International Scope of Fourth Amendment Protections: United States v. Verdugo-Urquidez

Mark Andrew Marionneaux

Repository Citation
Available at: https://digitalcommons.law.lsu.edu/lalrev/vol52/iss2/8

This Note is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.
International Scope of Fourth Amendment Protections:  
United States v. Verdugo-Urquidez

[We] also must take great pains to ensure that the Constitution does not become the first casualty in the “War on Drugs.”

I. INTRODUCTION

Ever since the United States declared a “war on drugs,” the government has tried to eradicate drugs at their source. Most drugs found in the United States, however, have their source in other countries. Thus, United States law enforcement has taken on a vast international scope. These international law enforcement efforts have caused the United States courts to struggle with questions of when and to whom the Fourth Amendment to the United States Constitution will apply. Recent decisions of the Supreme Court have put the fourth amendment, which grants protection against unreasonable searches and seizures, in jeopardy.

On February 28, 1990, the United States Supreme Court handed down the most aggressive decision to date on the subject of fourth amendment application. In United States v. Verdugo-Urquidez (hereinafter Verdugo), the Supreme Court reversed the United States Court of Appeals for the Ninth Circuit and held that the fourth amendment does not apply to the search and seizure, by United States agents, of property that is owned by a non-resident alien and located in a foreign country. This decision is more important, however, because it gives radical implications of suppression of fourth amendment rights in other circumstances as well.

This casenote will begin with some background information on United States law enforcement efforts in Mexico which preceded the Verdugo decision. It will attempt to illustrate some of the problems and

Copyright 1991, by LOUISIANA LAW REVIEW.
1. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1218 (9th Cir. 1988).
2. U.S. Const. amend. IV reads as follows: “[t]he 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.”
4. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988). The Ninth Circuit held that protection of the fourth amendment extended to the government’s search of Verdugo’s Mexican residence.
5. Verdugo-Urquidez, 110 S. Ct. at 1059.
uncertainties associated with international law enforcement efforts through exploration of the Verdugo decision at both the Court of Appeals and Supreme Court level. This casenote will attempt to give the reader a brief synopsis of under what circumstances the Fourth Amendment to the United States Constitution applies, and reasons why the Verdugo decision leaves application of the fourth amendment vulnerable to attack in many circumstances.

A. Background Facts Leading up to the Verdugo Decision: The Camarena Murder

Enrique ("Kiki") Camarena was a special agent of the United States Drug Enforcement Administration (DEA) who was assigned in 1980 to the DEA office located in Guadalajara, Mexico. His mission for the next several years was two-fold: to locate and bring to justice Mexico's most notorious marijuana and cocaine barons, and, more importantly, to produce evidence for the Reagan administration linking Mexico's multi-billion dollar drug pipeline to the highest ranking Mexican army, police, and government officials. Upon arriving in Mexico, Camarena learned quickly that the corruption of Mexican officials surpassed his wildest imaginations. The situation in which Camarena became most involved was one which involved an accusation against the Mexican Attorney General's office of sabotaging the aerial spraying program, which the United States State Department was funding, and pocketing the bulk of the ten million dollars that the United States provided toward the program each year. Through informants' tips, Camarena and his colleagues became aware that the Mexican drug barons were producing high grade marijuana in Mexico's desert by irrigation methods from underground wells. Agents knew that if these "marijuana plantations" existed in the quantities claimed, they would serve as sound proof that Mexican officials were not complying with the aerial spraying operations agreement. In May of 1982, DEA agents, along with Mexican police and an air force of seven helicopters, set out on a search and destroy mission. About twenty miles into the desert, the marijuana forest came into sight. Some 220 acres were cultivated in some of the highest grade marijuana ever seized, with plant stalks five feet high. In sum, this raid netted 5,000 tons of marijuana. The next raid netted twenty

7. Id. at 87.
8. The Mexican government could not claim that it overlooked the emerald green foliage in an open desert; it could be seen from the air miles away.
tons. The most astonishing raid of all, however, occurred in November of 1984, when 10,000 tons of marijuana were seized from a Mexican desert plantation. The amount of marijuana seized can be appreciated when one notes that United States analysts in 1983 concluded that only 12,000 to 15,000 tons of marijuana were used in the United States that year.\textsuperscript{10}

Camarena's identity became known to the drug barons who owned the marijuana plantations. On February 7, 1985, Special Agent Camarena was abducted by Mexican Federal Judicial Police Officers and brought to the ranch of Caro-Quintero, a major Mexican drug trafficker. Witnesses, who have since testified in United States prosecutions, claim Camarena was "brutally beaten and kicked around for hours,"\textsuperscript{11} and then ordered killed by Quintero, with the consent of other drug lords, including Matta-Ballesteros and Verdugo-Urquidez. Camarena's body was found on the side of a dirt road about sixty miles out of Guadalajara. Doctors performing an autopsy on the body revealed several broken ribs, a large number of lacerations, a crushed skull, and the possibility that the victim had been buried alive.\textsuperscript{12} The DEA officials were further distraught when Quintero, who was then known to have been involved in the murder, was protected from DEA officials by the Mexican Federal Judicial Police. He was allowed to leave in his private jet from Guadalajara Airport while DEA officials watched in dismay.

