

exist. Criminal defendants and, indeed, the entire criminal justice system, would be well-served by defense attorneys who attack insufficient instructions and force judges to be mindful of the need for more careful instruction.

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FOREIGNERS, FOREIGN PROPERTY, AND THE FOURTH AMENDMENT:
United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

In waging the war against drugs, both in the United States and abroad, law enforcement officials rely heavily on searches to provide evidence to convict suspected drug traffickers and dealers. Within the United States, searches must comply with the Fourth Amendment.¹ Until recently it was unclear to what extent the Fourth Amendment governed searches conducted outside the United States, although at least one court had assumed that when the United States government acted abroad, the Constitution as a whole circumscribed that action.² The Supreme Court's recent decision in *United States v. Verdugo-Urquidez*³ rejects that assumption, holding that the Fourth

1. U.S. CONST. amend. IV:

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.

2. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1217 (9th Cir. 1988) ("[I]ndeed, 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 extraterritorial law enforcement objectives."); *see also*, *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion):

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. 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 country.

The Supreme Court, however, has also clearly rejected the notion that the Constitution has extraterritorial effect in a long line of cases. *See, e.g.*, *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (Fifth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (Sixth Amendment grand-jury provisions inapplicable in the Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (Fifth Amendment jury-trial provisions inapplicable in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (Sixth Amendment provisions on indictment by grand jury and Fifth Amendment jury-trial provisions inapplicable in Hawaii); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Revenue Clauses inapplicable to Puerto Rico).

3. 110 S. Ct. 1056 (1990), *reh'g denied*, 110 S. Ct. 1839 (1990).

Amendment does not apply to the search and seizure by United States agents of a nonresident alien's property on foreign soil.⁴ The holding itself may be heralded because of the impact it may have on the war against drugs generally and the trial of former Panamanian dictator Manuel Noriega specifically. The opinion, however, lacks the theoretical coherence that would make it a useful analytic tool for understanding the nature of the Fourth Amendment.

In January 1986, at the request of American officials, six Mexican police officers apprehended and transferred Rene Martin Verdugo-Urquidez across the border to American hands.⁵ In Calexico, California, United States marshals arrested Verdugo-Urquidez on drug trafficking charges. The following day four United States Drug Enforcement Agency (DEA) personnel searched the suspect's homes in Mexicali and San Felipe, Mexico, for evidence of both narcotics trafficking and involvement in the kidnapping and murder of DEA Special Agent Enrique Camarena.⁶ At the time, Verdugo-Urquidez was not under investigation in Mexico for any crime.⁷

United States agents arrested Verdugo-Urquidez pursuant to a valid United States warrant, but no warrant was issued for the subsequent search of his Mexican homes. In the United States, Verdugo-Urquidez was indicted on forty-one counts of narcotics-related crimes, including conspiracy to import marijuana, possession with intent to distribute tons of marijuana, and engaging in a continuing criminal enterprise.⁸ At trial, Verdugo-Urquidez, a resident and citizen of Mexico, moved to suppress the evidence on the ground that the searches violated his rights under the Fourth Amendment. He maintained that the government did not obtain a warrant and that the searches did not fall within any cognizable exception to the warrant requirement.⁹ The Federal District Court for the Southern District of California agreed and suppressed the evidence, and the Ninth Circuit

4. The facts in *Verdugo-Urquidez* involved three levels of foreignness: (1) the suspect was an alien, (2) the suspect was a nonresident, and (3) the property searched was foreign property on foreign soil. The Court did not make clear whether all three elements were essential to its holding.

5. See 856 F.2d at 1216.

6. See *id.* at 1216-17. In a separate proceeding, Verdugo-Urquidez was convicted of involvement in the murder of Camarena. See 110 S. Ct. at 1059.

