior to Verdugo-Urquidez and discusses the varying theoretical constructs concerning the scope of the Constitution's application to United States citizens and resident and nonresident...

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23. Id.
24. Id.
25. In Maryland v. Buie, 494 U.S. 325 (1990), the Court held that police officers may search an entire house incident to an in-house arrest if they have reasonable suspicion that a dangerous individual is inside. Id. at 337. Buie substantially expanded the area allowed to be searched incident to an arrest. Prior to this holding, a police officer could only search the individual and his immediate surrounding area. See also Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 634 (1989) (holding that drug and alcohol tests mandated by the Federal Railroad Administration are constitutional under the Fourth Amendment despite the lack of probable cause or reasonable suspicion). Skinner limits the types of citizens protected from unreasonable or arbitrary searches under the Fourth Amendment to those who are not employees as defined by the Federal Railroad Safety Act. Id. at 628.
26. See George J. Church, Fighting Back; Bush Declares Another War on Drugs But It May Not Help Much, TIME, Sept. 11, 1989, at 12.
aliens, within the United States and extraterritorially. The Note shows that Verdugo-Urquidez, by reversing precedent, continues a developing Court trend to defer to the executive and legislative branches in issues of foreign criminal investigations and prosecutions. This Note also projects potential domestic and international ramifications of Verdugo-Urquidez. The Note concludes that the Court, in limiting the breadth of the Fourth Amendment, will encourage United States federal officials involved in extraterritorial government actions to engage in activity not compatible with Fourth Amendment protections. The Note maintains that this result will diminish, in the eyes of the world community, the credibility of the values and ideals upon which the United States purports to be based.

I. THEORIES OF CONSTITUTIONAL APPLICATION

A. The General Scope of the Constitution

The United States Supreme Court addressed three separate yet related areas of legal history in construing its theory of constitutional application in United States v. Verdugo-Urquidez.\textsuperscript{27} The first area deals generally with constitutional theories of entitlement and geographic limitations. The second area focuses on the meaning and practices of the Fourth Amendment in general. The third area centers on the specific application of the Fourth Amendment extraterritorially. The Court relies on historical interpretations of the Constitution and the Framers' intent, as well as precedent, to map out the evolution of these broader themes.

The drafters of the Bill of Rights neither included any explicit references to geographical limitations of constitutional applicability nor delineated specific individual characteristics that would necessarily preclude or include a person in the covenant of the Constitution.\textsuperscript{28} Many constitutional scholars agree, however, that the Framers did not foresee extending the application of the Fourth Amendment beyond United States territory.\textsuperscript{29} At the same time, the Framers did not explicitly limit constitutional protections to a specified

\textsuperscript{27} 110 S. Ct. at 1056.

\textsuperscript{28} \textit{JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES} 709 (1987).

group of individuals, and scholars have interpreted the scope of constitutional application in a number of ways.\textsuperscript{30}

One prevailing interpretation of constitutional application is the social compact theory, which evolved out of a medieval concept of a contract of government that a monarch entered into with his subjects.\textsuperscript{31} This theory broadened over time to encompass an individual's voluntary submission to government authority in exchange for the protection and civilizing force of organized government.\textsuperscript{32} Entitlement to constitutional protection resulted from being a member of the contracting party by birthright or by acquisition, thereby establishing fundamental ties to the national community. Under this theory, aliens abroad are "neither parties to nor beneficiaries of the agreement between the federal government and the people embodied in the Constitution."\textsuperscript{33}

A second approach views the Constitution as guaranteeing certain inalienable rights to individuals and protecting them from government encroachment via the Bill of Rights.\textsuperscript{34} Those that subscribe to this theory see the Constitution as an "'organic' act giving 'life' to the federal government . . .

\begin{itemize}
\item \textsuperscript{30} \textit{See} Andreas F. Lowenfeld, \textit{U.S. Law Enforcement Abroad: The Constitution and International Law, Continued}, 84 \textit{Am. J. Int'l L.} 444, 454 (1990). Professor Lowenfeld posits that the Court has two conflicting theories of constitutional application. One theory regards the Bill of Rights as limiting the official actions of the government, thereby protecting an individual's inherent and natural rights. The other theory postulates that protections are granted to "persons" via the Constitution. According to Lowenfeld, it usually does not matter which theory is adopted when the Court examines the constitutionality of an issue, but a conflict arises when the individual defendant does not readily fall into the class of people who are considered "persons" for constitutional purposes. \textit{Id.}
\item \textsuperscript{31} Neuman, \textit{supra} note 29, at 921; \textit{see also} Henkin, \textit{supra} note 29, at 30; Ragosta, \textit{supra} note 29, at 301.
\item \textsuperscript{32} Neuman, \textit{supra} note 29, at 916. Neuman describes four separate theories of constitutional application, falling into two camps. The membership or social compact theory measures the relationship between the individual and the government. \textit{Id.} at 917-18. The universalists' theory considers the inalienable rights of individuals as superior to federal authority to act. \textit{Id.} at 916-17. This theory embraces the notion that the Constitution is a fundamental law which protects all individuals from unreasonable government intrusion.
\item The second camp focuses on territorial limitations. Those who follow a municipal law approach view the Constitution as extending as far as its sovereign authority does. \textit{Id.} at 918. Federal action requires constitutional constraint if the action is committed in United States controlled territories. The final view regards the Constitution as containing a limited restrictive role, in that it guarantees a protection of fundamental due process regardless of where the federal activity occurs. \textit{Id.} at 919. This theory, followed by Justice Blackmun in his concurrence in \textit{Verdugo-Urquidez}, is called the "global due process" approach. \textit{Id.} at 919.
\item \textsuperscript{33} Stephen A. Saltzburg, \textit{The Reach of the Bill of Rights Beyond the Terra Firma of the United States}, 20 \textit{Va. J. Int'l L.} 741, 782 (1980). Professor Ragosta points out, however, that the only time the Court has applied such a restrictive privity doctrine was in Scott v. Sanford, 60 U.S. 393 (1857), roundly repudiated in subsequent legal scholarship. Ragosta, \textit{supra} note 29, at 301.
\item \textsuperscript{34} Neuman, \textit{supra} note 29, at 916; \textit{see also} Saltzburg, \textit{supra} note 33.
\end{itemize}
[which] cannot exercise powers withheld by the Constitution."\(^{35}\) This theory limits United States action by constitutional constraints, allowing the government to exercise only those powers specifically enumerated in the articles and amendments to the Constitution.\(^{36}\) Following this approach, the Court has held that the Constitution guarantees certain rights to non-citizens residing in the United States legally or illegally.\(^{37}\)

The United States Supreme Court has followed both views when interpreting the Constitution. For example, in 1886 the Court expressly addressed whether the Constitution protected resident aliens in *Yick Wo v. Hopkins*.\(^{38}\) The Court held that the Equal Protection Clause of the Fourteenth Amendment protected Chinese aliens legally residing in San Francisco from discriminatory municipal ordinances. The Court asserted that legal aliens within the territorial jurisdiction of the United States were entitled to the same Fourteenth Amendment protections as United States citizens.\(^{39}\) After *Yick Wo*, the Court extended fundamental rights to aliens legally residing in the United States and allowed for a varying degree of protection for temporary and illegal aliens.\(^{40}\)

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37. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (Equal Protection Clause of the Fourteenth Amendment); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (Fifth Amendment); Bridges v. Wixon, 326 U.S. 135 (1945) (First Amendment); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (Just Compensation Clause); Wong Wing v. United States, 163 U.S. 228 (1896) (Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Fourteenth Amendment); *see supra* notes 10-13 and accompanying text.

38. 118 U.S. 356 (1886). Prior to the Alien and Sedition Acts of 1798 (Acts), the express issue of whether the Constitution protected aliens within the United States had not been addressed by any language in the Bill of Rights, nor explicitly by the Framers. Arising out of a conflict between Federalists and Republicans, the Acts allowed for the expulsion of aliens on an order of the President. In the congressional debates over the Acts, the Federalists relied on a membership theory of the Constitution, arguing that aliens were not "persons" under the Constitution and, therefore, not party to its protections. Alien and Sedition Acts of 1798, 1 Stat. 576, 577, 596. The Republicans maintained a "municipal law" approach which held that the Constitution was a law which allowed limited constitutional protections to aliens in exchange for a "temporary obedience." A modified rights analysis to constitutional entitlements emerged from these acts which protected aliens against the states and was supported by the Marshall Court. Neuman, *supra* note 29, at 927-39.

39. *Yick Wo*, 118 U.S. at 369. The Court stated:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . The questions we have to consider . . . are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

*Id.* By holding that the Equal Protection Clause of the Fourteenth Amendment applied to aliens, the Court set the stage for the eventual incorporation of due process protections to the states. Ragosta, *supra* note 29, at 295-96.

40. *See* cases cited *supra* notes 10-12.
B. Specific Rights of Aliens Under the Constitution

In *Kwong Hai Chew v. Colding*, United States officials had attempted to bar an alien from reentering the United States, and the Court held that resident aliens have a Fifth Amendment due process right. The Court reasoned that an alien's development of permanent ties to the United States merited him protection under the Bill of Rights. In *Graham v. Richardson*, the Court considered whether a state could set a residency requirement for legal aliens' eligibility for welfare benefits. In *Graham*, an Arizona Act mandated a fifteen year residency requirement before eligibility accrued. Petitioner challenged the act under the Fourteenth Amendment Equal Protection Clause. The Court applied strict scrutiny analysis and determined that no justifiable distinction could be made between aliens and citizens, reasoning that aliens also contributed to the state's economy and community.

