

NOTE

THE UNREASONABLENESS OF REQUIRING A WARRANT FOR SEARCHES OF NON-RESIDENT ALIENS IN A FOREIGN COUNTRY: *United States v.* *Verdugo-Urquidez*

INTRODUCTION

In *United States v. Verdugo-Urquidez*,¹ the Ninth Circuit Court of Appeals held that a non-resident alien may invoke the fourth amendment to challenge the reasonableness of a search conducted in a foreign country.² Additionally, the court held that the search in Mexico was constitutionally unreasonable because the United States agents did not obtain a search warrant from a U.S. Magistrate.³ With the explosive international war on drugs emerging, the *Verdugo-Urquidez* decision comes when the question whether, and to what extent, the fourth amendment binds U.S. government activities directed against foreign nationals, is of heightened significance.

This Note explains how and why the fourth amendment has been erroneously extended to foreign nationals in foreign countries. To accomplish this task, this Note first explains how the *Verdugo-Urquidez* majority misapplied the joint venture doctrine.⁴ Second, this Note examines the history of the U.S. Constitution and the framers' intention that it establish a social contract between the United

1. 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, (U.S. No. 88-1353). On February 28, 1990, after this article was completed, the Ninth Circuit decision was reversed by the U.S. Supreme Court. For more details about the reversal, *see supra* notes 165-177 and accompanying text.

2. *Id.*

3. *Id.* "Since the DEA obtained no warrant to make that search, and because exigent circumstances were lacking, the search was unlawful under the fourth amendment." *Id.* at 1230.

4. *See infra* notes 26-33 and accompanying text.

States government and the people of the United States.⁵ Third, this Note analyzes the specific language of the fourth amendment in determining who are “the people” it was meant to protect.⁶ Fourth, this Note explains why requiring U.S. law enforcement officials to obtain a warrant from a U.S. magistrate prior to searching a non-resident alien’s foreign home is unreasonable.⁷ Finally, the author proposes a standard for searches abroad involving foreign nationals’ property.⁸

I. FACTS OF *Verdugo-Urquidez*

Since the late 1970s, the Drug Enforcement Administration (DEA) was aware that Rene Martin Verdugo-Urquidez was engaged in drug smuggling.⁹ The DEA obtained a warrant for Verdugo-Urquidez’s arrest after receiving a tip that he planned to smuggle tons of marijuana into the United States.¹⁰ Unable to locate him in the United States, the United States Marshal’s Service contacted Mexican law enforcement officials, who informed the service that Verdugo-Urquidez could be arrested by Mexican police in Mexico, if there was an outstanding U.S. warrant for his arrest.¹¹ In January 1986, Mexican officers arrested Verdugo-Urquidez, then transported him to the U.S.-Mexico border where marshals placed him under arrest.¹²

After the DEA agents took custody of Verdugo-Urquidez, they discussed the possibility of searching his Mexican homes.¹³ The DEA believed that a search of Verdugo-Urquidez’s Mexicali residence would disclose cash proceeds from his drug dealings, as well as drug ledgers and phone books listing the names and addresses of his associates.¹⁴ The DEA also hoped a search would disclose information relevant to the investigation of the torture-murder of DEA Special Agent Enrique Camarena Salazar.¹⁵

The DEA contacted the Director General of the Mexicali Fed-

5. See *infra* notes 34-54 and accompanying text.

6. See *infra* notes 55-70 and accompanying text.

7. See *infra* notes 104-120 and accompanying text.

8. See *infra* notes 121-164 and accompanying text.

9. Verdugo-Urquidez, 856 F.2d at 1215.

10. *Id.* at 1215, 1216.

11. *Id.* at 1216.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Verdugo-Urquidez, in a separate prosecution, was convicted of murdering Special Agent Enrique Camarena Salazar. For a discussion of the conviction of Verdugo-Urquidez in the Camarena matter, see Shannon, *Desperados*, TIME, Nov. 7, 1988, at 84.

eral Judicial Police (MFJP), asking him to authorize the search.¹⁶ The Director agreed. He instructed the DEA to inform the local MFJP commandante in Mexicali that the search had been authorized and that the MFJP officers were to assist the DEA in conducting the searches.¹⁷ Upon arriving in Mexicali, the DEA agents relayed the Director's statements to the Mexicali MFJP commandante who verified this authorization with his superior officer. After assuring the DEA agents that everything was fine, the commandante double-checked the authorization with the official representative of the Mexicali Attorney General in Mexico. After doing so, the commandante agreed to help in the search. Before leaving the MFJP office, the commandante informed the DEA agents that they were allowed to take any documentary evidence they found back to the United States.¹⁸

With the assistance of several MFJP officers, the DEA agents searched Verdugo-Urquidez's Mexicali residence, and a house owned by Verdugo-Urquidez in San Felipe, Baja California. During the search of the Mexicali residence, a tally sheet was found which listed the amounts of marijuana that Verdugo-Urquidez had smuggled into the United States.¹⁹

At the district court level, the court suppressed the introduction of the tally sheet as evidence.²⁰ The district court could find no precedent addressing the question "whether the Fourth Amendment applies to a foreign search of a foreign national."²¹ Nevertheless, the district court concluded it was likely that the fourth amendment was intended to protect an alien, already in custody in the United States, from searches for the express purpose of obtaining evidence relevant to the pending prosecution. Since the agents had not secured a warrant from a U.S. district court, the court held the searches were unconstitutional.²²

16. Verdugo-Urquidez, 856 F.2d at 1226.

17. *Id.*

18. *Id.* at 1226.

19. *Id.* at 1217.

20. *Id.*

21. 5 INT'L ENFORCEMENT L. REP. 229 (June 1989). The district court's framing of the issue was somewhat broader—"whether the Fourth Amendment applies to a foreign search of a foreign national conducted as a joint venture by the United States and foreign officials". The "joint venture" doctrine was expounded in *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968). For more on the "joint venture" doctrine and the majority's application of it to this case see *infra* notes 26-33.

22. Verdugo-Urquidez, 856 F.2d at 1217. The district court also found that the execution of the searches was unreasonable under the fourth amendment because: (1) the searches were conducted primarily at night; (2) the agents did not prepare contemporaneous inventories of the seized items; and (3) the searches were excessively general in scope. *Id.*

The Ninth Circuit Court of Appeals affirmed by a divided vote.²³ The majority concluded that the protection of the fourth amendment extended to the government's search of the Mexicali residence. The court reasoned that "since the DEA did not obtain a search warrant, and because exigent circumstances were lacking,"²⁴ the search was unlawful under the fourth amendment [and] the evidence obtained in that search was properly suppressed."²⁵

II. THE *Verdugo-Urquidez* MAJORITY'S MISAPPLICATION OF THE JOINT VENTURE DOCTRINE*

The *Verdugo-Urquidez* majority began their analysis by conceding that the issue of whether the fourth amendment applies to a foreign national whose foreign residence has been searched by U.S. law enforcement officers had never been answered by the Supreme Court, nor resolved by any Circuit Court of Appeals.²⁶ Furthermore, the majority observed that "neither the Fourth Amendment to the United States Constitution nor the exclusionary rule of evidence . . . is applicable to the acts of foreign officials."²⁷ However, the majority stated that "the Fourth Amendment could apply to raids by foreign officials . . . if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials."²⁸ The majority then found that the DEA agents' activities were sufficiently substantial to bring the case within the scope of this "joint venture" doctrine.²⁹

23. In a vigorous dissent, Judge Wallace said that the fourth amendment does not apply to the search of a foreign residence belonging to a foreign national. *Id.* at 1230. According to Judge Wallace, with whom the author agrees, the protections of the fourth amendment are limited, by their terms, to "the people," a class that does not include foreign nationals with respect to searches in foreign countries. See *infra* notes 57-70 and accompanying text.