7. See 856 F.2d at 1218.

8. See 856 F.2d at 1215.

9. See 110 S. Ct. at 1059.

affirmed.¹⁰

On appeal, however, the Supreme Court reversed by a vote of six-to-three with an opinion authored by Chief Justice Rehnquist.¹¹ Justice Kennedy joined the Court's opinion in a separate concurrence, and Justice Stevens concurred separately in the judgment. Justice Brennan, joined by Justice Marshall, dissented, and Justice Blackmun likewise dissented in a separate opinion.

In its analysis of the applicability of the Fourth Amendment to nonresident aliens, the majority focused on the specific language of the Amendment. The Court noted that the Fourth Amendment extends its protection to "the people," unlike the Fifth and Sixth Amendments, which apply to "any person" and "the accused" respectively. In a brief textual exegesis, the Court maintained that "the people" is "a term of art employed in select parts of the Constitution" that refers only to "a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community."¹²

The Court further analyzed both the legislative history and original applications of the Amendment to argue that the Fourth Amendment only protects the people of the United States against their government. For example, during the undeclared war with France in 1798, Congress and President Adams gave "the same license and authority" to commanders of public armed vessels as the government itself had and instructed these commanders to "subdue, seize and take any armed French vessel" found within the jurisdictional limits of the United States.¹³ The French received no constitutional protection against these searches. The Court thus concluded that

10. *See id.*

11. *See id.* at 1060. The majority included Chief Justice Rehnquist and Justices White, Stevens, O'Connor, Scalia, and Kennedy.

12. *Id.* at 1061.

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."

Id. (emphasis in original). Moreover, the First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble," and Article I provides for election of Representatives from "the People" of the States. *Id.* (emphasis in original).

13. *Id.* (citing 1 Stat. 578, 579).

the Fourth Amendment protects only "the people" of the United States and not nonresident aliens like Verdugo-Urquidez.

Throughout his opinion, Chief Justice Rehnquist argued that at least two criteria must be met before an alien becomes one of "the people." First, the alien must be within the territory of the United States voluntarily, and second, he must have developed substantial connections with this country, also voluntarily.¹⁴ Chief Justice Rehnquist further implied that an alien's presence in the United States must be lawful.¹⁵ Because Verdugo-Urquidez's presence in the United States was lawful but *involuntary* and because he lacked other significant voluntary connections, he was not one of "the people" for purposes of the Fourth Amendment; the Fourth Amendment did not apply to a search of his foreign property.

While denying Verdugo-Urquidez any Fourth Amendment protection, the Court left unclear what would constitute a "significant voluntary connection" sufficient to trigger Fourth Amendment protection for aliens. At one extreme, the requisite significant connections might be full citizenship or at least permanent resident status, but such a standard seems extremely harsh, as it would exclude millions who voluntarily and legally live in or visit the United States. Beyond a suggestion that residency status is *sufficient* to invoke the Fourth Amendment, Chief Justice Rehnquist provided little guidance on what a meaningful minimum threshold for significant connections would be.¹⁶

Is residency status the minimum connection or would a less significant tie suffice? Does the Fourth Amendment apply to an alien with largely inchoate connections, but who is lawfully,

14. *See id.* at 1064. *But see id.* at 1070 n.5 (Brennan, J., dissenting):

None of the cases cited by the majority[] require an alien's connections to the United States to be 'voluntary' before the alien can claim the benefits of the Constitution Furthermore, even if a voluntariness requirement were sensible in cases guaranteeing certain governmental benefits to illegal aliens, it is not a sensible requirement when our Government chooses to impose our criminal laws on others.

(Citations omitted).

15. *See id.* at 1064 ("But this sort of presence—lawful but involuntary—is not the sort to indicate any substantial connection with our country.").

16. *See id.* The dissent noted the majority's ambiguity over what connections are sufficient to invoke the Fourth Amendment by citing four possible substantive standards intimated in the majority opinion: (1) substantial connections, (2) voluntary presence, (3) societal obligations, or (4) possession of property in the United States. *See* 110 S. Ct. at 1070 (Brennan, J., dissenting).

voluntarily, and permanently present in the United States? If an alien earns money in the United States through a job or through investments and therefore pays taxes, would those activities meet the significant connections standard? Is a sightseeing foreign tourist with no intentions of becoming part of the people protected against unreasonable searches and seizures? Because of both its imprecision and its inherent malleability, the significant-connections standard poses more questions than it answers.

