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Fourth Amendment--Search and Seizure of Property Abroad: Erosion of the Rights of Aliens

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FOURTH AMENDMENT—SEARCH AND SEIZURE OF PROPERTY ABROAD: EROSION OF THE RIGHTS OF ALIENS

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

I. INTRODUCTION

In *United States v. Verdugo-Urquidez*,¹ the United States Supreme Court held that the fourth amendment² does not protect individuals against the search and seizure by a United States agent of property that is both owned by a nonresident alien and located in a foreign country. This Note explores the *Verdugo-Urquidez* opinions and concludes that the Court wrongly refused to recognize the application of the fourth amendment to the above factual situation. This Note reasons that the Court misconstrued both the history and the text of the fourth amendment. This Note also reasons that, in misapplying precedent, the Court improperly lent credence to notions of territoriality and social compact long since rejected by the Court. This Note further reasons that the Court committed an egregious error in ignoring notions of fairness and mutuality implicit in the fourth amendment. Finally, this Note concludes that, in reaching its decision, the Court may have been subtly influenced by political pressures created by a highly publicized murder intimately connected to the case.

II. FACTS AND PROCEDURAL HISTORY

Respondent Rene Martin Verdugo-Urquidez is a citizen and resident of Mexico.³ He is also a registered United States alien.⁴

¹ 110 S. Ct. 1056 (1990).

² The fourth amendment to the Constitution of the United States proclaims that, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV.

³ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

⁴ Brief for Respondent at 5 n.3, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter Brief for Respondent].

The United States Drug Enforcement Administration (DEA) believes that Verdugo-Urquidez is one of the leaders of a large and violent narcotics smuggling ring.⁵ In addition, he was a suspect in the highly publicized murder of DEA agent Enrique Camarena Salazar.⁶ In fact, Verdugo-Urquidez subsequently was convicted for this murder in a separate proceeding.⁷

On August 3, 1985, the United States obtained a warrant for Verdugo-Urquidez's arrest in connection with this smuggling ring.⁸ On January 24 of the following year, while driving his car in San Felipe, Baja California, Mexico, six Mexican police officers stopped Verdugo-Urquidez.⁹ The officers ordered Verdugo-Urquidez from his car, placed him in their police vehicle, and drove him to the Mexican/American border.¹⁰ Verdugo-Urquidez was then transported across the border to Calexico, California, where United States Marshalls arrested him.¹¹

Following Verdugo-Urquidez's arrest, a DEA agent began making arrangements to search Verdugo-Urquidez's two Mexican residences located in Mexicali and San Felipe.¹² DEA officials believed that these searches would reveal evidence related to Verdugo-Urquidez's alleged smuggling activities and his involvement in the murder of Camarena Salazar. At the agent's request, the Assistant Special Agent in charge of the DEA office in Mexico City contacted the Director General of the Mexican Federal Judicial Police (MFJP), who authorized the searches and promised the cooperation of Mexican authorities.¹³ The DEA never sought approval from either the Justice Department or any United States Attorney's Office for the intended search in Mexico.¹⁴ The DEA also never discussed obtaining a search warrant from an American magistrate.¹⁵ DEA

⁵ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

⁶ *Id.* See also *infra* text accompanying notes 144-149.

⁷ Verdugo-Urquidez was sentenced to 240 years in prison and an additional life term for his role in what the prosecution termed "narco-terrorism." *L.A. Times*, Oct. 27, 1988, at A3, col. 5.

⁸ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

⁹ District Court's factual findings as noted in Brief for Respondent, *supra* note 4, at 3-4.

¹⁰ *Id.* at 4.

¹¹ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

¹² *Id.*

¹³ *Id.*

¹⁴ Brief for Respondent, *supra* note 4, at 8-9.

¹⁵ *Id.* at 9. As Justice Brennan pointed out, "a warrant serves the same primary function overseas as it does domestically; it assures that a neutral magistrate has authorized the search and limited its scope." *Verdugo-Urquidez*, 110 S. Ct. at 1077 (Brennan, J., dissenting). In failing to obtain a neutral magistrate's approval for the search, the DEA agents guaranteed themselves the opportunity to conduct a search without boundaries.

agents, in conjunction with members of the MFJP, searched both residences and seized certain documents relating to Verdugo-Urquidez's involvement in narcotics trafficking and the assassination of Camarena Salazar.¹⁶ In particular, the search of the Mexicali residence uncovered a tally sheet, which the government believed reflected quantities of marijuana smuggled into the United States by Verdugo-Urquidez.¹⁷

The United States District Court for the Southern District of California granted Verdugo-Urquidez's motion to suppress evidence seized during the searches, concluding that the fourth amendment applied to the searches and that the DEA agents had failed to justify searching Verdugo-Urquidez's premises without a warrant.¹⁸ The District Court found that Verdugo-Urquidez, a registered alien, was among "the people" protected by the fourth amendment.¹⁹

The United States Court of Appeals for the Ninth Circuit affirmed this decision.²⁰ In support of its decision, the Court of Appeals relied on two Supreme Court decisions: *Reid v. Covert*²¹ and *Immigration and Naturalization Service v. Lopez-Mendoza*.²² *Reid* concerned the right of American citizens to be protected by the fifth and sixth amendments when tried by United States military authorities overseas. The Court held that citizens abroad are entitled to the protections of the fifth and sixth amendments.²³ *Lopez-Mendoza* concerned the rights of aliens illegally within the United States to be protected by the fifth and sixth amendments. In *Lopez-Mendoza*, the Court went beyond *Reid* and held that illegal aliens were also entitled to these constitutional rights.²⁴ Based on these two decisions, the Court of Appeals reasoned that it would be odd to acknowledge Verdugo-Urquidez's entitlement to fifth and sixth amendment protections, but deny him the protections afforded by the fourth amendment.²⁵

¹⁶ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

¹⁷ Brief for Petitioner at 4, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter Brief for Petitioner].