In connection with the Camarena murder, United States courts handed down twenty-two indictments.\textsuperscript{13} Of the twenty-two people indicted for the murder and related crimes, seven have been brought to the United States to stand trial. Of these seven, three were brought before the same United States District Court by means of covert forcible abduction from their homeland: Verdugo-Urquidez, Matta-Ballesteros, and Caro-Quintero.\textsuperscript{14} Although abduction may seem barbaric, one must realize that

\textsuperscript{10} Shannon, supra note 6, at 88.
\textsuperscript{11} United States-Mexican Cooperation in Narcotics Control Efforts: Hearings before the House Committee on Foreign Affairs, 99th Cong., 2d Sess. (1986).
\textsuperscript{12} Drug Enforcement Administration Reauthorization for Fiscal Year 1986, supra note 9, at 26.
\textsuperscript{13} United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). It is also interesting to note that these indictments from the Camarena murder included such Mexican officials as two police officers, the brother-in-law of the former Mexican president, the ex-director of the Mexican Federal Judicial Police, and the Commander of the Mexican Anti-Drug Unit who was also head of the Mexican Bar Association.
\textsuperscript{14} Verdugo-Urquidez was apprehended by Mexican police officers at the request of United States Marshals. However, his abduction was unknown to the Mexican Police officials, and in fact, the officers who kidnapped Verdugo for the U. S. Marshals were imprisoned by Mexican officials upon their return. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988).
Matta-Ballesteros was apprehended in Honduras by a special force of Honduran troops
Camarena was murdered because he found evidence linking Mexico’s highest government officials to these drug barons (now accused murderers). Thus, as one might expect, Mexican officials did not cooperate in extradition proceedings.

B. Cases Resulting from the Camarena Murder

The three cases involving the abduction of criminal defendants outside the United States who were brought back to the United States to stand trial raise very interesting fourth amendment questions, and, in fact, were all argued on different grounds. However, since only one, Verdugo, has reached the Supreme Court, the remainder of this casenote will focus on its holding that the Fourth Amendment to the United States Constitution does not apply to the search and seizure of nonresident aliens outside of United States territories. The Verdugo holding must be analyzed in light of the fact that this case came about as the result of the torture/murder of a United States law enforcement officer in the line of duty. One must delve into the realm of reality and realize that even the United States Supreme Court is literally "only human." Such emotional facts from such a widely publicized case must lead one to at least speculate that the Verdugo holding was more inclined to be righteous than right.

led by four U. S. Marshals. He was handcuffed, blindfolded, driven immediately to a U. S. Air Force Base, and flown to the United States. Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990).

Caro-Quintero was the subject of several extradition attempts by United States officials. However, Mexican officials required a $50,000 transport fee for his custody. When the U. S. refused to pay the sum, Mexico refused to extradite Quintero. The DEA then authorized a reward for Quintero’s capture and delivery to the U. S.-Mexico border. Mexican bounty hunters then abducted Quinteró at his office at gunpoint and immediately drove him to the border. Caro-Quintero, 745 F. Supp. at 599.

15. Matta-Ballesteros argued that he fell under the Toscanino exception to the Ker-Frisbee Rule. The Ker-Frisbee Rule is that the defendant himself may not be suppressed as the result of an illegal search or seizure. The Toscanino exception holds that if the defendant has been brought before the court “as a result of the Government’s deliberate, unnecessary and unreasonable invasion of the accused’s constitutional rights,” the court is required to divest itself of jurisdiction over the person of the defendant (United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974)). The Matta-Ballesteros court, however, held that the facts of this case did not reach the level of Toscanino. Matta-Ballesteros, 896 F.2d at 261.

Verdugo-Urquidez, as this note will explore, argued that his fourth amendment rights were violated by the unlawful search of his house in Mexico; thus, he contended that the evidence against him should be excluded.

Caro-Quintero was obviously the most liked abductee by the Mexican government, because they raised two official protests to his abduction. This change of facts allowed Quintero to argue treaty violation. This argument was successful at the district court level and they ordered his return to Mexico in an attempt to "right the wrong" of the treaty violation. Caro-Quintero, 745 F. Supp. at 599.

In *United States v. Verdugo-Urquidez*, the subject of this casenote, the respondent did not claim a fourth amendment violation because of an illegal seizure of his person, as was unsuccessfully tried by co-defendant Matta-Ballesteros prior to Verdugo's hearing. Rather, Verdugo claimed his fourth amendment rights were violated by an illegal search and seizure of his Mexican residence after he was abducted and brought to the United States to stand trial. He thus attempted to have the bulk of the evidence against him suppressed. As will be discussed, the Supreme Court in *Verdugo* held that an alien has no fourth amendment protections from search and seizure outside the United States territories. Thus, his conviction, as that of Matta-Ballesteros, remained in effect.

II. THE VERDUGO-URQUIDEZ DECISION

Rene Martin Verdugo-Urquidez was indicted by the United States for drug trafficking and for the murder of Camarena Salazar, a United States DEA agent, in Mexico. The problem was that Verdugo-Urquidez was a Mexican citizen residing in Mexico. Extradition attempts failed because Mexico's extradition treaty with the United States did not require Mexico to extradite its own nationals. Although the treaty provided that Mexico could extradite a national if it deemed it proper to do so, the Mexican law prohibits such extradition of nationals. Thus, the DEA arranged for six Mexican police officers to forcibly abduct Verdugo-Urquidez and bring him to the Mexico-United States border to be arrested by waiting United States Marshals. Thereafter, while Verdugo-Urquidez was incarcerated in the United States pending trial, four DEA agents, with the assistance of several officers of the Mexican Federal Judicial Police, conducted a search of Verdugo's residence in which incriminating evidence was obtained. Although Mexican police were present at the search, the United States officials initiated it and conducted it at their discretion; thus, it was considered a joint venture and the fact that it was a United States search was not contested.

At no time prior to the search did the DEA seek or receive approval from the Justice Department or an American magistrate to conduct the search.

17. See supra note 15.
21. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1227 (9th Cir. 1988). ("Given the high degree of American involvement in the searches and the low degree of Mexican interest in Verdugo-Urquidez, we do not even find the question [of whether this is an American search] a close one.").
search. No search warrant was obtained, nor were there exigent circumstances to justify the search. Thus, when Verdugo moved to suppress the evidence obtained in the search because his fourth amendment rights had been violated, the Court was squarely faced with the issue of whether Verdugo, a non-resident alien, was afforded fourth amendment protections outside of United States territories. If Verdugo was found to be protected by the fourth amendment, clearly a violation had occurred and the evidence against him would probably be suppressed under the Mapp v. Ohio23 exclusionary rule. However, if Verdugo had no fourth amendment rights because of his status as a non-resident alien, then obviously no fourth amendment violation could have occurred and his conviction would be affirmed.