In denying the similarity between Verdugo-Urquidez and several other instances where aliens have been granted constitutional protection,¹⁷ the Court relied upon its new requirement of a significant voluntary connection. None of the cases the majority cited, however, actually stated that an alien must have significant voluntary connections with the people of the United States to claim any constitutional protection.¹⁸ For example, *Plyler v. Doe* explicitly stated that even if an alien enters this country illegally, her presence is, in and of itself, sufficient to invoke the Due Process Clause of the Fourteenth Amendment.¹⁹ *Yick Wo v. Hopkins* applied the Fourteenth Amendment universally "to all persons within the territorial jurisdiction" of the United States.²⁰ *Wong Wing v. United States* held that "all persons within the territory of the United States" receive the protection of the Fifth and Sixth Amendments.²¹ Although these cases apply constitutional protections to resident aliens, it is clear that personal presence within American territory, not the nature of alienage or residency, is what triggers the protec-

17. See 110 S. Ct. at 1064 (citing *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (resident alien is "person" for purposes of Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment applies to aliens); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Fifth and Sixth Amendments apply to resident aliens); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Fourteenth Amendment protects resident aliens)).

18. In his concurring opinion, Justice Kennedy argued that no matter to whom the property belongs, the "full protections of the Fourth Amendment" apply if the search is conducted in the United States. Justice Kennedy's analysis avoids the problems of applying the significant connections test to aliens—resident and nonresident, legal and illegal—by stating that the Fourth Amendment applies to all property in the *United States*. See 110 S. Ct. at 1067-68 (Kennedy, J., concurring).

19. See *Plyler*, 457 U.S. 202, 215 (1981). In recognizing the due process and equal protection rights of illegal aliens, *Plyler* held that illegal alien children in Texas could not be excluded from public schools.

20. *Yick Wo*, 118 U.S. 356, 369 (1886).

21. *Wong Wing*, 163 U.S. 228, 238 (1896).

tions involved. Of course, residency status heightens the significant connections between an alien and the American community, but in the past the Court has not made that connection the basis for granting constitutional protection.²² Indeed, after imparting crucial substance to the semantic distinction between a "person" and "the people," Chief Justice Rehnquist surprisingly drew the Fourth Amendment significant-voluntary-connections test from discussions of other amendments that do grant protections to persons rather than to the people.²³

Chief Justice Rehnquist's bifurcation of the Fourth Amendment standard into (1) presence within American territory and (2) significant connections with the American people seems an attempt to avoid the problem that Verdugo-Urquidez was in fact within the territorial jurisdiction of the United States at the time the search of his Mexican residences took place. If the standard for Fourth Amendment protection were presence within the United States alone, Verdugo-Urquidez would qualify for that protection. Chief Justice Rehnquist argued that application of the Fourth Amendment to a nonresident alien's property should not turn on the fortuity "of whether the custodian of [a] nonresident alien owner had or had not transported [the nonresident alien] to the United States" at the time of the search.²⁴

While making application of the Fourth Amendment less "fortuitous" for nonresident aliens whose property is searched abroad and who may or may not be transported to the United States, the significant-connections standard makes the application of Fourth Amendment protections to other aliens extremely fortuitous. The need for significant connections may legitimate searches of aliens who are legally and voluntarily within the United States but whose connections to "the people" are as limited as those of Verdugo-Urquidez because of the timing or nature of their entry or the search itself—camera-toting tourists, for example. Thus, the significant-connections

22. Two cases cited by the Court, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) and *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), suggest obliquely that residency rather than mere presence may be important for some constitutional protections. See *supra* note 17. But see *Matthew v. Diaz*, 426 U.S. 67, 77 (1976) (explicitly rejecting the idea that an alien must have sustained connections before receiving constitutional protection).