In 1982, the Court considered the extent to which illegal aliens residing in the United States are "persons" for the purposes of constitutional protection. In *Plyler v. Doe*, the Court applied a rational basis equal protection test to a Texas statute that denied enrollment in public schools to children who had not been legally admitted into the United States. The Court emphasized that the Equal Protection Clause of the Fourteenth Amendment provides that the state shall not deprive "any person within its jurisdiction the equal protection of the laws." The plurality maintained that aliens are "persons" under both the Fifth and Fourteenth Amendments, whether or not they are legally in the United States. The Court rejected the state's argument that illegal aliens are beyond Texas' jurisdiction.

41. 344 U.S. 590 (1953).
42. Id. at 596.
43. 403 U.S. 365 (1971).
44. Id. at 367.
46. Id. at 367-68.
47. Id. at 376.
49. Id. at 205.
50. Id. at 210. Section 1 of the Fourteenth Amendment reads:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1.
51. *Plyler*, 457 U.S. at 213. "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is
Previously, the Court had decided that the Fourth Amendment protects aliens legally within the United States but without residency status. In *Almeida-Sanchez v. United States*, the police stopped and searched the petitioner, a Mexican citizen, without a warrant, probable cause, or reasonable suspicion, approximately twenty miles from the Mexican-American border. The Court held that a search by a roving patrol in the absence of probable cause violated the petitioner's Fourth Amendment rights. Therefore, at least within the United States, legal and illegal aliens are "persons" under the Fourth, Fifth and Fourteenth Amendments and are thereby guaranteed protection from arbitrary state action under the Constitution.

The Court addressed the question of whether the Constitution protects aliens outside of the United States in *Johnson v. Eisentrager*. In *Johnson*, twenty-one German nationals petitioned the United States District Court for the District of Columbia for writs of habeas corpus. *Johnson* involved soldiers who had continued hostilities against the United States after the end of World War II. A Military Commission constituted by a United States Commanding General at Nanjing, pursuant to a special grant of the Joint Chiefs of Staff, tried and convicted the soldiers. The soldiers alleged that their conviction and trial violated the Fifth Amendment as well as Articles I and III of the United States Constitution.

The *Johnson* Court held that the Fifth Amendment does not apply to "all persons," reasoning that the Constitution made no grant of Fifth Amendment protection to enemy aliens because doing so would, in effect, give aliens more protection than is provided to United States citizens. The Court maintained that the Constitution did not extend to individuals outside of the United States, holding that the Framers had not envisioned "[s]uch extraterritorial application of organic law." The Court acknowledged that even if the Constitution applied to those individuals, it would be impractical to enforce. The *Johnson* Court admitted, however, that some constitutional

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53. *Id.*
54. *Id.* at 267-68.
55. *Id.* at 273.
57. *Id.* at 766.
58. *Id.* at 783. "[B]y the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens . . . nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens . . . ." *Id.* at 769.
59. *Id.* at 784.
60. *Id.* at 767.
provisions might extend beyond "the citizenry," maintaining that "[t]he alien ... has been accorded a generous and ascending scale of rights as he increases his identity with our society." The Court considered two criteria in determining whether an individual is protected by the Bill of Rights. First, the Court considered where the infraction occurred. Second, it evaluated the extent and nature of the relationship between the individual and the United States. Because the soldiers were never within the territorial jurisdiction of United States courts and because they were enemies of the United States, the Johnson Court held that they were not entitled to writs of habeas corpus under the Constitution.

Nearly thirty years later, United States v. Tiede limited Johnson to its facts. The United States Court for Berlin held that a Polish national tried under United States laws in West Germany has the same constitutional protections as a United States citizen. Judge Stern heard the case and distinguished Johnson by emphasizing that the appellants in Johnson were enemy nationals charged with violating the laws of war. By contrast, the appellant in Tiede was a Polish citizen charged with hijacking a plane and forcing it to land in West Berlin. The appellant filed a motion demanding a jury trial and the court held that he had this right under the United States Constitution. Judge Stern asserted that when an individual is tried in West Berlin for a nonmilitary crime, "the United States must provide the defendant[ ] with the same constitutional safeguards that it must provide to [a] civilian defendant[ ] in any other United States court."

61. Id. at 770.
62. Id. at 777-78.
63. Id. at 781.
65. Id. at 260.
66. Id. at 245.
67. Id. at 228.
68. Id. at 229.
69. Id. at 260.
70. Id. For a thorough analysis of Tiede, see Herbert J. Stern, Judgment in Berlin (1984).

C. Territorial Limitations on Constitutional Applicability

While courts dealt with the issue of what rights noncitizens had intra and extraterritorially, a second line of cases emerged based on the territorial limits of the Constitution's application. As noted, the Framers most likely did not envision application of the Constitution outside United States borders. For a majority of the nineteenth century, however, the idea that the Constitution "followed the flag" prevailed. As the United States asserted its dominance as a colonial power in the international arena, extending constitutional rights to persons outside the boundaries of the United States proved inconvenient. The Court began to apply a membership theory of constitutional participation which handily excluded extending constitutional rights to members of territories not incorporated in the United States. The Supreme Court adopted this theory in In re Ross. In Ross, an American citizen challenged his conviction for murder adjudicated by the American Consulate Tribunal in Japan by arguing that the Sixth Amendment of the Constitution guaranteed him a jury trial. The Supreme Court affirmed the conviction, holding that the Sixth Amendment right applies only to individuals within the United States.

After Ross, the Court decided a series of cases referred to as the Insular cases. The Insular cases considered whether constitutional protections extended to residents of territories under the control of the United States but not a part of it. Residents of these territories had an uncertain constitutional status; they were not citizens of the United States, yet United States laws governed them. The Court maintained that the extension of constitutional protections should be interpreted in a territorially restrictive manner. In

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71. See supra note 28 and accompanying text.
72. International law of the eighteenth and nineteenth centuries mirrored this viewpoint. At that time, international law did not recognize international individual rights, but rather dealt with nations as entities. Hunter, supra note 29, at 653.
73. Neuman, supra note 29, at 958.
74. 140 U.S. 453 (1891).
75. Id. at 454, 461.
76. Id. at 465. The Court stated that:
   By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords . . . apply only to citizens and others within the United States, or [to those] who are brought there for trial for alleged offenses committed elsewhere. . . . The Constitution can have no operation in another country.
   Id. at 464.
77. See infra notes 78-88 and accompanying text.
78. Downes v. Bidwell, 182 U.S. 244 (1901). While the Court argued that there were territorial limitations on constitutional applicability, legislators in Congress were arguing that the Constitution should blanket all people who fall under United States control. In its report on the establishment of Puerto Rico, the 56th Congress stated that the "United States' author-
Downes v. Bidwell,\textsuperscript{79} the Court addressed whether merchandise brought into New York from Puerto Rico was exempt from a duty charge.\textsuperscript{80} The Court had recently held that Puerto Rico was a territory of the United States,\textsuperscript{81} but had not decided whether Article I, Section 8 of the Constitution, which mandates uniform "duties, imposts and excises" throughout the United States, applied to the island territory.\textsuperscript{82} The Court examined the relationship between the inhabitants of the territory and the United States. The Court reasoned that to extend procedural rights to the territories would prove unduly burdensome and was not required under the Constitution.\textsuperscript{83} The majority limited the rights of non-United States citizens residing in a territory of the United States to fundamental rights.\textsuperscript{84}

In a second Insular case, Dorr v. United States,\textsuperscript{85} the Court rejected an appellant's claim that the Sixth Amendment right to a jury trial applied to a resident of the Philippines, then an unincorporated United States territory. The Court reaffirmed Downes, holding that the Constitution did not require Congress to adopt "a system of laws which shall include the right of trial by jury" to aliens in territories that are ultimately governed by Congress.\textsuperscript{86} The Court dismissed Congress' view that every constitutional provision is applicable wherever the United States chooses to "exercise its power."\textsuperscript{87}

Two world wars later, the Court's territorially restrictive view of constitutional application, while still in force, was losing its authority. As the United States evolved as a superpower, and as the Warren Court's commitment to human and civil rights grew, a new theory of constitutional entitlement emerged.\textsuperscript{88} Although the Court refused to grant aliens Fifth

\textit{Neuman, supra} note 29, at 965.
Amendment protection in Johnson v. Eisentrager, the majority did acknowledge that aliens may merit some constitutional protection.

In 1957, the Supreme Court reexamined the issue of the extraterritorial application of the Constitution in Reid v. Covert. The Court held that the federal government is a "creature of the Constitution" and, therefore, official United States action is subject to constitutional restraints. In Reid, the wife of a serviceman charged with his murder challenged her conviction by a military tribunal in Great Britain on the grounds that she had a right to a jury trial under the Sixth Amendment. The Court rejected the Insular precedent, which denied any constitutional applicability extraterritorially, and held that when the Government attempts 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." The Reid Court rejected the idea that the United States could operate abroad without the constraints of the Bill of Rights. Reid thus limited the Insular cases to instances when accused persons are tried by territorial authorities in territorial courts and replaced the territorial and social compact focus of constitutional analysis with what Professor Neuman calls a "municipal law" theory of the Constitution. This theory of constitutional employment applies the Bill of Rights to nonresident aliens extraterritorially whenever the United States "seeks to impose obligations upon them under United States law."