A. The Court of Appeals Decision

The United States Court of Appeals for the Ninth Circuit affirmed the District Court's holding that Verdugo-Urquidez had fourth amendment rights, that these rights were in fact violated, and that therefore evidence therefrom must be suppressed.24 The Court of Appeals analysis in Verdugo concentrated on discrediting use of the Social Compact Theory in this case. The Social Compact Theory25 regards the Constitution as a contract between the government of the United States and its citizens. This theory supposes that only those who are given rights in the contract can invoke them.

A reading of each amendment provides who is afforded rights under that amendment. The fourth amendment, for example, provides its protection to "the people."26 Therefore, only "the people" who participate in the contract, United States citizens, can invoke its protections. On the other hand, the fifth amendment provides its protections to a "person."27 By using the word "person," Social Compact theorists claim that fifth amendment protections are offered to anyone who wishes to invoke them.

---

22. Id. at 1216 n.2.
23. 367 U.S. 643, 81 S. Ct. 1684 (1961). (Violations of the fourth amendment require that evidence illegally obtained be excluded from both state and federal trials.).
24. Verdugo-Urquidez, 856 F.2d at 1215.
26. U.S. Const. amend. IV, supra note 2 ("[t]he right of the people to be secure ...") (emphasis added).
27. U.S. Const. amend. V reads in pertinent part: 

"[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." (emphasis added).
The Supreme Court has consistently used the Social Compact Theory in its decisions regarding extra-territorial application of the Constitution. In rejecting the Social Compact Theory in this case, the court of appeals stated that "we are not persuaded that the Compact Theory is a legitimate mode for applying the Constitution in this case." The court did have to concede, however, that "this Compact Theory of the Constitution has deep roots in our nation's history," but the court said, in its own defense, that use of the Social Compact Theory in past Constitutional interpretation cases has been primarily in the realm of federalism, not in extra-territorial application of Constitutional protections.

After discrediting use of the Compact Theory, the court attempted to find support for its use of the Natural Rights Theory to explain the rights of aliens abroad. The Natural Rights Theory looks upon the Constitution as a constraint on United States activities anywhere. The Natural Rights Theory views the protections of the Constitution as limits on the actor, whereas the Social Compact Theory views the protections of the Constitution as rights given to victims. In short, the Natural Rights Theory "posits that the Constitution inherently constrains the acts of United States officials, regardless of locale." Thus, this view potentially allows Constitutional protections to be invoked by anyone, anywhere.

Although the Natural Rights Theory is popular among commentators, it is nonetheless rarely used by courts in cases involving the extra-territorial applicability of the Constitution. However, the court of appeals cited commentators who favor broad Constitutional interpre-

28. See the language of the Court in United States ex rel. Turner v. Williams, 194 U.S. 279, 292, 24 S. Ct. 719, 723 (1904). (An excludable alien is not entitled to first amendment rights because the first amendment protects "the people," and an excludable alien "does not become one of the people to whom these things are secured by our Constitution."). See also United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1061 (1990). "The available historical data shows, therefore, that the purpose of the fourth amendment was to protect the people...."
29. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1219 (9th Cir. 1988).
30. Id.
31. Id. at 1220-21.
32. For a more specific discussion of the Natural Rights Theory, see Note, The Extraterritorial Application of the Constitution—Unalienable Rights? 72 Va. L. Rev. 649 (1986). See also Note, The Extraterritorial Applicability of the Fourth Amendment, 102 Harv. L. Rev. 1672 (1989). (This article refers to the Natural Rights Theory as the "Organic Perspective.").
33. Verdugo-Urquidez, 856 F.2d at 1219-1224.
34. Note, supra note 25, at 1675 (emphasis added).
tation to support its use of the Natural Rights Theory. The court, trying to find precedential support for the Natural Rights Theory, cited \textit{Immigration and Naturalization Service v. Lopez-Mendoza} for the proposition that illegal aliens in this country have fourth amendment rights. The court held it would thus be illogical to grant one who is in this country voluntarily but illegally fourth amendment rights, and not grant Verdugo, who is here involuntarily, but legally, these same protections.

The court then concluded that Verdugo-Urquidez must have fourth amendment protections and that they were violated.

The court of appeals dissent by Judge Wallace focused on use of the Social Compact Theory. He cited early Constitutional writers, as well as the Preamble to the Constitution, to support his view. The dissent also stated that Verdugo's brief involuntary presence in the United States, which consisted of incarceration while awaiting trial, did not entitle him to the rights of an alien located in this country, whatever those rights may be, but rather his rights must be determined as if he were present in Mexico, a point which the Supreme Court majority addressed in its reversal of the court of appeals.

Finally, Wallace blasted the majority opinion for ignoring the language in \textit{United States v. Curtiss-Wright Export Corporation}, which says that the Constitution has no force in foreign territory, except with respect to American citizens. Further, Wallace said that even without the language in \textit{Curtiss-Wright}, it would be difficult to accept the majority's illogical position in the absence of "compelling precedence or sound reasoning. The majority, [according to Wallace] provides us with neither."
B. The Supreme Court Decision in Verdugo-Urquidez

In an opinion delivered by Chief Justice Rehnquist, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the fourth amendment does not apply to the search and seizure by United States agents of property that is owned by a non-resident alien and located in a foreign country. The Supreme Court made several distinctions early in its opinion which are important to understand when attempting to limit its decision. First, the Court noted that fourth amendment violations differ from fifth and sixth amendment violations in time and place of occurrence. A violation of the fourth amendment, said the Court, is "fully accomplished' at the time [and place] of an unreasonable government intrusion,'" unlike violations of trial rights guaranteed by the fifth and sixth amendments, which necessarily must occur at the time and place of trial. Thus, in Verdugo, the fourth amendment violation, if one occurred, occurred solely in Mexico. The second preliminary distinction which the Court made involved its reminder that it was not deciding whether the evidence obtained in the Mexican search should be excluded. That issue was not before the Court and as such was not decided.