23. See 110 S. Ct. at 1064.

24. *Id.*

requirement overcomes fortuity of presence for nonresident aliens seized abroad only through reliance on circumstances that are equally fortuitous for aliens voluntarily present in the United States.

The implied third requirement—that the defendant also be *lawfully* present in the United States—poses yet another problem for aliens voluntarily present in the United States, even if they meet the vague significant-connections test. The boundary between the applicability and inapplicability of Fourth Amendment protections remains clouded. Although Fourth Amendment protection for illegal aliens was not the issue directly in front of the Court in *Verdugo-Urquidez*, the reasoning in *Verdugo-Urquidez* casts doubt on the assumption that illegal aliens are entitled to Fourth Amendment protection. By emphasizing that *Verdugo-Urquidez* was lawfully present in the United States,²⁵ Chief Justice Rehnquist implied that legal presence may be a prerequisite for Fourth Amendment protection. The Court of Appeals had relied heavily on *INS v. Lopez-Mendoza*²⁶ for its decision that the evidence seized against *Verdugo-Urquidez* must be suppressed. In *Lopez-Mendoza*, the Supreme Court had assumed that Fourth Amendment rights apply to aliens illegally present in the United States in the course of deciding whether the exclusionary rule extends to civil deportation proceedings.²⁷ Chief Justice Rehnquist, however, pointed out that a mere assumption in one case is not binding on future decisions.²⁸

Even if the assumption of Fourth Amendment protection for illegal aliens were binding, the majority distinguished *Verdugo-Urquidez*'s situation. Illegal aliens who are voluntarily present in the United States presumably have accepted some significant "societal obligations." Under the Chief Justice's reasoning, *Verdugo-Urquidez*'s presence in a San Diego jail was neither voluntary nor significant and therefore was insufficient to invoke the Fourth Amendment for a search of his Mexican property.

Putting aside the theoretical difficulties and ambiguities in the Court's standard, a further practical question remains: How

25. *See id.*

26. 468 U.S. 1032 (1984) (exclusionary rule does not apply in a deportation proceeding).

27. *See id.* at 1034.

28. *See* 110 S. Ct. at 1065.

does a government agent ascertain the legality of an individual's status before a search begins? The potential for discrimination against ethnic and immigrant groups with large illegal populations is significant. If the Fourth Amendment does not apply to illegal aliens, police will have a disincentive to observe the Fourth Amendment rights of ethnic populations as a whole. Without some type of initial intrusion—checking birth certificates or green cards—it is extremely difficult if not impossible to distinguish among citizens, legal aliens, and illegal aliens, much less those persons with “significant connections” to the people of the United States. Searches could either become a means to harass ethnic populations or be stymied in their inception.

The Verdugo-Urquidez reasoning will certainly influence United States government conduct abroad.²⁹ The majority refused to apply the Fourth Amendment to searches of aliens abroad for fear of disrupting the ability of the executive and legislative branches to respond adequately to “foreign situations involving our national interest.”³⁰ Because modern nation-states must be able to function effectively outside their own borders, sometimes through military force, any restrictions on the extraterritorial operations of the United States government, the Court reasoned, should be imposed by the two political branches themselves.³¹ The search of Verdugo-Urquidez's homes, however, did not occur in anything like a military operation, when one might argue that political questions dominate and that the Fourth Amendment is inapplicable.³² Indeed, the Court's statement on this point appears to be a reference to the invasion of Panama, a full-scale military operation hardly analogous to the present case, in which United States military personnel searched the headquarters of Manuel Noriega pursuant to deposing him and seized evidence of his

29. See *N.Y. Times*, Mar. 5, 1990, at A14, col. 1 (editorial) (analogizing the decision to gunboat diplomacy and viewing it as detrimental to America's reputation for justice).

30. 110 S. Ct. at 1065.

