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United States v. Verdugo-Urquidez, the Fourth Amendment Has Limited Applicability to Aliens Abroad

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UNITED STATES v. VERDUGO-URQUIDEZ, THE FOURTH AMENDMENT HAS LIMITED APPLICABILITY TO ALIENS ABROAD

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It is generally accepted that the fourth amendment and exclusionary rule apply to searches and seizures by United States officials against American citizens, even when the operation takes place outside the United States. Any evidence obtained in violation of the fourth amendment will be excluded at trial.[1] It is also accepted that the exclusionary rule generally does not apply to searches conducted entirely by foreign officials.[2] Until recently it was unclear whether the fourth amendment applies when United States officials, acting alone or in conjuncture with foreign officials, seize evidence from foreign defendants and then attempt to use the evidence at trial in the United States.[3] The Circuit courts differed in their interpretations of the Constitution and a solution to this problem.[4] The Supreme Court resolved this situation in *United States v. Verdugo-Urquidez*,[5] decided in February 1990. The Supreme Court, in an opinion authored by Chief Justice Rehnquist, held that the fourth amendment does not apply when United States officials, acting outside the United States, search and seize property owned by a nonresident alien.[6]

This decision is one of importance for several reasons. First, it set-

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1. *See* Weeks v. United States, 232 U.S. 383 (1914). This case established the exclusionary rule prohibiting the introduction of evidence illegally seized by federal agents for use in the federal courts. The exclusionary rule was expanded in Mapp v. Ohio, 367 U.S. 643 (1961) to apply to evidence introduced in state courts. Here the Supreme Court implied that the rule was a necessary corollary to the fourth amendment and was therefore incorporated into the fourteenth amendment. *See Mapp*, at 655-657.

2. *See, e.g.*, United States v. Mount, 757 F.2d 1315 (D.C. Cir. 1985); United States v. Hensel, 699 F.2d 18 (1st. Cir. 1983), *cert. denied*, 461 U.S. 958 (1983).

3. The decision in United States v. Verdugo-Urquidez did not address the issue of searches and seizures made by United States officials while in international waters. It only involved searches actually made in foreign countries.

4. "Courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied." United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977).

5. 110 S. Ct. 1056 (1990).

6. *Id.* at 1059.

tles a dispute that has raged among the Circuit courts for years[7] and definitively answers the question of whether information collected from a nonresident, outside the United States, may in fact be used at trial in the United States. The decision also serves as yet another limitation on the protections of the fourth amendment. Finally, the decision has a substantial ramification on the international aspects of the "war on drugs." There have been several United States-foreign joint law enforcement operations in recent years as a result of increased drug trafficking which frequently crosses national boundaries.[8] Given the worldwide scope of this problem and the existing momentum in the United States for a crackdown on narcotics importation, it is safe to assume that United States law enforcement officials will continue to conduct such operations with their foreign counterparts. The *Verdugo-Urquidez* decision suggests that these operations now have judicial approval.

I. Prior Methods of Circumventing the Warrant Requirements of the Fourth Amendment

Prior to the decision in *United States v. Verdugo-Urquidez*, United States officials acting abroad were required to comply with the warrant requirements of the fourth amendment. Warrants have no legal effect outside the boundaries of the United States. Absent exigent circumstances, officials were required to obtain a search warrant from a United States magistrate, demonstrating the necessary level of probable cause. If officials failed to obtain the necessary warrant, a nonresident defendant facing trial in the United States was able to successfully suppress any evidence found on his property during the warrantless search.

However, the exclusionary rule generally did not require the suppression of evidence seized by foreign police agents and later turned over to United States officials. This evidence is admissible in United States courts except where foreign police conduct shocks the judicial conscience, American agents participated in the foreign search, or foreign officers acted as agents for their American counterparts.[9] This principle was generally accepted by all federal courts,[10] the rationale

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7. *See supra* note 4.

8. *See, e.g.*, United States v. Hensel, 669 F.2d 18 (1st Cir. 1983); United States v. Paternina-Vergara, 749 F.2d 993 (2nd Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); United States v. Peterson, 812 F.2d 486 (9th Cir. 1986).

9. *Hensel*, 699 F.2d at 25.

10. *See, e.g.*, United States v. Molina-Chacon, 627 F. Supp. 1253 (E.D.N.Y. 1986); United States v. Stano, 690 F. Supp (E.D.Pa. 1988); United States v. Mount, 757 F.2d 1315 (D.C. Cir. 1985); United States v. Peterson, 812 F.2d 487 (9th Cir.

being that the exclusionary rule is meant to serve as a deterrent to unlawful conduct by American officials.[11] It has no such effect on foreign officials.[12] However, if the foreign search falls within one of the three exceptions listed above, a court will be justified in refusing to admit the illegally obtained evidence.