In 1958, the Court held in Perez v. Brownell that certain constitutional provisions restricted Congress from regulating foreign affairs. The peti-

89. 339 U.S. at 777-78, 781.
90. Id. at 770.
91. 354 U.S. 1 (1957).
92. Id. at 5-6.
93. Id.
94. Id.
95. Id.
96. Id. at 14.
97. Neuman, supra note 29, at 918.
98. Neuman, supra note 29, at 918-19. Professor Neuman argues that after Reid, the modern theory of constitutional application, prior to Verdugo-Urquidez, establishes rights in three areas: (1) within the United States to all; (2) to United States citizens anywhere; and (3) to aliens outside the United States affected by United States law. Id. at 919.
100. Id. at 58.
tioner was a national of the United States who had lost his citizenship under section 401(e) and (j) of the Nationality Act of 1940. The petitioner alleged that the statute went beyond congressional authority. Although the Court upheld the constitutionality of section 401, the majority asserted that the parameters of the Constitution limited Congress in its authority to act in relation to other nations. This approach to constitutional application abandoned the Ross theory of strict territoriality. Reid and Perez reestablished a theory of constitutional application that restricts federal activity internationally to those actions constitutionally enumerated, and protects, at the very least, United States citizens from unconstitutional action abroad. Although not explicitly conferring these rights to non-United States citizens, lower courts had, until Verdugo-Urquidez, extended some constitutional rights to nonresident aliens in search and seizure cases abroad or, alternatively, had restricted federal government activity to constitutionally mandated actions.

II. THE FOURTH AMENDMENT AND INTERNATIONAL APPLICATION

The Fourth Amendment's inclusion in the Bill of Rights resulted from the Framers' aversion to random and open-ended searches and seizures which were customary in colonial times. To avoid such unspecified seizures, the authors of the Fourth Amendment included the Reasonableness and Warrant Clauses so as to limit what would be acceptable acts on the part of federal agents. Therefore, the Amendment has historically focused on

102. Perez, 356 U.S. at 58. As the Court stated:

Broad as the power of the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations.

103. Id. The American Law Institute's Restatement of Foreign Relations Law supports this approach. It proposes that the Constitution should protect individual rights of non-resident citizens and aliens alike, when United States federal agents act extraterritorially. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)-(2), cmt. m (1987).
104. See infra notes 113-24 and accompanying text.
105. STORY, supra note 28, at 709. As Justice Story points out, the Fourth Amendment codifies a common law principle which provides for the full enjoyment of property and personal rights. According to Justice Story, the Fourth Amendment evolved from the Framers' heightened sensitivity to the issuance of general warrants which authorized government officials to seize any person without specialized description. Id. at 710.
regulating and restricting unreasonable and arbitrary government action.\textsuperscript{107} To ensure that government agents do not overstep their constitutionally mandated authority, the Supreme Court fashioned a procedural safeguard. In \textit{Weeks v. United States},\textsuperscript{108} the Court devised the exclusionary rule. Under the exclusionary rule, evidence acquired through an illegal, unwarranted or unreasonable search by federal officials in the United States cannot be used against defendants in subsequent federal prosecutions.\textsuperscript{109} Prior to 1961, federal officials often acquired evidence that was excludable in federal court but admissible in state court. In these instances, the federal officials turned the evidence over to state officials on a "silver platter."\textsuperscript{110} The "silver platter" doctrine enabled state officials to admit otherwise illegally acquired evidence, thereby defeating the spirit of the exclusionary rule. The policy behind the exclusionary rule was to discourage police action that ran counter to the protections guaranteed under the Fourth Amendment.\textsuperscript{111}

Under the current rule, however, any evidence seized in an illegal search within the United States is subject to the exclusionary rule and inadmissible in both federal and state criminal prosecutions. When evidence is procured in foreign searches, however, the courts have retained the application of the "silver platter" doctrine and regularly admit the unlawfully obtained evidence. Courts limited the "silver platter" doctrine, however, to situations where foreign officials conducted a search on foreign land without a United States search warrant and then turned their evidence over to United States officials.\textsuperscript{112}

\begin{footnotes}
\item[107] Id.
\item[108] 232 U.S. 383 (1914).
\item[109] Id. at 398. In 1961, the exclusionary rule was incorporated through the Fourteenth Amendment to the states in the landmark case of Mapp v. Ohio, 367 U.S. 643 (1961).
\item[110] The "silver platter" doctrine was based on the argument that because prior to \textit{Mapp}, the exclusionary rule did not apply to evidence seized illegally under the Fourth Amendment by state authorities, "material seized unconstitutionally by a state officer could be admitted in a federal criminal proceeding. . . . [F]ederal authorities . . . could profit from the State's [unconstitutional] action by receiving on a silver platter evidence unconstitutionally obtained." United States v. Janis, 428 U.S. 433, 444-45 (1976); see also \textit{Mapp}, 367 U.S. at 657 (describing the converse application as follows: "[A] federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may. . . . Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.").
\item[111] United States v. Molina-Chacon, 627 F. Supp. 1253, 1259 (E.D.N.Y. 1986) ("The guiding principle is that the exclusionary rule is not a constitutional right of an individual but rather a judicially created device to deter police misconduct, to be applied only in those situations where this objective can be achieved." (quoting United States v. Janis, 428 U.S. 433, 446-47 (1976))).
\item[112] United States v. La Chapelle, 869 F.2d 488, 489 (9th Cir. 1989) ("[g]enerally, '[n]either our Fourth Amendment nor the judicially created exclusionary rule applies to acts of foreign officials'" (quoting United States v. Maher, 645 F.2d 780, 782 (9th Cir. 1981))); see
\end{footnotes}
Prior to Verdugo-Urquidez, courts fashioned three exceptions to the admissibility of evidence seized in foreign searches.\textsuperscript{113} First, federal courts would exclude evidence seized without a warrant if United States agents substantially participated in the search and seizure conducted outside the United States, thus qualifying the operation as a "joint venture."\textsuperscript{114} In Stonehill v. United States,\textsuperscript{115} the United States Court of Appeals for the Ninth Circuit reasoned that the Fourth Amendment applies to raids conducted extraterritorially by foreign officials "only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials."\textsuperscript{116} The court held that raids conducted in the Philippines by Philippine authorities without the participation of United States officials did not constitute substantial participation and, therefore, did not invoke the joint venture exception to the admissibility of evidence seized by unwarranted searches extraterritorially.\textsuperscript{117}

Second, courts have extended the exclusionary rule to the search and seizure activities of foreign officers who were acting as "agents" of United States officials. The United States Court of Appeals for the Fifth Circuit held in United States v. Morrow\textsuperscript{118} that "if American law enforcement officials participated in the foreign search, or if the foreign authorities actually conducting the search were acting as agents for their American counterparts, the exclusionary rule can be invoked."\textsuperscript{119} In Morrow, at the Federal Bureau of Investigation's (FBI) suggestion, Canadian police conducted an unwarranted search of the appellant's hotel room and recovered stolen securities.\textsuperscript{120} The Canadian police then turned these items over to the FBI.

\textit{also Restatement (Third) of Foreign Relations Law of the United States} § 433(3) (1987) (allowing for the admission of evidence obtained without a warrant if United States officials are not implicated in the search and seizure).

\textsuperscript{113} In United States v. Morrow, 537 F.2d 120, 139-41 (5th Cir. 1976), \textit{cert. denied}, 430 U.S. 956 (1977), Canadian officials conducted an unwarranted search of American citizens in Toronto. The court delineated the standard of activity that would warrant applying the exclusionary rule in a foreign search: first, joint participation in the search by United States and foreign officials; second, foreign authorities acting as agents of United States officials; and third, activity on the part of either United States or foreign agents that "shock the conscience" of the court. \textit{Id.}

\textsuperscript{114} Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), \textit{cert. denied}, 395 U.S. 960 (1969); \textit{see also} Lustig v. United States, 338 U.S. 74, 78-79 (1949) (holding that if a federal official "had a hand" in a search conducted with state authorities, the search must be considered a search by a federal official and, therefore, any evidence seized unconstitutionally under the Fourth Amendment must be excluded under Weeks v. United States, 232 U.S. 383 (1914)).

\textsuperscript{115} 405 F.2d 738 (9th Cir. 1968).

\textsuperscript{116} \textit{Id.} at 743.

\textsuperscript{117} \textit{Id.} at 746.

\textsuperscript{118} 537 F.2d 120 (5th Cir. 1976), \textit{cert. denied}, 430 U.S. 956 (1977).

\textsuperscript{119} \textit{Id.} at 139.

\textsuperscript{120} \textit{Id.}
Federal prosecutors subsequently used the securities in the defendant's trial in the United States. The court held that the FBI's minimal participation in instigating the actual search did not require endowing the defendant with Fourth Amendment protections.

Finally, federal courts have held that if the actions of the foreign officials in gathering evidence so "shock[s] the conscience" of the court, the court may invoke the exclusionary rule even without establishing agency between United States and foreign officials. Under these guidelines, federal courts have disallowed the admittance of evidence found to have been the result of a foreign search and seizure in which United States participation was substantial or the behavior of the foreign officials somehow tainted the subsequent findings. The courts reasoned in the first two instances that the

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121. Id.
122. Id. at 140.
123. Id. at 139. "[I]f the circumstances of the foreign search and seizure are so extreme that they 'shock the judicial conscience,' a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence so seized." Id. at 139 (citing Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir.), cert. denied, 382 U.S. 963 (1965)).
124. Byars v. United States, 273 U.S. 28, 33 (1927) (holding that "substantial participation" on the part of United States officials is enough to warrant "joint operation"); Stonehill v. United States, 405 F.2d 738, 746 (9th Cir. 1968) (holding that because United States agents did not participate in raids of defendant's business in the Philippines, which would have been illegal if conducted in United States, the court need not apply the Fourth Amendment under the "joint venture" doctrine), cert. denied, 395 U.S. 960 (1969).