24. Exceptions to the warrant requirement arise when immediate action is required and it would be unreasonable to secure a warrant. Examples include cases involving a "hot pursuit," see, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967); searches incident to a lawful arrest, see, e.g., *United States v. Robinson*, 414 U.S. 218 (1973); and seizure of evidence in plain view, see, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

25. *Verdugo-Urquidez*, 856 F.2d at 1230.

* The author wishes to acknowledge Judge Wallace's dissent as the primary source for his criticisms of the majority's opinion.

26. *Id.* at 1217.

27. *Id.* at 1224 (citing *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969)). "Because the fourth amendment does not itself require exclusion of unlawfully obtained evidence, and because excluding reliable evidence will not force foreign officers to abide by the norms of the fourth amendment, the exclusionary rule has no application to searches conducted solely by a foreign government."

28. *Id.* (quoting *Stonehill v. United States*, 405 F.2d 738, 743 (1968)).

29. *Verdugo-Urquidez*, 856 F.2d at 1228. Along with the facts stated in *supra* sec. I, the *Verdugo-Urquidez* majority relied upon the following:

Prior to Supreme Court decisions holding that the fourth amendment applied to state agencies through the fourteenth amendment,³⁰ the purpose of the "joint venture" doctrine was to determine "whether federal officials so substantially participated in a raid by state officials as to convert the raid into a joint venture between state and federal officials subject to the provisions of the fourth amendment."³¹ Later, the substantial participation inquiry was held to be "equally pertinent in determining whether federal officials so substantially participated in a raid by foreign officials as to convert it into a joint venture between the United States and the foreign government and therefore subject to the provisions and sanctions of the fourth amendment."³² In extending the joint venture doctrine to this case, the *Verdugo-Urquidez* majority disregarded that fact that the joint venture doctrine has never been extended to activities directed against foreign nationals.³³ *Verdugo-*

a team of between ten to fifteen MFJP officers, [four] DEA agents, and Commandante Salazar drove to [Verdugo-Urquidez's] Mexicali residence . . . Commandante Salazar stationed some of his officers around the perimeter of the house and, while the DEA agents waited in the street, an entry team composed entirely of MFJP officers entered the house. While the MFJP officers conducted a security sweep, the DEA agents entered the house but they did not search the house at this time.

Because it was already late and because San Felipe was two hours away, Commandante Salazar and [DEA] Agent Bowen decided to drive there and search the San Felipe house first. The Commandante left behind a force of four or five officers who were instructed to secure the Mexicali residence, but . . . not to search it until he and the DEA agents returned. . . The district court found that most of the MFJP officers stood a perimeter watch while the DEA agents searched the house over a two-hour period . . . During this search, the items were segregated depending upon which agency seized them. At the conclusion of the search . . . seized items were turned over to the DEA agents. The MFJP officers seized several weapons, as well as a 1984 Grand Marquis and some other motor vehicles.

The commandante and the DEA then returned to the Mexicali residence . . . and . . . conducted a room by room search of the Mexicali house. The DEA agents seized evidence thought relevant, while the MFJP officers brought documents they found to Agent Bowen, who decided whether the DEA wanted them. Again the seized items were segregated based on which agency found them, although all the seized documents were placed in the DEA agent's car. And, as in the San Felipe search, the MFJP kept all weapons they found. At around 3:00 or 4:00 a.m., Commandante Salazar grew tired of the search . . . [and he] placed all the remaining documents in a briefcase and handed the briefcase to Agent Bowen. Commandante Salazar told Agent Bowen to take all the documents and sort through them later because it was late and he wanted the search to end. Agent Bowen placed the briefcase in the DEA's car and the MFJP and DEA agents left the Mexicali house.

Id. at 1226-27.

30. *Mapp v. Ohio*, 367 U.S. 643 (1961); and *Elkins v. United States*, 364 U.S. 206 (1960).

31. *Stonehill*, 405 F.2d at 743.

32. *Id.*

33. *Byars v. United States*, 273 U.S. 28 (1927); *Lustig v. United States*, 338 U.S. 74 (1949); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967); and *Birdsell v. United States*,

Urquidez was a foreign national.

III. THE FRAMERS' DESIGN OF THE CONSTITUTION AS A SOCIAL CONTRACT

To fully appreciate why the majority's decision in *Verdugo-Urquidez* is erroneous, it is necessary to understand the underlying intent of the fourth amendment and to determine who it was designed to protect. To do so, it is imperative to understand the framers' vision of the Constitution.³⁴ For the purpose of this analysis, what is required by the Constitution must be distinguished from that which is desirable as a matter of social policy.³⁵

Traditionally, the Constitution was viewed as a social contract or compact between the people of the United States and their government.³⁶ This compact creates reciprocal rights and duties between each of the parties.³⁷ The thrust of this compact/social contract theory is that the people³⁸ of the United States allow the government to exercise substantial authority over them. In exchange, the government, in exercising this authority, agrees that its authority may be limited by the Constitution.³⁹

As Judge Wallace's dissent in *Verdugo-Urquidez* pointed out, in the pre-constitution era, "the 'compact' or 'social contract' concept of government pervaded American political philosophy, both in theory and in practice."⁴⁰ For instance, in 1620, the Pilgrims enacted the Mayflower Compact, in which they proclaimed that "'We . . . solemnly and mutually . . . covenant and combine ourselves together into a civil Body Politick for our better Ordering and Preservation.'" ⁴¹ After the American Revolution, Americans continued to

346 F.2d 775 (5th Cir. 1965).

34. When the founding fathers drafted the Constitution, they did not envision extensive foreign involvements. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Actions*, 17 N.Y. J. INT'L L. & POL. 287, 288 (1985).

35. Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 778 (1980). In considering this, Chief Justice Marshall's admonition should be kept in mind that "we must never forget that it is a constitution we are expounding." *McCulloch v. Maryland*, 17 (4 Wheat.) 316, 407 (1819).

36. See the *FEDERALIST* Nos. 39, 43 and 44 (J. Madison); see also *id.* No. 22 (A. Hamilton).

37. *Id.*

38. See U.S. CONST. preamble. "We the People of the United States . . . do ordain and establish this Constitution for the United States of America."