A. Conduct By Foreign Officials That Shocks The Conscience

Most courts refuse to accept evidence obtained by foreign officials abroad if the officers' actions are so outrageous that they shock the judicial conscience. The issue was first raised in *Ker v. Illinois*[13], where United States officials learned that Ker had fled to Peru, following embezzlement and larceny charges. Instead of making a demand on the Peruvian government for Ker's surrender, American officials forcibly arrested Ker and transported him to the United States for trial. Ker charged that the abduction denied him of his constitutional right to due process of law.[14] The Supreme Court held that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for [an] offense."[15] Due process was satisfied if the defendant received a fair and impartial trial.[16] The Supreme Court unequivocally reaffirmed its position in *Frisbie v. Collins*.[17] In *Frisbie*, the defendant claimed Michigan state officials forcibly and violently abducted him from Illinois and took him back to Michigan to stand trial for murder. The Court held that "this court has never departed from the rule [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.' "[18]

The Court in *Rochin v. California*[19] broadened the "*Ker-Frisbie*"

1986).

11. *See Mount*, 757 F.2d at 1317. "The principal purpose of the exclusionary rule is the deterrence of unlawful police conduct . . . [thus] foster[ing] obedience to the mandate of fourth amendment."

12. "In circumstances where application of the rule does not result in appreciable deterrence, its use is not warranted." *Id.* at 1317.

13. 119 U.S. 436 (1886).

14. *Id.* at 439-440.

15. *Id.* at 444. Note that the Court declined to answer the question of how forcible and violent the seizure and transfer must be before a defendant can use this conduct as a defense. The Court left this decision up to the state courts and common law.

16. *Id.* at 440.

17. 342 U.S. 519 (1952).

18. *Id.* at 522.

19. 342 U.S. 165 (1952).

doctrine which held that the Due Process Clause of the fifth and fourteenth amendments required only a fair trial and did not relate to the methods in which the defendant was brought to trial, by setting aside a state court conviction resting on evidence obtained through police brutality. In *Rochin*, after an unsuccessful attempt to forcibly extract capsules swallowed by the defendant, state officials brought Rochin to a hospital where an emetic was forced into his stomach, causing him to vomit the capsules.[20] The capsules were later found to contain morphine.[21] Rochin claimed this treatment violated his right to due process.[22] The Court held that the Due Process Clause required it to "exercise [judgment] over the whole course of the proceedings . . . in order to ascertain whether they offend . . . decency and fairness . . . Due process of law is a summarized constitutional guarantee of respect for those [fundamental] personal immunities."[23] Several cases since *Rochin* applied the principle that due process extends to the pretrial conduct of law enforcement authorities.[24]

Note, as the above cited cases suggest, that although the "shock the conscience" doctrine began as a bar against improper conduct by United States officials, courts extended it to apply to passive conduct by foreign officials as well. However, not all improper conduct by officials was enough to warrant dismissal of a case under the exclusionary rule.[25] Rather, the exception was fairly narrow in that the improper

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 169, citing Malinski v. New York, 324 U.S. 401, 416-417 (1944). Note that the court held that the conduct complained of must "offend [more] than some fastidious squeamishness . . . This [must be] conduct that shocks the conscience." *Id.* at 172.

24. *See, e.g.*, United States v. Russell, 411 U.S. 423 (1973).

The Second Circuit applied *Rochin* to its holding in United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974). Toscanino, an Italian national, was convicted of conspiracy to import and distribute narcotics into the United States. The court reversed his conviction because the conduct of the arresting officers, who kidnapped Toscanino from Uruguay and tortured him, was so outrageous as to shock the judicial conscience. *Toscanino*, 500 F.2d at 274.

See also United States v. Fernandez-Caro, 677 F.Supp. 893 (S.D.Tex. 1987)(conduct of foreign officials in beating defendant and applying electrical shocks to his wet body, among other things, was sufficiently shocking to require suppression of evidence); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); United States v. Maher, 645 F.2d 780 (9th Cir. 1981).

25. There are several Supreme Court decisions that have reaffirmed the *Ker-Frisbie* doctrine. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States v. Crews, 445 U.S. 463 (1980); Stone v. Powell, 428 U.S. 465 (1976). In fact, the Second

conduct had to be excessive.

B. *Joint Ventures Between United States And Foreign Officials*

The second major exception to the rule admitting evidence illegally seized by foreign officials occurred when American officials participated in the search to the extent that the search became a joint venture.[26] This exception was accepted among all the circuits, although each circuit had its own way of analyzing the issue.[27] There was no set standard for determining when there was sufficient participation by American officials to constitute a joint venture.[28] However, an overview of prior case law suggests that the courts were reluctant to find that a joint venture had taken place.

The seminal case is *Stonehill v. United States*,[29] in which the defendant allegedly avoided paying income tax. American and Philippine officials held meetings at the home of the United States' official in preparation for a search in the Philippines.[30] The Americans made suggestions concerning the search and provided Philippine officials with a diagram and a memorandum concerning two targeted buildings.[31] Additionally, the United States agents located the most significant piece of evidence during the search of a warehouse.[32] Despite this level of involvement, the Ninth Circuit held that a joint venture did not exist between the United States and the Philippines.[33]

In *United States v. Marzano*,[34] the Seventh Circuit adopted the

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Circuit later clarified its holding in United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2nd Cir.) *cert. denied*, 421 U.S. 1001 (1975) restricting the rule in *Toscanino* to cases involving "the use of torture, brutality and similar outrageous conduct." *Lujan*, 510 F.2d at 65-66.

26. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

27. *See, e.g.*, United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir.), *modified*, 801 F.2d 378 (1986), *cert. denied*, 480 U.S. 919 (1987); *Paternina-Vergara*, 749 F.2d at 998; United States v. Hawkins, 661 F.2d 436, 455-56 (5th Cir. 1981); United States v. Marzano, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

28. The court in *Morrow* observed, "The . . . courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied . . ." *Morrow*, 537 F.2d at 140.

29. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 746.

34. 537 F.2d 257 (7th Cir. 1976).

reasoning in *Stonehill*. Here, the court held that "providing information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information."[35] The court further noted that merely being present during a search does not make federal officers participants.[36]

The Ninth Circuit found that a joint venture existed in *United States v. Peterson*.[37] The defendants in *Peterson* were convicted of possession of marijuana in United States customs waters.[38] The Ninth Circuit held that the degree of participation between United States and Philippine officials constituted a joint venture.[39] Specifically, the court noted that the United States agents termed their action a joint venture, as they were involved daily in translating and decoding intercepted transmissions and advised the Philippine officials of their importance.[40]

The courts also distinguished joint ventures from legitimate law enforcement cooperation efforts between the United States and another country, where American involvement is minimal. This type of situation arose in *United States v. Maher*.[41] Maher was convicted on various drug charges.[42] He claimed that Canadian officials used an illegal wiretap to obtain information given to American agents who used the information as the basis for a United States warrant.[43] The Ninth Circuit held that although the wiretap was illegal, the information gained from the tap was admissible.[44] There was no evidence that American officials participated in the wiretap and the Canadian officials denied any illegality in obtaining the evidence. Furthermore, it was apparent that the Canadians initiated and controlled the investigation, with only minimal

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35. *Id.* at 270.

36. *Id. See also* Government of the Canal Zone v. Sierra, 594 F.2d 60 (5th Cir. 1979)(no joint venture where the search was solely under the jurisdiction of the foreign government, even though American officials provided important information leading to the search of the defendant's home and was present during the search); United States v. Heller, 625 F.2d 594 (5th Cir. 1980)(fact that defendant was arrested by British officials on a tip from American agents was insufficient to establish American participation); United States v. Molina-Chacon, 627 F.Supp. 1253 (E.D.N.Y. 1986)(fact that search was motivated by tip from United States officials is not sufficient justification to apply the fourth amendment).

37. 812 F.2d 486 (9th Cir. 1987).

38. *Id.*

39. *Id.* at 490.

40. *Id.*

41. 645 F.2d 780 (9th Cir. 1981).

42. *Id.*

43. *Id.* at 782.

44. *Id.*

support and assistance from the Americans. Therefore a joint venture did not exist.[45]

This was the state of the law with respect to searches of property located outside the United States and owned by nonresident aliens prior to the decision in *United States v. Verdugo-Urquidez.* This decision would seem to negate the applicability of the joint venture exception as American officials themselves need no longer comply with the fourth amendment warrant requirements when operating abroad. However, the "shock the conscience" exception probably remains valid because it always applied to improper conduct by any official, including foreign officials.

II. *UNITED STATES V. VERDUGO-URQUIDEZ*[46]

Rene Martin Verdugo-Urquidez is a citizen and resident of Mexico.[47] Drug Enforcement Administration (DEA) officials suspected Verdugo-Urquidez of being among the leaders of a large and violent Mexican-based drug organization.[48] He was also a suspect in the kidnapping and torture-murder of DEA Special Agent Enrique Camarena Salazar.[49] The DEA obtained a United States warrant for his arrest on August 3, 1985.[50] At the DEA's request, Mexican officials arrested Verdugo-Urquidez at his home in Mexico in January, 1986 and turned him over to American officials in the United States.[51] Following the arrest, DEA agents arranged with Mexican officials to search Verdugo-Urquidez's Mexican residences for evidence of his drug smuggling activities and his involvement in the Salazar kidnapping and murder.[52] The Mexican Director General of the Mexican Federal Judicial Police (MF JP) authorized the DEA search.[53] The DEA and MF JP officers then searched Verdugo-Urquidez's Mexican residences and seized certain documents.[54] At no time did the DEA seek approval from the United States Justice Department or the United States Attorney's Office. The DEA did not request a search warrant from a United States

45. *Id.*
46. 110 S. Ct. 1056 (1990).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. 110 S. Ct. at 1059.
52. Verdugo-Urquidez was later convicted of the kidnapping and murder charges in a separate prosecution. *Id.*
53. *Id.*
54. *Id.*

magistrate.[55]

The District Court for the Southern District of California granted Verdugo-Urquidez's motion to suppress the evidence seized during the searches, holding that the searches constituted a joint venture between the DEA and Mexican officials[56] and therefore, the fourth amendment applied. The fourth amendment's requirements were not met because the DEA failed to obtain a valid search warrant and was unable to justify searching the premises without the warrant.[57] A majority of the Ninth Circuit affirmed,[58] relying on the Supreme Court's decision in *Reid v. Covert*[59] and *INS v. Lopez-Mendoza*.[60] Based on these decisions, the majority held that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad,"[61] and that Verdugo-Urquidez was entitled to the same rights enjoyed by other aliens facing judicial proceedings in the United States.[62] The majority also noted that an alien defendant facing trial in the United States was entitled to fifth and sixth amendment rights,[63] and it would be "odd" to grant Verdugo-Urquidez these protections, but not fourth amendment protections.[64] Therefore, the DEA search was unconstitutional because the DEA agents failed to obtain a search warrant.[65]

The dissenting judge argued that United States laws have no effect in foreign territories, except with respect to American citizens, and

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55. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215-1217 (9th Cir. 1988).

