

AMERICAN CONSTITUTIONALISM  
VOLUME II: RIGHTS AND LIBERTIES  
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Supplementary Material

Chapter 10: The Reagan Era – Foundations/Scope/Extraterritoriality

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

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*Rene Martin Verdugo-Urquidez, a Mexican citizen, was apprehended by Mexican officials. He was transported to California, where he was arrested by U.S. officials and charged with drug smuggling. Federal agents searched Verdugo-Urquidez's residence in Mexico, where they found evidence supporting the drug charges against him. A federal district court suppressed the evidence on the ground that federal officials did not have a warrant when they searched the Verdugo-Urquidez residence. That decision was sustained by the Court of Appeals for the Ninth Circuit. The United States appealed to the Supreme Court of the United States. Bush administration officials claimed that federal officials acting in foreign countries were not bound by the Fourth Amendment's warrant requirement.*

*The American Civil Liberties Union submitted an amicus brief supporting Verdugo-Urquidez. That brief claimed,*

*Imposition of the warrant requirement for foreign searches serves the same salutary purpose of interposing a judicial officer's objective judgment as it does for domestic searches. If the government can show "exigent circumstances" in a particular case, the warrant requirement can and should be excused, but the government has shown no such circumstances here.*

*The Criminal Justice Legal Foundation filed an amicus brief on behalf of the United States. That brief asserted,*

*Subjecting the search to the Fourth Amendment is both bad policy and bad constitutional law. It is bad law because it infringes upon the primacy of the executive in its conduct of foreign affairs. It is bad policy as it places the judiciary in an area outside of its traditional expertise – foreign affairs.*

*The Supreme Court by a 6–3 vote ruled that federal officials did not violate the Constitution when they searched Verdugo-Urquidez's residence. Chief Justice Rehnquist's majority opinion held that aliens who reside outside the United States have no Fourth Amendment rights. Why did Justice Rehnquist reach this conclusion? Why did Justice Brennan disagree? Did Rehnquist believe that government officials acting abroad must respect any constitutional rights? Did Justice Brennan believe that American police in Paris must obey the same standards as American police in New York? What do you believe are the correct constitutional rules?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. . . . Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. . . . The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable

governmental intrusion. . . . For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico. Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence vel non of the constitutional violation. . . .

The Fourth Amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That text, by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people." . . . "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." . . . 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 or who have otherwise developed sufficient connection with this country to be considered part of that community. . . . The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters. . . . The driving force behind the adoption of the Amendment . . . was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel. . . . The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the *Insular Cases* (1901-22), which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. . . .

Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager* (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. . . .

Respondent urges that we interpret [*Reid v. Covert* (1957)] to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act. But the holding of *Reid* stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. . . . Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.

Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. . . . Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

. . . The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in “searches or seizures.” The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. . . . Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. . . . The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands. But the Court of Appeals’ global view of its applicability would plunge them into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad. . . .

For better or for worse, we live in a world of nation-states in which our Government must be able to “functio[n] effectively in the company of sovereign nations.” . . . Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

JUSTICE KENNEDY, concurring.

. . . The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory. We should note, however, that the absence of this relation does not depend on the idea that only a limited class of persons ratified the instrument that formed our Government. Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it. . . . The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms.

For somewhat similar reasons, I cannot place any weight on the reference to “the people” in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation’s concern over warrantless and unreasonable searches, explicit recognition of “the right of the people” to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it. The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of “the people.”

I take it to be correct, as the plurality opinion in *Reid v. Covert* (1957) sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic. But this principle is only a first step in resolving this case. The question before us then becomes what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations. . . . [W]e must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad. . . .

The conditions and considerations of this case would make adherence to the Fourth Amendment’s warrant requirement impracticable and anomalous. Just as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories because of their “wholly dissimilar traditions and institutions,” the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien. If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment

would apply. But that is not this case. The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country. For this reason, in addition to the other persuasive justifications stated by the Court, I agree that no violation of the Fourth Amendment has occurred in the case before us. The rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case.

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JUSTICE STEVENS, concurring in the judgment.

In my opinion aliens who are lawfully present in the United States are among those "people" who are entitled to the protection of the Bill of Rights, including the Fourth Amendment. Respondent is surely such a person even though he was brought and held here against his will. I therefore cannot join the Court's sweeping opinion. I do agree, however, with the Government's submission 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. I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches. I therefore concur in the Court's judgment.