¹⁸ *Verdugo-Urquidez*, 110 S. Ct. at 1059.

¹⁹ *Id.*

²⁰ *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).

²¹ 354 U.S. 1 (1957).

²² 468 U.S. 1032 (1984).

²³ *Verdugo-Urquidez*, 110 S. Ct. at 1059 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

²⁴ *Verdugo-Urquidez*, 110 S. Ct. at 1059-60 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

²⁵ *Id.* at 1060.

III. SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,²⁶ Chief Justice Rehnquist began by noting that the fourth amendment functions differently from the fifth amendment.²⁷ The privilege against self-incrimination guaranteed by the fifth amendment²⁸ is a fundamental right of criminal defendants; its violation may occur only at trial.²⁹ By contrast, a violation of the fourth amendment is "fully accomplished" at the time of an unreasonable government intrusion.³⁰ Thus, if there was a constitutional violation in this case, it occurred solely in Mexico; as such, it was not a domestic matter.³¹

The Chief Justice also examined the fourth amendment phrase "the people."³² Unlike the fifth and sixth amendments which apply to all criminal defendants regardless of citizenship, the fourth amendment has been interpreted to apply only to "the people." The majority interpreted "the people" as a term of art referring to "a class of persons who are part of a national community or have otherwise developed sufficient connection with this country to be

²⁶ Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Kennedy.

²⁷ *Verdugo-Urquidez*, 110 S. Ct. at 1060.

²⁸ The fifth amendment to the Constitution of the United States proclaims that,

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

U.S. CONST. amend. V.

²⁹ *Verdugo-Urquidez*, 110 S. Ct. at 1060. While a violation of the fifth amendment may occur only at trial, behavior of law enforcement officials prior to trial ultimately may impair that right. See *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

³⁰ *Verdugo-Urquidez*, 110 S. Ct. at 1060 (citing *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

³¹ *Id.* The majority stated that the locus of the search is of constitutional importance. The Court apparently believes that government actions that violate the language of the fourth amendment in foreign jurisdictions cannot be recognized as constitutional violations in U.S. courts. Thus, the fact that the violation of the language of the fourth amendment occurred in Mexico means that a victim of United States government action abroad cannot be restored. However, this is based on the incorrect notion that the Constitution only controls within the borders of the United States. Recall, for example, *Reid v. Covert*, 354 U.S. 1 (1957). The point lost on the majority is that the fourth amendment restricts United States officials wherever a search takes place. For a further discussion of this issue, see *infra* Section IV.

³² See *supra* note 2.

considered part of that community.”³³ Those who have not established a sufficient connection to this country are not one of “the people,” and thus are not entitled to fourth amendment protections.

The majority claimed that the legislative history of the fourth amendment also suggests that the purpose of the amendment was to restrict only those searches and seizures conducted by agents of the United States within the borders of the United States.³⁴

It was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory. There is likewise no indication that the fourth amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory.³⁵

In light of this interpretation, the Court criticized the “global view”³⁶ taken by the Court of Appeals as contrary to the Supreme Court’s decisions in the *Insular Cases*.³⁷ These cases held that not every constitutional provision applies to governmental activity, even where the United States has sovereign power.³⁸ In addition, *Johnson v. Eisentrager*³⁹ rejected the notion that aliens are entitled to fifth amendment protections outside the sovereign territory of the United States.⁴⁰ Thus, the *Verdugo-Urquidez* Court concluded that

³³ *Verdugo-Urquidez*, 110 S. Ct. at 1061. The Court adopted the view that the Constitution is a social compact between the American people and their government,

[a]nd therefore does not restrict the conduct of the American government toward other people . . . Concentrating on the identity of the alleged rightholder to determine if he can be deemed a party to this compact, this perspective holds constitutional protections inapplicable to aliens affected by the actions of American officials outside the United States.

Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1674 (1989) [hereinafter Note, *Extraterritorial Applicability*]. This view stands in contrast to the “organic” or “natural rights” perspective, which “envision[s] the United States government as entirely a creature of the Constitution and bound thereby in all its actions . . . This view focuses on the identity of the alleged infringer of a right. It therefore potentially entitles anyone injured by United States officials—American or alien—to constitutional redress.” *Id.* at 1674-75. While there may be limits to the organic perspective, there is nothing in the Constitution to support the notion of social compact. See generally Section IV *infra*.

³⁴ *Verdugo-Urquidez*, 110 S. Ct. at 1061.

³⁵ *Id.*

³⁶ *Id.* at 1062. The “global view” that the Court attacks is synonymous with the “organic” or “natural rights” perspective. For a discussion of this perspective, see *supra* note 33.

³⁷ See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (fifth amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (sixth amendment grand jury provision inapplicable in Philippines).

³⁸ *Verdugo-Urquidez*, 110 S. Ct. at 1062.

³⁹ 339 U.S. 763 (1950).

