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## *United States v. Verdugo-Urquidez*: Hands Across the Border - The Long Reach of United States Agents Abroad, and the Short Reach of the Fourth Amendment

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# COMMENTS

## **UNITED STATES v. VERDUGO- URQUIDEZ: HANDS ACROSS THE BORDER — THE LONG REACH OF UNITED STATES AGENTS ABROAD, AND THE SHORT REACH OF THE FOURTH AMENDMENT**

### I. INTRODUCTION

The Fourth Amendment of the United States Constitution<sup>1</sup> acts as a limitation upon governmental searches and seizures. The amendment has traditionally put United States courts in a position to protect the public from potentially overzealous law enforcement personnel.<sup>2</sup> Decisions in the past thirty years suggest that the Fourth Amendment protects privacy.<sup>3</sup> Until re-

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1. The Fourth 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.

U.S. CONST. amend. IV.

2. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 744 (1980) [hereinafter Saltzburg].

3. A right of privacy was, in fact, created by the Fourth Amendment. L. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 222, 246 (1988). Judicial interpretation of the Fourth Amendment has acknowledged a person's expectation of privacy. One way this has been done is by including this expectation in the balancing process through which the Court decides Fourth Amendment cases. *See, e.g., United States v. Biswell*, 406 U.S. 311 (1972) (warrantless inspection of a gun shop, authorized under the Gun Control Act of 1968, is not a violation of the Fourth Amendment because the owner of such a shop is alerted to inspection ordinances as part of the licensing procedures and thus expects them); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (permanent immigration checkpoints are not a violation of the Fourth Amendment because of immigration law enforcement considerations and adequate road signs warning travelers); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (mandatory drug testing for employees seeking jobs in drug interdiction and positions requiring them to carry a firearm is not a violation of the Fourth Amendment because governmental inter-

cently, however, the courts have not delineated exactly whose privacy is protected.

In February 1990, the Supreme Court of the United States, in *United States v. Verdugo-Urquidez*,<sup>4</sup> addressed the issue of whether Fourth Amendment protection extends to a nonresident alien whose property, located on foreign soil, is searched by United States law enforcement personnel. Chief Justice Rehnquist's majority opinion held that a foreign national is not entitled to Fourth Amendment protection.<sup>5</sup> This decision appears to be the first time since the famous "Insular Cases"<sup>6</sup> that a United States court has specifically recognized a class of people who fall under United States municipal law but do not benefit from United States constitutional safeguards. The majority comprising the *Verdugo-Urquidez* opinion agree only that this search and seizure was constitutional; the weakness of the Court's opinion lies in the mere plurality of Justices who agree on the specific reasons why.<sup>7</sup>

This Comment analyzes the Supreme Court's decision in *Verdugo-Urquidez*. It examines the reasoning and differences between the majority opinion and the two concurrences, as well as the dissenting opinions. This analysis is undertaken in light of the history of the Bill of Rights and the language of the Fourth Amendment, the application of the Fourth Amendment to citizens of foreign states, and the United States policies that underlie the erosion of the scope of the Fourth Amendment both here and abroad.

This Comment finds that the Supreme Court's decision in *Verdugo-Urquidez* withholds Fourth Amendment protection from the vast class of people who do not live on United States

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ests override an individual's expectation of privacy).

4. 494 U.S. 259 (1990).

5. *Id.* at 261-62.

6. The "Insular Cases" were a series of decisions in the early part of this century in which the Supreme Court held that citizens of United States territories are not entitled to the same constitutional safeguards as people residing in the United States. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972). See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico* [sic], 258 U.S. 298 (1922); see *infra* note 36.

7. The decision was six to three, with Justices Brennan, Marshall, and Blackmun dissenting. Chief Justice Rehnquist delivered the opinion of the Court, joined by Justices Kennedy and Stevens who filed separate concurring opinions. *Verdugo-Urquidez*, 494 U.S. 259.

soil, do not have "substantial connections"<sup>8</sup> with the United States, and, yet, are expected to observe United States laws. Further, the splintered *Verdugo-Urquidez* opinion does not elucidate clear reasoning that lower courts can apply.<sup>9</sup> Finally, this Comment concludes that the Supreme Court majority is using the Constitution to further current United States anti-drug enforcement policy on an international level.

## II. UNITED STATES v. VERDUGO-URQUIDEZ

### A. Facts and Procedure

Rene Martin Verdugo-Urquidez is a Mexican citizen and resident. In response to an outstanding United States warrant for his arrest, several Mexican police officers apprehended Verdugo-Urquidez on January 24, 1986, in Mexico.<sup>10</sup> The Mexican officers handcuffed Verdugo-Urquidez, forced him to lie face down, and covered him with a jacket in the back of the police car for the two hour drive to the Mexican-United States border.<sup>11</sup> Verdugo-Urquidez, who was not told why he was apprehended, was subsequently handed over to several United States Marshals at the border.<sup>12</sup> Terry Bowen, a Drug Enforcement Agency (DEA) agent who was expecting Verdugo-Urquidez's arrival at the border, transported Verdugo-Urquidez to a correctional facility in San Diego.<sup>13</sup> Though contrary to the Mexican Constitution<sup>14</sup> and a United States-Mexico extradition treaty,<sup>15</sup>

8. *The Supreme Court, 1989 Term: Leading Cases: I. Constitutional Law; F. Search and Seizure*, 104 HARV. L. REV. 276, 280 (1990) [hereinafter *The Supreme Court, 1989 Term*].

9. The application of the holding in *Verdugo-Urquidez* to other cases, with different fact patterns, is unclear. *The Supreme Court, 1989 Term*, *supra* note 8, at 280.

10. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216 (9th Cir. 1988).

11. *Id.*

12. Verdugo-Urquidez was actually stuffed through a hole in the fence marking the United States-Mexican border. It is not uncommon for the United States to obtain jurisdiction over foreign nationals in ways other than those provided for in treaties. This type of irregular extradition is often carried out with the foreign government's consent. The United States paid six Mexican officers to kidnap and deliver Verdugo-Urquidez to the United States Marshal's Service at the border. Mexico protested two and a half years after the kidnapping. No action was taken by the United States to satisfy the tardy complaint. Murphy, *Special Project: Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1294, 1300 (1990) [hereinafter Murphy]. See *infra* note 23; see also *Ker v. People of the State of Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952).

13. *United States v. Verdugo-Urquidez*, 856 F.2d at 1216.

