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The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive *United States v. Verdugo-Urquidez*?[1]

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> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of . . . power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[3]

I. INTRODUCTION

With increasing frequency, federal law enforcement activities have transcended national boundaries. In an attempt to curb the international drug trade and combat international terrorism, the United States government has fought both of these battles with a broad arsenal of weapons, combining traditional law enforcement tools with a plethora of foreign policy tools.

To illustrate, during the past six years the United States intercepted a jet carrying Palestinian terrorists who had hijacked a cruise ship;[4] it bombed

1. 110 S. Ct. 1056 (1990).

2. Associate Professor of Law, University of Oklahoma College of Law. B.A. 1981, J.D. 1984, University of Texas. I would like to thank Harry F. Tepker, Jr. for his review and comments of an earlier draft. Additionally, I would like to thank William Wallo for his research assistance.

3. United States v. Robel, 389 U.S. 258, 264 (1967).

4. *See* N.Y. Times, Oct. 11, 1985, at 1A, col. 2.

Libya in response to a terrorist act committed in West Germany;[5] it has contemplated increasing the military's role in the war on drugs;[6] it has "kidnapped" a foreign national to bring him to trial in the United States;[7] and it has used its criminal laws to bring international defendants to trial.[8] The distinction between international law enforcement activities and the conduct of foreign policy often becomes blurred. The December 1989 United States military operation in Panama provides a poignant, though not necessarily representative, example.[9]

International law enforcement activities by agents of the United States government place the fourth amendment's protection against unreasonable searches and seizures at odds with the political branches' constitutionally derived plenary power to conduct foreign affairs. The United States Supreme Court partially resolved this tension recently. In *United States v. Verdugo-Urquidez*,[10] the Court concluded that the fourth amendment did not apply to an extraterritorial search of an alien defendant's home.[11]

Inexplicably the Court, *sua sponte*, opened a question, long assumed closed, concerning whether the fourth amendment protected illegal aliens from unreasonable domestic searches and seizures.[12] This dicta also raises questions concerning the applicability of the fourth amendment to aliens lawfully within the United States, especially those aliens whose affinity toward the United States is more attenuated than that of a permanent resident alien. This Article will focus on the domestic implications of *Verdugo-Urquidez*. A brief overview of the fourth amendment will be the focus of Part II. Part III

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5. *See* N.Y. Times, April 15, 1986, at 2A, col. 2.

6. *See* N.Y. Times, July 2, 1989, at 1A, col. 3.

7. *See* United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990). In *Caro-Quintero*, defendant was accused of participating in the murder of Drug Enforcement Administration Special Agent Enrique Camarena-Salazar. *Id.* at 601. The district court concluded that the defendant had been arrested in violation of an extradition treaty with Mexico. *Id.* at 609. Therefore, he had to be returned to Mexico. *Id.* at 614.

8. *See, e.g.*, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990). Several United States laws have extraterritorial reach. *See, e.g.*, 21 U.S.C. § 959(c) (Supp. 1990) (prohibiting the manufacture, distribution, or possession of a controlled substance for purposes of unlawful importation); 18 U.S.C. § 2331 (Supp. 1990) (unlawful to commit terrorists acts against United States nationals abroad).

9. The objectives of American troop deployment were "to safeguard American lives, restore democracy, preserve the Panama Canal treaties, and *seize General Noriega to face federal drug charges in the United States.*" United States v. Noriega, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990) (emphasis added).

10. 110 S. Ct. 1056 (1990).

11. *Id.* at 1066.