56. *Id.* at 1217. The court also held that a foreign national generally may seek the suppression of evidence seized by American officials during a search conducted abroad on the grounds that the search violates the standards set by the fourth amendment.

57. *Id.*

58. *Id.*

59. 354 U.S. 1 (1957). The Court held in *Reid* that American civilians tried by United States military authorities in a foreign country were still entitled to fifth and sixth amendment protections.

60. 468 U.S. 1032 (1984). The Supreme Court held in *Lopez-Mendoza* that illegal aliens in the United States had fourth amendment rights.

61. 856 F.2d at 1218.

62. *Id.* at 1223. The court was referring to the fourth amendment rights of aliens living illegally in the United States to be free from unreasonable searches and seizures.

63. The fifth amendment ensures that a defendant receives due process of law and the sixth amendment guarantees a defendant the right to a fair trial. U.S. CONST. amend. V, VI.

64. 856 F.2d at 1224.

65. The Court of Appeals noted that a search warrant would have no legal effect in Mexico. However, a warrant would be of value in the United States because it would show an independent finding of probable cause by a neutral magistrate. Additionally, the warrant would also define the scope of the search. *Id.* at 1230.

Verdugo-Urquidez could not claim fourth amendment rights.[66] The dissent also argued that the Constitution was intended as a "compact" between the newly created government and the people of the United States, and that the protections of the fourth amendment were limited to United States citizens.[67] The Supreme Court granted certiorari to decide the important constitutional issues involved.[68]

A five-member majority of the Supreme Court reversed the decision of the Court of Appeals.[69] The majority held that the fourth amendment does not apply to the search and seizure by American officials of property located in a foreign country and owned by a nonresident alien.[70] The majority noted as a preliminary matter that fourth amendment protections are triggered at the time the search and seizure occur.[71] Here, the search took place in Mexico; any constitutional violation could only have occurred there.[72] Next, the majority adopted a "Compact Theory" interpretation of the Constitution, holding that the wording and history behind the creation of the Constitution indicated that the fourth amendment was intended to apply only to United States citizens and aliens who had sufficient contacts with the United States to bring them within the national community.[73] Verdugo-Urquidez, the Court held, did not have sufficient contacts within the United States to make him one of "the people" within the definition of the Compact Theory.[74]

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66. *Id.* The dissent relied on the Supreme Court's holding in United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936).

67. 856 F.2d at 1232. The dissent described at length the period leading up to the Revolutionary War. "Prevalent during the period leading to the American Revolution was the recurrent notion that a government was created by a compact among those governed . . ."

68. 110 S. Ct. at 1060.

69. The majority consisted of Chief Justice Rehnquist, who authored the majority opinion, and Justices White, O'Connor, Scalia and Kennedy. Justice Kennedy also filed a separate concurring opinion. Justice Stevens filed an opinion concurring in the judgment. Dissenting opinions were filed by Justice Brennan, joined by Justice Marshall, and by Justice Blackmun.

70. 110 S. Ct. at 1066.

71. *Id.* at 1060.

72. *Id.* at 1060. The fourth amendment "prohibits 'unreasonable searches and seizures' . . . and a violation of the amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *Id. citing* United States v. Calandra, 414 U.S. 338, 354 (1974). This is different from fifth amendment protections which are fundamental trial rights. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).

73. 110 S. Ct. at 1061.

74. *Id., relying on* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904)(alien was not entitled to first amendment rights because "[h]e does not become

The majority went on to reject the argument that the Constitution applies wherever the United States exercises its power, stating that this theory was contrary to the Court's previous holdings in the "Insular Cases"[75] and in *Johnson v. Eisentrager*.[76] Finally, the majority held that a contrary decision would create serious difficulties in conducting future United States foreign operations and suggested that the legislative or executive branches impose restrictions on searches and seizures.[77]

Justice Kennedy filed a concurring opinion, in which he agreed that no violation of the fourth amendment occurred.[78] However, he stated that the Insular Cases did not stand for the proposition that the Constitution never applies to nonresident aliens when the government acts abroad.[79] Rather these cases stand for the proposition that the government is not bound by the fourth amendment warrant requirements where the circumstances presented would make adherence to the requirements impracticable.[80] In the situation presented in *Verdugo-Urquidez*, it would be impracticable to require a search warrant, due to "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the fourth amendment's warrant requirements should not apply in Mexico as it does in this country."[81] Justice Stevens also filed an opinion concurring in the judgment only.[82] He argued that Verdugo-Urquidez became one of "the people," entitled to fourth amendment protections because he was being held in the

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one of the people to whom these things are secured by our Constitution . . .").

75. This line of cases stood for the proposition that certain constitutional provisions do not apply when the government acts abroad. *See, e.g.*, Balzac v. Puerto Rico, 258 U.S. 298 (1922), where the constitution was held not to apply even though the United States government had sovereign power over the territory of Puerto Rico. *See also* Downes v. Bidwell, 182 U.S. 244 (1901)(constitutional clauses relating to revenue did not apply in Puerto Rico); Hawaii v. Mankichi, 190 U.S. 197 (1903)(provisions on indictment by a grand jury and jury trial did not apply in Hawaii); Dorr v. United States, 195 U.S. 138 (1904)(jury trial provisions did not apply in the Philippines); Ocampo v. United States, 234 U.S. 91 (1914)(sixth amendment grand jury provisions did not apply in the Philippines).