The Court began its analysis with a strong Social Compact Theory element by going through a textual distinction of the amendments to the Constitution. The Court distinguished use of the words "the people" in several amendments in conjunction with a definition of "the people" as United States citizens in the Preamble of the Constitution to support the Social Compact Theory of Constitutional interpretation. The Court noted:

[While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community . . . .

The Court then attempted to find precedential support for its decision that the fourth amendment has no application to a non-resident alien. They first cited cases which were the result of the United States naval battle with France in 1798. The issue in these cases was whether illegal seizures took place when the United States seized French ships under

---

45. Id. at 1060.
46. Id.
47. Id. at 1060-61. "'The people' seems to have been a term of art employed in select parts of the Constitution.'
48. Id. at 1061.
49. Id. at 1062.
authority of Congress. To support the Verdugo holding, the Court said of these cases: "it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this."

The Court also cited the Insular Cases\(^\text{51}\) to support its decision. The Insular Cases stand for the proposition that not every Constitutional provision extends everywhere that the United States exerts sovereign power. The Chief Justice reasoned that since the Insular Cases held that not all Constitutional protections extend to inhabitants of territories governed by the United States, then even fewer Constitutional protections will extend to aliens in foreign nations.\(^\text{52}\) The Court also relied on Johnson v. Eisentrager\(^\text{53}\) for support. The Johnson case denied enemy aliens, imprisoned in Germany by the United States, fifth amendment rights. The Court reasoned here that the fifth amendment uses the general word "person," and its use was denied to non-resident aliens; therefore, the fourth amendment, which uses the words "the people," should a fortiori be denied as well.\(^\text{54}\)

The remainder of the Court’s analysis cited a grocery list of cases which provide resident aliens with first, fifth, sixth, and fourteenth amendment protections,\(^\text{55}\) but not with fourth amendment protections. The Court, however, held that Verdugo was a non-resident alien with no previous significant voluntary connection with the United States; thus, these cases were of no help to him.\(^\text{56}\)

In its conclusion, the Court paradoxically seemed to narrow its holding to the facts of this case only, rather than to assert a broad rule that the fourth amendment does not apply to non-resident aliens.\(^\text{57}\) The Court held:

\(^{50}\) Id.

\(^{51}\) The Insular Cases are a group of early Supreme Court cases which refused to provide Constitutional rights to residents of newly acquired United States territories; see e.g., Balzac v. Puerto Rico, 258 U.S. 298, 42 S. Ct. 343 (1922) (sixth amendment right to trial by jury denied in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 34 S. Ct. 712 (1914) (the Court refused fifth amendment rights in the Philippines); Dorr v. United States, 195 U.S. 138, 24 S. Ct. 808 (1904) (sixth amendment right to jury trial denied in Philippines); Hawaii v. Mankichi, 190 U.S. 197, 23 S. Ct. 787 (1903) (fifth and sixth amendment rights denied in Hawaii); Downes v. Bidwell, 182 U.S. 244, 21 S. Ct. 770 (1901) (Article I clauses inapplicable in Puerto Rico).


\(^{54}\) Verdugo-Urquidez, 110 S. Ct. at 1063.

\(^{55}\) Id. at 1064.

\(^{56}\) Id.

\(^{57}\) It seems odd that the Court wanted to narrow this decision to the facts only, after it impliedly sounded a death knell to fourth amendment protections in other situations, such as to Americans abroad and aliens here in the United States.
At the time of the search, [Verdugo] was a citizen and resident of Mexico with no voluntary attachment to the United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application. To correct this decision, if found to be unappealing, the Court suggests that restrictions on American search and seizure activities be imposed "by the political branches through diplomatic understanding, treaty, or legislation."

C. Dangerous Implications of the Court's Opinion

Throughout the opinion, Chief Justice Rehnquist made statements limiting cases which have granted Constitutional protections, resulting in what seems to be a Territorial Social Compact Theory for the application of the fourth amendment. He emphatically rejected respondent's claim that Reid v. Covert can be interpreted to mean that the fourth amendment constrains federal officials whenever and against whomever they act. The Court said that "Reid stands for no such sweeping proposition;" rather, it limits Reid to granting United States citizens stationed abroad protection of the fifth and sixth amendments only. Further, the Court noted that Reid was only a plurality opinion and that the two concurring Justices in Reid declined to hold that United States citizens abroad are entitled to the full range of Constitutional protections. Only after the Court limited Reid to granting only fifth and sixth amendment protections to United States citizens abroad did it say that Reid was of no help to Verdugo because he was not a United States citizen.

The Court had no reason in this case to limit the holding of Reid if it was going to distinguish the case on the facts anyway. Thus, the Court seems to imply, or at least leaves open the question, that United States citizens abroad may not always invoke the fourth amendment.

The Court similarly limited the holding of Immigration and Naturalization Service v. Lopez-Mendoza. The Supreme Court held that the court of appeals erred when it assumed that Lopez-Mendoza granted

59. Id.
60. It is this writer's opinion that the only time one can be certain that the fourth amendment will apply is when dealing with American citizens in the United States. Thus a territorial Social Compact Theory results.
61. 354 U.S. 1, 77 S. Ct. 1222 (1957). (The plurality court held that non-military United States citizens, traveling abroad with military spouses, are entitled to fifth and sixth amendment protections.).
fourth amendment protections to illegal aliens in the United States. The Court said that its decision in *Lopez-Mendoza* stands only for the proposition that the "Fourth Amendment Exclusionary Rule should be extended to deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country." Then the Court noted that sometimes when deciding particular issues, it assumes antecedent propositions, which "even on jurisdictional issues, are not binding in future cases that directly raise the questions." Thus, the Court seems to imply, or at least leaves us with the possibility that, illegal aliens in the United States may not have fourth amendment protection.

**D. Concurrence and Dissent**

Justice Kennedy joined the opinion of Chief Justice Rehnquist because he said that his views were fundamentally the same. However, he wrote a concurring opinion in order to more thoroughly explain these views which he concedes are very troublesome. I submit that Justice Kennedy's views do not extend as far as Chief Justice Rehnquist's do. Perhaps he tried, as Justice Harlan so eloquently did in *United States v. Katz,* to give the Court's opinion a more acceptable basis.