12. *See id.* at 1064-65.

of the Article will review the seven appellate opinions in *Verdugo-Urquidez,* two in the Ninth Circuit and five in the Supreme Court. In Part IV of this Article, I will argue that fourth amendment protection should apply to aliens, regardless of their immigration status, when agents of the government conduct a domestic search. Any other result would undermine a long line of precedent holding that when the government's purely domestic police powers are implicated, all aliens receive the same protections from the Bill of Rights as citizens.[13]

II. OVERVIEW OF THE FOURTH AMENDMENT

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 person or things to be seized.[14]

The fourth amendment enjoins unwarranted governmental intrusion into the private lives of people.[15] The importance of this right was underscored when it was selectively incorporated into the fourteenth amendment. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the fourth amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[16] For the last three decades, this amendment has been the subject of more litigation than any other provision in the Bill of Rights.[17] The litigation arises, in large part, because of the amorphous nature of the words chosen. Since the fourth amendment does not

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13. *See infra* text accompanying notes 122-147. I make no attempt in this Article to discuss how the fourth amendment should apply where the United States' foreign affairs powers are implicated; the discussion here is limited to the fourth amendment as it applies to aliens in the traditional law enforcement arena.

14. U.S. CONST. amend. IV. This section of the Article treats the fourth amendment in perfunctory fashion. For a complete analysis of this amendment, see W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987).

15. *See, e.g.,* Weeks v. United States, 232 U.S. 383, 391-92 (1914).

16. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The Due Process Clause "exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty.'" *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

17. *See* W. LAFAVE, *supra* note 14, at IX.

prohibit all searches and seizures, only "unreasonable" ones, the courts are faced with the task of determining reasonableness. The reasonableness of a search "is judged by balancing its intrusion on the individual's fourth amendment interests against its promotion of legitimate governmental interests."[18]

The balance normally requires the government to follow the procedures set forth in the amendment's warrant clause.[19] The Court has recently readjusted the scales in favor of the government when the government exhibits "special needs, beyond the normal need for law enforcement."[20] Commentators have suggested that the vitiation of the fourth amendment's "probable cause" and "warrant" requirements reflects the prominence of the "war on drugs" being waged in this nation.[21]

Until *Verdugo-Urquidez,* courts have uniformly assumed that the domestic application of the fourth amendment protected aliens in the same fashion as citizens.[22] Courts have not suggested that domestic searches of aliens present "special needs" counseling restraint in applying the fourth amendment with full force to those searches. Nor can the government persuasively articulate any legitimate reason for treating domestic searches of aliens differently than similar searches of citizens, at least in the context of a criminal investigation.

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18. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979).

19. *See, e.g.,* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

20. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Several recent cases indicate a general retreat from the warrant and probable cause requirements. *See id.* at 878 (search of probationer's home without probable cause justified by "the deterrent effect of the supervisory arrangement"); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (search of government employee's desk and office justified by "the efficient and proper operation of the workplace"); and New Jersey v. T.L.O., 469 U.S. 325, 343 (1985) (school official's search of student property justified by need to maintain "order in the schools"). *See also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989) (blood, urine, and breath test justified by "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety").

21. *See* Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights,* 38 HASTINGS L.J. 889 (1987).

22. *See, e.g.,* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (in holding the exclusionary rule inapplicable in civil deportation hearing, the Court assumed that the fourth amendment protected illegal aliens); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (marijuana conviction of Mexican citizen having a United States work permit reversed because of fourth amendment violation); Abel v. United States, 362 U.S. 217 (1960) (in holding that search was a proper administrative search, the court assumed that alien protected by fourth amendment).

III. *UNITED STATES V. VERDUGO-URQUIDEZ*

A. The Facts

Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, is believed to be a leader in a large and violent organization that smuggles drugs into the United States.[23] In August of 1985, the United States Government obtained a warrant for his arrest on various narcotics charges. In January 1986, Mexican police officers apprehended him and transported him to the United States border where he was taken by U.S. marshals to a prison in Southern California to await trial on drug charges.[24] Subsequent to the arrest, the U.S. Drug Enforcement Agency (DEA) initiated an attempt to search Verdugo-Urquidez's two residences in Mexico.[25] With approval from and the assistance of tne Mexican Federal Judicial Police, the DEA searched his two residences, uncovering a tally sheet allegedly tallying the quantities of marijuana smuggled by Verdugo-Urquidez into the United States.[26] In Verdugo-Urquidez's drug trial, the district court granted defendant's motion to suppress evidence obtained in the searches, concluding that defendant's fourth amendment rights were violated by the DEA agents.[27] A Ninth Circuit panel affirmed, with one dissent.[28] In a 6-3 decision, the Supreme Court reversed, concluding that the fourth amendment did not apply to a search of an alien's residence outside the United States.[29]