Courts also have ruled that if an action on the part of foreign officials "shocks the conscience" of the court, it will exclude any evidence discovered by such action. In United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the defendant was convicted on a narcotics charge. He argued that the court had no jurisdiction over him because his "presence . . . had been illegally obtained." Id. at 269. Through testimony, the court discovered that the defendant had been severely tortured while in the custody of foreign officials and while United States agents were present. Id. at 270. The United States agents were found to have participated in some of the torture as well. Id. The appellate court overturned the lower court's ruling which had allowed the admission of Toscanino's confession. Id. at 271. The lower court had relied on the Ker-Frisbie doctrine which stated "that the government's power to prosecute a defendant is not impaired by the illegality of the method by which it acquires control over him." Id. at 271.

In Ker v. Illinois, 119 U.S. 436 (1886), federal officials forcibly abducted the appellant without serving an issued arrest warrant. The Supreme Court held that no violation of due process had occurred. Id. at 443. In Frisbie v. Collins, 342 U.S. 519 (1952), United States officials kidnapped the appellant from Illinois and took him to Michigan for trial. The Supreme Court held that the "power of a court to try a person for a crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction." Id. at 522.

The Court's ruling in Toscanino reflected the erosion of the Ker-Frisbie doctrine. The erosion resulted from the expansion of the breadth of the Due Process Clause to include rights to a fair procedure at trial. In Toscanino, the United States Court of Appeals for the Second Circuit wanted to avoid allowing the government to prosper from the "fruits of the [its] exploitation of its own misconduct." Toscanino, 500 F.2d at 275. The court held that "the Bill
exclusionary rule's purpose could be served by refusing to admit evidence seized or gathered with United States participation. In the third instance, the courts refused to be an accomplice to offensive and illegal activity.

These judicially created exceptions to the admissibility of evidence seized in foreign countries relied on a theory of constitutional application which restricted federal action both domestically and internationally. Courts had supported this theory, holding that United States officials had acted unconstitutionally. Moreover, the United States Supreme Court had even recognized a cause of action in cases where Fourth Amendment violations had occurred. After Verdugo-Urquidez, however, the Court, by holding that the Fourth Amendment does not restrict United States officials extraterritorially, has rejected the joint venture and agency inclusions in the exclusionary rule.

III. United States v. Verdugo-Urquidez

In United States v. Verdugo-Urquidez, the Supreme Court adopted a modified social compact theory of constitutional entitlement based on the assumption that the Constitution applies only to certain members of the population. The Court abandoned the traditional Fourth Amendment analysis, requiring a joint venture determination in lieu of a theory that broadly expands United States officials' capacity to gather evidence extraterritorially. Members of the United States DEA believed the respondent, Rene Verdugo-Urquidez, a citizen and resident of Mexico, to be a leader of a drug-
smuggling organization. The government obtained a warrant for Verdugo-Urquidez’s arrest based on a complaint charging him with narcotics-related offenses.\textsuperscript{130} Mexican police, after consulting with United States marshals, kidnapped Verdugo-Urquidez in Mexico and transported him to California, where United States authorities arrested and imprisoned him.\textsuperscript{131}

While Verdugo-Urquidez was in United States custody, a DEA agent suspected that a search of Verdugo-Urquidez’s residences in Mexico would reveal incriminating evidence relating to drug trafficking, as well as to the kidnapping, torture and murder of DEA Special Agent Enrique Camarena Salazar.\textsuperscript{132} In the search, DEA agents and officers of the Mexican Federal Judicial Police recovered a “tally sheet” that the government sought to proffer as evidence of the quantities of marijuana that Verdugo-Urquidez allegedly smuggled into the United States.\textsuperscript{133} At no time did any United States agent consult with an Assistant United States Attorney or attempt to acquire a search warrant from a neutral magistrate to search Verdugo-Urquidez’s houses.\textsuperscript{134}

Verdugo-Urquidez moved to suppress the evidence procured by the DEA agents in Mexico on the grounds that the agents had seized the tally sheet in violation of the Fourth Amendment and, therefore, that it should be excluded under the exclusionary rule.\textsuperscript{135} The United States District Court for the Southern District of California granted Verdugo-Urquidez’s motion to suppress, concluding that the Fourth Amendment applied to the extraterritorial searches and that absent exigent circumstances justifying the unwarranted search, the evidence must be excluded.\textsuperscript{136} A divided United States Court of Appeals for the Ninth Circuit affirmed, relying in part on the Supreme Court’s ruling in \textit{Reid v. Covert},\textsuperscript{137} and held that “[t]he Constitution imposes substantive constraints on the federal government, even when it

\begin{itemize}
\item \textsuperscript{131} \textit{Verdugo-Urquidez}, 110 S. Ct. at 1059.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} A joint force of Mexican and American officers searched the respondent’s residences. The searches were conducted at night, culminating at 4:00 a.m., at which time the senior Mexican official requested that the United States officials remove evidence for examination at a later date. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1217 (9th Cir. 1988), rev’d, 110 S. Ct. 1056 (1990).
\item \textsuperscript{134} \textit{Verdugo-Urquidez}, 856 F.2d at 1216 n.2.
\item \textsuperscript{135} \textit{Id.} at 1217.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} 354 U.S. 1 (1957).
\end{itemize}
operates abroad.” The appellate court also relied on *Immigration & Naturalization Service v. Lopez-Mendoza*, in which the Supreme Court determined that illegal aliens residing in the United States acquired Fourth Amendment protections, and argued by analogy that aliens incarcerated legally within the United States are entitled to these same protections. The court further argued that because Verdugo-Urquidez was entitled to “due process under the fifth amendment, and to a fair trial under the sixth amendment,” it would be inconsistent to deny him Fourth Amendment rights.

The appellate court recognized that while a search warrant issued in the United States would have no “legal validity” in Mexico, “it would have substantial constitutional value in this country” based on the legitimacy imparted when a neutral magistrate determines the scope and reasonableness of a search and seizure. The majority concluded that the evidence seized in Mexico should be excluded from trial because it was seized without a warrant in violation of the Fourth Amendment.

In a dissenting opinion, Judge Wallace maintained that *United States v. Curtiss-Wright Export Corp.* controlled. In *Curtiss*, the Supreme Court held that “[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.” Judge Wallace argued that the Constitution is a “‘compact’... among the people of the United States” and that the protection of the Fourth Amendment was only guaranteed to “the people” who assented to that “compact,” the citizens of the United States.

The Supreme Court incorporated Judge Wallace’s dissent in large part when it reversed the Ninth Circuit’s decision. The Court analyzed the case from three perspectives. First, Chief Justice Rehnquist argued that Verdugo-Urquidez lacked a sufficient connection with the United States to merit protection of the Constitution. Chief Justice Rehnquist relied on a historical and textual analysis to support his theory of the Constitution as a social compact. Second, the Court argued that prior case law had estab-

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140. *Verdugo-Urquidez*, 856 F.2d at 1223.
141. *Id.* at 1224.
142. *Id.* at 1230.
143. *Id.*
144. *Id.*
145. 299 U.S. 304 (1936).
146. *Verdugo-Urquidez*, 856 F.2d at 1230 (Wallace, J., dissenting).
150. *Id.* at 1061-62.
lished that the Constitution does not necessarily extend to all government action. Instead, the majority maintained that the United States agents' participation in the search in Mexico was exempted from constitutional restraints.\textsuperscript{151} Finally, Chief Justice Rehnquist framed Verdugo-Urquidez's case as raising a separation of powers issue and argued that it is in the national interest to defer to the executive branch's authority when conducting international criminal investigations.\textsuperscript{152}

A. The Constitution as Social Compact—Establishing a Sufficient Connection

Chief Justice Rehnquist asserted that under a social compact theory, Fourth Amendment protection against unreasonable searches and seizures is guaranteed only to those individuals who are entitled to protection as contracting parties in the compact.\textsuperscript{153} He supported his interpretation by examining the Framers' choice of the term "the people" as the subject of the Fourth Amendment. By analogy, Chief Justice Rehnquist argued that the Court should interpret the Fourth Amendment in the same manner as the Preamble, the First, Second, Ninth, and Tenth Amendments, as well as Article I, Section 2, Clause 3 of the Constitution.\textsuperscript{154} In each of these sections, the Court found that the Framers intended to convey rights to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."\textsuperscript{155} Because Verdugo-Urquidez's only connection with the United States was his incarceration in California on drug charges, the Court concluded that his connection was not substantial enough to include him as a participant in the national community.\textsuperscript{156} The Court implied that Verdugo-Urquidez might have established a substantial connection to the United States if he had resided in the United States for a longer period of time and, perhaps, had entered the United States voluntarily.\textsuperscript{157}