31. See *id.* at 1066:

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.

32. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (articulating standards for application of the political question doctrine).

drug-trafficking activities. The *Verdugo-Urquidez* decision thus clears the way for the use of that evidence against Noriega, but at the cost of distorting analysis of the immediate case.

The difficulty of sustaining the significant-connections test as a coherent theory of Fourth Amendment protection becomes apparent when applied beyond the specific facts of this case. The Court appeared unwilling to say that Fourth Amendment protection is a benefit of citizenship. At the same time, however, the Court refused to recognize Fourth Amendment guarantees as applicable to all individuals as a matter of natural right. Rather, the significant-connections test is an apparent compromise between these polar conceptions of citizenship-related rights on the one hand and natural rights on the other. The Court wholly failed to explain the theory, however, or the principle behind this compromise.

Whatever the specific reasoning in *Verdugo-Urquidez* means for theoretical understandings of the Fourth Amendment, it seems unlikely that the Court will refuse to grant the Amendment's protections to illegal aliens or other persons voluntarily present in the United States. The holding in *Verdugo-Urquidez* depends on facts specific to the case: the defendant's nonresident alien status and the location of the property abroad. Although the Court did not explicitly rely on the point, this "triple foreignness" of nonresidency, alien status, and foreign property appears to form the intuitive basis for its holding.³³

In his concurrence, Justice Kennedy suggested a less disruptive standard for application of Fourth Amendment protections. Although Justice Kennedy did not view his concurrence as differing in fundamental respects from the analysis of the majority,³⁴ his analysis is much more cogent and practical. Under his view, location of the property on American soil and general principles of constitutional interpretation—rather than the identity of the defendant as one of "the people"—control applicability of the Fourth Amendment.

As Justice Harlan noted, concurring in *Reid v. Covert*, all the provisions of the Constitution do not automatically apply in all foreign locations in all circumstances, even for American citi-

33. See *supra* note 4.

34. See *id.* (Kennedy, J., concurring) ("Although some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the court, which I join.").

zens; often there are conditions "that would make adherence to a specific guarantee altogether impracticable and anomalous."³⁵ When United States government agents operate abroad, the need to cooperate with the officials of another sovereign state, the absence of judges and magistrates to issue warrants, and the different notions of privacy and reasonableness all may make application of the Fourth Amendment's warrant requirement impracticable and anomalous.³⁶ Justice Kennedy insisted that Verdugo-Urquidez would have benefited from the Fourth Amendment if the property searched had been within United States territory: "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."³⁷ In the United States, none of the relevant impracticable and anomalous conditions would have existed. With its evident simplicity, Justice Kennedy's "situs" standard harbors none of the practical difficulties and malleability of the majority's significant-connections test.

Though Justice Kennedy's "situs" standard is eminently practical (unlike that of the majority), his analysis is equally troubling theoretically. Under his view, Fourth Amendment protection is implicitly a property right rather than a right vested in the individual. Given prior Fourth Amendment decisions of the Court and the history of the Bill of Rights generally, viewing Fourth Amendment protections as essentially a property-based seems untenable.³⁸

Justice Stevens, concurring only in the judgment, argued that Verdugo-Urquidez should receive protection against unreasonable searches because he was lawfully present in the United States, the involuntary nature of his presence notwithstanding. Still, Justice Stevens concurred in the final judgment.³⁹ The evidence seized against Verdugo-Urquidez was admissible, he argued, because the search was "reasonable" under the

35. 110 S. Ct. at 1067 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

36. See 110 S. Ct. at 1068 (Kennedy, J., concurring).

37. *Id.* at 1067-68 (Kennedy, J., concurring).

38. See *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited."); *Katz v. United States*, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people, not places.") (extending the Fourth Amendment to the recording of oral statements).