B. The Ninth Circuit Opinions

The split in the Ninth Circuit occurred over the nature of the Constitution's formation, and the rights emanating from the end product. The majority held that the fourth amendment's safeguard against unreasonable searches and seizures derived from the "natural rights" of human kind thus deserving universal applicability.[30] The dissent viewed the Constitution as a "social compact" between the "people" and the government by which the people ceded to the government certain rights in order to secure other rights;

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

24. *Id.* Verdugo-Urquidez was also charged and subsequently convicted in the murder of a Drug Enforcement Agent. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

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

30. *Verdugo-Urquidez*, 856 F.2d at 1219-20.

therefore, only those that ceded rights could claim the government's protection of the rights retained.[31] The Ninth Circuit opinion is discussed in detail because that court articulated positions taken only subtly by the Supreme Court.

The majority rejected the "compact theory" as a basis for limiting fourth amendment rights.[32] The compact theory was irrelevant to the court's analysis for three reasons: 1) history indicates that the Bill of Rights recognized that certain rights are inalienable; 2) the Supreme Court cases discussing the compact theory all involved unique questions of federalism and thus do not provide guidance to questions concerning the extraterritorial reach of the Constitution; and 3) Supreme Court precedent has extended constitutional protection to aliens who supposedly fall outside any social contract.[33]

Weaving two strands of Supreme Court precedent together, the majority concluded that the fourth amendment applies to extraterritorial searches of an alien's residence when the alien is in the United States. Relying on cases involving the rights of citizens, the majority noted that the Constitution operates to restrain some extraterritorial action by the United States government.[34]

The court also read previous Supreme Court decisions as establishing first, fifth, sixth, and fourteenth amendment protection for aliens, including those illegally in the United States.[35] The court could see no reason why the fourth amendment protection should not also benefit aliens who were present in the United States, *albeit,* involuntarily.[36] To support its position, the Ninth Circuit relied on *INS v. Lopez-Mendoza*[37] for support, suggesting that eight out of nine Supreme Court Justices recognized that illegal aliens are cloaked with fourth amendment protection.[38] "Consequently, it seems absurd to grant the protection of the fourth amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez,

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31. *See id.* at 1233 (Wallace, J., dissenting).

32. *Id.* at 1219.

33. *Id.* at 1219-24. For a further discussion of the Constitutional rights of aliens, see *infra* text accompanying notes 98-150.

34. *See Verdugo-Urquidez,* 856 F.2d at 1218 (citing Reid v. Covert, 354 U.S. 1 (1957); Balzac v. Puerto Rico, 258 U.S. 298 (1922)). As the dissent points out, the cases extending the Constitution beyond the borders of the United States have given only *citizens* constitutional protection abroad. *See id.* at 1230-31 (Wallace, J., dissenting).

35. *Id.* at 1222. *See, e.g.,* Plyler v. Doe, 457 U.S. 202, 211 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

36. *Verdugo-Urquidez,* 856 F.2d at 1223.

37. 468 U.S. 1032 (1984).