76. 339 U.S. 763 (1950).

77. 110 S. Ct. at 1066.

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

79. *Id.* at 1067.

80. *Id.* at 1068.

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

82. 110 S. Ct. at 1068 (Stevens, J., concurring).

United States at the time of the search.[83] However, Justice Stevens stated that the use of the evidence at trial was proper as the DEA search was reasonable.[84]

Justice Brennan, joined by Justice Marshall, dissented, holding the United States is a government of limited powers.[85] Therefore, the protections of the fourth amendment were not meant to create rights only applicable to certain classes of persons.[86] Rather, the framers sought to prohibit an infringement on pre-existing rights.[87] Justice Brennan also noted that aliens are required to comply with United States laws, imposing a reciprocal obligation on the United States government to follow its laws with respect to aliens.[88] He discounted the majority's conclusion that the fourth amendment only applies to aliens having a voluntary or legal connection with the United States, noting that the cases cited by the majority lacked these requisites and that the fourth amendment did not impose these requirements.[89] In any event, Verdugo-Urquidez would meet the requirements necessary to establish a sufficient connection with the United States in order to claim fourth amendment protections because he was in the United States legally, although voluntarily.[90]

Justice Brennan next attacked the majority's rational that American foreign policy operations could be jeopardized if the fourth amendment were to apply to aliens abroad.[91] He held that the doctrinal exceptions to the fourth amendment would protect government operations.[92] Justice Blackmun dissented separately, holding that while the government generally is not bound by the fourth amendment when acting abroad, Verdugo-Urquidez became one of "the governed" when the government brought him to the United States for trial on criminal charges.[93] This opinion is similar to the conclusions reached by Justice

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83. *Id.*

84. *Id.* at 1068 (Stevens, J. concurring). Justice Stevens held that the search was reasonable in that Drug Enforcement Administration officials had the approval and cooperation of the Mexican Federal Judicial Police. Additionally, he concurred in the judgment, stating that American magistrates had no power to authorize searches in foreign residences under the warrant clause.

85. *Id.* at 1069, 1072 (Brennan, J. and Marshall, J. dissenting).

86. *Id.* at 1071 (Brennan, J. and Marshall, J., dissenting).

87. *Id.* at 1071 (Brennan, J. and Marshall, J., dissenting).

88. 110 S. Ct. at 1068-1069 (Brennan, J. and Marshall, J. dissenting).

89. *Id.* at 1070 (Brennan, J. and Marshall, J., dissenting).

90. 110 S. Ct. at 1070-1072 (Brennan, J. and Marshall, J. dissenting).

91. *Id.* at 1074-1075 (Brennan, J. and Marshall, J., dissenting).

92. *Id.* at 1075 (Brennan, J. and Marshall, J., dissenting).

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

Stevens.[94] Justice Blackmun, however, was unable to concur in the majority's judgment because he concluded that the DEA search was unreasonable because the government did not show probable cause.[95] He would vacate the Court of Appeals judgment and remand the case.[96]

III. ANALYSIS

Although the majority cited several reasons against applying the warrant requirements of the fourth amendment to searches of property owned by nonresident aliens and located abroad,[97] in reality, the Court's opinion rested primarily on its decision to apply the "Compact Theory" of the Constitution instead of the "Enumerated Powers Theory".[98] This decision has a substantial impact on the judiciary's prior treatment of cases involving this fourth amendment issue. Additionally, the decision in *Verdugo-Urquidez* creates a new standard for determining the application of the Constitution to nonresident aliens, including issues other than tose presented by the fourth amendment.[99] The remainder of this Note addresses the effect of the Court's decision upon the earlier treatment of fourth amendment warrant claims brought by nonresident aliens and examines the constitutional basis for the Court's holding.

A. Effect of the Decision Upon Previous Methods of Determining Fourth Amendment Violations

As stated previously, the Supreme Court's decision eliminates the distinction between searches in foreign countries by foreign officials which would not have been invalid for lack of a valid warrant, and identical searches by American officials which would have required a

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94. *Id.* at 1068 (Stevens, J., concurring).

95. 110 S. Ct. at 1078 (Blackmun, J., dissenting).

96. *Id.*

97. *Id.* at 1061-1066.

98. All of the majority's arguments against extending the fourth amendment protections to Verdugo-Urquidez stemmed from the premise that the Constitution in general does not to apply to nonresident aliens, absent some legal or voluntary connection to the United States. *See supra* notes 107-140 and accompanying text. Once this premise was reached, the majority merely distinguished the situation before it from earlier cases in which aliens were granted some constitutional protections.