39. *Verdugo-Urquidez*, 856 F.2d at 1218.

40. *Id.* at 1231 (Wallace, J., dissenting).

41. *Id.* (citing Mayflower Compact, November 11, 1620, reprinted in *SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 60 (Perry ed. 1954)) [hereinafter *SOURCES OF OUR*

view government as a compact between the people and their respective states.⁴²

When the framers drafted the Constitution, they understood it to be a compact or social contract.⁴³ Likewise, the Supreme Court has repeatedly proclaimed its understanding of the Constitution as a compact between the people of the United States and its government. For example, in *Chisholm v. Georgia*,⁴⁴ Chief Justice Jay announced that every state constitution "is a compact . . . and the constitution of the United States is likewise a compact made by the people of the United States to govern themselves."⁴⁵ In *McCulloch v. Maryland*,⁴⁶ Chief Justice Marshall proclaimed that "[t]he government of the Union . . . is, emphatically and truly, a government of the people . . . [i]t emanates from them. Its powers are granted by them, and . . . for their benefit."⁴⁷

Viewed in this light, a fundamental principle of the Constitution becomes apparent: one can make no claim of entitlement to the rights guaranteed by the Constitution without also assuming certain obligations to the United States Government.⁴⁸ It follows that for Verdugo-Urquidez to claim a right of protection under the fourth amendment from an unreasonable search and seizure, he must have assumed some reciprocal obligation to the United States. Verdugo-Urquidez, a foreign national residing in a foreign country, has not done this.

IV. THE *Verdugo-Urquidez* MAJORITY'S EMPHASIS ON MAN'S NATURAL RIGHTS

The *Verdugo-Urquidez* majority believed that the social contract theory was only part of the philosophical theology reflected in the

LIBERTIES].

42. 852 F.2d at 1232 (Wallace, J. dissenting). Constitution of Massachusetts, October 29, 1780, reprinted in *SOURCES OF OUR LIBERTIES*, *supra* note 41, at 373. For example, in the Preamble to the Massachusetts Constitution of 1780, the people proclaimed "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." *Id.*

43. *Verdugo-Urquidez*, 856 F.2d at 1231 (Wallace, J. dissenting).

44. 2 U.S. (2 Dall.) 419 (1793).

45. *Id.* at 471.

46. 17 U.S. (4 Wheat.) 316 (1819).

47. *Id.* at 404.

48. See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-44 (1913). Hohfeld advocates that rights and duties are best analyzed not as moral absolutes owed to or demanded from the whole world, but rather as different aspects of bilateral relationships between particular parties.

Constitution and the Bill of Rights. The majority was more influenced by the notion that Americans of the revolutionary era also held a deeply-felt belief in the "natural rights of man."⁴⁹ For this proposition, the majority chiefly relies upon the Declaration of Independence, with its reference to "the laws of nature" and "inalienable rights."⁵⁰

Viewing the compact and natural rights theories as mutually exclusive, as the majority did, ignores the interrelationship between the two. The framers incorporated the concept of natural rights into the social compact scheme, embodying these rights in the Constitution.⁵¹ Hence, while liberties listed in the Bill of Rights were perceived by the framers as reflecting man's natural rights, they also recognized that the Constitution formed a compact among the people of the United States to sacrifice some measure of these natural rights in order to create a central government capable of preserving the rest.⁵² Furthermore, rather than enhancing the *Verdugo-Urquidez* majority's reliance on natural rights as a source for constitutional extension, a reading of the Declaration of Independence tends to fortify the compact theory. To this end, the Dec-

49. *Verdugo-Urquidez*, 856 F.2d at 1219-20 (citing The Declaration of Independence (U.S. 1776), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 251-52 (1972)); Vermont Declaration of Rights (1777), *reprinted in* 1 B. SCHWARTZ, *supra*, at 319. "All government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man." *See also* II. J. KENT, COMMENTARIES ON AMERICAN LAW 1 (1827) "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable." III B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON (Volume 1) 170 (1968). Professor Schwartz explained that the dominant conception when the framers wrote was that stated in Blackstone: "By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society, or in it." *Id.* at 170 [emphasis in original].

50. *Verdugo-Urquidez*, 856 F.2d at 1219 (citing The Declaration of Independence (U.S. 1776), *reprinted in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 251-52 (1971)).

51. Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 408 (1979). For descriptions of the framers' views of natural rights and government, *see* BERN, THE CONSTITUTION AS THE BILL OF RIGHTS IS, IN HOW DOES THE CONSTITUTION SECURE RIGHTS? (Goldwin & Shambra ed. 1985). Natural rights theory is manifested in the Constitution's first ten amendments, the Bill of Rights. When the Constitution was originally proposed in 1789, it lacked limitations on governmental encroachment on the rights of individuals. Therefore, as a price of their support, the antifederalists extracted promises that the Constitution would be amended to provide for a specific list of individual rights. *See also supra* note 49 and accompanying text.

52. *Verdugo-Urquidez*, 856 F.2d at 1232 (Wallace, J., dissenting, citing SOURCES OF OUR LIBERTIES, *supra* note 41, at 418).

laration of Independence declares, "In order to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."⁵³ Applying their notion of "natural law," the *Verdugo-Urquidez* majority failed to follow a time-honored tenet first laid down in *Marbury v. Madison*, requiring judges to recognize that "the United States is entirely a creature of the Constitution. Its powers and authority have no other source."⁵⁴

V. WHO ARE THE PEOPLE TO WHOM THE FOURTH AMENDMENT APPLIES?

Before one can claim the benefit of a law, one must be within the class of people the law was intended to protect.⁵⁵ To this end, 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.⁵⁶

"By its express terms, the rights set forth in the this amendment are secured to 'the people.'"⁵⁷ "The People" referred to in the fourth amendment are those referred to in the Constitution's Preamble,⁵⁸ who endowed the federal government with certain enumerated powers.⁵⁹ The Supreme Court has continually reiterated that "the language of the Constitution, where clear and unambiguous, must be given its plain evident meaning."⁶⁰

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation

53. The Declaration of Independence ¶ 2 (U.S. 1776).

54. U.S. (1 Cranch) 137, 176-80 (1803).

55. Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

56. U.S. CONST. amend. IV.

57. 856 F.2d at 1231 (Wallace J., dissenting).

58. The Preamble states in full: "We the People of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America" (emphasis added).

59. *Verdugo-Urquidez*, 856 F.2d at 1231 (Wallace, J., dissenting).