38. *Verdugo-Urquidez,* 856 F.2d at 1223.

whose presence in the United States, although legal, is plainly involuntary."[39] In this conclusion, the court ignores or overlooks the fact that although the defendant is involuntarily residing in the United States, the search, and consequently, the alleged violation of the fourth amendment took place in Mexico.[40]

The court went on to hold that the searches of Verdugo-Urquidez' residences were conducted by U.S. officials in violation of the fourth amendment because no warrant had been issued and no exception to the warrant requirement was present.[41]

Judge Wallace dissented in the Ninth Circuit with a lengthy and fairly persuasive opinion. He stated:

> The reasoning by which the majority reaches this result is severely flawed. From one line of Supreme Court cases establishing that American *citizens* have constitutional rights abroad and another line holding that aliens in the United States are entitled to constitutional safeguards against certain actions taken by our officials *in this country,* the majority, without explanation, arrives at the conclusion that a *foreign national* residing in a *foreign country* is entitled to fourth amendment rights against actions taken by our officials *on foreign soil.*[42]

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39. *Id.* at 1224.

40. Early in the opinion, the majority establishes that the Constitution applies in some form beyond the territorial jurisdiction of the United States, but the court never returns to this issue to analyze whether the fourth amendment applies abroad where an alien with an attenuated affiliation with United States seeks its protection.

41. *Verdugo-Urquidez,* 856 F.2d at 1230.

42. *Id.* at 1230-31 (emphasis in original). Judge Wallace's criticism of the court's oscillation between examining an alien's constitutional rights within the boundaries of the United States and the extraterritorial application of the Constitution to protect citizens evokes an image created by Professor Leon Lipson's analysis of Justice Cardozo's opinion in Alleghany College v. National Chautauqua Co. Bank, 246 N.Y. 369, 159 N.E. 173 (1927) concerning the application of promissory estoppel and consideration. *See* Lipson, *The Allegheny College Case,* 23 YALE L. REP. No. 3, at 11 (1977). To paraphrase Professor Lipson's image:

> When we look at the oscillation of argument in the opinion, we are reminded of another image, one that was suggested one hundred and fifty years before the Verdugo-Urquidez case by that odd and engaging logician, Richard Whately, sometime later to be Archbishop of Dublin. Judge Thompson goes from the extraterritorial application of the Constitution to its territorial application with respect to aliens and back and forth again to victory for Verdugo-Urquidez. Whenever his arguments emphasizing the extraterritorial application of the Constitution runs thin, he moves on to territorial protection afforded aliens; whenever his hints in favor of territorial protection of aliens approach the edge of becoming a committed

Unlike the majority, Judge Wallace sees no inconsistency between a "natural rights" view of the Constitution and a "compact theory." While certain rights exist in the state of nature, when a civilization forms a constitutional compact, the people "[g]ive up some degree of liberty in order for them to secure others in return."[43] Thus the ones who benefit from the Constitution's protection are those who have relinquished some of their natural liberty for the good of the whole.[44]

While recognizing that an alien's right to constitutional protection increases as the alien takes on increasingly more of the burden of affiliation with the United States, the dissent looks at the "locus of governmental action" to determine what rights to grant a foreign national, such as Verdugo-Urquidez, with only a tenuous relationship with the United States.[45] Judge Wallace concluded that Verdugo-Urquidez is entitled to fifth and sixth amendment trial rights, but not fourth amendment protection because the violation occurred extraterritorially at the time of the search and not in the United States at the time the evidence is presented at trial.[46]

Suggesting that where agents of the United States conduct themselves abroad in such a manner as to shock the conscience, the fifth amendment due process clause might compel exclusion of evidence obtained while engaged in such conduct, Judge Wallace concluded that this theory was inapplicable in *Verdugo-Urquidez* because the agents' action did not shock the conscience.[47] Finally, Judge Wallace rejected the district court's finding that it

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> ground of decision, he veers off in another direction. Arguments that oscillate in this way, repeatedly promoting each other by the alternation, call to mind Whately's simile of "the optical illusion effected by that ingenious and philosophical toy called the Thaumatrope: in which two objects are painted on opposites sides of a card— for instance, a man and a horse, [or] — a bird and a cage"; the card is fitted into a frame with a handle, and the two objects are, "by sort of rapid whirl [of the handle], presented to the mind as a combined in one picture — the man *on* the horse's back, the bird *in* the cage."
>
> Now what were the objects painted on the opposite sides of Judge Thompson's Thaumatrope? His trouble was that on the extraterritorial side he had a shaky rule but solid facts; on the territorial side he had a solid rule but shaky facts. He twirled the Thaumatrope in order to give the impression that he had solid facts fitting a solid rule. Some lawyers think that what emerges instead is a picture of a bird on the horse's back.