\begin{enumerate}
\item \textsuperscript{151} Id. at 1064.
\item \textsuperscript{152} See id. at 1065-66.
\item \textsuperscript{153} Id. at 1061.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id. (citing United States ex rel. Turner v. Williams, 194 U.S. 279 (1904)). In Turner, the Court held that an illegal alien was not entitled to First Amendment privileges because he was not a person under the Constitution. The Turner Court found that simply entering the country, especially illegally, is not sufficient to warrant constitutional protection. Turner, 194 U.S. at 292. To determine whether an alien is entitled to First Amendment protections, the Court will consider whether he or she is part of the "people" to whom these rights are guaranteed. Id. The majority in Verdugo-Urquidez applied this holding by analogy to nonresident aliens. Id. at 1065.
\item \textsuperscript{156} Id. at 1064.
\item \textsuperscript{157} Id. at 1064-65.
\end{enumerate}
The Court then provided a historical overview of the Fourth Amendment, explaining that its adoption was designed to protect citizens from the unreasonable government searches which were a recurring pre-Revolutionary abuse of authority.\footnote{158 Id. at 1061.} According to Chief Justice Rehnquist, the Framers originally rejected the Fourth Amendment, believing that the national government would not have the authority to conduct searches.\footnote{159 Id.; see Charles C. Warren, The Making of the Constitution 508-09 (1937); The Federalist No. 84, at 578-79 (Alexander Hamilton) (Jacob Cooke ed., 1961).} Because the debate concerning the Amendment’s inclusion focused on the government’s authority in relation to its citizens, the Court suggested that this necessarily excludes its application to any noncitizens.\footnote{160 Verdugo-Urquidez, 110 S. Ct. at 1061.} The Court explained that the debate concerning the Fourth Amendment made clear that the Framers wished to restrain the government’s ability to search and seize in a domestic capacity only. Though the fear of unregulated government searches and seizures resulted in the Fourth Amendment’s inclusion in the Bill of Rights, the Court maintained that there is no evidence that the Framers intended the Fourth Amendment to apply to “activities of the United States directed against aliens in a foreign territory.”\footnote{161 Id. The Court pointed to the “undeclared war” between the United States and France, wherein Congress authorized President Adams to instruct United States ships to seize, among others, any French ship found in United States waters or “elsewhere, on the high seas.” Id. at 1062 (quoting An Act Further to Protect the Commerce of the United States, ch. 68, § 1, 1 Stat. 578 (1789)). The majority maintained that the Framers never suggested that the Fourth Amendment restrained this type of activity. Id. Arguably, however, although no party sued the government under this argument, this omission does not necessarily legitimize President Adams’ instructions. Additionally, these cases are fundamentally distinguishable because they involve acts of war.} \footnote{162 Id. at 1061.}  

After recognizing that the protection of the Constitution only extends to those who have entered the “compact of the Constitution,” the majority next determined who is party to the social compact and who makes up “the persons” the Constitution seeks to protect.\footnote{163 See supra notes 10-12.} Chief Justice Rehnquist maintained that the cases cited by the respondent that extended constitutional rights to aliens turned on whether the aliens resided within the boundaries of the United States and “developed substantial connections with this country.”\footnote{164 Verdugo-Urquidez, 110 S. Ct. at 1064.} According to the majority, Verdugo-Urquidez was “an alien with no previous significant voluntary connection with the United States” and, therefore, was not entitled to constitutional protections.\footnote{165 Id.} Although, as Justice Stevens pointed out in his concurrence, Verdugo-Urquidez was...
within the confines of the United States’ borders when the searches were conducted in Mexico, the majority held that “this sort of presence—lawful but involuntary—is not the sort to indicate any substantial connection with our country.”\textsuperscript{166} Chief Justice Rehnquist carefully limited the Court’s holding to the facts in \textit{Verdugo-Urquidez}, where the search of the respondent’s residence took place five days after his arrest and incarceration in the United States.\textsuperscript{167} Chief Justice Rehnquist did not rule on whether incarceration for an extended period of time would create a substantial connection, but rather, he maintained that the “fortuitous” circumstances that brought the respondent to the United States when the search occurred should not control the constitutionality of the search.\textsuperscript{168}

\section*{B. Precedent and the Rights of Foreign Nationals}

In his analysis of the foreign application of the Constitution, Chief Justice Rehnquist argued that cases granting illegal aliens Fourth Amendment protections should be read narrowly and are distinguishable from \textit{Verdugo-Urquidez} on their facts.\textsuperscript{169} The Court relied on the \textit{Insular} cases to support the proposition that “not every constitutional provision applies to governmental activity, even where the United States has sovereign power.”\textsuperscript{170} Chief Justice Rehnquist asserted that because constitutional rights do not necessarily extend to aliens in territories that Congress ultimately governs, the Constitution does not protect nonresident, extraterritorial aliens, whose

\begin{itemize}
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} \textit{Id.}
  \item \textsuperscript{168} \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} at 1064-68. The Court first addressed Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984). Chief Justice Rehnquist asserted that the \textit{Lopez-Mendoza} decision stood merely for the proposition that the exclusionary rule should apply to illegal aliens’ deportation hearings, but not to illegal aliens as a whole. \textit{Verdugo-Urquidez}, 110 S. Ct. at 1064-65. Therefore, the Court maintained, it is “not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens.” \textit{Id.} at 1065. Chief Justice Rehnquist further posited that \textit{Lopez-Mendoza} can be distinguished on the grounds that \textit{Verdugo-Urquidez} is neither an illegal alien nor a voluntary resident of the United States. \textit{Id.}
  
  Relying on Graham v. Richardson, 403 U.S. 365 (1971), in which the Court struck down state statutes that denied welfare benefits to resident aliens, Verdugo-Urquidez argued that treating aliens differently from United States citizens violates the Equal Protection Clause of the Fourteenth Amendment. \textit{Verdugo-Urquidez}, 110 S. Ct. at 1065. The Court countered this argument by referring to Mathews v. Diaz, 426 U.S. 67 (1976), in which the Court held that Congress need not provide to all aliens the benefits that it is required to provide to citizens. \textit{Id.} at 80. The majority in \textit{Verdugo-Urquidez} argued that the Constitution, therefore, “expressly accord[s] differing protections to aliens than to citizens.” \textit{Verdugo-Urquidez}, 110 S. Ct. at 1065.
  
  \item \textsuperscript{170} \textit{See supra} notes 77-87 and accompanying text.
  \item \textsuperscript{171} \textit{Verdugo-Urguidez}, 110 S. Ct. at 1062.
\end{itemize}
connection to the United States government is even more attenuated.\textsuperscript{172} Chief Justice Rehnquist rejected the view that every constitutional provision is applicable wherever the United States chooses to exercise its power.\textsuperscript{173}

\section*{C. Separation of Powers}

Along with its textual analysis of the Constitution, the Court placed strong stock in its view that under the constitutionally mandated separation of powers, the executive branch should be free to carry out its foreign and domestic policy objectives without constitutional restraint.\textsuperscript{174} Chief Justice Rehnquist suggested that the holding of the Ninth Circuit Court of Appeals in \textit{Verdugo-Urquidez} would inhibit not only law enforcement operations, but also foreign policy operations.\textsuperscript{175} According to the majority, requiring a United States law enforcement agent to acquire a search warrant prior to searching a suspect's home outside of the United States would hamstring government officials' efforts to enforce drug laws and conduct foreign policy.\textsuperscript{176} The majority feared that enforcing the warrant requirement of the Fourth Amendment would swamp the courts with lengthy case-by-case adjudications.\textsuperscript{177} Chief Justice Rehnquist maintained that the lower court's "global view" would "plunge [legislators and executive officials] into a sea of uncertainty as to what might be reasonable in the way of searches and

\begin{itemize}
  \item \textsuperscript{172} \textit{Id.}
  \item \textsuperscript{173} \textit{Id.} at 1063. Chief Justice Rehnquist distinguished \textit{Reid v. Covert}, 354 U.S. 1 (1957), holding that the extraterritorial application of the Constitution is limited to United States citizens and does not constrain federal officials if they are acting outside the United States against a non-citizen. \textit{Verdugo-Urquidez}, 110 S. Ct. at 1063.
  \item \textsuperscript{174} \textit{Verdugo-Urquidez}, 110 S. Ct. at 1066.
  \item \textsuperscript{175} \textit{Id.} at 1065-66.
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Id.} at 1065. The Court was concerned with increased adjudications due to recognition of new causes of action under the Fourth Amendment. See \textit{Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics}, 403 U.S. 388, 389 (1971) (holding that when a federal agent "acting under color of his authority" violate's the Fourth Amendment, this "gives rise to a cause of action for damages"). In \textit{Bivens}, the Federal Bureau of Narcotics arrested the respondent and manacled and searched him in front of his family without a warrant. The Court held the respondent was entitled to recover money damages as a result of the federal agents violation of the Fourth Amendment. \textit{Id.} at 397; see also \textit{Tennessee v. Garner}, 471 U.S. 1, 11 (1985) (striking down a Tennessee statute that allowed a police officer to use whatever force necessary to effect an arrest). The \textit{Garner} Court reasoned that an apprehension is a seizure under the Fourth Amendment and, therefore, it must be reasonable. The Court held that disallowing the use of deadly force in a situation where it was obvious that neither the police officer nor any bystander was at risk would not "severely hamper effective law enforcement." \textit{Id.} at 19; see also \textit{Graham v. Connor}, 490 U.S. 386, 394-95 (1989) (finding that questions concerning excessive force in an investigatory stop should be analyzed under the reasonableness standard of the Fourth Amendment).
\end{itemize}
seizures conducted abroad." The majority concluded that the Court should not impede the executive branch's ability to function effectively in the international arena. The Court maintained that any restrictions on extraterritorial searches and seizures "must be imposed by the political branches through diplomatic understanding, treaty, or legislation."