⁴⁰ *Verdugo-Urquidez*, 110 S. Ct. at 1063 (citing *Johnson v. Eisentrager*, 339 U.S. 763

the view that every Constitutional provision applied wherever the United States government exercised its power was insupportable.⁴¹

Verdugo-Urquidez also relied on the decision of the Court in *Reid v. Covert* to argue that federal officials are constrained by the fourth amendment wherever and whenever they act.⁴² The Court attacked this line of reasoning, declaring it was misplaced, and subsequently limited the holding in *Reid* to allow only United States citizens stationed abroad to invoke the protections of the fifth and sixth amendments.⁴³ Furthermore, the Court also characterized Verdugo-Urquidez as misguided for relying on a series of cases which he argued held that aliens enjoy certain constitutional rights.⁴⁴ From the majority's perspective, these cases "establish[ed] only that aliens receive[d] constitutional protections when they [had] come within the territory of the United States and developed substantial connections with this country."⁴⁵ Since Verdugo-Urquidez is an alien "who has had no previous significant voluntary connection with the United States . . . these cases avail him not."⁴⁶

The Court also distinguished its holding in *Lopez-Mendoza*, where a majority of justices assumed, but did not decide, that the fourth amendment applies to illegal aliens in the United States.⁴⁷ According to the Court, the decision in *Lopez-Mendoza* "did not encompass whether the protections of the fourth amendment extend

(1950)). Recall, however, that at the time of the search of his Mexican residences, Verdugo-Urquidez was already in the United States and under the control of United States officials. Therefore, a case regarding Constitutional protections of aliens *outside* the United States cannot assist the majority in its argument here.

⁴¹ *Id.* at 1062.

⁴² *Id.* at 1063.

⁴³ *Id.*

⁴⁴ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982) (illegal aliens protected by equal protection clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to fifth and sixth amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (fourteenth amendment protects resident aliens).

⁴⁵ *Verdugo-Urquidez*, 110 S. Ct. at 1064.

⁴⁶ *Id.* The Court omitted the fact that Verdugo is a registered United States alien and was lawfully within the United States at the time of the search, albeit against his will. None of these cases requires that an alien's presence be voluntary. Therefore, as Justice Brennan pointed out in dissent, these cases should indeed apply. *Id.* at 1070 n.5 (Brennan, J., dissenting).

⁴⁷ *Id.* at 1064. The Court distinguished *Lopez-Mendoza* by claiming that it relied on the assumption that the fourth amendment applies to illegal aliens within this country. However, this is an inaccurate characterization of the Court's holding. In *Lopez-Mendoza*, the Court impliedly recognized that illegal aliens within the United States have fourth amendment rights. Therefore, Verdugo-Urquidez, as an alien legally within this country, was entitled to protection under the fourth amendment. Moreover, in *Lopez-Mendoza*, even the Solicitor General of the United States conceded that illegal aliens have fourth amendment rights. Brief for Respondent, *supra* note 4, at 39-40.

to illegal aliens in this country.”⁴⁸ In fact, even if such aliens were entitled to fourth amendment protections, they were distinguishable from Verdugo-Urquidez because they were in this country voluntarily; Verdugo-Urquidez had no voluntary connection with this country. Thus, there was no link which might place him among “the people” of the United States for purposes of the fourth amendment.⁴⁹

Finally, the majority turned to the possible negative consequences of accepting Verdugo-Urquidez’s arguments.⁵⁰ In Verdugo-Urquidez’s claims, the Court saw “significant and deleterious consequences for the United States in conducting activities beyond its boundaries.”⁵¹ The Court feared that the rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in searches or seizures.⁵² The Court, in particular, feared that the Court of Appeals’ decision would tread on the authority of the political branches and the abilities of the armed forces.⁵³ “If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.”⁵⁴

Because Verdugo-Urquidez was a citizen and resident of Mexico, with no voluntary attachment to the United States, and because the place searched was located in Mexico, the Court concluded that the fourth amendment could not be applied.⁵⁵

⁴⁸ *Verdugo-Urquidez*, 110 S. Ct. at 1064. *But see* Amici Curiae Brief of American Civil Liberties Union, *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990) (No. 88-1353) [hereinafter ACLU Brief] (arguing that Verdugo-Urquidez was lawfully present in the United States at the time of the search at issue). Thus, this case does not involve the rights of nonresident aliens, but rather the constitutional rights of a foreign national lawfully residing here, and facing prosecution here for violation of United States laws. This should place Verdugo-Urquidez among “the people” protected by the fourth amendment. *See also supra* notes 46-47.

⁴⁹ *Verdugo-Urquidez*, 110 S. Ct. at 1065.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* The Court’s fear, however, is unfounded. As an alien legally within the United States, Verdugo-Urquidez’s claim does not advocate according protections of the fourth amendment to aliens abroad and without ties to this country. Furthermore, actions relating to national security during wartime generally are accorded greater leeway by the Court. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁵⁴ *Verdugo-Urquidez*, 110 S. Ct. at 1066.

⁵⁵ *Id.*

B. CONCURRING OPINIONS

Justice Kennedy concurred with the opinion of the Court.⁵⁶ Justice Kennedy, however, rejected the notion that the reference in the fourth amendment to "the people" was intended to restrict its protections.⁵⁷ Rather, the crucial consideration in Justice Kennedy's analysis of cases involving the extraterritorial application of the Constitution, was whether the person claiming its protection is a citizen or an alien.⁵⁸ According to Justice Kennedy, a fine distinction should be observed when noting whether the person claiming the protection of the Constitution is a citizen or an alien, as "the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."⁵⁹

In light of this distinction, Justice Kennedy suggested that the question addressed by the Court should be refocused. One alternative focus is "what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations?"⁶⁰ Constitutional protections must be interpreted "in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."⁶¹ Thus, "there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."⁶²

In conclusion, Justice Kennedy noted that "the conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement⁶³ impracticable and anomalous."⁶⁴ "The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country."⁶⁵

⁵⁶ *Id.* (Kennedy, J., concurring).

⁵⁷ *Id.* at 1067 (Kennedy, J., concurring).

⁵⁸ *Id.* at 1066 (Kennedy, J., concurring). Here, Justice Kennedy seemed to explicitly adopt the "social compact" theory. See *supra* note 33.