60. *Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957) (citing *Ogden v. Saunders*, 12 Wheat. 213, 302-03 (1827)).

or addition. . . The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase . . . is persuasive evidence that no qualification was intended.⁶¹

Because “the people” in the fourth amendment are only “the people of the United States,” Verdugo-Urquidez is entitled to the protection of the fourth amendment only if he can be classified as one of “the people” of the United States.⁶² However, the *Verdugo-Urquidez* majority did not read the phrase “the right of the people to be secure” as a limit on the class of people to whom the amendment applies.⁶³

VI. VERDUGO-URQUIDEZ IS NOT ONE OF “THE PEOPLE” TO WHOM THE FOURTH AMENDMENT EXTENDS

The fourth amendment to the Constitution was never meant to apply to a person in Verdugo-Urquidez’s situation. Verdugo-Urquidez is not a citizen. He does not reside in the United States. The search of his house occurred in a foreign country. However, the *Verdugo-Urquidez* majority concluded that under the fourth amendment, Verdugo-Urquidez could have evidence suppressed which was obtained in a search conducted in Mexico by United States agents with the express permission and cooperation of the Mexican government.⁶⁴

The *Verdugo-Urquidez* majority noted that “[w]hen the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights . . . provide[s] to protect his life and liberty should not be stripped away just because he happens to be in another country.”⁶⁵ Further, the *Verdugo-Urquidez* court stated that “the Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted.”⁶⁶

61. *United States v. Sprague*, 282 U.S. 716, 731-32 (1931) (citations omitted).

62. *League v. DeYoung*, 52 U.S. (11 How.) 184, 203 (1850). “The Constitution of the United States was made by, and for the protection of, the people of the United States.” *Id.* at 202.

63. *Verdugo-Urquidez*, 856 F.2d at 1223. The majority reasoned that “the language of the amendment does not so limit ‘people’ and we will not insert qualifying language into the amendment to limit its application in such a fashion.” *Id.*

64. *Verdugo-Urquidez*, 856 F.2d at 1230 (Wallace J., dissenting). *See also supra* notes 14-17. .

65. *Verdugo-Urquidez*, at 1217 (citing *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)).

66. *Verdugo-Urquidez*, 856 F.2d at 1218 (citing *Balzac v. Porto Rico*, 258 U.S. 298,

From one set of Supreme Court cases holding that United States citizens have constitutional rights abroad,⁶⁷ and another set holding that aliens present within the United States are entitled to some constitutional rights against certain actions taken by U.S. officials in this country,⁶⁸ the *Verdugo-Urquidez* majority concluded that a non-resident alien is entitled to fourth amendment protection against United States officials on foreign soil.⁶⁹

This holding is not only unprecedented, it also runs counter to the fact that when the Supreme Court extended Constitutional protections beyond United States citizens, the Court vehemently stated that "it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."⁷⁰

VII. CONSTITUTIONAL LIMITATIONS: PROTECTION FOR U.S. CITIZENS ABROAD AND FOR ALIENS WITHIN THE UNITED STATES

Although the Constitution is in force wherever and whenever the sovereign power of the United States is exerted, it does not follow that the Constitution, by being in force, imposes the same rules in every time and place.⁷¹ It "contains grants of power and limitations which, in the nature of things, are not always and everywhere applicable."⁷² Thus, while aliens enjoy some constitutional protection within the United States,⁷³ it does not follow that they enjoy the same protection with respect to our federal government's activities abroad.⁷⁴

312 (1922)).

67. *Reid v. Covert*, 354 U.S. 1 (1957); *Balzac v. Porto Rico*, 258 U.S. 298 (1933). In *Balzac*, the Supreme Court recognized that in territories where the United States is sovereign, the Constitution is in force. *Id.* at 312.

68. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (extending the fourteenth amendment to resident aliens because that amendment is not confined to the protection of citizens but rather is universal in its scope); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (a resident alien is a "person" within the meaning of the fifth amendment); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (all persons within the territory of the United States are protected by the fifth and sixth amendments).

69. *Verdugo-Urquidez*, 856 F.2d at 1230 (Wallace, J., dissenting).

70. *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950).

71. *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

72. *Id.*

73. *Johnson v. Eisentrager*, 339 U.S. at 770-71. For example, the Supreme Court has steadily enlarged the right against executive deportation of aliens who are probationary residents except upon full and fair hearing. *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912); *Tisi v. Todd*, 264 U.S. 131 (1923); *Bridges v. Wixon*, 326 U.S. 135 (1944); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). And since 1886, the Supreme Court has extended to resident aliens the constitutional guarantee of due process of law of the fourteenth amendment. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

74. Stephan, *supra* note 35, at 780.

This constitutional limitation is underscored by the cases that distinguish between the constitutional rights of aliens seeking admission into the United States and those aliens already present in the United States. As to the former, the Supreme Court has ruled that an alien seeking admission to the United States is accorded no constitutional rights.⁷⁵ In other Supreme Court cases, specific amendments have been expressly denied to non-resident aliens.⁷⁶

When considering the extension of fourth amendment rights to aliens, residency within the United States is important in the context of the compact theory.⁷⁷

Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship,⁷⁸ guaranteed by the Constitution to all people within our borders. Correlatively, 'an alien owes a temporary allegiance to the government of the United States, and he assumes duties and obligations which do not differ materially from those of native born or naturalized citizens.'⁷⁹

The Supreme Court has also acknowledged that "the Government's obligation of protection is correlative with the duty of loyal support inherent in the citizen's allegiance."⁸⁰ Based on this duty of loyalty, the court has distinguished between the rights of its citizens and the rights of nonresident aliens complaining of allegedly unconstitutional actions by agents of the United States abroad.⁸¹ It follows that the dissent in *Verdugo-Urquidez* correctly realized that some allegiance to the United States, as evidenced by citizenship or residency, is the "consideration" for receiving the protection of the Bill of Rights against the extraterritorial actions of the United States officials.⁸² Therefore, since *Verdugo-Urquidez* is neither a United States citizen nor an alien residing within the United

75. *Landon v. Plasencia*, 459 U.S. 21 (1982).

76. *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904); *Kwong Hai Chen v. Colding*, 344 U.S. 590 (1953). "Excludable aliens . . . are not within the protection of the fifth amendment." *Id.* at 600.

77. *Verdugo-Urquidez*, 856 F.2d at 1236 (Wallace, J., dissenting). See also *supra* notes 34-46.

78. For example, the Constitution protects the privileges and immunities only of citizens, U.S. CONST. amend. 14, § 1, art. IV, § 2, cl. 1; and the right to vote only of citizens, amend. 15, 19, 24, 26. It requires that representatives have been citizens for seven years, art. 1, § 2, cl. 2, and senators citizens for nine, art. 1, § 3, cl. 3, and that the president be a "natural born citizen," art. II, § 1, cl. 5.

79. *Verdugo-Urquidez*, 856 F.2d at 1236 (Wallace, J. dissenting, quoting *Eisler v. United States*, 170 F.2d 273, 279 (D.C. Cir. 1948)).

80. *Johnson v. Eisentrager*, 334 U.S. at 770.

81. *Id.*

82. *Verdugo-Urquidez*, 856 F.2d at 1236 (Wallace, J., dissenting).