1. Justice Kennedy's Concurrence

In his concurring opinion, Justice Kennedy denied that the Constitution extended protection to "some undefined, limitless class of non-citizens who are beyond our territory," but maintained that the term "the people" should not be interpreted as "a source restricting [the Fourth Amendment's] protections." Justice Kennedy based his conclusion that the Constitution does not extend to nonresident aliens on "general principles of interpretation." He posited that because the government can act only as the Constitution mandates, the issue is what the Constitution mandates in respect to nonresident aliens. Justice Kennedy interpreted constitutional protections "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." Justice Kennedy reasoned that this authority must be weighed against the facts of each case in an effort to devise what rights the Constitution necessarily guarantees. By weighing the circumstances in this case, Justice Kennedy concluded that "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous."

178. Verdugo-Urquidez, 110 S. Ct. at 1066.
179. Id.
180. Id. (Kennedy, J., concurring). Justice Kennedy argued that although the Constitution does not extend extraterritorially, United States criminal statutes do. Id.

Justice Stevens also concurred, but disagreed with the majority's contention that Verdugo-Urquidez was not one of the "people" entitled to constitutional protection. Id. at 1068 (Stevens, J., concurring). Justice Stevens posited that Verdugo-Urquidez's lawful presence in the United States afforded him Fourth Amendment protection, but that the seized tally sheet need not be excluded because the search was reasonable for Fourth Amendment purposes. Id.

181. Id. at 1067 (Kennedy, J., concurring). Alternatively, Justice Kennedy asserted that the Framers' choice of the "people" may have been to "underscore the importance" of the right to be free from unreasonable searches. Id.
182. Id.
183. Id.
184. Id.
185. Id. at 1067-68.
186. Id. at 1067. The facts Justice Kennedy looked to were the absence of local judges to issue warrants, the different sense of reasonableness and privacy abroad, and the need to cooperate with foreign officials. Id. at 1068.
2. **Justice Brennan's Dissent**

Justice Brennan responded in his dissent that "at the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law." Justice Brennan claimed that although the majority agreed that "the people" includes non-United States citizens, the majority failed to satisfactorily define what constituted a "sufficient connection." Justice Brennan asserted that at one point the majority required that aliens must have a "substantial connection" to the community to be considered part of "the people," while at other times it suggested that merely a voluntary presence and an acceptance of some "societal obligations" should be enough. The dissent maintained that "the people" should be interpreted "as a rhetorical counterpoint to 'the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government.'" The thrust of the dissent's analysis revolved around whether an individual is subject to the government to the extent that he could be considered one of the "governed." Justice Brennan asserted that the United States government has created a significant connection to Verdugo-Urquidez by "attempting to hold him accountable under United States criminal laws." He argued the fact that the respondent may be sentenced to spend the rest of his life in a prison in the United States makes him a member of the community and "one of the governed." The dissent asserted that "fundamental fairness" requires that if an individual is subject to the laws of the United States, the United States should afford the individual a corresponding constitutional protection.

Justice Brennan summarized the Court's decision as holding that "foreign nationals must abide by our laws . . . [while] our Government need not abide by the Fourth Amendment when it investigates them for violations of our

187. *Id.* at 1070 (Brennan, J., dissenting).
188. *Id.*
189. *Id.*
190. *Id.* at 1072.
191. *Id.* at 1071.
192. *Id.* at 1070-71.
193. *Id.* at 1071. Justice Brennan quoted James Madison in a speech against the Alien and Sedition Acts. "'Aliens are no 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.'" *Id.* (quoting JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in 4 ELLIOT'S DEBATES 556 (2d ed. 1836)). Justice Brennan also made an Equal Protection argument, asserting that because it is possible that a citizen of the United States will be tried as a codefendant in the same trial for the same crime with a non-United States citizen—international criminal conspiracy for example—it is discriminatory that the Constitution protects one defendant from unreasonable searches but not the other. *Id.* at 1071.
laws." He argued that the United States government continuously has sought to charge foreign nationals with crimes committed under federal laws for "conduct committed entirely beyond the territorial limits of the United States." Because Congress' sole source of authority to enforce these laws is the Constitution, Justice Brennan criticized the Court's holding as creating "an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them."196

Justice Brennan concluded that the majority placed undue emphasis on the fact that the Framers used the term "person" and "accused" in the Fifth and Sixth Amendments in contrast to "the people" in the Fourth.197 The majority asserted that this difference intentionally broadens the scope of the Fifth and Sixth Amendments to all defendants in criminal prosecutions, regardless of their ties to the United States, and limits the scope of the Fourth Amendment to encompass only the "people" in compact with the United States.198 Justice Brennan demonstrated that the phraseology of the Fourth Amendment would be rather awkward if "person" were to replace "the people."199 Likewise, he explained that the Framers could not have used the term "accused" in the Fourth Amendment because the Fourth Amendment does not apply solely to those accused of crimes.200 Justice Brennan suggested a purely syntactical reason for the use of the term "people" in the Fourth Amendment and effectively undermined the majority's emphasis on this choice of phrase.

194. Id. at 1068.
196. Verdugo-Urquidez, 110 S. Ct. at 1069-70 (Brennan, J., dissenting).
197. Id. at 1072 n.9.
198. Id. at 1063.
199. Id. The American Civil Liberties Union argued in its amicus brief to the Supreme Court in Verdugo-Urquidez that the most likely reason for the use of the term "people" was "to avoid the awkward rhetorical redundancy that would have been caused if 'persons' were used." Brief for Amici Curiae by the American Civil Liberties Union at 9, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (No. 88-1353). For example, it would have been extremely awkward for the clause to read the right of "persons" to be secure in their persons is guaranteed.
200. Verdugo-Urquidez, 110 S. Ct. at 1072 n.9 (Brennan, J. dissenting).
Justice Brennan explained that the Framers intended to shape a government of limited powers, one which would be markedly different from the unrestrained plenary authority of pre-revolutionary British domination.\footnote{Id. at 1072-73.} He argued that "Americans vehemently attacked the notion that rights were matters of 'favor and grace,' given to the people from the government."\footnote{Id. at 1073; see also B. Bernard Bailyn, The Ideological Origins of the American Revolution 182, 187 (1967).} Instead, he maintained, the Bill of Rights merely prohibited government from infringing on "pre-existing" or naturally endowed rights and liberties.\footnote{Verdugo-Urquidez, 110 S. Ct. at 1073 (Brennan, J., dissenting).} Justice Brennan asserted that the Fourth Amendment's assurance that the people are to be safe from unreasonable searches and seizures simply upholds a basic human right. Because these rights are inherent in all persons, Justice Brennan reasoned that "delineating protected groups would have been inconsistent with the drafters' fundamental conception of a Bill of Rights."\footnote{Id. Justice Brennan argued that the drafter of the Bill of Rights chose not to explicitly limit the Fourth Amendment. Both New York's and Virginia's conventions wanted to ratify that every "freeman" was to be secure from searches and seizures. But the drafter rejected this limiting statement. Justice Brennan maintained that there are no background historical papers that suggest the Framers intended any limitations as to the class of persons the Fourth Amendment protects. Id. Justice Brennan argued that the cases the majority used to illustrate the historical perspective indicating an intent to limit its breadth solely to non¬foreigners are not on point. Id. at 1070 n.7 (quoting id. at 1061 (majority opinion)). Justice Brennan rejected the majority's reading of the controlling cases. He maintained that the majority interpreted Johnson v. Eisentrager, 339 U.S. 763 (1950), to reject broadly the claim that aliens are guaranteed Fifth Amendment rights. See supra text accompanying notes 56-63. In contrast, Justice Brennan argued that Johnson applies solely to enemy aliens at war with the United States, and that the Insular cases are "inapposite" because they deal with the protections accused persons enjoy when tried by territorial authorities in territorial courts. Verdugo-Urquidez, 110 S. Ct. at 1074 (Brennan, J., dissenting). According to Justice Brennan, the holding in Reid v. Covert, 354 U.S. 1 (1957), had long ago limited the Insular cases to their individual facts, and, therefore, these cases hold no analytical value when dealing with Fourth Amendment assertions by criminal defendants in federal court. Verdugo-Urquidez, 110 S. Ct. at 1074 n.11 (Brennan, J., dissenting).} 

Additionally, Justice Brennan pointed out that the majority's analysis implies that a foreign national who had "'developed sufficient connection with this country to be considered part of [the] community' would be protected by the Fourth Amendment regardless of the location of the search," thereby imbuing the foreign national with constitutional rights.\footnote{Id. at 1070 n.7 (quoting id. at 1061 (majority opinion)). Justice Brennan rejected the majority's reading of the controlling cases. He maintained that the majority interpreted Johnson v. Eisentrager, 339 U.S. 763 (1950), to reject broadly the claim that aliens are guaranteed Fifth Amendment rights. See supra text accompanying notes 56-63. In contrast, Justice Brennan argued that Johnson applies solely to enemy aliens at war with the United States, and that the Insular cases are "inapposite" because they deal with the protections accused persons enjoy when tried by territorial authorities in territorial courts. Verdugo-Urquidez, 110 S. Ct. at 1074 (Brennan, J., dissenting). According to Justice Brennan, the holding in Reid v. Covert, 354 U.S. 1 (1957), had long ago limited the Insular cases to their individual facts, and, therefore, these cases hold no analytical value when dealing with Fourth Amendment assertions by criminal defendants in federal court. Verdugo-Urquidez, 110 S. Ct. at 1074 n.11 (Brennan, J., dissenting).} According to Justice Brennan, however, this reasoning would conflict with the majority's holding that the Constitution does not apply extraterritorially.
By focusing on the function of the Fourth Amendment, Justice Brennan countered the majority's argument that the Court should defer to the executive branch in foreign policy questions. He asserted that the Fourth Amendment's role is to assure that a neutral magistrate decides the reasonableness of the contemplated search. According to Justice Brennan, the neutrality of the magistrate is determinative. He reasoned that the Court cannot ignore the Warrant Clause of the Fourth Amendment simply because Congress has not given United States magistrates explicit authority to issue warrants for foreign searches. Similarly, he argued that the judiciary, rather than Congress, should "define the contours" of the Constitution. "The need to protect those suspected of criminal activity from the unbridled discretion of investigating officers is no less important abroad than at home." Justice Brennan reiterated that policy dictates enforcement of the strictures of the Warrant Clause. He argued that when United States officials act in an unconstitutional manner abroad they are not functioning in a legitimate foreign policy capacity, and asserted that if the United States respects the inherent rights of foreign nationals, the United States will cultivate reciprocal respect.