⁵⁹ *Verdugo-Urquidez*, 110 S. Ct. at 1066 (Kennedy, J., concurring).

⁶⁰ *Id.* at 1067 (Kennedy, J., concurring).

⁶¹ *Id.* (Kennedy, J., concurring).

⁶² *Id.* (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). For reasons left unexplained, Justice Kennedy tempered his earlier approval of the social compact perspective. See *supra* notes 33 and 58.

⁶³ See *supra* note 2 (providing language of the warrant requirement).

⁶⁴ *Verdugo-Urquidez*, 110 S. Ct. at 1067 (Kennedy, J., concurring).

⁶⁵ *Id.* at 1068 (Kennedy, J., concurring). Justice Kennedy focused on what might be required to issue a warrant in a foreign country. However, the proper question is, as

Justice Stevens also concurred in the judgment of the Court, but declined to join the Court's "sweeping opinion."⁶⁶ In his opinion, he noted that "aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment."⁶⁷ However, he concluded that the search was not "unreasonable as that term is used in the first clause of the [Fourth] Amendment [T]he Warrant Clause has [no] application to searches of non-citizen's homes in foreign jurisdictions because American magistrates have no power to authorize such searches."⁶⁸

C. DISSENTING OPINIONS

Justice Brennan, joined by Justice Marshall, authored a dissenting opinion. In his powerful dissent, Justice Brennan recognized that the nature of the Court's holding was such that "although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws."⁶⁹

Quoting the plurality opinion in *Reid*, Justice Brennan noted that "the United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."⁷⁰ Furthermore, as Justice Kennedy noted in his concurrence, "the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."⁷¹ Thus, in the opinion of Justice Brennan, the majority created an antilogy: "the Constitution authorizes our Government to enforce our criminal

suming authority, whether a United States Magistrate would issue the warrant in accordance with the demands of the United States Constitution and our conceptions of privacy and reasonableness. While the warrant requirement might be disposed of by Justice Kennedy's conception, it does not discard the fourth amendment's protection against unreasonable search and seizure.

⁶⁶ *Id.* (Stevens, J., concurring).

⁶⁷ *Id.* (Stevens, J., concurring).

⁶⁸ *Id.* (Stevens, J., concurring). However, as Justice Brennan noted in dissent, the Warrant Clause exists so that a magistrate can make a determination of the reasonableness of the proposed search. It is not necessary for the constitutional purposes discussed here that the magistrate be empowered to grant the particular warrant. *Id.* at 1076-77 (Brennan, J., dissenting).

⁶⁹ *Verdugo-Urquidez*, 110 S. Ct. at 1068 (Brennan, J., dissenting).

⁷⁰ *Id.* at 1069 (Brennan, J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)). This is one of the strongest expressions of the "organic perspective" by the Court, and stands in stark contrast to the Court's holding in *Verdugo-Urquidez*. See *supra* note 33 (discussing elements of the organic perspective).

⁷¹ *Verdugo-Urquidez*, 110 S. Ct. at 1069 (Brennan, J., dissenting) (quoting *id.* at 1067 (Kennedy, J., concurring)).

laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law."⁷²

Justice Brennan criticized the nebulous borders of the majority's definition of "the people."⁷³ Justice Brennan pointed out that:

the Court admits that 'the people' extends beyond the precise borders of the citizenry, but leaves the precise contours of its 'sufficient connection' test unclear. At one point the majority hints that aliens are protected by the fourth amendment only when they come within the United States and develop 'substantial connections' with our country. At other junctures, the Court suggests that an alien's presence in the United States must be voluntary and that the alien must have 'accepted some societal obligations.'⁷⁴

None of the cases cited by the majority⁷⁵ required an alien's presence to be "voluntary" before the alien could claim the benefits of the Constitution.⁷⁶

In establishing its "sufficient connection" test, Brennan explained that the majority ignored

the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and [was] being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The 'sufficient connection' [was] supplied not by Verdugo-Urquidez, but by the Government He [became], quite literally, one of the governed.⁷⁷

This should have entitled him to all the protections of the Constitution.

Justice Brennan also explored the notion of mutuality, which he felt the majority had disregarded.⁷⁸ He made a simple point of fairness:

If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive government behavior as are United States citizens investigated and prosecuted for the same alleged violations.⁷⁹

⁷² *Id.* at 1069-70 (Brennan, J., dissenting).

⁷³ *Id.* at 1070 (Brennan, J., dissenting).

⁷⁴ *Id.* (Brennan, J., dissenting).

⁷⁵ *See id.* at 1063-64.

⁷⁶ *Id.* at 1070 n.5 (Brennan, J., dissenting); *see also supra* notes 46-47.

⁷⁷ *Id.* at 1070-71 (Brennan, J., dissenting).

⁷⁸ *Id.* at 1071 (Brennan, J., dissenting).

⁷⁹ *Id.* (Brennan, J., dissenting).

Justice Brennan also noted that "[t]he Fourth Amendment contains no express or implied territorial limitations."⁸⁰

Allowing the government to act with disregard for the law can only breed contempt for the law, inviting anarchy and destroying the values of law and order.⁸¹ "By placing respondent among those governed by federal criminal laws and investigating him for violations of those laws, the Government has made him a part of our community for purposes of the Fourth Amendment."⁸²

Adding fuel to the fairness argument, Justice Brennan noted that while "the majority suggests a restrictive interpretation of those with 'sufficient connection' to this country to be considered among 'the people,' the term 'the people' is better understood as a rhetorical counterpoint to 'the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government.'"⁸³ This was the mindset of the Framers, who designed the Bill of Rights to prohibit the government from infringing on pre-existing rights and liberties.⁸⁴

Justice Brennan added that "the majority mischaracterize[d] *Johnson v. Eisentrager* as having 'rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.'"⁸⁵ These were not the grounds for the decision in *Eisentrager*. Rather, as this Court wrote in *Eisentrager*, "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage."⁸⁶ Thus, the *Eisentrager* Court "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers."⁸⁷

Furthermore, Justice Brennan noted that the *Insular Cases* also do not stand for the propositions that the majority suggested.⁸⁸ "The *Insular Cases* all concerned whether accused persons enjoyed the protections of certain rights in criminal prosecutions brought by territorial authorities in territorial courts."⁸⁹ The *Insular Cases* were limited to their own particular facts long ago by the Court's holding

⁸⁰ *Id.* at 1070 n.7 (Brennan, J., dissenting).