First, Justice Kennedy did not agree with the majority's Social Compact Theory. He said that the words "the people," as used in some Constitutional amendments, create no restrictions as to applicability. He would not allow such textual word choice to detract from the fourth amendment's force or reach. Secondly, Justice Kennedy's opinion does not hold that the fourth amendment does not apply to non-resident aliens outside the United States, as Chief Justice Rehnquist's opinion does. Rather Justice Kennedy seems to hold that the warrant requirement of the fourth amendment does not apply to the search of a non-resident's foreign home. In Justice Kennedy's view, to force adherence to the warrant requirement of the fourth amendment would be impracticable and anomalous because no United States magistrate could issue a search warrant which would be valid in Mexico. Thus, he concludes that "[just as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories ... the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a non-resident alien."

---

64. *Verdugo-Urquidez,* 110 S. Ct. at 1064.
65. Id.
66. Id. at 1064-65.
67. 389 U.S. 347, 88 S. Ct. 507 (1967) (Justice Harlan's concurring opinion has become the opinion most cited for the *Katz* holding.).
Although he joined Chief Justice Rehnquist's opinion (along with Justices White, Scalia, and O'Connor), Justice Kennedy's remarks do not imply that he intends the fourth amendment to be inapplicable to non-resident aliens. Moreover, I do not think that he would want to leave the question of the applicability of the fourth amendment to resident aliens and United States citizens abroad open for debate; which is exactly what Chief Justice Rehnquist's opinion does. In fact, Chief Justice Rehnquist was appointed by President Nixon to help swing the pendulum away from the protection of rights of the accused and toward the power of the government.\textsuperscript{69} In his view, any conflict between a criminal defendant and the state should be resolved in favor of the state. Although I agree that Chief Justice Rehnquist's intention is good, I cannot agree with brushing aside basic Constitutional protections.

In his concurrence, Justice Stevens asserted that aliens lawfully in the United States are protected by the Bill of Rights, including the fourth amendment. He found that Verdugo fit into this category of aliens lawfully in the United States, even though he was here against his will. But Justice Stevens concurred in the result because he found that the warrant clause can have no application in searches of non-citizens' homes in foreign jurisdictions because United States magistrates have no power to authorize such searches.\textsuperscript{70} Justice Stevens' opinion is a more digestible remedy. He only suspends the warrant clause in appropriate circumstances and his opinion does not give the impression that fourth amendment protections are being smothered.

The dissent, authored by Justice Brennan, with whom Justice Marshall joined, tried to salvage some remnants of protection for non-resident aliens. In his eloquent style of writing, Justice Brennan tried to form the plurality opinion into a "sufficient connection test" which could guide lower courts in deciding when the fourth amendment protection should be afforded to non-resident aliens.\textsuperscript{71} However, the Court created no such test. Though Justice Rehnquist did hint that an alien's significant connections with the United States may have an impact on its decision, he never actually held such. But the dissent analyzed the facts of Verdugo's case in light of the "sufficient connection test" anyway and found that Verdugo had the most obvious connection with the United States; he was investigated and prosecuted under United States law. Thus, the dissent concluded that Verdugo had sufficient

\textsuperscript{69} S. Davis, Justice Rehnquist and the Constitution (1989).
\textsuperscript{70} Verdugo-Urquidez, 110 S. Ct. at 1068 (Stevens, J., concurring).
\textsuperscript{71} Id. at 1070 (Brennan, J., dissenting) ("The Court admits that 'the people' extends beyond the citizenry, but leaves the precise contours of its 'sufficient connection' test unclear." However, though mentioned in the plurality opinion, no sufficient connection test was created.).
connection with the United States to warrant his protection by the fourth amendment.

In refuting the Court's theory that the phrase "the people" creates a social compact, the dissent suggested that the words "the people" are "better understood as a rhetorical counter-point to 'the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government.'" Further, the dissent noted that use of the word "person" in the fourth amendment would have led to an awkward sentence structure. It then concluded that such word choice could not have had such significant implications.

The dissent then concluded with a fundamental fairness argument, asserting that every person upon whom the United States exerts its law must likewise be afforded its protection. Brennan wrote:

When we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same.

In short, the dissent found that the fourth amendment must govern every action by United States officials that could be characterized as a search or seizure.

III. CATEGORIZATION OF FOURTH AMENDMENT APPLICATION

A. Applicability of the Fourth Amendment to United States Citizens in the United States

The fourth amendment purports to protect, among other things, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ". The right which is afforded by the fourth amendment is clearly applicable to "the people." In order to decipher exactly who the framers intended "the people" to be, one can simply turn back to the Preamble of the Constitution and read that "[w]e the people of the United States, in Order to form a more perfect Union, establish Justice . . . do ordain and establish this Constitution for the United States of America." By reading the fourth amendment as protecting "the people," and the Preamble's definition of "the people" as United States citizens, neither the Social Compact theorists nor the Natural Rights theorists

72. Id. at 1072.
73. Id. at 1072 n.9 (1990) ("[t]he Right of Persons to be secure in their person . . . ").
74. Id. at 1077.
75. U.S. Const. amend. IV (emphasis added). See supra note 2.
can deny that "the people" includes United States citizens located in the United States. This fourth amendment application is obvious, and United States courts have so held.\footnote{See, e.g., Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967); United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984).}

B. Applicability of the Fourth Amendment to Aliens in the United States

The more difficult question is whether "the people" includes aliens present in United States territories, or, phrased differently, whether or not the Constitution of the United States, especially the fourth amendment, applies to aliens within the territory of the United States. The older Supreme Court jurisprudence held some provisions of the Constitution to be applicable to aliens in the United States.