99. Although it appears well established that nonresident aliens are entitled to such fundamental rights as the right to due process of law and the right to a fair trial (*see supra* note 63 and accompanying text), the decision in *Verdugo-Urquidez* could be read to deny other protections that are granted to American citizens.

valid search warrant.[100] This also eliminates the need for the joint venture exception to the general rule that foreign searches conducted by foreign officials are valid.[101] This will aid lower courts in deciding motions to suppress evidence that arises in cases similar to *United States v. Verdugo-Urquidez*. Rather than making a factual determination as to whether sufficient United States involvement occurred to term the foreign operation a joint venture, courts may simply deny the motion on the grounds that no fourth amendment violation occurred.[102]

Although the *Verdugo-Urquidez* decision will negate the importance of the joint venture rule, it should have no effect on motions to suppress evidence acquired through methods that shock the judicial conscience.[103] This doctrine has never been limited to actions by American officials upon foreign nationals that shock the conscience.[104] Rather, the right to due process, guaranteed by the fifth amendment, is seen as a fundamental right that extends to the pretrial conduct of law enforcement officials.[105] This right may not be interfered with, even as against a nonresident alien.[106]

B. The Constitutional Basis for the Decision

In holding that the fourth amendment warrant requirements do not apply when the United States government acts against nonresident aliens, the Supreme Court adopted the "Compact Theory" interpretation of the Constitution as compared with the "Enumerated Powers Theory." Proponents of the Compact Theory view the Constitution as a reciprocal agreement, or compact, between the government and the people of the United States.[107] The people give the federal government

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100. Note that the Supreme Court did not address the need for the search to comply with the laws of the foreign country. This question should, and probably will, be resolved as later cases, relying on this decision, arise.

101. *See supra* notes 26-45 and accompanying text.

102. *See supra* note 28 and accompanying text.

103. *See supra* notes 13-25 and accompanying text.

104. *See, e.g.*, Rochin v. California, 342 U.S. 519 (1952)(American officials used improper methods to retrieve drug capsules from an American suspect); United States v. Fernandez-Caro, 677 F.Supp. 893 (S.D.Tex. 1987)(foreign officials tortured a foreign suspect to obtain information later used at trial in the United States).

105. *See supra* notes 40-41 and accompanying text.

106. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 77 (1976)("[e]ven one whose presence in this country is unlawful, involuntary or transitory" enjoys fifth amendment rights); In re Ross, 140 U.S. 453 (1891)(the guarantees of the fifth and sixth amendments apply to persons brought to the United States for trial).

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

authority over them, and in exchange the government agrees to act in accordance with the limitations set forth in the Constitution.[108] Because the government was "ordained and established 'for the United States of America,' and not for countries outside of [its] limits . . . [t]he Constitution can have no operation in another country."[109] The Compact Theory has been in existence since the formation of the Constitution itself and there are many cases following the principle that "[t]he government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[110]

The majority in *Verdugo-Urquidez* rejected the Enumerated Powers Theory, which stands for the proposition that the United States government is bound by the limitations of the Constitution. Under this view, there are substantive restraints placed on the government, even when it operates outside the boundaries of the United States.[111] One of the earlier cases utilizing the Enumerated Powers Theory with respect to the extraterritorial effect of the Constitution is the landmark case of *Reid v. Covert*.[112] There, a plurality held that the Constitution limits United States' actions abroad.[113] *Reid* only addressed the applicability of constitutional protections to Americans living abroad and did not address the rights of aliens brought to trial in the United States. Some proponents of the Enumerated Powers Theory argue that the Constitution limits American officials who must act within constitutional limita-

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108. *See* Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777, 783-784 (1980).

109. In re Ross, 140 U.S. at 464.

110. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-405 (1819). *See also* League v. DeYoung, 52 U.S. (11 How.) 185, 202 (1850)("The Constitution of the United States was made by, and for the protection of, the people of the United States."); In re Ross, 140 U.S. 453, 464 (1891).

111. *See* Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 745 (1980).

112. 354 U.S. 1 (1957). This case involved an American civilian living overseas. She was facing a military trial for killing her husband.

113. The Supreme Court stated in *Reid* that:

> The United States is entirely a creature of the Constitution . . . It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.

Id. at 5-6.

tions, regardless of where the actions occur.[114] Other supporters of the Enumerated Powers Theory look to the concept of natural or fundamental rights to support the idea that constitutional protections apply to aliens as well as United States citizens.[115]

C. *Application of the Compact Theory to Verdugo-Urquidez*

In applying the Compact Theory to the situation presented in *Verdugo-Urquidez*, the majority first noted that historical data, dating from the late 1700's, indicated that the purpose of the fourth amendment was to protect only American citizens from arbitrary actions by the newly formed United States government and was not intended to protect aliens in foreign countries from American operations.[116]

The majority then referred to a series of cases known as the "Insular Cases"[117] as well as to its decision in *Johnson v. Eistentrager*[118] to further support the notion that the Constitution was not intended to extend to aliens.[119] The general rule gleaned from the Insular Cases is

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114. *See, e.g.*, Saltzburg, *supra* note 111, at 745. "Wherever and whenever [the United States government] acts it relies on the Constitution as the source of its powers. Whenever [the government] acts, it must . . . accept the [Constitutional] limits on its power . . . ."

115. *See* 1 B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: RIGHTS OF THE PERSON 170 (1968). Schwartz wrote:

> 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. This source interprets the Constitution's purpose as that of preventing arbitrary government restraints on natural rights. *See also* Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

116. 110 S. Ct. at 1061, *citing* Boyd v. United States, 116 U.S. 616, 625-626 (1886). The majority also referred to § 1 of An Act Further to Protect the Commerce of the United States, Ch. 68, 1 Stat. 578 (1798), enacted during a period when France interfered with American commercial trade. This statute granted President Adams the authority to permit American military vessels to seize French military vessels found within the jurisdictional limits of the United States or on the high seas.