Id.

43. *Verdugo-Urquidez*, 856 F.2d at 1233.
44. *Id.*
45. *Id.* at 1240.
46. *Id.* at 1239.
47. *Id.* at 1245.

possessed inherent power to devise an exclusionary rule to ensure proper police conduct. This is especially true in the area of international relations where the Constitution allocates most of the power to the political branches of the government.[48]

C. *The Supreme Court Opinions*

The Supreme Court reversed the Ninth Circuit in a 6-3 decision, in which three distinct views emerged. Five members of the majority held the fourth amendment was not violated by this search of an alien's residence in a foreign country.[49] Four Justices thought that the fourth amendment applied to such searches but only two would apply the warrant clause.[50] Justice Stevens, who thought the fourth amendment applied but not the warrant clause, sided with the majority because he concluded that the search was "not unreasonable as that term is used in the first clause of the Amendment."[51] Justice Blackmun, who, like Justice Stevens, thought the fourth amendment applied but not the warrant clause, dissented and would have remanded the case to determine if the American agents had probable cause to conduct the search, in accord with the fourth amendment.[52]

Although the Court refrained from repeating the Ninth Circuit's overly simplistic discussion of the "natural rights" versus "compact theory" dichotomy, strains of those arguments clearly run through the majority opinion written by Chief Justice Renhquist and the main dissenting opinion written by Justice Brennan. The majority refused to extend fourth amendment protection to Verdugo-Urquidez upon reviewing the textual language of the Constitution, the history of the fourth amendment's development, the history of early searches and seizures in international waters, and the court's precedent. The focus of Rehnquist's opinion vacillated between the locus of the governmental intrusion and the nature of the defendant's relationship with the United States.[53] Reading the opinion as a whole, it is unclear whether the Court's

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48. *Id.* at 1248.

49. *Verdugo-Urquidez,* 110 S. Ct. at 1059. Four of the Justices explicitly concluded that the fourth amendment was inapplicable. The fifth, Justice Kennedy concurred holding the fourth amendment inapplicable on narrower grounds than the other four.

50. *Id.* at 1068 (Stevens, J., concurring); *id.* (Brennan, J., joined by Marshall, J., dissenting); and *id.* at 1077 (Blackmun, J., dissenting).

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

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

53. Hereafter, arguments based on the location of the government's action will be referred to as "locus determinative", and arguments based on the alien's relationship with the United States will be referred to as "affinity determinative."

holding rested upon the extraterritoriality of the search or the defendant's tenuous association with the United States. Most likely, the opinion reflects some interrelationship between these two vital elements.

The Court offered several reasons why the *locus* of the United States' governmental action determined the applicability of the fourth amendment. Precedents, the Court concluded, had foreclosed the possibility that "[e]very constitutional provision applies wherever the United States Government exercises its power."[54] Support for this proposition was drawn from three distinct lines of cases. The *Insular Cases* limited the constitutional protection granted to inhabitants of the United States' insular possessions.[55] Similarly, the right to a writ of habeas corpus did not extend to an enemy alien imprisoned in Germany.[56] Finally, the Court distinguished *Reid v. Covert*,[57] which held that fifth and sixth amendment protection applied in criminal trials abroad, on the basis that the defendants in *Reid* were citizens.[58]

In an attempt to glean the framers' intent, the Court took an historical perspective, looking at international searches and seizures by the United States around the time of the fourth amendment's ratification. Pointing out that Congress had authorized the seizure of French vessels in international waters in 1798 without any suggestion that the fourth amendment applied to such seizures, the Court concluded that there was no indication that those in power around the time the amendment was ratified ever intended it to apply to foreigners outside of the United States.[59]

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54. *Id.* at 1062 (majority opinion).