The first and most cited case on this point is \textit{Yick Wo v. Hopkins}\footnote{118 U.S. 356, 6 S. Ct. 1064 (1886). (Yick Wo was a subject of the Chinese Emperor living in the United States. He operated a cleaning business here for 22 years. He challenged a San Francisco ordinance which required laundry houses to be made of brick or stone as discriminatory under the fourteenth amendment.)}, where the Supreme Court was faced with deciding if petitioner, a subject of the Emperor of China who was now living in the United States, was afforded the protection of the fourteenth amendment against discrimination. The Court held that the fourteenth amendment protects \textit{resident} aliens. They said of the fourteenth amendment: "[t]hese provisions are universal in their application, to all persons within the territorial jurisdiction without regard to any differences of race, of color, or of nationality..."\footnote{Id. at 369, 6 S. Ct. at 1070.} One must note, however, that it was not the fourth amendment protection which was afforded to Yick Wo through the fourteenth amendment. Rather, his claim was one based strictly on equal protection through the fourteenth amendment itself.

In subsequent cases, the Supreme Court tacked on several other Constitutional protections which are afforded to aliens within the territory of the United States. First amendment rights of resident aliens were recognized in \textit{Bridges v. Wixon}\footnote{326 U.S. 135, 148, 65 S. Ct. 1443, 1449. ("Freedom of speech and of press is accorded aliens residing in this country.").}, where the Court recognized in \textit{Kwong Hai Chew v. Colding}\footnote{344 U.S. 590, 73 S. Ct. 472 (1953). (Petitioner, considered a resident alien, challenged a detention by immigration officials as a violation of the fifth amendment. The Court held that an alien lawfully in the United States is a person within the protection of the fifth amendment.).} a resident alien's right to protection from deprivation of his life, liberty, or property without due process of law.
under the fifth amendment. Then, in *Wong Wing v. United States*, the court reiterated the application of the fifth amendment to resident aliens and further added that anyone within the territory of the United States may also invoke the sixth amendment to challenge actions of the federal government. The older Supreme Court jurisprudence, however, never specifically addressed whether aliens in the United States have fourth amendment rights.

The more recent cases which address the issue of applicability of Constitutional protections to aliens within the United States territory have been in accord with the older jurisprudence. In the case of *Mathews v. Diaz*, decided in 1976, the Supreme Court was confronted with a resident alien’s claim that a requirement of residency in the United States for five years before he could claim Social Security benefits, was discriminatory and a deprivation of property without due process of law. Although the Court held that Congress could restrict an alien’s right to receive all the benefits of full citizens, it expressly held that aliens nonetheless did have the protections of the fifth and fourteenth amendments. The Court said:

> [t]here are literally millions of aliens within the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.

In the 1982 Supreme Court decision of *Plyler v. Doe*, the Court again held the fourteenth amendment applicable to aliens within the United States. Here, under the equal protection clause of the fourteenth amendment, aliens were held to have just as much of a right to public education as United States citizens did. As with the older cases, the newer jurisprudence has not addressed the issue of the right of aliens in the United States to fourth amendment protection.

Supreme Court cases dealing with the applicability of the Constitution to resident aliens are relatively few in number, but on the whole consistently grant protections to resident aliens. Strikingly, however, none specifically state that the protection of the fourth amendment applies to resident aliens. The Court had the opportunity in 1971 to hear a court of appeals decision which expressly stated that “aliens in this

---

82. 163 U.S. 228, 16 S. Ct. 977 (1896). (Petitioner challenged a Congressional act which provided that a Chinese person, adjudicated by justice, judge, or commissioner to be in the United States unlawfully, shall be imprisoned at hard labor for a year and then deported. The Court held that this act violated petitioner’s fifth and sixth amendment rights to indictment by grand jury and trial by jury.).
84. Id. at 77, 96 S. Ct. at 1890.
country are sheltered by the Fourth Amendment . . .," but it denied certiorari. The only Supreme Court case which approaches the issue of applicability of the fourth amendment to aliens located within the United States is *Immigration and Naturalization Service v. Lopez-Mendoza*, decided in 1984. In *Lopez-Mendoza*, the petitioner was illegally arrested by Immigration and Naturalization Service officials and evidence was obtained in the arrest. Petitioner then objected to the use of the illegally obtained evidence in his subsequent deportation hearing as a violation of his fourth amendment rights. The Supreme Court held that deportation hearings are not appropriate proceedings in which to apply the exclusionary rule. However, the Court stated at the end of the opinion:

> [w]e do not condone any violations of the Fourth Amendment that may have occurred . . . [or] our conclusions concerning the Exclusionary Rule's value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread.

This language was interpreted by lower courts to mean that the fourth amendment applies to illegal aliens in the United States. However, the Supreme Court in *Verdugo* held that this interpretation of *Lopez-Mendoza* was understandable but erroneous. The majority said that the holding in *Lopez-Mendoza* "was limited to whether the Fourth Amendment's Exclusionary Rule should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country." Therefore, the Supreme Court clearly stated that the question of whether illegal aliens in the United States have fourth amendment rights is unanswered. One can speculate, however, from the trend set by the *Verdugo* decision and the implications therein that the answer will be that illegal aliens in the United States certainly do not have full, if they in fact have any, fourth amendment rights. This proposition is further strengthened by the fact that the *Verdugo* court could have distinguished *Lopez-Mendoza* on the factual ground that in *Lopez*, the contested search took place in the United States, whereas in *Verdugo* the search took place in Mexico, but

---

88. Id. at 1051, 104 S. Ct. at 3489.
89. Id., 104 S. Ct. at 3489.
90. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1223 (9th Cir. 1988). "We find support for the proposition that illegal aliens have fourth amendment rights from statements which appear in INS v. Lopez-Mendoza."
it did not. Rather it vehemently discredited the assumption that everyone within United States territory has fourth amendment rights.

Although lower courts have readily assumed that legal aliens in this country have fourth amendment rights, the Verdugo decision may also threaten this assumption. If one takes the Social Compact theorists' view, as the Supreme Court in Verdugo did, then it can be contended that an alien located in the United States is not one of "the people" who is a party to the Social Compact; thus, he is not afforded fourth amendment protection. The decision in United States v. Verdugo-Urquidez may have the effect of not only withholding fourth amendment protections from aliens outside the United States, but also withholding these protections from aliens located within the United States, both legally and illegally.