⁸¹ *Id.* at 1071 (Brennan, J., dissenting).

⁸² *Id.* at 1072 (Brennan, J., dissenting).

⁸³ *Id.* (Brennan, J., dissenting).

⁸⁴ *Id.* at 1073 (Brennan, J., dissenting).

⁸⁵ *Id.* at 1074 (Brennan, J., dissenting) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

⁸⁶ *Id.* (Brennan, J., dissenting) (quoting *Eisentrager*, 339 U.S. at 771).

⁸⁷ *Id.* (Brennan, J., dissenting).

⁸⁸ *Id.* (Brennan, J., dissenting). For a listing of the *Insular Cases*, see *supra* note 37.

⁸⁹ *Id.* (Brennan, J., dissenting).

in *Reid v. Covert*, where the Court proclaimed that "it is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion."⁹⁰

Finally, Justice Brennan examined the reasons for enforcing the Warrant Clause where a warrant would be of no legal effect.⁹¹

The Warrant Clause would serve the same primary functions abroad as it does domestically, and I see no reason to distinguish between foreign and domestic searches A warrant defines the scope of a search and limits the discretion of the inspecting officers These purposes would be served no less in the foreign than in the domestic context.⁹²

That an American warrant would be of no legal force within Mexico is of no consequence to the interpretation of the fourth amendment, since "as a matter of United States constitutional law, a warrant serves the same primary function overseas as it does domestically: it assures that a neutral magistrate has authorized the search and limited its scope."⁹³ This is no less important abroad than within our country's borders.⁹⁴

Justice Blackmun also authored a dissent in this case.⁹⁵ While stipulating that the relationship between agents of the government and foreign nationals is fundamentally different than that between United States officials and individuals residing in this country,⁹⁶ Justice Blackmun agreed with Justice Brennan that "when a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections."⁹⁷ In this scheme, it is the enforcement of domestic criminal law that implicates the fourth amendment and not the government's exercise of power beyond our shores.⁹⁸

Because an American magistrate is powerless to authorize foreign searches, Justice Blackmun concluded that the Warrant Clause was inapplicable to the search of a noncitizen's residence abroad.⁹⁹ However, Justice Blackmun would have remanded the case for a determination as to whether the search violated the reasonableness re-

⁹⁰ *Id.* (Brennan, J., dissenting) (quoting *Reid v. Covert*, 354 U.S. 1, 14 (1957)).

⁹¹ *Id.* at 1075-76 (Brennan, J., dissenting).

⁹² *Id.* at 1076-77 (Brennan, J., dissenting).

⁹³ *Id.* at 1077 (Brennan, J., dissenting).

⁹⁴ *Id.* (Brennan, J., dissenting).

⁹⁵ *Id.* (Blackmun, J., dissenting).

⁹⁶ *Id.* at 1078 (Blackmun, J., dissenting).

⁹⁷ *Id.* (Blackmun, J., dissenting).

⁹⁸ *Id.* (Blackmun, J., dissenting).

⁹⁹ *Id.* (Blackmun, J., dissenting).

quirement of the fourth amendment.¹⁰⁰

IV. ANALYSIS

In *Verdugo-Urquidez*, the Supreme Court wrongly decided that the protections of the fourth amendment do not apply to the search and seizure of property located in a foreign country and owned by a nonresident alien legally present in the United States. In its decision, the majority misconstrued both the history and the purpose of the fourth amendment, as well as its own prior decisions, and blatantly disregarded fundamental notions of fairness.

A. HISTORICAL PURPOSE AND THE TEXT OF THE FOURTH AMENDMENT

The Court relied on the text of the fourth amendment, historical evidence, and cases refusing to apply certain constitutional provisions beyond the borders of the United States. As Justice Brennan pointed out, however, "none of these . . . justifies the majority's cramped interpretation of the fourth amendment's applicability."¹⁰¹

The principles forwarded by the majority are unsupported by the text and historical purpose of the fourth amendment. The amendment was drafted "primarily to restrict the government's ability to obtain evidence from a criminal defendant for use in his prosecution."¹⁰²

The purpose of the fourth amendment also supports its application, at a minimum, to all people whom the United States has subjected to criminal prosecution As early as 1886, [in *Boyd v. United States*¹⁰³] the Court explained the intimate connection between the protection against unreasonable searches and seizures and a fair criminal trial.¹⁰⁴

That the search here was conducted abroad is irrelevant for purposes of constitutional interpretation. "The critical factor is not the locus of the search, but the fact that United States officials conducted it for the express purpose of obtaining evidence to use in Mr. Verdugo-Urquidez's prosecution here."¹⁰⁵ "Similarly, in applying the exclusionary rule, the Court has stated that 'the need for deterrence and hence the rationale for excluding the evidence are strong-

¹⁰⁰ *Id.* (Blackmun, J., dissenting).

¹⁰¹ *Id.* at 1072 (Brennan, J., dissenting).