States, he has not assumed any reciprocal obligations to the United States government, as required by the compact, that would enable him to enjoy all of the rights guaranteed to "the people" of the United States by its Constitution.⁸³

This does not mean that Verdugo-Urquidez is not entitled to some of the protections of the Constitution. As Justice Harlan stated, "the proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."⁸⁴ For Verdugo-Urquidez's obligation to stand trial in the United States for alleged violations of our narcotics laws, he is entitled to a fair judicial trial. Even though Verdugo-Urquidez is a non-resident alien, he is still entitled to fifth and sixth amendment protection.⁸⁵ This is because the fifth amendment, by its express language, applies to "all persons"⁸⁶ and the sixth amendment's language commands that in all prosecutions "the accused"⁸⁷ shall enjoy the right to a fair trial. However, this does not mean that Verdugo-Urquidez is therefore entitled to the protection of the fourth amendment. The fourth amendment's language, as distinct from the language of the fifth and sixth amendments, is expressly limited to "the people."⁸⁸ The *Verdugo-Urquidez* majority, however, believed "it would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment . . . and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment."⁸⁹ Yet, at the same time, they did not interpret the phrase "the right of the people to be secure,"

83. *Id.* at 1237.

84. *Reid v. Covert*, 354 U.S. 1, 74 (1957) (emphasis in original).

85. *Verdugo-Urquidez*, 856 F.2d at 1237 (Wallace J., dissenting). *See also* *Wong Wing v. United States*, 163 U.S. 228 (1896), which provides:

All persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.

Id. at 238.

86. The fifth amendment reads in pertinent part, "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. . . ."

87. The sixth amendment reads in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

88. *Verdugo-Urquidez*, 856 F.2d at 1237 (Wallace, J., dissenting). *See also supra* notes 55-59.

89. *Verdugo-Urquidez*, 856 F.2d at 1224.

as restricting the application of the fourth amendment to a special class of people.⁹⁰ The majority reasoned that “the language of the amendment does not so limit ‘people,’ and we will not insert qualifying language into the amendment to limit its application in such a fashion.”⁹¹

This reasoning is unsound for a number of reasons. First, the Supreme Court has stated that “the fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship.”⁹² The Supreme Court said this was so because “a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other.”⁹³

Second, no United States constitutional amendment has language limiting its scope except for the terms of each particularized amendment. For example, in different amendments, the framers of the Constitution spoke in terms of “the people,”⁹⁴ “the accused,”⁹⁵ “citizens,”⁹⁶ and “all persons.”⁹⁷ No qualifying language is needed to determine their intent. Juxtaposition of terms, for instance, “all persons” versus “the people,” and “citizens” versus “all persons,” makes clear to whom they apply. As the Supreme Court, when interpreting the Constitution, has reiterated, “the language of the Constitution, where clear and unambiguous, must be given its plain evident meaning.”⁹⁸

Third, the extension of fifth and sixth amendment protection to aliens is due in large part to the fact that any violation of such constitutional rights would occur within the United States.⁹⁹ “Unlike the right to a jury trial or due process of law, fourth amendment violations do not occur at trial.”¹⁰⁰ “Violations of the Fourth Amendment occur at the time the government intrudes unreasona-

90. *Id.* at 1223. *See also supra* note 60.

91. *Id.*

92. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976).

93. *Id.*

94. For example, the preamble, first amendment, second amendment, fourth amendment, ninth amendment, and tenth amendment.

95. U.S. CONST. amend. VI.

96. U.S. CONST. amend. IV.

97. U.S. CONST. amend. V.

98. *See supra* note 61 and accompanying text.

99. *Wong Wing v. United States*, 163 U.S. 228 (1896).

100. *Verdugo-Urquidez*, 856 F.2d at 1241 (Wallace, J., dissenting).

bly into a citizen's legitimate sphere of privacy."¹⁰¹ Moreover, there is no independent violation of the fourth amendment when unlawfully seized evidence is introduced into a criminal proceeding.¹⁰²

Verdugo-Urquidez is not one of "the people" to whom the fourth amendment applies. Therefore, rather than extending the fourth amendment to a non-resident foreign national for an action committed in a foreign country, the *Verdugo-Urquidez* majority should have adhered to the Supreme Court's definitive admonition that:

Neither the Constitution nor the laws passed in pursuance of it have *any force in foreign territory unless in respect of our own citizens*; and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law.¹⁰³

VIII. THE FOURTH AMENDMENT DOES NOT PROHIBIT ALL SEARCHES, ONLY UNREASONABLE SEARCHES

Assuming, *arguendo*, as the *Verdugo-Urquidez* majority did, that the fourth amendment applies¹⁰⁴ to the search of a foreign national's residence, what exactly does the fourth amendment require?¹⁰⁵

The *Verdugo-Urquidez* majority held that the search of Verdugo-Urquidez's Mexican residence required a warrant to be reasonable.¹⁰⁶ They reasoned, "the warrant requirement serves to interpose a 'neutral and detached magistrate' between the public and the police officer, who is 'engaged in the often competitive enterprise of ferreting out crime.'"¹⁰⁷ However, in the same breath, the *Verdugo-Urquidez* majority recognized that "a warrant issued by an American magistrate would be a dead letter in Mexico,"¹⁰⁸ and that "international law enforcement is a cooperative venture and it would be an affront to a foreign country's sovereignty if the DEA presented an American warrant."¹⁰⁹ Nevertheless, the major-

101. *Id.* (citing *U.S. v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

102. *Leon*, 468 U.S. at 906; *United States v. Janis*, 428 U.S. 433, 458-59, n.35 (1976).

103. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (emphasis added).

104. *Verdugo-Urquidez*, 856 F.2d at 1228.

105. *See supra* note 56.

106. *Verdugo-Urquidez*, 856 F.2d at 1230.

107. *Id.* at 1229 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948))).

108. *Verdugo-Urquidez*, 856 F.2d at 1229.

109. *Id.* at 1230.

ity still held the search to be unreasonable because the DEA did not obtain this impotent warrant.