Finally, responding to the majority's concern that allowing aliens Fourth Amendment rights would "disrupt the ability of the political branches to respond to foreign situations," the dissent argued that, in cases of national security, federal officials could circumvent the warrant requirement by stating existing exigent circumstances. There may be instances when "ofen-

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206. Verdugo-Urquidez, 110 S. Ct. at 1074-75.
207. Id. at 1076.
208. Id.
209. Id. at 1077.
210. Id.
211. Id. Justice Brennan also pointed out that the United States' Army has recognized that a warrant issued by a judicial court is necessary when they wish to intercept a wire or oral communication abroad. Id. at 1077 n.14.
212. Id. at 1077.
213. Id. at 1071.
215. Verdugo-Urquidez, 110 S. Ct. at 1065; id. at 1075 (Brennan, J., dissenting).
216. Id. at 1075 (Brennan, J., dissenting); see Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that fingernail scrapings recovered from a suspect without a warrant were admissible due to the existence of probable cause and the easy destructibility of the evidence).
sive use of constitutional rights should be limited," but, according to Justice Brennan, if the executive branch wants to use the evidence seized in a foreign search, it must first obtain a valid search warrant.

IV. THE CONSTITUTION AS AN EMBODIMENT OF NATURAL RIGHTS

The majority's ruling indicates that the Supreme Court is willing to play a less active role in fashioning constitutional solutions to foreign policy issues. By embracing the social compact theory, the Court limits the scope of the Constitution and, therefore, in effect reduces the reach of the Fourth Amendment. Recent decisions where federal and state officials have been granted a broader scope of authority in domestic search and seizure situations and cases involving border and administrative searches illustrates the Court's trend to limit the effect of the Constitution.

Chief Justice Rehnquist decided the issue of constitutional applicability in a manner inconsistent with precedence. His analysis of those who are incorporated in the Constitution as "the people" superficially addresses whether

217. Verdugo-Urquidez, 110 S. Ct. at 1075; see Dennis v. United States, 341 U.S. 494, 516 (1951) (upholding the constitutionality of the Smith Act, 18 U.S.C. § 11 (1946), because advocating the overthrow of the United States government was a "substantial enough interest for the Government to limit speech"); Korematsu v. United States, 323 U.S. 214, 219 (1944) (finding the forced internment of American citizens of Japanese descent during World War II was constitutional as a necessary response to the waging of war); Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that a pamphlet that advocated avoiding the draft violated the Espionage Act and that the First Amendment did not protect such speech).

218. Verdugo-Urquidez, 110 S. Ct. at 1077 (Brennan, J., dissenting). Justice Blackmun asserts in his dissent that although American agents acting abroad are not generally exercising sovereign authority over foreign nationals, when United States federal officials hold such nationals accountable for United States criminal laws, they are "the governed" and, therefore, are entitled to Fourth Amendment protections. Id. at 1078 (Blackmun, J., dissenting). "[T]he enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey." Id.

In applying the Fourth Amendment, Justice Blackmun maintains that the Warrant Clause is inapplicable, arguing that United States magistrates lack jurisdictional authority extraterritorially. Id. He does contend, however, that the agents' actions in Verdugo-Urquidez may have violated the Reasonableness Clause of the Fourth Amendment, and would have remanded the case for further fact finding. Id.

219. Maryland v. Buie, 494 U.S. 325, 337 (1990) (holding that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing danger to those on the arrest scene").

220. United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (holding that the detaining of a suspected drug smuggler by customs officials for over 16 hours and subsequently removing her to a hospital and subjecting her to a rectal examination without a warrant was constitutional).

221. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); see also supra notes 25-26 and accompanying text.
individuals are sufficiently "connected" to it to merit constitutional protection. The prospect of life in prison should qualify Verdugo-Urquidez as one who is "governed" by United States authority, and should categorize him as sufficiently connected to the United States community to inherit the mantle of constitutional protections. The simplicity of the majority's textual analysis ignores the heart of the Fourth Amendment's protection and the values and ideals upon which it is based.

The social compact theory of the Constitution is just one of two approaches to analyzing the scope of the Fourth Amendment. The Constitution can also be viewed as a collection of laws, limiting and restricting the actions of the government itself, thereby allowing the people to retain their naturally endowed rights. According to one constitutional commentator, the Court has inconsistently applied the compact theory.\textsuperscript{222} This inconsistency is at the root of the Court's failure to establish a determinative standard by which an individual is judged to be part of the community and, therefore, endowed with constitutional rights.\textsuperscript{223} In \textit{Yick Wo v. Hopkins},\textsuperscript{224} the Court extended the compact to aliens within the boundary of the United States, reasoning that a substantial connection to the community existed when the individual voluntarily crossed the border.\textsuperscript{225} In \textit{In re Ross},\textsuperscript{226} however, the Court refused to apply the social compact theory to encompass all individuals under the authority of the United States government. Finally, in \textit{Reid v. Covert},\textsuperscript{227} the Court, in effect, overturned \textit{Ross} and broadened the application and scope of constitutional protections by holding that "individual rights must be respected whenever and wherever federal officials act."\textsuperscript{228}

The \textit{Reid} holding, if read to include both citizens and non-citizens of the United States, can be interpreted to require a respect of individual rights and to limit governmental intrusions to a constitutional standard of reasonableness. The fact that the natural rights described in the Constitution and the Bill of Rights antecede both documents reflects the Framers' "commitment to respect the individual rights of all human beings."\textsuperscript{229} The lack of explicit geographical and population characterizations in the Constitution is intentional and allows for a broader reading of the Constitution's scope.\textsuperscript{230} As the Fifty-Sixth Congress stated in its report to the House of Representatives

\begin{itemize}
\item 222. Henkin, \textit{supra} note 29, at 31.
\item 223. \textit{Id}.
\item 224. 118 U.S. 356 (1886).
\item 225. \textit{Id} at 369.
\item 226. 140 U.S. 453 (1891).
\item 227. 354 U.S. 1 (1957).
\item 228. Henkin, \textit{supra} note 29, at 31.
\item 229. \textit{Id} at 32.
\item 230. \textit{Id}.
\end{itemize}
in 1900, the "United States' authority to act abroad stems from the Constitution; the Government must therefore accept the limits provided by the same document that is the source of its power."\textsuperscript{231} When the Court shifts the focus from the government's duty to the individual's status, it is explicitly weighing the community's interest against the individual's interest.\textsuperscript{232} This analysis undermines the basic values of the individual rights protected by the Fourth Amendment and enforced judicially by the exclusion of improperly seized evidence. The exclusionary rule acts not only to protect individual rights but also to ensure that the judiciary does not become an "accomplice after the fact."\textsuperscript{233}

The majority relied on the \textit{Insular} cases in its argument that the Constitution does not extend beyond the United States' borders and interpreted \textit{Reid} to control only in situations where the United States was acting against a citizen in a territory of the United States. It is equally legitimate, however, to hold, as Justice Brennan did in his dissent, that \textit{Reid} effectively overturns the \textit{Insular} cases by maintaining that they do not rule on the constitutionality of actions taken by United States agents outside the United States, but rather deal solely with the actions of local extraterritorial authorities.\textsuperscript{234} The \textit{Insular} cases can also be distinguished because they rely on Congress' authority under Article IV, Section 3 of the Constitution to regulate all territory belonging to the United States.\textsuperscript{235} Because the United States has no sovereign authority over foreign nations, it is unnecessary for the Court to weigh Congress' plenary power against an individual's Fourth Amendment rights. The \textit{Insular} cases can be understood to stand for the principle that a United States citizen is not necessarily guaranteed constitutional rights if tried in a United States territory.\textsuperscript{236} If citizens are not prosecuted by the United States government, their rights under the Constitution cannot take effect. The \textit{Insular} cases do not control in \textit{Verdugo-Urquidez} because the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{231} S. REP. No. 249, 56th Cong., 1st Sess. 11 (1900); see Jules Lobel, \textit{The Constitution Abroad}, 83 AM. J. INT'L L. 871, 873 (1989).
\item \textsuperscript{232} Lobel, supra note 231, at 873.
\item \textsuperscript{233} United States v. Calandra, 414 U.S. 338, 351 (1974) (holding that evidence seized outside the scope of a search warrant can be used in Grand Jury proceedings as a derivative use of illegally seized evidence but cannot be entered during trial).
\item \textsuperscript{234} \textit{Verdugo-Urquidez}, 110 S. Ct. at 1074 (Brennan J., dissenting); see also United States v. Tiede, 86 F.R.D. 227, 249 (U.S. Ct. for Berlin, 1979) ("[T]he \textit{Insular Cases} examined the extent to which a criminal defendant in a territory administered or governed by the United States was the beneficiary of the rights guaranteed by the United States Constitution, regardless of whether the United States itself was the prosecuting authority.").
\item \textsuperscript{235} Brief for Amici Curiae by the American Civil Liberties Union at 14, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (No. 88-1353). The purpose of that clause was to allow a territory to use its own laws and customs if necessary and or desired. \textit{Id}.
\item \textsuperscript{236} \textit{Id}.
\end{enumerate}
\end{footnotesize}
issue of territorial authority is not implicated and because the United States
government is the prosecuting agent.