¹⁰² ACLU Brief, *supra* note 48, at 5.

¹⁰³ 116 U.S. 616 (1886).

¹⁰⁴ ACLU Brief, *supra* note 48, at 13.

¹⁰⁵ *Id.* at 5. In 1886, the Court declared that the fourth and fifth amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life . . . any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime." *Id.* at 13 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

est where the government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search.' ”¹⁰⁶

The text of the fourth amendment demonstrates that it is of no consequence that the search of the residences of a registered alien lawfully within the United States took place outside the boundaries of the United States. The plurality in *Reid* expressly repudiated such a “territoriality” notion,¹⁰⁷ and “since *Reid*, no court has suggested that any constitutional provision is inapplicable because the challenged conduct occurred in a foreign country.”¹⁰⁸ Furthermore, no territorial limitations can be found in the language of the fourth amendment. In fact, the Court has held that the fourth amendment refers to and protects “people” rather than “areas.”¹⁰⁹ By contrast, other Constitutional provisions specifically limit their geographical protections.¹¹⁰ For example, Article I, Section Eight of the Constitution requires that all duties, imposts and excises “be uniform throughout the United States.”¹¹¹ The Constitution also grants Congress the power to “define and punish Piracies and Felonies committed on the high Seas.”¹¹²

Not only is the fourth amendment without geographical limitations, it also lacks the emphasis on citizenship that the majority wishes to give it. The majority's emphasis on the fourth amendment phrase “the people” is equally misplaced, improperly relying on the framers efforts to avoid a literal redundancy. As Justice Brennan noted, “the majority's suggestion that the drafters could have used ‘person’ ignores the fact that the fourth amendment then would have begun quite awkwardly: ‘the right of persons to be secure in their persons.’ ”¹¹³ The framers simply avoided an awkward rhetor-

¹⁰⁶ ACLU Brief, *supra* note 48, at 14 (quoting *United States v. Calandra*, 414 U.S. 338, 347-48 (1974)).

¹⁰⁷ “The approach that the Constitution has no applicability abroad has long since been directly repudiated by numerous cases.” *Reid v. Covert*, 354 U.S. 1, 56 (1957) (Frankfurter, J., concurring). The notion that the Constitution is inoperative outside the United States “has long since evaporated. Governmental action abroad is performed under both the authority and the restrictions of the Constitution.” *Id.* at 67 (Harlan, J., concurring). The plurality's approach was adopted three years later in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

¹⁰⁸ Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 23 (1985).

¹⁰⁹ *Katz v. United States*, 389 U.S. 347, 353 (1967). Note that the term “people” here is not limited to citizens.

¹¹⁰ ACLU Brief, *supra* note 48, at 10. See, e.g., U.S. CONST. art. I, sec. 8, cls. 3, 4, 10 & 17; U.S. CONST. art. IV, sec. 2, cl. 2.

¹¹¹ U.S. CONST. art. I, sec. 8, cl. 1.

¹¹² U.S. CONST. art. I, sec. 8, cl. 10.

¹¹³ *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1072 n.9 (1990) (Brennan, J., dissenting).

ical redundancy in their use of the phrase "the people."¹¹⁴ The term is thus "better understood as a rhetorical counterpoint to 'the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government.'"¹¹⁵

In concentrating on the phrase "the people," the majority implicitly gave credence to the "social compact" perspective of constitutional interpretation, which "envisages the Constitution as a social compact that binds by mutual obligations both the government and 'We the People' of the United States."¹¹⁶ This perspective is inapposite with a long history of constitutional interpretation. Citizenship itself cannot serve as the touchstone for the applicability of constitutional rights, because the Supreme Court has long recognized that aliens within the United States, even illegally, enjoy a broad panoply of such rights.¹¹⁷ "This panoply includes the fourth amendment right against unreasonable searches and seizures."¹¹⁸ Only once has the Court applied the social compact doctrine, in *Dred Scott v. Sandford*.¹¹⁹ The Court should be careful not to repeat this ignominious bit of history. Therefore, "the people" must be synonymous to "the governed."¹²⁰

Verdugo-Urquidez became one of the governed when the United States first investigated and then arrested him for violation of its laws. These two events created the "substantial connection"

¹¹⁴ ACLU Brief, *supra* note 48, at 12 n.4.

¹¹⁵ *Verdugo-Urquidez*, 110 S. Ct. at 1072 (Brennan, J., dissenting).

¹¹⁶ Note, *Extraterritorial Applicability*, *supra* note 33, at 1674. See also *supra* note 33 (discussing social compact theory).

¹¹⁷ Note, *Extraterritorial Applicability*, *supra* note 33, at 1675-76. Indeed, most legal classifications based on alienage are subject to the most severe form of judicial review, the "strict scrutiny" test. *Id.* at 1676 n.17. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (holding that the equal protection clause of the fourteenth amendment bars states from denying public education to illegal aliens); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment . . . is not confined to the protection of citizens . . . [Its] provisions are universal in their application, to all persons within the territorial jurisdiction [of the United States].").

¹¹⁸ Note, *Extraterritorial Applicability*, *supra* note 33, at 1675-76. The Supreme Court has made clear that the fourteenth amendment protects aliens within the United States. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *Lopez-Mendoza* implicitly recognized that illegal aliens within the United States have fourth amendment rights. Furthermore, "even nonresident aliens have been granted constitutional rights against takings of property within the United States without just compensation." Note, *Extraterritorial Applicability*, *supra* note 33, at 1676 n.17 (citing e.g., *United States v. Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931)) (emphasis in original).

¹¹⁹ 60 U.S. 393 (1856).