In reaching this conclusion, the *Verdugo-Urquidez* majority reasoned that, despite the geographic limitations on the validity of American warrants, the government still has a duty to obtain a search warrant for a search in a foreign country.¹¹⁰ "To do so would be to treat foreign searches differently from domestic searches."¹¹¹

[I]f the residence were located in the United States, we would conclude that the evidence sought to be introduced in this case would have to be suppressed because the government did not obtain a warrant and no exigent circumstances existed. We can discern no logical reason to formulate a different rule just because the residence to be searched happens to be in Mexico.¹¹²

In reaching this conclusion, the *Verdugo-Urquidez* majority ignored the fact that the law does not require the doing of a futile act or a futile gesture.¹¹³

This reasoning is troubling. It is beyond question that in the event United States agents searched a United States residence without a warrant, consent, or exigent circumstances, the search would be constitutionally unreasonable.¹¹⁴ What the *Verdugo-Urquidez* majority overlooked is that "the ability of United States agents in a foreign country to take any action against a citizen of that country often depends . . . on the authorization and cooperation of the foreign government."¹¹⁵ As guests acting with the foreign government's permission, U.S. officials are not in a position to require the foreign government to recognize our constitution.¹¹⁶ The *Verdugo-Urquidez* majority's reasoning also ignores the reality that "when [U.S. officials] conduct searches abroad . . . foreign officials . . . decide the scope and reasonableness of any proposed search, whether the search will occur at all, and under what conditions."¹¹⁷

110. *Id.*

111. *Id.*

112. *Id.*

113. *South Hollywood Hills Citizens Ass'n v. King Cty.*, 101 Wash. 2d 68, 677 P.2d 114 (1984). The futile gestures doctrine arises most often in the exhaustion of state remedies cases. Exhaustion of administrative remedies is required before resort to the courts, but exhaustion is excused if resort to administrative procedure would be futile. *Id.* at 74. *See also* *Zylstra v. Piva*, 85 Wash. 2d 743, 539 P.2d 823 (1975).

114. *Steagald v. United States*, 451 U.S. 204, 212 (1981).

115. *Verdugo-Urquidez*, 856 F.2d at 1248 (Wallace, J., dissenting, citing *United States v. Toscanino*, 500 F.2d 267 (2nd. Cir. 1974)).

116. *Id.*

117. *Id.* at 1249 (Wallace, J., dissenting). *See also supra* note 98.

In light of this, it is unreasonable to require an admittedly invalid warrant to legitimize an otherwise reasonable foreign search.

Furthermore, the *Verdugo-Urquidez* majority ignored the fact that United States district judges generally possess no extraterritorial jurisdiction to issue search warrants.¹¹⁸

By its express language, Federal Rule of Criminal Procedure 41(A) requires the search warrant to be issued by a judge within the district where the property is located.¹¹⁹ Moreover, besides being of no force in Mexico, presently there is no district in the United States from which a valid search warrant for Mexico could be obtained. Therefore if the fourth amendment applies in these situations, a reexamination of its requirements should be undertaken, keeping in mind the Supreme Court's pronouncement that, "there is no formula for the determination of reasonableness."¹²⁰

IX. BEYOND *Verdugo-Urquidez*

In setting standards to govern this issue, the Supreme Court should adopt an operative, flexible framework rather than the "rigidity often characteristic of constitutional adjudication."¹²¹ Toward this end, the author proposes a two-step test modeled after the one used to review the legality of extraordinary apprehensions of alleged law-breakers not present within the United States.¹²² By doing so, the Supreme Court could implement a practical and workable standard which protects both the public interest in law enforcement, and reasonable private expectations of justice.

A. *Extraordinary Apprehensions*

The United States usually uses extradition treaties in order to take custody of suspected lawbreakers outside its boundaries.¹²³ "International extradition is the legal process through which one nation, upon request by another nation, apprehends and delivers to the requesting nation, an individual within its borders who has been

118. *Weinberg v. United States*, 126 F.2d 1004, 1006 (1942).

119. Rule 41(A) entitled "Authority to Issue Warrant" provides: "A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government." *Id.*

120. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1930).

121. *Mathews v. Diaz*, 426 U.S. 67 (1976).

122. See *infra* section IIC.

123. *Abramovsky & Eagle, U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?*, 57 OR. L. REV. 51 (1977-78).

accused or convicted of a crime in the requesting nation.”¹²⁴ Governments may, and in recent years the United States increasingly has, resorted to extraordinary apprehensions,¹²⁵ foregoing the extradition process in order to obtain custody over such individuals.¹²⁶

There are two basic types of extraordinary apprehensions: abductions and irregular renditions. Abduction is the unilateral seizure of a fugitive by officials of the apprehending nation without the cooperation or acquiescence of the government of the nation in which the fugitive is located.¹²⁷ Irregular renditions are seizures accomplished by informal agreements between law enforcement agents of the apprehending and asylum states whereby an individual is forcibly removed to the state of apprehension either through the cooperation or acquiescence of officials of the asylum state.¹²⁸

The United States’ position on extraordinary apprehensions differs depending upon whether the seizure was an abduction or an irregular rendition.¹²⁹ Although extremely rare, unilateral abductions are deemed to be violations of customary international law,¹³⁰ which is considered part of American law.¹³¹ Therefore abductions are usually redressable by the return of the abducted individual.¹³² On the other hand, irregular renditions have not been proscribed by

124. Note, *Extradition Treaty Improvements to Combat Drug Trafficking*, 15 GA. J. INT’L & COMP. L. 285 (1985) [hereinafter Note].

125. The United States is not the only nation which has resorted to extraordinary apprehensions in an effort to obtain custody over persons accused of a crime who have either obtained refuge in other countries, or who have committed their acts outside the territorial boundaries of the requesting state. For example, in the landmark Eichmann case, the District Court of Jerusalem held: “It is an established rule of law that a person . . . tried for an offense against the laws of a state may not oppose his trial by reason of the illegality of his arrest or of the means whereby he was brought within the jurisdiction of that State.” Attorney-General of Israel v. Eichmann, 36 I.L.R. 5, 59 C.D. Jerusalem, Israel 1961, *aff’d* 36 I.L.R. 304 L.S. Ct. Israel (1962). For a more detailed list of countries and cases which have also followed this principle, as well as a more exhaustive article on extraordinary apprehensions, see Abramovsky & Eagle, *supra* note 123.

126. Abramovsky & Eagle, *supra* note 123, at 51.

127. *Id.*

128. *Id.*

129. Note, *supra* note 124, at 301.

130. Generally, customary international law governs where a federal statute or judicial decision does not provide otherwise. The *Paquete Habana*, 175 U.S. 667, 700 (1900).

131. “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.” *Id.* at 700. “Abduction is such a manifestly extralegal act, and in practice so hazardous and uncertain, that it is unworthy of serious consideration as an alternative method to extradition in securing custody of fugitive offenders.” I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 75 (1971).

132. “Abductions by one state of persons located within the territory of another violate the territorial sovereignty of the second state and are redressable usually by the return of the person kidnapped.” U.S. v. Toscanino, 500 F.2d 267, 278 (2d Cir. 1974). For more on Toscanino, see *infra* notes 145-61 and accompanying text.

customary international law.¹³³ To the contrary, some United States courts have expressly held that irregular renditions are consistent with international law.¹³⁴ Before a court will divest itself of jurisdiction for an irregular rendition, there must also be a violation of the person's due process rights.¹³⁵

1. *The Legality of Extraordinary Apprehension*

In the landmark case of *Ker v. Illinois*,¹³⁶ the United States Supreme Court first evaluated the legality of extraordinary apprehension methods. The defendant in *Ker*, then residing in Peru, was indicted in Illinois for embezzlement and larceny.¹³⁷ Ker contested on the ground that his removal to Illinois violated the United States extradition treaty with Peru.¹³⁸

The Supreme Court rejected this. The Court stated that the existence of a bilateral treaty does not mean that obtaining physical custody over an alleged offender without recourse to the treaty violates its provisions. The Court conceded that the treaty had not been followed and that Ker had been kidnapped.¹³⁹ However, the Court affirmed his conviction, holding that forcible abduction does not negate U.S. jurisdiction over the person, as long as the person is properly indicted and given a fair trial.¹⁴⁰

Sixty-six years later the conclusion in *Ker* was reaffirmed by the Supreme Court in *Frisbie v. Collins*.¹⁴¹ "Thus, under the . . . *Ker-Frisbie* rule, due process was limited to the guarantee of a constitutionally fair trial, regardless of the method by which jurisdiction

133. Abramovsky & Eagle, *supra* note 123, at 64.

134. U.S. *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975).

135. *Id.* at 68.