39. See *id.* at 1068 (Stevens, J., concurring in the judgment).

circumstances and because the Warrant Clause should not apply where American magistrates have no power to authorize searches.⁴⁰

Justice Stevens's analysis is pragmatic, at least in terms of the Warrant Clause. Because American magistrates have no power to issue warrants for searches on foreign soil, warrants cannot be the mechanism for protecting Fourth Amendment rights. Although he accepted this particular search as reasonable under the circumstances, Justice Stevens failed to articulate what made the search reasonable. He denied the applicability of the traditional mechanism for guaranteeing reasonableness—the warrant process—without offering a replacement, thereby limiting the usefulness of his opinion as an analytic guide for the future.

In contrast, Justice Brennan's dissent argued that even by the majority's questionable standard of significant connections, Verdugo-Urquidez should receive Fourth Amendment protection.⁴¹ The defendant's connection to the United States, which is undeniably significant in Justice Brennan's mind, is his indictment for violation of American criminal law: "[T]he 'sufficient connection' is supplied not by Verdugo-Urquidez, but by the Government [itself]."⁴² Because the United States government has treated him as "one of the governed" for purposes of enforcing American law, he should receive constitutional protections.⁴³

Interpreting significant connections in this manner would provide Fourth Amendment protection to all persons whom the United States government chose to indict and thus would create mutuality of law. The law would bind American officials as they sought to impose American law on aliens. As Justice Brennan explained, "[T]he Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law," whether that enforcement occurs in the United States or abroad.⁴⁴ Because of this argument for mutuality of law, Justice Brennan ultimately rejected the notion that the Fourth Amendment applies only to "the people" of the United States

40. *See id.* (Stevens, J., concurring in the judgment).

41. *See id.* at 1070. (Brennan, J., dissenting). Justice Brennan was joined by Justice Marshall. Justice Blackmun dissented separately.

42. *Id.* (Brennan, J., dissenting).

43. *Id.* (Brennan, J., dissenting).

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

or to those who have significant voluntary connections with them. The Bill of Rights, in Justice Brennan's conception, dictates how and what the government may do, not against whom the government may act.⁴⁵

In responding to the majority's concern that applying the Fourth Amendment abroad would impede the political branches in protecting national security, Justice Brennan differentiated Verdugo-Urquidez from enemy aliens in times of war. Granting Fourth Amendment protection in this case would not mean that enemy aliens in wartime would have to receive the same protection.⁴⁶ Moreover, when sensitive searches abroad involve national security, exigent circumstances could be used to excuse the warrant requirement.

Justice Brennan thus comes closest to a natural-rights view of the Fourth Amendment. In contrast to all the other approaches, Justice Brennan argued not only that protection against unreasonable searches applies abroad, but also that the Warrant Clause applies abroad. The Warrant Clause serves the same purpose abroad as it does at home: It interposes a neutral magistrate, who defines and limits a search, between zealous law enforcement and individual privacy. Although Congress has not granted United States magistrates the authority to issue search warrants for foreign searches,⁴⁷ Justice Brennan insisted that "Congress cannot excise the [Warrant] Clause from the Constitution by failing to provide a means for United States agents to obtain a warrant."⁴⁸

Finally, Justice Blackmun argued in dissent that the Fourth Amendment applies to Verdugo-Urquidez because he is essentially one of the governed, given that he is being tried for violations of United States law.⁴⁹ In this respect, he agreed with Justice Brennan. Because neither the District Court nor the Court of Appeals addressed the reasonableness of the search, however, Justice Blackmun would have vacated the judgment of the Court of Appeals and remanded for a judgment on reasonableness.⁵⁰ Justice Blackmun agreed with Justice Stevens that

45. *See id.* at 1073 (Brennan, J., dissenting). Like the majority, Justice Brennan analyzed historical data and legislative intent to support his point.

46. *See id.* at 1075 (Brennan, J., dissenting).

47. *See* FED. R. CRIM. P. 41(a).

48. 110 S. Ct. at 1070 (Brennan, J., dissenting).

49. *See id.* at 1078 (Blackmun, J., dissenting).

50. *See id.* (Blackmun, J., dissenting).