117. *See supra* note 75.

118. 339 U.S. 763 (1950). In *Eisentrager*, the Supreme Court denied writs of habeas corpus by enemy aliens arrested in China and imprisoned in Germany following World War II. The prisoners claimed their convictions violated their fifth amendment due process rights. The Court held that although Constitutional provisions had in some instances been extended to aliens with connections to the United States, there could be no extraterritorial application of the fifth amendment.

119. 110 S. Ct. at 1063.

that people residing in United States territories were not guaranteed all constitutional rights.[120] Instead, "[o]nly fundamental constitutional rights are guaranteed to inhabitants of those territories."[121] The majority then analogized this rule to the issue before it, holding that if United States territories were not guaranteed universal Constitutional protections, "respondent's claim that the protections of the fourth amendment extend to aliens in foreign nations is even weaker."[122] The majority then referred to its earlier decision in *Eistentrager*, in which fifth amendment rights were denied to aliens imprisoned outside the territory of the United States, holding that "[i]f such is true of the fifth amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the fourth amendment, which [by its terminology] applies only to 'the people.' "[123]

The dissent argued that the Court's decision in *Reid v. Covert*[124] severely restricted the holdings in the Insular Cases,[125] indicating that *Reid* stood for the proposition that the fourth amendment restricts American officials' actions wherever and against whomever they act.[126] However, the majority, in turn, restricted the holding in *Reid*, stating that the case merely stood for the proposition that American citizens, living abroad, could claim fifth and sixth amendment protections.[127] The dissent also attempted to restrict the *Eistentrager* decision on the ground that the defendants in that case were not entitled to Constitutional protection because they were enemy soldiers, not because they were aliens.[128] This is a valid distinction, given the Court's rationale in *Eisentrager*. Apparently, the majority in *Verdugo-Urquidez* chose to

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120. *Id.* at 1062.

121. *Id., citing Dorr*, at 148; *Balzac*, at 312-313.

122. 110 S. Ct. at 1062.

123. *Id.* at 1063.

124. 354 U.S. 1 (1957).

125. 110 S. Ct. at 1074 (Brennan, J. dissenting), *citing Reid*, "[i]t is our judgment that neither the [Insular Cases] nor their reasoning should be given any further expansion." *See also* Note, *The Extraterritorial Application of the Constitution - Unalienable Rights?*, 72 VA. L. REV. 649, 659 (1986)("[t]he *Reid* decision . . . represents the abandonment of the nineteenth century concept of strict territoriality").

126. 110 S. Ct. at 1069-1070 (Brennan, J. and Marshall, J., dissenting).

127. 110 S. Ct. at 1063. The majority also noted that *Reid* was only decided by a plurality and that the concurring opinions in *Reid* were substantially narrower than plurality holding. This may help to explain why the *Verdugo-Urquidez* majority was unwilling to give much deference to the *Reid* decision.

128. 110 S. Ct. at 1074, *citing* Johnson v. Eistentrager, 339 U.S. 763,771-772 (1950)("It is war that exposes the relative vulnerability of the alien's status . . . [D]isabilities 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."

disregard this part of the *Eistentrager* Court's rationale.

D. Verdugo-Urquidez's Claim of Substantial Connection to the United States

Despite its application of the Compact Theory in *Verdugo-Urquidez*, the majority conceded that fourth amendment protections would apply to an alien who could claim a substantial connection to the United States.[129] A substantial connection may occur through the alien's voluntary or legal presence in the United States and his subsequent development of ties to this country.[130] The majority held that Verdugo-Urquidez could not establish the existence of such a connection because his only ties to the United States were through his arrest and involuntary transfer to the United States.[131] This connection was not substantial enough because Verdugo-Urquidez had only been in the United States for a few days when DEA agents searched his home in Mexico.[132] One problem with the majority's analysis, as the dissent noted, is that none of the cases cited by the majority, in support of its contention that voluntary or legal connection to the United States is necessary to invoke constitutional protections, specifically impose these requirements.[133] Additionally, the majority failed to create a standard to determine the point at which an alien has developed a substantial enough connection to the United States to claim constitutional protections.[134] Finally, both dissenting opinions and one concurring opinion held that even if an alien is required to establish substantial connections to the United States before being permitted to claim constitutional protection, the fact that Verdugo-Urquidez was brought to the United States to face a criminal prosecution was sufficient to create the

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129. 110 S. Ct. at 1064, *citing* Plyer v. Doe, 457 U.S. 202, 211, 212 (1982)(illegal aliens may claim equal protection rights under the fourteenth amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945)(resident aliens enjoy first amendment rights); Wong Wing v. United States, 163 U.S. 228, 238 (1896)(resident aliens enjoy fifth and sixth Amendment rights).

130. 110 S. Ct. at 1065. The majority seemed to view the necessary connection to the United States as involving acceptance by the alien of societal obligations.

131. *Id.* at 1064. The majority held that a lawful but involuntary connection to the United States was not the result intended by the cases cited in note 129, *supra.*

132. *Id.* The majority held that "We do not think the applicability of the fourth amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made."