14. Much like our own Fourth Amendment, Article 16 of the Mexican Constitution necessitates a written order, containing specifics, from the appropriate judicial authority

this illegal extradition was accomplished without significant official Mexican protest.<sup>16</sup>

Agent Bowen believed that a search of Verdugo-Urquidez's Mexicali and San Felipe homes (both in Baja California, Mexico) would yield evidence of a drug operation and homicide.<sup>17</sup> Assistant Special Agent White (in charge of DEA operations in Mexico) gave Agent Bowen permission to search Verdugo-Urquidez's Mexican property and agreed to contact the Mexican authorities, even though Agent Bowen had never consulted the Justice Department.<sup>18</sup> At Special Agent White's request, Director General Ventura of the Mexican Federal Judicial Police (MFJP) agreed to the search. Four DEA agents (all of whom knew that Verdugo-Urquidez had been arrested), along with ten to fifteen MFJP officers supplied by Director Ventura, participated in the search. A MFJP commandante told the DEA agents that they would be able to take the fruits of the search back to the United States.<sup>19</sup>

The searches of both homes took place on the night of January 25, 1986. The DEA agents who took an active role in the searches did not inventory or receipt Verdugo-Urquidez's be-

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prior to molesting a person or their possessions. Wedgewood, *Extraterritorial Jurisdiction — Applicability of Constitutional Restraints to U.S. Officials Acting Abroad — Searches by U.S. Officials of Alien-Owned Premises in Foreign Countries*, 84 AM. J. INT'L L. 747, 748-49 (1990) [hereinafter Wedgewood] (citing Flanz & Moreno, *Constitution of Mexico*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (1988)).

15. Federal District Judge Edward Rafeedie ruled that the extradition treaty between the United States and Mexico was violated when a Dr. Humberto Alvarez (suspected of involvement with the Camarena murder) was forcibly abducted from Guadalajara, Mexico and brought to the United States for trial. The Mexican authorities said that there was an opportunity to dissolve tension between the United States and Mexico. The Mexican officials' views were vindicated when Judge Rafeedie sent Alvarez back to Mexico. The Christian Science Monitor, Aug. 17, 1990, at 6.

16. The question remains as to why no one in Mexico complained when Rene Verdugo-Urquidez was forcibly abducted and brought to the United States. A Mexican official attributes the lack of protest to the different regimes in power in Mexico and the United States at the time. *Id.* The recent turnaround is accredited to Mexican domestic public policy. *Id.* See also *supra* note 15.

17. At the time, Verdugo-Urquidez was also suspected of participating in the brutal kidnapping and torture-murder of DEA Special Agent Enrique Camarena Salazar. *Verdugo-Urquidez*, 856 F.2d at 1215. Verdugo-Urquidez has been convicted of the Camarena Salazar murder and is currently serving a life plus 240 years sentence. L.A. Times, Dec. 13, 1989, at A3, col. 5. He is not eligible for parole until age 96. L.A. Times, Apr. 17, 1989, at A2, col. 5. Other persons have either been convicted of this murder or are currently awaiting trial for that crime. See, e.g., *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir. 1990).

18. *Verdugo-Urquidez*, 856 F.2d at 1216 n.2.

19. *Id.* at 1225, 1226.

longings.<sup>20</sup> The DEA took possession of all pertinent documentation while the MFJP confiscated all firearms that were discovered. At about three or four o'clock in the morning MFJP officers grew weary, and the commandante told Agent Bowen to take all of the documents in a particular briefcase and to sort through them later. Of all the documents seized from either of Verdugo-Urquidez's residences, only one tally sheet<sup>21</sup> (that was contained in the briefcase) was introduced at trial.<sup>22</sup>

After a hearing, the United States District Court for the Southern District of California suppressed the tally sheet stating that "the fourth amendment to the Constitution applied to the DEA's search because it was a 'joint venture' of United States and Mexican police officers."<sup>23</sup> The district court also concluded that a search of a foreign national, conducted by United States agents on foreign soil and yielding evidence to be used at a trial in the United States, entitles that individual to Fourth Amendment protection.<sup>24</sup> The district court specifically stated that the search was invalid because

the DEA failed to seek a warrant . . . [and] even if a warrant was not required . . . the DEA's conduct in carrying out that search was not reasonable because the search was unconstitutionally general, it occurred after midnight and the DEA failed to leave a contemporaneous inventory of the evidence seized.<sup>25</sup>

The Court of Appeals for the Ninth Circuit affirmed the district court's findings.<sup>26</sup> The Supreme Court granted certiorari for the evidentiary issue<sup>27</sup> and reversed the lower courts, allowing the

20. *Id.* at 1227.

21. The government believed that this "tally sheet" revealed the "quantities of marijuana smuggled by [the defendant] into the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 262-63 (1990).

22. *Verdugo-Urquidez*, 856 F.2d at 1226, 1227.

23. *Id.* at 1217. The level of involvement of United States personnel in law enforcement on foreign soil dictates the necessity of following United States law. For a more complete explanation of the "joint venture doctrine," see *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978).

24. *Verdugo-Urquidez*, 856 F.2d at 1217.

25. *Id.*

26. In a two-to-one decision, Circuit Judge Wallace filed a lengthy dissent. *Id.* at 1214.

27. The only issue on appeal concerned the admissibility of the tally sheet that was found in the briefcase removed from one of Verdugo-Urquidez's homes. The forcible abduction of Verdugo-Urquidez was not at issue. According to the "Ker-Frisbie Rule," "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 'forcible abduction.'" *Ker v. People*

tally sheet into evidence.<sup>28</sup>

### B. *The Supreme Court's Rationale*

The Supreme Court, in five published opinions,<sup>29</sup> uses analyses which encompass three general approaches: an analysis of the language of the Fourth Amendment, an application of this language to *Verdugo-Urquidez*, and an analysis of current national drug policies that underlie the holding of this case.<sup>30</sup> Although they comprise one third of the Court majority, both Justice Kennedy and Justice Stevens disagree with Chief Justice Rehnquist (the author of the plurality opinion) on critical portions of his analysis.<sup>31</sup> Justices Kennedy and Stevens' concurrences do not stand alone in supporting the Court's holding. Because of the different justifications given for the holding among the majority of the Court in this case, the application of this new precedent could either be very fact-specific or could greatly expand the holding beyond its current parameters.<sup>32</sup>

#### 1. The Majority Composite

The majority of the Supreme Court holds that the Fourth Amendment does not apply "to the search and seizure by United

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of the State of Illinois, 119 U.S. 436, 440 (1886); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952). More recently this doctrine has come under attack as a due process violation. Courts now rid themselves of cases in which jurisdiction is attained through constitutional violations. *United States v. Toscanino*, 500 F.2d 267, 272-75 (2d Cir. 1974). *Toscanino* does not control in this case because jurisdiction over the defendant is not at issue.

28. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

29. The five published opinions comprise the majority opinion (reflecting a four Justice plurality), two concurrences, and two dissenting opinions. *Id.*

30. *Id.*

31. See *infra* notes 39-45 and accompanying text.

32. So far, lower federal courts have subscribed to the *Verdugo-Urquidez* rationale, especially in drug seizure cases. See *United States v. Van Sichen*, SS No. 89 Cr. 813, 1990 U.S. Dist. LEXIS 12597 (S.D.N.Y. 1990) (court is bound by *Verdugo-Urquidez* in denying a remedy to a Dutch national whose Amsterdam apartment was searched in connection with the joint Dutch-United States investigation of a heroin ring). The language of the opinion has been interpreted to also apply to vessels owned by nonresident aliens which are searched in international waters. See *United States v. Aikens*, 912 F.2d 285 (9th Cir. 1990) (drugs seized from nonresident aliens while in international waters does not trigger the Fourth Amendment, as per *Verdugo-Urquidez*); *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990) (a retroactive application of *Verdugo-Urquidez* to an appeal of a search and seizure of a vessel in international waters, which is owned by a nonresident alien, is based on the language of *Verdugo-Urquidez* since *Verdugo-Urquidez* specifies no exception for activities on the high seas).

States agents of property that is owned by a nonresident alien and located in a foreign country.”<sup>33</sup> The Chief Justice, writing for a four-Justice plurality, begins with the language of the Fourth Amendment. He finds that the term “the people” as it is used in the Fourth Amendment is a term of art,<sup>34</sup> referring to only those present in the country and having sufficient connection to the country.<sup>35</sup>

Turning to the application of the Fourth Amendment to Verdugo-Urquidez, Chief Justice Rehnquist relies heavily on the “Insular Cases” to show that the Bill of Rights does not automatically extend to foreign nationals under United States control.<sup>36</sup> This line of cases, which is still good law in United States unincorporated territories,<sup>37</sup> holds that an United States exercise of power does not necessarily invoke the Constitution.<sup>38</sup> Chief Justice Rehnquist relies in part on *Johnson v. Eisentrager*<sup>39</sup> to show that even the Fifth Amendment’s due process guarantee is not naturally extended to nonresident aliens.<sup>40</sup>

The Chief Justice strongly asserts the need for effective United States foreign policy as a reason for his holding.<sup>41</sup> He is concerned that the extension of Fourth Amendment rights to nonresident aliens will somehow weaken the international political clout of the United States:

[S]ituations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American

33. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

34. *Id.* at 265.

35. Chief Justice Rehnquist defines a person with “sufficient connection” as a person who would be considered a member of the national community. *Id.*

36. See, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico* [sic], 258 U.S. 298 (1922); see also *supra* note 6.

37. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 268 (1972). See also *supra* notes 6 & 36.

38. See *supra* notes 6 and 36.

39. 339 U.S. 763 (1950). The Chief Justice relies upon *Eisentrager* (a habeas corpus motion brought by defendants who were being held by the United States Army in Germany after having been convicted by a military tribunal) to show that foreign nationals are not guaranteed due process of the law. In *Eisentrager*, however, the defendant was an enemy soldier — a German soldier who, during World War II operated against the United States in China.

40. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

41. *Id.* at 273-74.



action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.<sup>42</sup>

However, the Chief Justice neglects to assert that even Verdugo-Urquidez is considered to be innocent until proven guilty.<sup>43</sup>

Justice Kennedy, unlike the Chief Justice, does not place great weight on the term "the people" in his concurrence. He claims that "the force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms."<sup>44</sup> Instead, Justice Kennedy defers to the "unascertainable conceptions of reasonableness and privacy that [will] prevail abroad, and the need to cooperate with foreign officials . . . ."<sup>45</sup> Unlike the Chief Justice, Justice Kennedy believes that the Fifth Amendment guarantee of due process will safeguard the foreign national who is prosecuted by the United States.<sup>46</sup>

In a separate concurrence, Justice Stevens dismisses the analysis of the meaning of "the people" altogether. Justice Stevens asserts that even if "the people" is read as protecting only those persons lawfully in the United States, Verdugo-Urquidez is among "the people."<sup>47</sup> Even though Verdugo-Urquidez was brought to the United States against his will, he is lawfully in the country, and the search of his home took place after he was imprisoned.<sup>48</sup> Justice Stevens takes a somewhat impotent view of United States abilities in foreign lands by relying on the belief that a search warrant would have been impracticable.<sup>49</sup> He points out that a search warrant would have been useless since the authorizing magistrate lacks jurisdiction in Mexico.<sup>50</sup> But, like Justice Kennedy, Justice Stevens does not rely on the need for national security in denying Verdugo-Urquidez Fourth

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42. *Id.* at 275.

43. Chief Justice Rehnquist says that United States agents operating abroad should not be limited in their activities aimed at apprehending those guilty of smuggling drugs. He implies that Verdugo-Urquidez is guilty, by saying that "the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Id.* at 273.

44. *Id.* at 276.

45. *Id.* at 278.

46. *Id.*

47. *Id.* at 279.

48. *Id.*

49. *Id.*

50. *Id.*

Amendment rights.<sup>51</sup>

## 2. The Dissenting Array

The primary dissent, delivered by Justices Brennan and Marshall, states that the majority opinion does not afford United States legal protection for foreigners who are obliged to follow United States law.<sup>52</sup> In his examination of the text of the amendment, Justice Brennan asserts that a doctrine of basic fairness and mutuality underlies the Bill of Rights, thus protecting all people.<sup>53</sup> The dissent views the Bill of Rights as enumerating pre-existing liberties rather than creating rights.<sup>54</sup>

Not surprisingly, Justice Brennan disagrees with the Chief Justice's interpretation of cases that have applied the Fourth Amendment to foreign nationals in the past. Justice Brennan points out that the "Insular Cases"<sup>55</sup> apply only to United States territories, and not to other sovereign states. The dissent also effectively distinguishes *Johnson v. Eisentrager*<sup>56</sup> from the instant case.