136. 119 U.S. 436 (1886).

137. *Id.* at 438.

138. *Id.* at 439. Ker argued that his Peruvian residence accorded him a right to asylum, and that he could only be removed from Peru in accordance with the provisions of the treaty.

139. *Id.* at 442-43.

140. *Id.* at 440.

141. 342 U.S. 519 (1952). In *Frisbie*, the defendant argued that because he was unlawfully apprehended in Illinois by Michigan law enforcement officials, his conviction in Michigan was obtained in violation of the due process clause of the fourteenth amendment. *Id.* at 521. The Court disagreed:

This court has never departed from the rule announced in *Ker* . . . that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction'. . . . Due process of law is satisfied when one present in court is convicted of crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards.

Id. at 522.

was obtained over the defendant.”¹⁴²

2. *Modern Rulings on Extraordinary Apprehension*

In *United States v. Toscanino*, the Second Circuit Court of appeals reexamined the *Ker-Frisbie* doctrine.¹⁴³ Toscanino, an Italian citizen, was convicted of conspiracy to import narcotics into the United States.¹⁴⁴ On appeal, Toscanino did not claim any error with the trial itself. Instead, he claimed the entire district court proceedings against him were void because his presence within the court’s jurisdiction was illegally obtained.¹⁴⁵

Toscanino alleged that he was lured from his home in Montevideo, Uruguay, at the urging of a Montevideo policeman acting as a paid United States agent.¹⁴⁶ Toscanino claimed that when he met the agent, he was knocked unconscious by a gun, thrown into a car, blindfolded, and driven to Brazil.¹⁴⁷

Once in the custody of Brazilians, Toscanino was tortured and interrogated for seventeen straight days.¹⁴⁸ Following this period of torture, Toscanino alleged that he was drugged by Brazilian-American agents and placed on a flight “destined for the waiting arms of the United States government.”¹⁴⁹ “The government prosecutor neither affirmed nor denied these allegations, but claimed they were immaterial to the district court’s power to proceed.”¹⁵⁰ While acknowledging the strict judicial adherence to the *Ker-Frisbie* doc-

142. U.S. v. Toscanino, 500 F.2d at 272.

143. 500 F.2d 267 (1974).

144. *Id.* at 268.

145. Toscanino, 500 F.2d at 269.

146. *Id.*

147. *Id.*

148. *Id.* at 270. Throughout this period, the United States government and the United States Attorney for the eastern district of New York prosecuting this case were aware of the interrogation, and in fact received progress reports. *Id.* In addition, Toscanino claimed his captors:

Denied him sleep . . . for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive. . . . Toscanino was forced to walk up and down a hallway for eight hours at a time. When he could no longer stand, he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino’s earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.

149. *Id.* Toscanino’s apprehension also violated two international agreements. For a discussion of the importance of the violation of international agreements in Toscanino, as well as in other cases, see *infra* notes 161-62.

150. Toscanino, 500 F.2d at 270.

trine in similar cases, the Second Circuit Court of Appeals applied an expanded concept of due process which was first laid down by the Supreme Court in *Rochin v. California*.¹⁵¹

It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'¹⁵²

The *Toscanino* court concluded: "We view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."¹⁵³

Applying this standard to the facts in *Toscanino*, the court held that if the defendant could prove that United States agents engaged in reprehensible conduct which deprived him of due process of law, the district court would have to divest itself of jurisdiction over him.¹⁵⁴

A year later in *United States ex rel. Lujan v. Gengler*,¹⁵⁵ the Second Circuit Court of Appeals¹⁵⁶ clarified the scope of *Toscanino*.¹⁵⁷ In *Lujan*, the court held that "in recognizing that *Ker*

151. 342 U.S. 165 (1952).

152. *Id.* at 172-73. In *Rochin*, sheriffs went to the petitioner's house with information that he was selling narcotics. They entered the house through an open door, and forced open the door to petitioner's bedroom. The sheriffs saw two capsules on a night stand, and when they asked *Rochin* about them he put them in his mouth and swallowed them. *Rochin* was taken to a hospital where the contents of his stomach were pumped, revealing that the capsules contained morphine. *Id.* at 166.

153. *Toscanino*, 500 F.2d at 275.

154. *Id.* at 275-76. On remand the district court held that the defendant failed to prove his allegations. Therefore the court would not divest itself of jurisdiction. 398 F. Supp. 918 (E.D.N.Y. 1975).

155. 510 F.2d 62 (1975).

156. The members of the *Lujan* panel also participated in *Toscanino*. Judge Oakes concurred in Judge Mansfield's majority opinion in that case, and in a separate opinion Judge Anderson concurred in the result.

157. *Lujan* was charged with conspiracy to import and distribute heroin. 510 F.2d at 63. According to the Second Circuit,

Lujan's arrest [warrant] commanded any special agent of the Drug Enforcement Administration or United States Marshal . . . to bring him before the District Court for the Eastern District of New York . . . *Lujan*, a licensed pilot, was hired in Argentina by one *Duran* to fly him to Bolivia. *Duran* represented that he had business to transact there with American interests in Bolivian mines . . . he in fact had been hired by American agents to lure *Lujan* to Bolivia. When *Lujan* landed in Bolivia . . . he was promptly taken into custody by Bolivian police who were [acting solely as] paid agents of the United States. *Lujan* was not permitted to communi-

and *Frisbie* no longer provided a *carte blanche* to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court."¹⁵⁸

The court then pointed out that the government conduct Lujan complained of could not compare with that alleged by Toscanino.¹⁵⁹ While not intending to approve illegal government conduct, the *Lujan* court felt compelled to recognize that, absent conduct like that in *Toscanino*, not every violation by prosecutors or police requires nullification of the indictment.¹⁶⁰

The *Lujan* court further distinguished Lujan's case from Toscanino's. It is significant that in *Toscanino*, the court held that Toscanino's abduction violated the United Nations Charter¹⁶¹ and the Charter of the Organization of American States, while Lujan's abduction did not.¹⁶²

cate with the Argentine embassy, an attorney, or any member of his family. [Six days later] Bolivian police, acting together with American agents, brought Lujan to the airport and placed him on plane headed to New York. Upon his arrival [in New York], Lujan was formally arrested by federal agents. At no time had he been formally charged by the Bolivian police, nor had a request for extradition been made by the United States.