¹²⁰ This position is consistent with the "organic perspective" discussed *supra* note 33.

for which the majority searched in vain. The majority simply ignored the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and arrested by officials of this country and may be subject to lengthy incarceration in an American prison. Consequently, as Justice Brennan properly pointed out, the "substantial connection" is ironically supplied not by Verdugo-Urquidez, but by the government.¹²¹

Invocation of the exclusionary rule presupposes that an alien is in United States custody and is being prosecuted in a United States courtroom for a violation of United States law. As the 'government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States,' it strengthens the nexus created at the time of the search.¹²²

It should be noted here that the "substantial connection" test appears nowhere in the history of the fourth amendment, and there is nothing else to suggest that the framers thought it should be a factor. Indeed, it comes perilously close to the "social compact" perspective that the Court has long since rejected. Thus, the Court erred in two respects: first, in applying a "substantial connection" test which is not within the realm of the fourth amendment; and second, in holding that Verdugo-Urquidez failed to meet the test.

The majority also erred in its construction of the Court's prior decisions. Had the Court properly construed its own holdings, it could not have reached the result that the majority reached here. As Justice Brennan pointed out in his dissent, the majority misconstrued and mischaracterized the cases it chiefly relied upon. Neither *Eisentrager* nor the *Insular Cases* stands for the propositions that the majority suggests. Indeed, the *Insular Cases* did not even concern constitutional rights vis-a-vis United States agents, but vis-a-vis the local territorial authorities.¹²³ In *Balzac v. Porto Rico*¹²⁴ [sic], for example, "the claim was not that the Constitution restricts United States officials, but that because of United States sovereignty over Puerto Rico, the local courts and local officials were required to afford the defendant a jury trial."¹²⁵ Thus, "the *Insular Cases* do not apply when the United States is acting as prosecutor in its own

¹²¹ *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1070 (1990) (Brennan, J., dissenting).

¹²² Note, *Extraterritorial Applicability*, *supra* note 33, at 1681 (quoting *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974)). See also *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978) ("Once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment.").

¹²³ ACLU Brief, *supra* note 48, at 31.

¹²⁴ 258 U.S. 298 (1922).

¹²⁵ *Id.* at 31-32.

court."¹²⁶ Moreover, the *Insular Cases* involved construction of Congress' power to regulate all territory belonging to the United States,¹²⁷ a power that historically has been viewed as plenary.¹²⁸

The Second Circuit Court of Appeals in *United States v. Toscanino*¹²⁹ developed a better approach to the issues presented by this case. In *Toscanino*, the Second Circuit applied fourth amendment protections to foreign wiretapping in the context of a federal criminal prosecution of a foreign national. The Second Circuit concluded that "it is beyond dispute that an alien may invoke the fourth amendment's protection against an unreasonable search and seizure conducted in the United States."¹³⁰ The Second Circuit next made clear that there is no sound basis on which to support a different rule "with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."¹³¹ This notion is buttressed by the holding of the Supreme Court in *Balzac*, in which the Court declared that, "the Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted,"¹³² and is recognized by the "organic" or "natural rights" perspective.¹³³

This philosophy, consistent with the Court's holdings regarding constitutional rights of aliens, would have better served the court in properly adjudicating Verdugo-Urquidez's claim, since it views the extraterritorial reach of the Bill of Rights as coextensive with the protections they guarantee within U.S. territory without regard to citizenship.¹³⁴ In focusing on the alleged infringer of a right, rather than the identity of the alleged rightholder, the organic perspective protects all individuals affected by the conduct of United States officials. This is consistent both with the history and purpose of the fourth amendment outlined above and with the Court's own

¹²⁶ *United States v. Tiede*, 86 F.R.D. 227, 249 (U.S. Ct. for Berlin 1979) (quoted in ACLU Brief, *supra* note 48, at 32).

¹²⁷ U.S. CONST. art. IV, sec. 3.

¹²⁸ ACLU Brief, *supra* note 48, at 32. See *Dorr v. United States*, 195 U.S. 138, 148 (1904); see also Note, *Inventive Statesmanship vs. the Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers*, 60 VA. L. REV. 1041, 1046-47, 1052 (1974).

¹²⁹ 500 F.2d 267 (2d Cir. 1974).

¹³⁰ *Id.* at 280 (citing *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971)).

¹³¹ *Toscanino*, 500 F.2d at 280.

¹³² *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922).

¹³³ For discussion of the "organic" perspective, see *supra* note 33.

¹³⁴ Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L. L. 741, 747 n.30 (1980).

precedents.¹³⁵

The Court's holding in *Balzac* is more consistent with constitutional principles than the holding in the present case. Aliens in this country have been consistently protected by those provisions of the Constitution not expressly limited to American citizens.¹³⁶ Conversely, the Constitution expressly limits the actions of United States officials abroad. "In applying the Constitution abroad . . . it is always a United States citizen—a government official—who is being controlled by the Constitution."¹³⁷

B. MUTUALITY

In its decision, the Court creates an impermissible paradox: while foreign nationals must abide by our laws, even when in their own countries, our government need not abide by our laws—in particular the fourth amendment—when conducting investigations of these same foreign nationals. As Justice Brennan pointed out, such a decision ignores all notions of mutuality and simple fairness. "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them."¹³⁸

This fundamental principle has been recognized since the time of the framers and is essential to the fundamental fairness that underlies the Bill of Rights.¹³⁹ James Madison, speaking on the rights of aliens under the Constitution, noted that "it will not be disputed that, as [aliens] owe, on one hand a temporary obedience [to the Constitution], they are entitled, in return, to [constitutional] protection[s] and advantage[s]."¹⁴⁰ The underlying rationale for this position is clear when we recognize that "foreign nationals investigated

¹³⁵ See Comment, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 676 (1986).