There is little agreement between Justice Brennan and the Chief Justice in terms of policy considerations. Justice Brennan's policy arguments posture the United States as an example-setter in human and civil rights.<sup>57</sup> Furthermore, Justice Brennan characterizes Chief Justice Rehnquist's concerns about national security<sup>58</sup> as a "doomsday scenario."<sup>59</sup>

Justice Blackmun's short dissent voices his agreement with much of Justice Brennan's dissent and Justice Stevens' concurrence. Justice Blackmun adds that the Court has not examined whether the agents had probable cause and whether the reasona-

51. *Id.*

52. *Id.*

53. *Id.* at 284.

54. *Id.* at 288. For clarification of the view that the Bill of Rights creates rights, see *supra* notes 45-53 and accompanying text.

55. See *supra* notes 6 and 36.

56. 339 U.S. 763 (1950). See *supra* note 39.

57. See *supra* notes 48 and 49. This decision indeed weakens the perception of United States integrity in foreign eyes. The Chinese have criticized the Supreme Court in that the *Verdugo-Urquidez* opinion teaches the world that the United States Constitution does not truly safeguard international human rights because it allows law enforcement officials to do whatever they like to achieve the United States view of justice. N.Y. Times, Mar. 23, 1990, at B5, col. 5.

58. See *supra* note 41 and accompanying text.

59. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 (1990) (Brennan, J., dissenting).

bleness requirement of the Fourth Amendment had been met.<sup>60</sup> He questions the Court's ability to make a "reliable determination" on the case until a record, addressing probable cause and the reasonableness of the search, has been built.<sup>61</sup>

### C. *Analysis of the Supreme Court Decision*

The Supreme Court majority overlooks the necessity for easily applicable law<sup>62</sup> in favor of allowing the fruits of a search, that in itself would be unconstitutional if it had occurred on United States soil, to be used as evidence in a United States court.<sup>63</sup> The majority is actually comprised of a plurality plus two Justices who concur in the holding, but whose rationale is sometimes at odds with the reasoning of the majority opinion. Through an analysis of the language of the Fourth Amendment, an examination of how this amendment has been applied, and a discussion of applicable policy considerations, the Court appears to accomplish its agenda at the expense of the Bill of Rights.

#### 1. The Text of the Fourth Amendment and Constitutional Theory

The two major theories of Constitutional construction are the "compact theory" and the "natural rights theory."<sup>64</sup> The Chief Justice adopts the "compact theory," which is the belief that the Constitution is a social contract between the government and the governed.<sup>65</sup> The "compact theory" can be contrasted with the "natural rights theory," which advocates that the rights enumerated in the Constitution are but inherent rights set to paper.<sup>66</sup> This view perceives the content of the Bill of Rights not as governmental limitations, but as fundamental

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60. *Id.* at 297-98.

61. *Id.*

62. *See supra* note 9 and accompanying text.

63. *See supra* note 30 and accompanying text.

64. For an excellent discussion of the two theories as well as references to the instant case, see the majority and dissenting views in the circuit court opinion of *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1220-21 (9th Cir. 1988).

65. *Id.* at 1220-21.

66. The debate and tension between these two theories is present in a multitude of cases and articles which seek to interpret and apply the Constitution. The circuit court opinion, including the dissent, of the instant case offers a good summary of this issue. *See id.* at 1220 (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 327 at 296-97, 328 at 297-98, 340 at 309 (1883)); *see also* *Reid v. Covert*, 354 U.S. 1 (1957).

individual rights that are derived from a higher source.<sup>67</sup>

There are many learned jurists and publicists who advocate the natural rights theory. Justice Brennan, in his dissent, states, "[the framers] designed the Bill of Rights to prohibit our government from infringing rights and liberties presumed to be pre-existing."<sup>68</sup> Professor Louis Henkin has said that "individual's rights do not derive from the Constitution. They are not constitutional rights . . . [B]ut they are protected by the Constitution. [T]he idea of rights . . . reflected in the Constitution applies to all human beings."<sup>69</sup> In support of this theory, Professor Henkin points out that when the Constitution was penned, "all men" and "the people" did not technically include many United States citizens.<sup>70</sup> In contrast to the position taken by the Chief Justice, Professor Henkin believes that the use of these terms did not pertain to the idea of rights but were flaws in the thinking of the time.<sup>71</sup>

The Constitution, in order to be effective through time, must be a combination of the two theories. The framers may have set down what they saw as natural rights in the Bill of Rights, but the document as a whole can be perceived as a contract between the government and the people who live under it. This raises the question that is so often referred to in constitutional analysis — what was the framers' intent? In *The Federalist*, Number 84, Alexander Hamilton, a framer of the Bill of Rights, assures New York that a Bill of Rights is inherent in the Constitution and therefore unnecessary.<sup>72</sup> Hamilton asks ". . . why declare that things shall not be done which there is no power to do?"<sup>73</sup> The Fourth Amendment, specifically, was penned in reaction to overly-broad searches of the Colonists accomplished under general warrants,<sup>74</sup> but notions of privacy in

67. L. Henkin, *Rights: Here and There*, 81 COLUM. L. REV. 1581, 1587 (1981).

68. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting).

69. L. HENKIN, *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 3 (1990) [hereinafter L. HENKIN].

70. For example, slaves, native Americans, and even white women did not warrant the same constitutional protection afforded white men at that time. *Id.* at 3-4.

71. *Id.*

72. A. HAMILTON, J. MADISON, & J. JAY, *THE FEDERALIST* (1961) [hereinafter A. HAMILTON, J. MADISON, & J. JAY].

73. *Id.* at 533.

74. E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 341-42 (14th ed. 1978). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974) [hereinafter Amsterdam].

one's home can be traced back to the Magna Carta.<sup>75</sup> Chief Justice Rehnquist claims that the Fourth Amendment is a purely domestic doctrine because the framers did not believe that the federal government had the power to conduct searches and seizures.<sup>76</sup> Contrary to the Chief Justice's point of view, it can be argued that although the framers were writing a domestic document they did expect the Constitution to be fluid enough to adapt to the growth of the nation.<sup>77</sup>

Regardless of the espoused theory, Verdugo-Urquidez was lawfully in the United States when his Mexican property was searched by United States agents.<sup>78</sup> A majority of the Supreme Court, consisting of Justices Brennan, Marshall, Blackmun, Stevens, and Kennedy, are of the opinion that either "the people" does not mean "the governed" or that Verdugo-Urquidez was "governed" at the time of the search.<sup>79</sup> Therefore, the conclusion that the language of the Fourth Amendment applies to "the governed," and that Verdugo-Urquidez is thereby excluded from its protection, is shared by only four Justices and is not the driving force behind the holding in this case.