Id. at 63.

158. *Id.* at 65 (emphasis in original).

159. *Id.* at 66.

160. *Id.*

161. *Toscanino*, 500 F.2d at 277. Article 2 paragraph 4 of the United Nations Charter provides: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."

162. Article 17 of the Charter of the Organization of American States provides: "The territory of a State is inviolable; it may not be the object, even temporarily of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized."

As evidence that abductions would violate these agreements, *Toscanino* relied upon the Eichmann incident. *See supra* note 125. In *Eichmann*, the United Nations Security Council found that Argentina's sovereignty was violated when Israel kidnapped the mass murderer from Argentina in order to bring him to justice (510 F.2d at 66, 67). The *Toscanino* court held a defendant might be able to interpose the violation of those charters as a defense to a criminal prosecution. 500 F.2d at 276.

"Unlike *Toscanino*, Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction." 510 F.2d at 67. This lack of objection was deemed fatal to Lujan's reliance upon the international charters. *Id.* "Thus, the failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred." *Id.* The court then definitively stated:

It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a 'recourse to measures in violation of international law or international convention'. If the State in which the fugitive is

B. Applying the Extraordinary Apprehension Doctrine to Searches on Foreign Soil Involving a Foreign National's Own Property

The framework analysis for extraordinary apprehensions of persons not present within United States jurisdiction can readily be extended by the Supreme Court to encompass foreign searches of property, which are not within the scope of the fourth amendment.

The first inquiry in this analysis is: was there permission, cooperation or acquiescence from the host government, its officers or its agents for the search? If the answer to this question is no, the inquiry ends. The unilateral search would be a violation of both international and U.S. law.¹⁶³ Therefore, the exclusion of the evidence from trial would be required.

If there were permission, cooperation or acquiescence by the government or its officers or agents in whose nation the search occurred, the second inquiry would be: did the search violate the defendant's due process rights? At a minimum, this author believes due process would require United States officials to make a good faith effort to comply with the host nation's laws. By doing so, non-resident aliens' reasonable expectations of justice would be protected. Beyond compliance with the host government's laws, attention should be paid to Supreme Court Justice Frankfurter's poignant admonition that: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"¹⁶⁴

CONCLUSION

The United States Supreme Court should overrule *Verdugo-Urquidez*. When the United States acts in foreign nations, it is at

found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality.

Id. The Lujan court went on to hold that since Lujan failed to allege "that Argentina or Bolivia protested his abduction or that the apprehension involved abuse of the type . . . condemned in *Toscanino*, there is no justification for ordering the district court to divest itself of jurisdiction over him." *Id.* at 68. Presently, therefore, before a court will divest itself of jurisdiction based on an extraordinary apprehension, there must be either a violation of international law or a violation of the person's due process rights.

163. See *supra* notes 129-131 and accompanying text.

164. *Rochin v. California*, 342 U.S. 165, 173.

most a guest, subordinate to the paramount authority of the host country. Both Supreme Court precedent and matters of principle and practicality necessitate distinguishing between “the people” of the United States and foreign nationals. When courts seek to impose limits on the actions of the United States in other countries, the extension of the fourth amendment’s protections to foreign nationals in foreign territories threatens unnecessarily to tie the hands of United States officials who cooperate with foreign governments to solve international crime. It is questionable whether any district in the United States can validly authorize a search warrant for searches abroad. In addition, because an American search warrant is a legal nullity in foreign countries, a search warrant should not be required. Instead, the search should be governed by the reasonableness clause. In lieu of the Supreme Court extending the protection of the fourth amendment to foreign nationals abroad, foreign nationals can be adequately protected by tenets of international law and due process.

EPILOGUE

On February 28, 1990, after this article was completed, the United States Supreme Court handed down their decision in *United States v. Verdugo-Urquidez*.¹⁶⁵ In a majority opinion authored by Chief Justice William Rehnquist¹⁶⁶ the Supreme Court held that the fourth amendment does not apply to search and seizure by United States agents of property that is owned by a nonresident alien located in a foreign country.¹⁶⁷

The Supreme Court, mirroring the analysis of Judge Wallace’s dissent in the Ninth Circuit decision, placed great weight on the text of the fourth amendment.¹⁶⁸ That text, like the text of the first, second, ninth and tenth amendments and unlike all the others, applies only to “the people.” The Court noted that the Preamble declares that the Constitution is ordained and established by “the People of the United States.”¹⁶⁹ The Court reasoned that while this

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

166. Rehnquist, C. J., delivered the opinion of the Court, in which White, O’Connor, Scalia and Kennedy, J.J. joined. Kennedy, J., and Stevens, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. Blackmun, J., also filed a dissenting opinion.

167. 110 S. Ct. at 1059.

168. *See supra* note 56 and accompanying text.

169. 110 S. Ct. at 1061.

textual analysis is not conclusive, it suggests that “the People” protected by the fourth amendment “refers 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.”¹⁷⁰ Justice Stevens’ concurrence stated that Verdugo Urquidez’s presence—lawful but involuntary—was not the sort of presence which indicates any substantial connection with the United States.¹⁷¹ Justice Stevens’ concurrence stated that at the time of the search, Verdugo-Urquidez was a citizen and resident of Mexico with no voluntary attachment to the United States. Since the place searched was located in Mexico, the fourth amendment had no application.¹⁷²

It should be noted that Justice Kennedy’s concurrence emphasized that a person in Verdugo-Urquidez’s position can look to the provisions of the fifth amendment’s due process clause for his protections.¹⁷³ Quoting Justice Harlan, he stated: “the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”¹⁷⁴

Justice Stevens felt that aliens lawfully within the United States are among those “people who are entitled to the protection of . . . the fourth amendment.”¹⁷⁵ Therefore, he could not join in the Court’s “sweeping opinion.”¹⁷⁶ However, he agreed that the search conducted by U.S. agents with the approval and cooperation of the Mexican authorities was not “unreasonable.”¹⁷⁷ He felt that the warrant clause of the fourth amendment had no application to searches of non-citizens’ homes in foreign jurisdictions because American magistrates have no power to authorize such searches. However, searches are still required to be reasonable.

This Note endorses the majority opinion that the fourth amendment does not apply to the search and seizure by United States agents of property which is owned by a non-resident alien and located in a foreign country. Therefore, in order to guide future ac-

170. *Id.*

171. *Id.* at 1068.

172. *Id.*

173. *Id.*

174. *Id.* (Quoting *Reid v. Covert*, 354 U.S. at 75).

175. *Id.*

176. *Id.*

177. *Id.*

tions of U.S. officials in similar situations, this author suggests implementing a two-step test modeled after the one used to review the legality of extraordinary apprehensions of the foreign person.

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