The extraterritorial application of the Constitution has evolved from the myopic territorial approach of the late nineteenth century . . . Courts should abandon the distinction between citizens and aliens in favor of a constitutional doctrine protecting all individuals affected by the conduct of United States officials, for the sake of protecting both the natural rights of men and the integrity of the Constitution.

Id.

¹³⁶ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-12 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

¹³⁷ Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U.J. INT'L. L. & P. 287, 293-94 (1985) (quoted in ACLU Brief, *supra* note 48, at 25).

¹³⁸ *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1071 (1990) (Brennan, J., dissenting).

¹³⁹ *Id.* (Brennan, J., dissenting).

¹⁴⁰ James Madison's Report on the Virginia Resolutions (quoted in *Verdugo-Urquidez*, 110 S. Ct. at 1071 (Brennan, J., dissenting)).

and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive government behavior as are United States citizens investigated and prosecuted for the same alleged violations."¹⁴¹ Aliens otherwise vulnerable to a government acting beyond the bounds of the Constitution are dependent upon considerations of mutuality for their protection.

Mutuality also serves the connected purpose of inculcating the values of law and order. As Justice Brennan aptly points out, "by respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Conversely, as Justice Brandeis warned in *Olmstead v. United States*,¹⁴² "if the government becomes a lawbreaker, it breeds contempt for law."¹⁴³

C. POLITICAL MOTIVATIONS

The Court may well be caught up in the "war on drugs." This country certainly is caught up in the "war" attempting to eradicate one of our country's gravest social ills. Verdugo-Urquidez has been convicted in a separate proceeding for his involvement in the highly publicized torture and murder of American Drug Enforcement Agent Enrique Camarena Salazar.¹⁴⁴ Since the murder, the Justice Department's Drug Enforcement Administration has been "relentless in its efforts to track down and bring to justice everyone involved in his death."¹⁴⁵ Indeed, the Justice Department's efforts are widely rumored to include kidnapping and the use of bounty hunters.¹⁴⁶ Among the more peaceful measures taken to track down the killers was Operation Intercept, in which the United States searched *every* car coming out of Mexico for clues to the murder.¹⁴⁷

The Court may have felt moved to punish all those responsible for a grizzly and public assassination. Several other aliens, including the a brother-in-law of a former Mexican president, have been convicted in United States courts for events connected with the

¹⁴¹ *Verdugo-Urquidez*, 110 S. Ct. at 1071 (Brennan, J., dissenting). This, of course, also relates to the historical purpose of the fourth amendment, discussed throughout this section.

¹⁴² 277 U.S. 438 (1928).

¹⁴³ *Id.* at 485 (Brandeis, J., dissenting) (quoted in *Verdugo-Urquidez*, 110 S. Ct. at 1071 (Brennan, J., dissenting)).

¹⁴⁴ See *supra* text accompanying notes 6-7. The death of DEA agent Enrique Camarena Salazar sparked a great deal of fury and received much attention both in the press and in policy-making circles.

¹⁴⁵ L.A. Times, Apr. 19, 1990, at B6, col. 1.

¹⁴⁶ *Id.*

¹⁴⁷ U.P.I., Mar. 30, 1985, International Section.

murder.¹⁴⁸ The murder was committed following days of torture at the hands of foreign drug smugglers, and included injections to keep Camarena Salazar's heart from failing during the brutal interrogation.¹⁴⁹

While the briefs obliquely refer to the death of a DEA agent, the Court referred sharply to a "kidnapping and torture-murder."¹⁵⁰ It is at least curious that the Court should stress facts that would otherwise seem less than intimately connected to the constitutional issue at hand.¹⁵¹

V. CONCLUSION

In *Verdugo-Urquidez*, the United States Supreme Court improperly ruled that the fourth amendment does not protect individuals against the search and seizure of property that is both owned by a nonresident alien and located in a foreign country. The Court reached this decision even though the material seized was specifically intended for use at trial against the alien within the United States.

In its holding, the Court diverged from precedent establishing the broad rights of aliens under the Bill of Rights and the fourteenth amendment. The *Verdugo-Urquidez* majority reduced the investigation of the rights of aliens to a substantial connection test that can be found nowhere in the Constitution. In doing so, the Court implicitly adopted notions of territoriality and social compact long since rejected, and ignored its prior holdings recognizing the natural rights of aliens. Furthermore, the Court cast a blind eye to fairness and the philosophy of mutuality implicit in the Bill of Rights in general and the fourth amendment in particular.

Allowing nonresident aliens the protection of the fourth amendment when their homes abroad are violated by United States agents fulfills the purpose of the fourth amendment. That purpose is to limit the government of the United States from improperly abridging the rights of any person. Its protections do not run to citizens alone. Ruling in *Verdugo-Urquidez*'s favor would have lim-

¹⁴⁸ L.A. Times, Sept. 27, 1988, at A3, col. 5. Some sixty people were tried in Mexico in connection with the murder.

¹⁴⁹ L.A. Times, Apr. 19, 1990, at B6, col. 1. Camarena Salazar's broken body was found dumped on a roadside wrapped in plastic. The body appeared to have been buried previously at another location and exhumed. Wash. Post, Mar. 7, 1985, at A16, col. 1.

¹⁵⁰ *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056, 1059 (1990).

¹⁵¹ For one scholar's view on reading between the lines of judicial opinions for important stories, see Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145 (1990).

ited the government's behavior only when it acts without regard to constitutional restraints and would not have unnecessarily impinged on the powers of the political branches. Instead, the Supreme Court's refusal to recognize the fourth amendment rights of nonresident aliens damages the purpose of the Bill of Rights and lays waste to considerations of mutuality and fairness.

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