## 2. Analysis of the Fourth Amendment As It Has Been Applied

The application of the Fourth Amendment to Verdugo-Urquidez can be evaluated on two different levels: the international scope of the Bill of Rights, and the specific application of the Fourth Amendment. The Supreme Court held that the Fourth Amendment itself does not constrain United States agents conducting an extraterritorial search, but the Justices who comprise the majority do not cite the same reasons.<sup>80</sup> It is therefore important to look at both how the Bill of Rights has been historically applied to aliens, and the manner in which the Fourth Amendment is applied domestically, in order to understand the consequences of the Court's decision.

The actual texts of the Constitution and the Bill of Rights

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75. L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 222 (1988).

76. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 266-67 (1990).

77. Amsterdam, *supra* note 74, at 394.

78. Verdugo-Urquidez was brought to San Diego on January 24, 1986. His houses were searched on January 25-26, 1986. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1216-17 (9th Cir. 1988).

79. *Verdugo-Urquidez*, 494 U.S. at 259.

80. *Id.* See also *supra* notes 31-47 and accompanying text.

do not place any limits or conditions on the enjoyment of rights.<sup>81</sup> In fact, the courts have specifically extended many Bill of Rights protections to aliens. For example, First Amendment protection has been guaranteed to foreign nationals.<sup>82</sup> An alien is entitled to the protection of Fifth Amendment due process and compensation for property confiscated by the United States Government.<sup>83</sup> The rights of the accused embodied in the Fifth and Sixth Amendments are extended to all accused and tried within the United States, regardless of their national status.<sup>84</sup> Furthermore, outside of the Bill of Rights, the Fourteenth Amendment guarantee of equal protection at the hands of the individual states has also been applied to both legal resident aliens<sup>85</sup> and illegal aliens.<sup>86</sup>

Chief Justice Rehnquist uses the "Insular Cases" to support his statement that the Bill of Rights does not automatically extend to foreign nationals.<sup>87</sup> However, in *Reid v. Covert*,<sup>88</sup> Justice Black distinguishes the "Insular Cases" by pointing out that these decisions involved questions of Congressional power over territories which were being assimilated into the United States.<sup>89</sup> Thus, as Justice Brennan points out in his dissent, the "Insular Cases" are limited to their facts.<sup>90</sup> There can be no doubt that

81. L. HENKIN, *supra* note 69, at 3-4.

82. See *Bridges v. Wixon*, 326 U.S. 135 (1945) (a communist alien was assured of the First Amendment freedom of speech).

83. See *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Russian corporation who was an assignee of United States shipbuilding contracts was called an "alien friend" and thus was entitled to the protection of the Fifth Amendment); *Landon v. Plasencia*, 459 U.S. 21 (1982) (citizen of El Salvador who was a permanent resident alien in the United States was denied re-entry into the United States and was made to undergo an exclusionary hearing but was allowed to avail herself of Fifth Amendment due process rights).

84. See *Wong Wing v. United States*, 163 U.S. 228 (1896) (Chinese victims of the Chinese Exclusionary Act of May 5, 1892 were guaranteed Fifth and Sixth Amendment rights); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904) (guaranteeing the Fifth and Sixth Amendment safeguards to aliens once they are in the United States).

85. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (a famous case involving discrimination against Chinese laundry owners in San Francisco; these Chinese aliens were afforded constitutional rights via the Fourteenth Amendment).

86. See *Plyler v. Doe*, 457 U.S. 220 (1982) (the right of illegal alien children to attend public school, thereby enjoying equal protection under the Fourteenth Amendment).

87. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990). See *supra* notes 6 and 36.

88. 354 U.S. 1 (1957).

89. *Id.*

90. *Verdugo-Urquidez*, 494 U.S. at 279 (Brennan, J., dissenting).

the instant case does not involve a territory being annexed to the United States.

It can be argued that the Fourth Amendment, like the Fifth Amendment, "should not lose force because [it is] applied outside U.S. territory."<sup>91</sup> In *Immigration and Naturalization Service v. Lopez-Mendoza*,<sup>92</sup> the Supreme Court found the Fourth Amendment inapplicable to civil deportation procedures because of the burden that the exclusionary rule would place on administrative procedures.<sup>93</sup> However, there is language in that opinion indicating that the Fourth Amendment might have an impact on a more critical proceeding (such as a criminal trial).<sup>94</sup> Justice O'Connor, writing for the majority of the Court, refused to condone any Fourth Amendment violations that may have transpired.<sup>95</sup> Indeed, the majority included the Fourth Amendment among liberties that, if violated, "might transgress notions of fundamental fairness."<sup>96</sup>

Not all searches on foreign soil, even those including a United States citizen, have been traditionally subject to this kind of scrutiny. United States courts have long held that searches occurring on foreign soil conducted by foreign law enforcement personnel are not subject to constitutional restraints.<sup>97</sup> Under the "silver platter" doctrine, the fruits of these searches can be used by United States courts, regardless of the conditions of the search.<sup>98</sup>

There are two exceptions to the constitutionality of foreign searches on foreign soil. First, if the search perpetrated upon the

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91. Saltzburg, *supra* note 2, at 760.

92. 468 U.S. 1032 (1984).

93. *Id.*

94. *Id.* at 1040-43.

95. *Id.* at 1050.

96. *Id.* at 1050-51.

97. See *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971) (where constitutional constraints did not apply to an Italian search warrant executed in Italy on a United States citizen); *Stowe v. Devoy*, 588 F.2d 336 (2d Cir. 1978) (where electronic surveillance of a New York resident by Canadian authorities was deemed to be on foreign soil); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (where electronic surveillance of United States citizens in Germany by German authorities was not governed by the United States Constitution).