C. Applicability of the Fourth Amendment to United States Citizens Outside United States Territory

The next logical question is whether Constitutional protections extend to United States citizens when they leave the United States. Historically, the Court took a strict territoriality view: the Constitution did not apply outside the United States. This view was posited by the Supreme Court in the 1891 decision of Ross v. McIntyre. In Ross, the petitioner was appealing his conviction in Japan, by a United States tribunal, for a murder which occurred on a United States ship harbored in Japan. He argued that he was denied his Constitutional rights to trial by jury and indictment by grand jury. The Court denied Ross these rights, holding that the guarantees of the Constitution "apply only to citizens and others within the United States," and that the "Constitution can have no operation in another country." Only ten years later, the Court again was confronted with the issue of whether the Constitution applied to United States citizens outside of the United States borders, in a series of decisions known as the Insular Cases. In these cases, the Court held that the rights to grand jury indictments and trial by jury, which are guaranteed by the Bill of Rights, extend only to United States citizens within states incorporated into the Union of the United States, but not to citizens in territories under

93. Note, supra note 25.
96. Id. at 462, 11 S. Ct. at 899.
97. Id. at 464, 11 S. Ct. at 900.
98. See supra note 51.
United States control. However, fundamental rights extend to wherever United States power is exerted. *Ross* and the *Insular Cases* are powerful precedent because they stand for an important general proposition: "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."99 Furthermore, these cases have not been overruled.100

The strict territoriality view of the applicability of Constitutional rights to United States citizens abroad as found in *Ross* and the *Insular Cases* was weakened, however, by a statement of the Supreme Court in the 1936 decision of *United States v. Curtiss-Wright Export Corporation*.101 The Court stated, "'[n]either the Constitution, nor the laws passed in pursuance of it, have any force in foreign territory *unless in respect of our own citizens*... '"102 Thus, one could glean a statement of the Court which said, in essence, in respect to our own citizens, the Constitution and laws passed in pursuance of it *have* force in foreign territories.

Strict territoriality was further modified to an uncertain extent by the Warren Court's 1957 holding in *Reid v. Covert*.103 *Reid* involved the trial of Mrs. Covert, a United States citizen living with her husband, a member of the Air Force, on a United States air base in England. Although not military personnel, she was tried by a court-martial for the murder of her husband, pursuant to the Code of Military Justice. The Supreme Court in a plurality opinion held that non-military wives could not be denied the right to civilian jury trials for capital offenses, at least not in time of peace.104 Thus, in essence, the *Reid* court granted United States citizens abroad fifth and sixth amendment rights. The plurality in *Reid* dismissed *Ross* as a "relic" from the past and distinguished the *Insular Cases* as cases involving the power of Congress to regulate, temporarily, newly acquired territories with "wholly dissimilar traditions and institutions...."105 From the outset, the Court in *Reid* rejected "the idea that when the United States acts against citizens abroad it [could] do so free of the Bill of Rights."106 Though *Reid* was

---

102. Id. at 318, 57 S. Ct. at 220.
103. 354 U.S. 1, 77 S. Ct. 1222 (1957).
104. Id. at 39-41, 77 S. Ct. at 1242-43.
105. Id. at 12-14, 77 S. Ct. at 1228-29. (To further show its distaste for *Ross* and the *Insular Cases*, Justice Black for the plurality wrote: "[m]oreover, it is our judgment that neither the[se] cases nor their reasoning should be given any further expansion.").
106. Id. at 5, 77 S. Ct. at 1225.
only a plurality decision, reading that opinion along with language from Curtiss-Wright, Americans could safely assume that they were now protected by the fourth amendment as they traveled abroad.

The holding of the Supreme Court in Verdugo-Urquidez, however, also impacted this category of fourth amendment application, that is, the application of the fourth amendment to United States citizens outside of United States territory, by limiting the holding in Reid. The Verdugo Court held that Reid does not stand for the sweeping proposition that federal officials are constrained by the fourth amendment wherever and against whomever they act.107 It limited Reid to holding only that “United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments.”108 The Verdugo Court further noted that the concurring justices in Reid refused to hold that in overseas criminal prosecutions United States citizens have the right to the full range of Constitutional protection. It is this writer’s opinion that the Verdugo Court’s emphatic limitation on the plurality holding in Reid and pronounced emphasis on the even narrower concurring opinions therein are subtle hints by the Court that fourth amendment protection to United States citizens abroad is at least not co-extensive with what is available in United States territory, and at most, is arguably non-existent. Thus, as Americans travel abroad, they must at least be aware that fourth amendment protection against search and seizure violations by United States officials may not follow them in their travels.

D. Applicability of the Fourth Amendment to Aliens Outside of United States Territory

We can now look at the final category of fourth amendment application. Does the fourth amendment apply to United States officials’ search and seizure of non-resident aliens outside of United States territory? This issue was the exact one faced by the Supreme Court in Verdugo. Until the Verdugo decision, this issue was res nova at the Supreme Court level and unresolved among the circuits.109 One 1950 Supreme Court decision, Johnson v. Eisentrager,110 approached the issue

108. Id.
109. See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1217 (9th Cir. 1988). The court said:

Strangely enough, this question has not yet been answered by the Supreme Court or definitely resolved by any Circuit Court of Appeals. Indeed, until this case, we have been content simply to assume that the Fourth Amendment constrains the manner in which the Federal Government may pursue its extra-territorial law enforcement objectives. (emphasis added).
of a non-resident alien's Constitutional rights abroad, but is not of much help because it is readily distinguishable upon its facts.