133. *Id.* at 1074 (Brennan, J. and Marshall, J., dissenting).

134. *Id.*

necessary connection to this country.[135] This proposition is supported by the Supreme Court's decision in *In re Ross*,[136] where the Supreme Court held that the Constitution applied to aliens "who are brought [to the United States] for trial for alleged offenses committed elsewhere. . . ."

While this argument is fairly convincing, there are some policy reasons against accepting this argument. Creating an exception that the fourth amendment warrant requirements do not apply to searches of property owned by aliens located outside the United States would, in effect, swallow the rule.[137] It would also force American law enforcement officers to revert back to requesting the assistance of foreign officials in obtaining evidence abroad, raising joint venture issues. It is better to set a definite standard that can be applied uniformly throughout the judicial system, even if the standard distinguishes between American citizens and resident aliens on one hand and nonresident aliens on the other.[138] The judiciary may also choose, at a later date, to place some restrictions on the actions of American law enforcement officers by requiring any American operation abroad to comply with the laws of the foreign country involved.[139] Additionally, the courts may also require that any search by American officers be reasonable. This appeared to be the opinion of both concurring opinions in *Verdugo-Urquidez* and in one of the dissents.[140]

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135. *See, e.g.*, 110 S. Ct. at 1078 (Blackmun, J., dissenting), "[W]hen 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."

136. 140 U.S. 453, 464 (1891).

137. It is hard to imagine a scenario where law enforcement officials decline to prosecute an alien defendant if evidence was found during a search of the alien's property.

138. This suggestion has a foundation in prior Supreme Court decisions. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 79-80 (1976)("In the exercise of its broad power . . . Congress regularly makes rules that would be unacceptable if applied to citizens."). If Congress is empowered to act in a discriminatory manner, the Supreme Court, within the confines of its judicial authority, has similar power.

139. Note that this issue was not before the Supreme Court in United States v. Verdugo-Urquidez, and therefore was not addressed.

140. *See, e.g.*, 110 S. Ct. at 1068 (Stevens, J., concurring)(agreeing with the Government's contention "that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable' as that term is used in the first clause of the Amendment"). Note also that both Justice Stevens and Justice Kennedy held in their concurring opinions that it should be unnecessary for American officials to obtain a United States warrant because "American magistrates have no power to authorize such searches." *Id.*

IV. CONCLUSION

The Supreme Court stated in *United States v. Paynor*,[141] that "willfully lawless activities undertaken in the name of law enforcement. . . . do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule."[142]

There is a trend in society to allow the use of "draconian" measures in combatting the drug problem that exists in this country. Congress has already enacted laws to facilitate the arrest and conviction of drug distributors[143] and some commentators have feared this attitude has lead and will continue to lead the Supreme Court to justify illegal actions on the part of American law enforcement in solving drug-related crimes.[144] The Court has taken a more active role in recent years in directing the course of the fourth amendment.[145] The question of whether the government won, or deserved to win, in these cases did not appear to be important. Rather they represent an increased desire on the government's part to expand its enforcement powers. Additionally, it appears that when the Supreme Court weighs the collective public interest in competent law enforcement against the individual defendant's due process and liberty interests, the social interest generally triumphs.[146] The Court has expressly stated that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit."[147] This has lead some commentators to believe that a "drug exception" to the fourth amendment is growing.[148]

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141. 447 U.S. 727 (1980).

142. *Id.* at 734.

143. Comprehensive Crime Control Act of 1984, 18 U.S.C. Section 1342 (Supp. 1986). *See also* the Anti-Drug Abuse Act of 1986, 18 U.S.C. 1956 (Supp. 1987) (imposing some of the severest penalties in the Code for various drug related offenses).

144. *See, e.g.*, S. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L. J. 889 (1987). "[The Constitution]. . . is rapidly being eroded by a positivist, bureaucratic attitude that we can-must-do whatever is deemed necessary or expedient in waging the War on Drugs." *Id.* at 890.

145. *Id.* at 907. "The Supreme Court's 1982-1983 term was marked by 'the overwhelming importance of the fourth amendment in drug cases' . . . the Supreme Court put its imprimatur on the enforcement techniques of the drug agencies . . . ." *Id. citing* the Supreme Court's term, 52 U.S.L.W. 3151 (U.S. Sept. 13, 1983).

146. *Id.* at 909. This result was particularly true if there existed a public perception of a drug crisis.

147. United States v. Mendenhall, 446 U.S. 544, 561 (1980).

148. *See generally* Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV., 257 (1983); Saltzburg, *Another Victim of Illegal Narcotics:*

The decision in *United States v. Verdugo-Urquidez* supports this belief. The decision in this case can be justified by existing case law and the Court may very well have reached the correct result. However, it should be noted that the cases relied upon by the majority are much older than the cases cited by the dissent and were, in some instances, limited by the subsequent decisions. Additionally, the majority's reading of prior case law seems strained at times. It could certainly be argued that in *United States v. Verdugo-Urquidez* the majority of the Supreme Court reached its conclusion first and then sought supporting authority. Whether or not *Verdugo-Urguidez* is an extension of the drug exception to the fourth amendment cannot be determined, but will certainly be of interest in the future.

The Fourth Amendment, 48 U. PITT. L. REV. 1 (1986).