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

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The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.

What the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The "sufficient connection" is supplied not by Verdugo-Urquidez, but by the Government. Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations," such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.

By concluding that respondent is not one of "the people" protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them. . . .

Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive Government behavior as are United States citizens investigated and prosecuted for the same alleged violations. Indeed, in a case such as this where the Government claims the existence of an international criminal conspiracy, citizens and foreign nationals may be codefendants, charged under the same statutes for the same conduct and facing the same penalties if convicted. They may have been investigated by the same agents pursuant to the same enforcement authority. When our Government holds these codefendants to the same standards of conduct, the Fourth Amendment, which protects the citizen from unreasonable searches and seizures, should protect the foreign national as well.

Mutuality also serves to inculcate the values of law and order. By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. . . .

Finally, when United States agents conduct unreasonable searches, whether at home or abroad, they disregard our Nation's values. For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs. Our national interest is defined by those values and by the need to preserve our own just institutions. We take pride in our commitment to a Government that cannot, on mere whim, break down doors and invade the most personal of places. We exhort other nations to follow our example. How can we explain to others—and to ourselves—that these long cherished ideals are suddenly of no consequence when the door being broken belongs to a foreigner?

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In drafting both the Constitution and the Bill of Rights, the Framers strove to create a form of Government decidedly different from their British heritage. Whereas the British Parliament was unconstrained, the Framers intended to create a Government of limited powers. . . .

Thus, the Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing. . . . The Fourth Amendment, for example, does not create a new right of security against unreasonable searches and seizures. It states that "[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. . . ." The focus of the Fourth Amendment is on what the Government can and cannot do, and how it may act, not on against whom these actions may be taken. Bestowing rights and delineating protected groups would have been inconsistent with the Drafters' fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern. It is thus extremely unlikely that the Framers intended the narrow construction of the term "the people" presented today by the majority.

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The majority's rejection of respondent's claim to Fourth Amendment protection is apparently motivated by its fear that application of the Amendment to law enforcement searches against foreign nationals overseas "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." The majority's doomsday scenario—that American Armed Forces conducting a mission to protect our national security with no law enforcement objective "would have to articulate specific facts giving them probable cause to undertake a search or seizure,"—is fanciful. Verdugo-Urquidez is protected by the Fourth Amendment because our Government, by investigating and prosecuting him, has made him one of "the governed." Accepting respondent as one of "the governed," however, hardly requires the Court to accept enemy aliens in wartime as among "the governed" entitled to invoke the protection of the Fourth Amendment.

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. . . In most cases implicating foreign policy concerns in which the reasonableness of an overseas search or seizure is unclear, application of the Fourth Amendment will not interfere with the Executive's traditional prerogative in foreign affairs because a court will have occasion to decide the constitutionality of such a search only if the Executive decides to bring a criminal prosecution and introduce evidence seized abroad. When the Executive decides to conduct a search as part of an ongoing criminal investigation, fails to get a warrant, and then seeks to introduce the fruits of that search at trial, however, the courts must enforce the Constitution.

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The Warrant Clause cannot be ignored simply because Congress has not given any United States magistrate authority to issue search warrants for foreign searches. . . . Congress cannot define the contours of the Constitution. If the Warrant Clause applies, Congress cannot excise the Clause from the Constitution by failing to provide a means for United States agents to obtain a warrant. . . .

Nor is the Warrant Clause inapplicable merely because a warrant from a United States magistrate could not "authorize" a search in a foreign country. Although this may be true as a matter of international law, it is irrelevant to our interpretation of the Fourth Amendment. As a matter of United States constitutional law, a warrant serves the same primary function overseas as it does domestically: it

assures that a neutral magistrate has authorized the search and limited its scope. The need to protect those suspected of criminal activity from the unbridled discretion of investigating officers is no less important abroad than at home.

When our Government conducts a law enforcement search against a foreign national outside of the United States and its territories, it must comply with the Fourth Amendment. Absent exigent circumstances or consent, it must obtain a search warrant from a United States court. 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. Because we cannot expect others to respect our laws until we respect our Constitution, I respectfully dissent.

JUSTICE BLACKMUN, dissenting.

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