In Johnson, the Supreme Court denied alien enemy soldiers the fifth amendment rights to writs of habeas corpus, although they were imprisoned by the United States Army in Germany after conviction of war crimes by a United States military tribunal. Johnson seems to lend support to the proposition that Constitutional protections, especially those of the fourth amendment, do not apply to non-resident aliens abroad. However, such argument is easily rebutted by claiming that in Johnson, it was the status of the petitioners as enemy, not alien, which resulted in their deprivation of fifth amendment protection. Therefore, although the Court in Verdugo cited Johnson as support for the proposition that non-resident aliens abroad have no fourth amendment protection, it did so briefly and did not use Johnson as a basis for its decision.

The Court in United States v. Verdugo-Urquidez did supply an answer for this category of fourth amendment application. The Court clearly refused to give Verdugo, a non-resident alien located outside of United States territory, fourth amendment protections. Whether or not this decision will develop into a general rule that non-resident aliens have no fourth amendment protections, or will evolve into a fact specific holding, is yet to be seen. However, in a recent decision the Ninth Circuit Court of Appeals, the same court who decided the Verdugo decision at the appellate level, cited the Supreme Court's version of Verdugo for the proposition that "the Fourth Amendment does not apply to a search of aliens conducted in foreign territory." This seems to imply that at least the Ninth Circuit reads Verdugo as establishing

111. Id., 70 S. Ct. at 936.
112. United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1074 (1990) (Brennan, J., dissenting). Refuting the plurality's use of Johnson as support, Brennan said:
   "The majority mischaracterizes Johnson v. Eisentrager (citation omitted) as having rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. . . ." [Actually] [t]he Court [in Johnson] rejected the German Naturalists' efforts to obtain writs of habeas corpus not because they were foreign Naturals, but because they were enemy soldiers.
113. Id. at 1063.
114. United States v. Aikens, 912 F.2d 285 (9th Cir. 1990). This case involved the search and seizure of a Panamanian freighter in international waters by the United States Coast Guard, United States Customs officials, and the DEA. The boat was suspected of carrying large quantities of marijuana and when searched, 21,000 pounds of marijuana were found. Documents and personal effects of the crew were seized. Petitioners sought to have this evidence suppressed because their fourth amendment rights had been violated. The Court cited Verdugo for the proposition that the fourth amendment does not apply to a search of aliens conducted in foreign territories, and consequently found, therefore, that no fourth amendment violation could have occurred in this case.
a general rule that aliens outside the United States territory have no fourth amendment rights.

IV. CONCLUSION

The Verdugo decision is a strong indication that application of the fourth amendment, other than to United States citizens in the United States, is a very uncertain topic. The decision, though dangerous because of its implications and indications, is relatively weak as precedent. It is dangerous in that it answered only a small issue of extra-territorial application of the fourth amendment, but reopened for debate several large issues which strike even closer to home. The Court's decision, without a doubt, opens the issue of whether illegal aliens in the United States have fourth amendment protections by its comment on the holding of Lopez-Mendoza, a comment which the Court in fact did not have to make.

One may cite Verdugo for the proposition that the issue of illegal aliens' fourth amendment rights in the United States is res nova, and using the Court's Social Impact Theory can conclude that they are not among "the people" to whom the fourth amendment applies. Further, the Court's holding in Verdugo leaves open to debate the question of whether citizens abroad are entitled to fourth amendment protections. By limiting Reid to granting only fifth and sixth amendment rights to citizens abroad, the Court implies that the fourth amendment may not follow United States citizens in their extra-territorial travels.

A third implication one can glean from the Court's opinion is that aliens lawfully in the United States may not have full fourth amendment rights. Though the Court had previously always assumed that aliens in the United States have fourth amendment rights, the Court in Verdugo made clear that such antecedent assumptions are not binding on subsequent courts. Though such a proposition seems far-fetched, a strict reading of the case points to no Supreme Court decision which grants aliens in the United States fourth amendment rights. Though many times the Court has used fourth amendment analysis for protection of aliens in the United States, such assumptions of protection are not binding. Therefore, the Verdugo decision is not dangerous because of its limited holding; it is dangerous for what it clearly does not hold. It is further dangerous because it implies that when dealing with aliens in the United

115. See supra text accompanying notes 63-66.
116. Verdugo-Urquidez, 110 S. Ct. at 1068 (Stevens, J., concurring) (In a footnote to his opinion, Justice Stevens aptly made the point that the plurality's comment on illegal aliens' entitlement to the fourth amendment was not necessary to resolve this case, and because of such, he refused to join the Court's "sweeping opinion.").
117. See supra text accompanying notes 60-62.
States or abroad, or with United States citizens abroad, United States law enforcement officers may not have any fourth amendment restraints. Conversely, *Verdugo* may also prove to be very fact specific. The Court knew about the torture/murder of Camarena Salazar, and the problems United States law enforcement officials face in their efforts to control drug traffic in this country. Therefore, one must ask if perhaps the *Verdugo* case is a specific exception to a general rule not yet created, one that provides that all have fourth amendment rights unless provided otherwise. Would the Court's decision have been the same if Verdugo-Urquidez were accused of extortion or some other non-violent crime and United States officials had abducted him from his homeland and searched his house without authorization by a neutral magistrate?

The Court is further asking for legislative help for a problem which has serious consequences no matter how it is decided. The Court at the end of its opinion suggested that change must come through the political branches. The political branches must heed this warning lest a line of precedent evolve restricting people's freedom from government intrusion. In fact, the Court should not suggest that a Constitutional protection be regulated by Congress. This is a matter of Constitutional interpretation and should remain exclusively in judicial control. Perhaps the Court could decide cases such as *Verdugo* as an exception to Constitutional guarantees during a time of war, a "war against drugs!" Whichever branch of government chooses to create the policy must do so clearly and quickly. With such uncertainty in such an important field of rights, citizens and aliens alike are uncertain as to what rights against search and seizure, if any, they have.

*Mark Andrew Marionneaux*

118. See supra text accompanying note 59.
119. Using a "War Against Drugs" approach, the Court could gain support from Johnson v. Eisentrager's holding that enemy aliens located outside the United States are not protected by the fourth amendment. This approach would, at least, not erode the fourth amendment protections to the extent decisions such as *Verdugo-Urquidez* will.