The majority's ruling reverses a long-standing policy of holding federal
officials accountable for their operations conducted in concert with foreign
officials in a foreign country. The facts of the search in Verdugo-Urquidez
exemplify an instance when the "joint venture" rule should apply. Because
United States agents were acting in conjunction with Mexican officials, the
agents should be held to the constitutional standard mandated by the Fourth
Amendment. Procedurally, this simply would require a federal official to
procure a search warrant proscribing the scope of the search. Over the
course of time that it took to gain Mexican approval for the search, DEA
agents could have presented their warrant request to a United States magis-
trate, including a list of what they hoped the search would recover. Nothing
in the facts of Verdugo-Urquidez makes this constitutional requirement un-
reasonable or unmanageable. The problem is not so much one of forcing a
United States officer to conform to both the foreign country's criminal pro-
cedure as well as to the United States Constitution, but rather one of main-
taining a consistent standard of judicial review.

The unfairness of subjecting a nonresident alien to the criminal process,
while refusing him the constitutional protection that is integral to that pro-
cess, erodes the values and ideals the Fourth Amendment and will inevita-
ibly undermine confidence in the Constitution at home. In an increasingly
interdependent world, it is important to accept a notion of "human rights"
that, as Justice Story wrote in the early nineteenth century, "arise from the
law of nature, and the gift of Providence, and are incapable of being trans-
ferred or surrendered."

For a number of years, the Court has granted United States officials lib-
erty of movement in their foreign criminal investigations and in the carrying
out of foreign policy. The Court subjected United States law enforcement

237. See supra notes 112-24 and accompanying text.
238. The majority ignored a separate issue raised by the defendant in his brief against
granting a writ of certiorari. Verdugo-Urquidez argued that DEA agents brought back docu-
ments in a suitcase to the United States and searched through them in California without a
warrant. He asserted that United States v. Chadwick, 433 U.S. 1 (1977), and United States v.
Place, 462 U.S. 696 (1983), should apply, both of which require a warrant to search documents
removed from the scene of seizure. Verdugo-Urquidez maintained that these documents were
searched inside the United States where there is no question that the Fourth Amendment
controls and, therefore, should be excluded from trial as having been illegally searched without
a warrant.
239. See Lobel, supra note 231, at 874.
240. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES
§ 340, at 309 (1833).
241. See supra note 112 and accompanying text.
officials to constitutional restraints when conducting searches abroad if the search involved a “joint venture” without exigent circumstances. The “joint venture” standard was minimally restrictive and faithfully upheld years of judicial attempts to correctly restrain oppressive government activity. Verdugo-Urquidez effectively overrules the “joint venture” qualification and replaces an historical restraint imposed by the Fourth Amendment on any search conducted intra or extraterritorially with a per se rule that allows United States officials to conduct open-ended and unwarranted searches if performed outside the United States against a non-United States citizen.

The executive branch unsuccessfully attempted to broaden this unchecked authority in a subsequent foreign criminal proceeding. In United States v. Caro-Quintero, the Supreme Court granted certiorari on a case that addressed whether a nonresident alien, kidnapped and transported to the United States from Mexico without official Mexican approval and, in violation of an existing extradition treaty between the two countries, must be returned to Mexico. Caro-Quintero arose from circumstances similar to Verdugo-Urquidez in that United States officials suspected that the respondent, a Mexican national, was involved in the kidnapping, torture, and murder of DEA agent Enrique Camenara. The United States District Court for the Central District of California held that because the Mexican Government had protested the kidnapping in a diplomatic letter, and because a legitimate extradition process existed that the United States government failed to follow, the respondent should be returned to Mexico.

The government argued that the court contravened precedent, relying in part on Justice Wallace’s reasoning in the appellate court’s dissent in Verdugo-Urquidez. Justice Wallace had maintained that separation-of-powers principles circumscribe the supervisory power of federal courts. Thus a federal court can only exercise its supervisory power “‘when a recognized [federal] right has been violated.’” As Justice Wallace stated, “[A]ny attempt on our part to create a new exclusionary rule would be

242. See supra notes 112-14 and accompanying text.
244. Id. at 601-02. The United States had been close to arranging an exchange for Alvarez with the Mexican government when a television miniseries aired that was based on the Camenara story. Although the political ramifications in Mexico resulted in the Mexican government revoking the exchange, Alvarez was subsequently kidnapped by Mexican police officers without official Mexican approval and transported to the United States. Id. at 603.
245. Id. at 604. The government argued that the extradition treaty had not been violated because the Mexican government had not officially invoked it. Id.
246. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1247-48 (9th Cir. 1988) (alteration in original) (quoting United States v. Gatto, 763 F.2d 1040, 1046 (9th Cir. 1985)).
doubly offensive to principles of separation-of-powers, because we would be attempting to direct the actions of United States executive officials abroad . . ."\textsuperscript{247} Finally, the government relied on Chief Justice Rehnquist's assertion in \textit{Verdugo-Urquidez} that any restrictions on extraterritorial activity "must be imposed by the political branches through diplomatic understanding, treaty or legislation."\textsuperscript{248} The focus of the government's arguments illustrates the lengths to which \textit{Verdugo-Urquidez} can be extended.

Other agencies of the executive branch have also jumped on the \textit{Verdugo-Urquidez} wagon, interpreting \textit{Verdugo-Urquidez} in a manner allowing unrestrained government action abroad. Officials at the Securities and Exchange Commission (SEC) have stated that the \textit{Verdugo-Urquidez} decision "does have implications for enforcement matters generally, and that would include securities regulations."\textsuperscript{249}

One issue left unanswered by \textit{Verdugo-Urquidez} is whether evidence seized illegally under both the host country's procedures and the United States Constitution would still be admissible under a "reverse silver platter" doctrine. It appears from \textit{Verdugo-Urquidez} that evidence not admissible in the host country could be given to United States officials to use in domestic prosecutions. It is certain that the converse application, in which a foreign official conducted an illegal search in the United States, would be unpalatable to the average American citizen who expects Fourth Amendment protections to create a cause of action against an offending search party. The reverse must hold true as well.\textsuperscript{250}

After \textit{Verdugo-Urquidez}, courts may allow federal officials unconditionally to enter a foreign country, conduct a warrantless and unlimited search, with or without the host country's permission, and then return to the United States with evidence fully admissible in a domestic criminal proceeding.\textsuperscript{251} The basic protection of the Fourth Amendment, mandating an independent

\textsuperscript{247} \textit{Id.} at 1248.


\textsuperscript{249} Bureau of International Affairs, Inc., \textit{Court Ruling May Impact SEC's Overseas Enforcement}, March 12, 1990, Vol. 3, No. 7, at 6. According to a Georgetown University law professor, the \textit{Verdugo-Urquidez} decision makes clear that "SEC employees can help foreign investigators overseas gather evidence . . . [that] would otherwise have violated our Fourth Amendment and which would be admissible in a court in the United States." \textit{Id.}

\textsuperscript{250} Although the issue was not presented, it is not clear that the search in Mexico complied with the Mexican Constitution's procedural requirements. \textit{See} Jacqueline A. Weisman, \textit{Extraordinary Rendition: A One-Way Ticket to the United States . . . Or is it?}, 41 CATH. U. L. REV. — (1992).

\textsuperscript{251} Brief for Amici Curiae by the American Civil Liberties Union at 8, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (No. 88-1353). The government is now "free to conduct warrantless searches without probable cause whenever the individual being prosecuted is a foreign national and his residence lies beyond our borders." \textit{Id.}
validation of an officer's probable cause, is circumvented once the location of the search is extraterritorial. In a "wild west" mentality, a lone law officer now has the authority to define how, when, and what he will search regardless of the reasonableness of his or her assumptions or motivations.

V. CONCLUSION

The "joint venture" and agency tests for constitutionality of searches conducted in foreign countries have been rendered immaterial by the United States v. Verdugo-Urquidez holding. Today, it is unnecessary for a United States official to acquire a warrant to search a nonresident alien outside of the United States. Foreign nationals, however, are required to conduct themselves in a manner consistent with United States law or be subject to prosecution. This double standard can only subvert United States relations with foreign countries at a time when co-dependence and cooperation are more necessary than ever. An inequitable approach to judicial enforcement may hamper an allied approach to drug control and to combatting international terrorism.

The manner in which the United States conducts its foreign criminal investigations and prosecutions has far reaching effects on how it is perceived in the international community. Prior to Verdugo-Urquidez, when the Court refused to accept evidence that was procured unconstitutionally, it was sending a message to the world concerning the integrity of the standards by which the United States government conducted the internal control of its prosecutorial system. In holding that the Constitution does not extend extraterritorially, the Court undermines United States efforts to encourage other countries to emulate our system of laws and compromises the very basis of that system, the Constitution.

Janet E. Mitchell