98. The "silver platter" doctrine governs the admissibility of evidence collected by foreign officials on foreign soil where such evidence may have been obtained by a means unavailable to United States police on United States soil. The theory is that the evidence is not tainted because it was presented to the United States law enforcement personnel on a "silver platter." See, e.g., *Stonehill v. United States*, 405 F.2d 738, 747-49 (9th Cir. 1968) (Browning, J., dissenting).

citizen is so extreme as to "shock the conscience," the fruits of the search can be excluded.<sup>99</sup> Second, if the search was a result of a joint venture between United States and foreign law enforcement personnel, the subject of the search is entitled to constitutional protection.<sup>100</sup> The theory behind the second exception is that if a United States agent is actively participating with foreign officials, that agent's conduct should be bound to the same code that she would have to follow in a domestic operation.<sup>101</sup> Under this theory the extent of United States involvement in a foreign operation is critical and can only be ascertained by examining the facts of each case.<sup>102</sup> For example, a mere tip supplied by a United States agent to a foreign agent does not constitute a joint venture.<sup>103</sup> On the other hand, direct participation in a search, for example, touching the potential evidence, will rise to the level of a joint venture.<sup>104</sup>

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99. "The forum state will give effect to foreign law as long as the foreign law is not repugnant to the moral sense of the community." *Brennan v. University of Kansas*, 451 F.2d at 1289. Abduction, interrogation, and physical torture (including narcotics, nourishment and sleep deprivation, beatings, forced physical exertion, and siphoning alcohol into bodily orifices) comprise circumstances which "shock the conscience" of United States courts, thereby invoking the exclusionary rule. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

100. The Fourth Amendment does not apply to raids by foreign officials unless United States officials "so substantially participate . . . as to convert that raid into a joint venture" between the countries. *Stonehill v. United States*, 405 F.2d 738, 745 (9th Cir. 1968) (documents which were provided to United States agents after being seized in the Philippines by Philippine law enforcement personnel were admissible because, even though United States officials shared intelligence that led to the raids with the Philippines officials, the United States agents neither requested the raids nor participated in them and, thus, the raids were not a joint venture); *see also* *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987) (evidence gathered through a warrantless wiretap and radio monitoring scheme was suppressed because DEA agents called their actions a "joint investigation" with Philippine officials); *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) (no joint venture existed, and the evidence was admissible, when a Canadian customs official discovered dutiable items in a false bottom of a suitcase and then turned the defendant and the evidence over to a United States agent); *United States v. Birdsell*, 346 F.2d 775 (5th Cir. 1975) (evidence seized by Mexican officials, without the aid of United States agents, was admissible because the Fourth Amendment does not apply to foreign officials in their own country).

101. Saltzburg, *supra* note 2, at 763. "If it is shown that American agents are in privity with the search through direct participation" the evidence obtained will be inadmissible in a United States court. *United States v. Phillips*, 479 F. Supp. 423, 431 (M.D. Fla. 1979) (United States agents' involvement with Canadian law enforcement was not a joint venture).

102. *Stonehill v. United States*, 405 F.2d 738, 745 (9th Cir. 1968).

103. *Id.* (citing *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967)); *see also* *United States v. Derewal*, 703 F. Supp. 372 (E.D. Pa. 1989).

104. *Stonehill*, 405 F.2d at 745 (citing *Corngold v. United States*, 367 F.2d 1 (9th



In *United States v. Verdugo-Urquidez*,<sup>105</sup> by the agent's own admission, the search of the Mexican property was a joint venture.<sup>106</sup> This issue is not addressed by the Supreme Court at all. However, the circuit court did address this issue by citing a case with similar facts as the instant case.<sup>107</sup> In the case cited by the circuit court, *United States v. Emery*,<sup>108</sup> the court found that a joint venture existed between Mexican police and United States DEA agents when the United States agents coordinated and participated in surveillance of Mr. Emery on Mexican soil.<sup>109</sup> The court held that "because of a joint venture between the Mexican and United States officials, the statements made during the interrogation and in the presence of the DEA agents should have been suppressed [because no Miranda warning was given] . . . [and that] the conviction must be reversed for this reason."<sup>110</sup>

Although the issues in *Emery* are governed by the Fifth and Sixth Amendments (verbal statements and Miranda warnings) whereas *Verdugo-Urquidez* focuses on the Fourth Amendment and admissibility of evidence, these cases are somewhat analogous. In both situations the law enforcement action was a joint venture between United States and Mexican authorities. Judicially devised safeguards<sup>111</sup> (Miranda warnings in *Emery* and a magistrate's warrant in *Verdugo-Urquidez*) were not effectuated in either case. Additionally, in both cases acts on the part of the authorities would have been clearly unconstitutional had they occurred on United States soil.<sup>112</sup> Therefore, suppression of evidence is warranted in both cases.<sup>113</sup>

The application of the Fourth Amendment is a much less

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Cir. 1966)).

105. 494 U.S. 259 (1990).

106. *Id.* at 262.

107. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1228 (9th Cir. 1988).

108. 591 F.2d 1266 (9th Cir. 1978).

109. *Id.*

110. *Id.* at 1268.

111. *See supra* note 3.

112. The remedy afforded to Emery, namely, suppression of his statements, would have been the same if the events had happened on United States soil. If the *Verdugo-Urquidez* scenario had happened on United States soil, the evidence would be suppressed. *See also supra* note 23 and *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1217 (9th Cir. 1988).

113. The similarity between the cases should bring similar consequences; as the statements made in *Emery* were suppressed, so should the evidence obtained in *Verdugo-Urquidez*.

speculative venture than determining whether or not to apply it in the first place. The Amendment prohibits unreasonable warrantless searches as well as searches conducted under general warrants.<sup>114</sup> The Supreme Court, in *Johnson v. United States*,<sup>115</sup> mandated that a detached and neutral magistrate must issue a warrant so as to guard against overzealous law enforcement personnel.<sup>116</sup> Although searches conducted with warrants are preferred, the Amendment itself allows a warrantless search if it is reasonable.<sup>117</sup> This provision has been narrowly interpreted, especially when applied to nonmovable property, to mean that a warrantless search is reasonable only in the face of a statutory scheme or exigent circumstances.<sup>118</sup> Exigent circumstances can justify a level of intrusion when such intrusion is measured against the emergency nature of the circumstances, for example, when evidence will not be available if not immediately seized.<sup>119</sup> In this case, however, the Mexican houses were unattended and the agents had time to consult a magistrate, and therefore no exigency existed. Further, there is no statutory scheme specifically condoning extraterritorial warrantless searches. Thus, it is quite clear that the DEA agents would be in violation of the Fourth Amendment if it were invoked.

In his concurrence, Justice Stevens maintains that the United States signing magistrate lacks jurisdiction in Mexico and, therefore, a warrant would have been useless.<sup>120</sup> However,

114. *Amsterdam*, *supra* note 74, at 410.

115. 333 U.S. 10 (1948).

116. *Id.*

117. *Id.*

118. Statutory schemes that provide for inspection of premises eliminate the need for a warrant. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311 (1972) (warrantless inspection of a gun shop, authorized under the Gun Control Act of 1968, is not a violation of the Fourth Amendment because the owner of such a shop is alerted to inspection ordinances as part of the licensing procedures and, thus, expects them); *Donovan v. Dewey*, 452 U.S. 592 (1981) (warrantless mine safety inspections authorized by statute). Perceived threats to police safety or an individual's safety, for example, can create exigent circumstances that will pardon a warrantless search and seizure. *See, e.g.*, *People v. Crawl*, 257 N.W.2d 86 (1977) (multi-person chaos in an apartment which was the scene of a murder investigation allowed officers to execute a full search without a warrant because there could have been a hidden threat to the officers' safety); *State v. Boggess*, 340 N.W.2d 516 (1983) (warrantless entry into a home was upheld due to suspected child abuse in the home).

119. For example, this was the basis for the long standing "Carroll Doctrine" that originally allowed warrantless searches and seizures of automobiles. The logic is that the car will leave the jurisdiction before a warrant can be obtained. *Carroll v. United States*, 267 U.S. 132 (1925).

120. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279 (1990) (Stevens, J.,

Justice Brennan replies that the Constitution cannot be so lightly disregarded and that the need to protect suspects from overzealous police "is no less important abroad than at home."<sup>121</sup> From the DEA's perspective, a warrant would have safeguarded the fruits of the search regardless of constitutional challenge.<sup>122</sup> It is obvious that either the agent just did not think of obtaining a warrant or else decided that it was more convenient to not bother with a warrant. Since the Supreme Court does not sympathize with arguments based upon convenience, there must be other motivations behind the Court's decision.

### 3. Analysis of Policy Considerations — Both Stated and Inferred

The accepted idea that "the United States is entirely a creature of the Constitution"<sup>123</sup> may currently be in danger. The pressures of an expanding and varied populace, technological advancement in every facet of life, and an increased world scope may be weightier influences on the United States than anyone would care to admit. These components may be removing the Supreme Court justices from their positions as "guardians of the Constitution"<sup>124</sup> and instead may be creating a policy-oriented body. The current national drug crisis is an example of such an influence on the Court,<sup>125</sup> and decisions such as *United States v. Verdugo-Urquidez*<sup>126</sup> indicate the ease with which the Supreme Court abandons the Constitution in order to further national policy.

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concurring).

121. *Id.* at 296.

122. By obtaining a warrant, the DEA would have been covered under any circumstances. Even if, as Justice Stevens points out, the warrant would have had no legal effect in Mexico, obtaining a warrant would have had a placating effect on the United States legal system. A warrant would have been, as it is in domestic use, a prophylactic measure against overzealous law enforcement. The ordinary warrant procedure forces officers to evaluate their actions because the reasons for issuing a warrant must be presented to an impartial magistrate. *See supra* notes 105-06 and accompanying text.

123. *Reid v. Covert*, 354 U.S. 1, 4 (1957).

124. A. HAMILTON, J. MADISON, & J. JAY, *supra* note 72, at 489.

125. *See infra* notes 127-43 and accompanying text.

126. 494 U.S. 259 (1990). When bringing the appeal, the United States Department of Justice indicated that the Ninth Circuit's opinion would "hamper the U.S. war on foreign drug traffickers." *L.A. Times*, Apr. 18, 1989, at 1, 4, col. 4. Also *see generally* recent cases such as those discussing drug testing and the "open fields doctrine." *See infra* notes 131-43.

Chief Justice Rehnquist's use of *Johnson v. Eisentrager*<sup>127</sup> to illustrate the policy implications of extraterritorial nonapplicability of the Bill of Rights provides a harsh comparison to the instant case. The Chief Justice likens an alleged marijuana smuggler to convicted Nazi troops and states that the "war on drugs" is actually being waged through international military action.<sup>128</sup> As Justice Brennan points out in his dissent, *Johnson v. Eisentrager* denied foreign *enemy* soldiers, not nonresident aliens, Fifth Amendment protection.<sup>129</sup> With such strong words, the Chief Justice seems to be guarding political interests<sup>130</sup> rather than the Constitution. Within the scope of a challenge to the Fourth Amendment, it is not the Supreme Court's duty to enforce the Executive's policy. Despite this, it does appear that an anti-drug policy is driving the majority of the Court.

The erosion of once widespread Fourth Amendment rights is by no means limited to action in foreign states when it comes to the issue of drugs. In *United States v. Montoya de Hernandez*,<sup>131</sup> when a Columbia national was detained at the border under the suspicion of being a drug smuggler, Justice Rehnquist delivered another majority opinion.<sup>132</sup> The Court held that at the international border, the balancing test between a person's Fourth Amendment expectation of privacy and the interests of the government tip heavily in favor of the government.<sup>133</sup>

The current Court has often attacked a citizen's right to privacy in the name of law enforcement against drugs. In the two recent drug-testing cases that have come before the Supreme Court,<sup>134</sup> the majority opinions (written by Justice Kennedy)

127. 339 U.S. 763 (1950); see also *supra* note 39.

128. The effort against drugs had indeed escalated to military action, but not the type of action typically identified with a war (for example, United States troops with arms in foreign states). The United States has supplied arms to drug-producing nations such as Bolivia. The military's intelligence forces are also deeply involved with international supply-side eradication of drugs. Murphy, *supra* note 12, at 1277, 1278.

129. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 290 (1990) (Brennan, J., dissenting). See *supra* note 56.

130. See *supra* notes 41-42, 58 and accompanying text.

131. 473 U.S. 523 (1985) (in an extraordinary case pitting customs agents against the calls of nature, Ms. Montoya de Hernandez was suspected of smuggling cocaine in her alimentary canal. She was detained for 16 hours, following her 10 hour flight, while customs agents waited for her to urinate or defecate in order to test her wastes. The customs agents finally obtained a court order for an x-ray and rectal exam. Ms. Montoya de Hernandez was indeed carrying 528 grams of cocaine in 88 balloons in her system.)

132. *Id.*

133. *Id.*

134. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (a five-

have carved out exceptions to one's reasonable expectation of privacy vis-a-vis urinalysis. By creating balancing tests to determine how intrusive the government's actions may be, states can assert their interests in inventive ways that, before the advent of the balancing equations, would not have been allowed.<sup>135</sup>

The view of the Fourth Amendment as the victim of national drug policies is also supported by the "open fields doctrine."<sup>136</sup> In *Oliver v. United States*,<sup>137</sup> the Court viewed an informant's tip regarding a field of marijuana as a justification for reducing the expectation of privacy that one has in his or her farmland.<sup>138</sup> The Court reasoned that open fields, unlike homes, are not places for the types of "intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."<sup>139</sup> Thus, the Court held that the word "property" in the Fourth Amendment did not include open fields.<sup>140</sup>

The "open field doctrine" has even been used to uphold law enforcement's right to conduct a low altitude fly-over of a specific backyard in order to substantiate an informant's tip about drugs.<sup>141</sup> In his dissent in *California v. Ciraolo*,<sup>142</sup> even Justice Powell, the author of the *Oliver v. United States* majority opin-

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to-four decision); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (a six-to-three decision).

135. Does this mean that the state's interests and purposes have become more compelling, thus having gained "nobility" at the expense of the individual? West, *The Supreme Court, 1989 Term: Forward: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 44 (1990). The recent drug urinalysis cases, for example, carve out exceptions to personal privacy and employment rights under the term "state interest" in interesting ways. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), the Supreme Court claims job promotion and transfer are vehicles of notice in order to justify drug testing through urinalysis. In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Supreme Court authorizes post-accident drug tests for railway workers, regardless of suspicion, because some workers involved in past, unrelated, train accidents had used drugs or alcohol.

136. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated By the Open Fields Doctrine)*, 48 U. PRR. L. REV. 1 (1986) [hereinafter Saltzburg, *Another Victim*].

137. 466 U.S. 170 (1984).

138. *Id.*

139. *Id.* at 179.

140. *Id.* at 177.

141. *California v. Ciraolo*, 476 U.S. 207 (1986) (the fly-over was a result of an anonymous informant's tip. This law enforcement effort yielded 73 marijuana plants at the expense of the defendant's privacy.)

142. Justice Powell prefers to justify the open fields doctrine through a discussion of curtilage rather than by what can be seen from a commercial airliner's window. *Id.* at 217-26.

ion, indicates his trouble with the idea of diminished expectation of privacy in all open spaces because of commercial air traffic. The extension of the "open fields doctrine" to include backyard fly-overs by police is a clear reaction to the national drug problem. As governmental intrusions on the behalf of drug enforcement increase, a "victim of illegal drugs may be the liberty of a nation."<sup>143</sup>

A concern that the Court will expand its powers beyond the Constitution by claiming that special circumstances must overcome individual rights is a recurrent theme in our judicial history. Chief Justice Hughes, in a 1935 decision saving a small business from the unreasonable burden of President Franklin D. Roosevelt's sweeping reforms while simultaneously preserving 150 years of constitutional interpretation, asserted that "[e]xtraordinary conditions do not create or enlarge constitutional power."<sup>144</sup> More recently, Justices Marshall and Brennan have warned that "history teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."<sup>145</sup> It appears that the Supreme Court's trend of analysis regarding the Fourth Amendment is moving "toward narrowing the scope . . . and the occasions for its use."<sup>146</sup>

Justice Brennan, in his dissent in *United States v. Verdugo-Urquidez*, speaks of an inherent mutuality "to ensure the fundamental fairness . . ." which "also serves to inculcate the values of law and order" in the policy behind our Constitution.<sup>147</sup> These views of the United States as a protector of liberties are far more palatable but may be just as unrealistic as the Chief Justice's "doomsday scenario."<sup>148</sup> Justice Brennan's eloquent and sensitive dissent concludes with the inarguable point that "we cannot expect others to respect our laws until we respect our Constitution."<sup>149</sup>

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143. Saltzburg, *Another Victim*, *supra* note 136, at 25.

144. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935).

145. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 609, 635 (1989) (Marshall, J., dissenting).

146. THE CONSTITUTION OF THE UNITED STATES OF AMERICAN ANALYSIS AND INTERPRETATION No. 96-26, 96TH CONG. 1ST SESS. S143 (1979). See also *supra* notes 131-43 and accompanying text.

147. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284-85 (1990) (Brennan, J. and Marshall, J., dissenting).

148. *Id.* at 291.

149. *Id.* at 297.

## III. CONCLUSION

*United States v. Verdugo-Urquidez* represents yet another opportunity<sup>150</sup> taken by the Supreme Court to further erode the protection of the Fourth Amendment. The majority excises extraterritorial searches from the Amendment's warrant clause in the name of drug eradication. Extraterritorial searches join the growing list of previously constitutionally guided activities that have been increasingly attached by the federal government in the furtherance of national policy.<sup>151</sup>

Lower courts have wasted no time in applying the *Verdugo-Urquidez* holding<sup>152</sup> even though its parameters are unclear. The Supreme Court has set out a "substantial connections"<sup>153</sup> test, not unlike the current civil rules, without defining the test's components. If the defendant satisfies this test, the Court has not provided any guidance as to how to judge the reasonableness of the search in the context of foreign notions of privacy.<sup>154</sup> Additionally, the Supreme Court has neither discussed a potential remedy for nor any limits on warrantless extraterritorial searches of alien property.<sup>155</sup> Without clear guidelines, lower courts may continue to expand this holding and law enforcement officials will continue to broaden their efforts, with human rights falling victim.

The general disagreement on the Court even within the majority as to whether or not *Verdugo-Urquidez*, who is currently on United States soil, is protected by the Fourth Amendment is somewhat reassuring. The Chief Justice's plurality opinion is so full of national security policy and so short on basic constitutional analysis that there is reason to believe the Court may again try to define clear rules for the lower courts. Hopefully, the debate over the reach of the Fourth Amendment is not over.

Mindy Ann Oppenheim

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150. See *supra* note 29 and accompanying text.

151. See *supra* notes 131-46 and accompanying text for examples. It has even been suggested that the holding in *Verdugo-Urquidez* was promulgated in anticipation of the prosecution against General Manuel Noriega. Wedgewood, *supra* note 14, at 753.

152. See *supra* note 32.

153. *The Supreme Court, 1989 Term*, *supra* note 8, at 280.

154. *The Supreme Court, 1989 Term*, *supra* note 8, at 285.

155. *The Supreme Court, 1989 Term*, *supra* note 8, at 280.