55. *Id. See, e.g.*, Balzac v. Puerto Rico, 258 U.S. 298 (1922) (fifth amendment right to trial by jury inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (provision of sixth amendment regarding grand juries inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (fifth amendment jury provision not applicable in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury indictment and jury trial provision not applicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (Constitution's revenue clauses inapplicable in Puerto Rico).

56. *Verdugo-Urquidez*, 110 S. Ct. at 1063. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950).

57. 354 U.S. 1 (1957).

58. The Court not only refused to expand the *Reid* holding to cloak Verdugo-Urquidez with fourth amendment protection, it hinted that not all constitutional protection apply to United States citizens subject to criminal investigations and prosecutions abroad. The Court stated that "[t]he concurring opinions by Justices Frankfurter and Harlan in *Reid* resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protection in all overseas criminal prosecutions." *Verdugo-Urquidez*, 110 S. Ct. at 1063.

59. *Id.* at 1061.

The fourth amendment's reach is not determined solely by the locus of the search; it is also *affinity* determinative, depending on the defendant's relationship with the United States. Noting that in contrast to the fifth and sixth amendments, which refer to "person" and "accused," the fourth amendment, like the first, second, ninth and tenth amendments, refers to "the people."[60] "While this textual exegesis is by no means conclusive, it suggests that 'the people' . . . 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."[61] Although the majority did not refer specifically to the Constitution as a compact between the governed and the state, its reading of the text and the history of its drafting lend support to the "compact theory." For instance, the majority states that "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."[62]

Likewise, the Court distinguished a host of cases holding that aliens have some constitutional rights,[63] concluding that these cases "[e]stablish only that aliens receive constitutional protection when they have come within the territory of the United States and *developed substantial connections* with this country."[64] Presence in this country at the behest of the United States government did not provide a sufficient connection to provide the defendant with fourth amendment protection.[65]

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60. *Id.*

61. *Id.*

62. *Id.*

63. *E.g.*, Plyler v. Doe, 457 U.S. 202, 211-12 (1982) (fourteenth amendment protects illegal aliens); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (person under fifth amendment includes resident alien); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (first amendment protects resident aliens); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931) (just compensation clause of fifth amendment extends to nonenemy alien); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (fifth and sixth amendments protect resident aliens); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment protects resident aliens).

64. *Verdugo-Urquidez*, 110 S. Ct. at 1064 (emphasis added). As discussed *infra* at text accompanying notes 113-15, this could signal backtracking by the Court. The aliens in *Plyler* were illegal alien children who were denied the right to attend public school in Texas. *Plyler*, 457 U.S. at 206. The Court in *Plyler* looked not to the substantial connection that these aliens had developed with this country, rather it focused on the probable future connection with this country and the tremendous social costs accompanying such connection in the absence of access to education. *Id.* at 230.

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

The Court distinguished *INS v. Lopez-Mendoza,*[66] a case in which the Court assumed, without deciding, that illegal aliens have fourth amendment protection. *Lopez-Mendoza* held that the fourth amendment's exclusionary rule does not apply to bar evidence in civil deportation hearings.[67] The Court distinguished *Lopez-Mendoza* on *locus* grounds, stating that even if illegal aliens possess fourth amendment rights, their situation is vastly different from Verdugo-Urquidez because illegal aliens "[are] [i]n the United States voluntarily and presumably [have] accepted some societal obligations; but respondent [nonresident criminal defendant arrested in a foreign country has] had no voluntary connection with this country that might place him among 'the people' of the United States."[68] Inexplicably, the Court went on to question the long-standing assumption, restated in *Lopez-Mendoza*, that the fourth amendment applies to protect illegal aliens in the United States.[69]

The Court also rejected an argument that treating a nonresident alien differently than a citizen violated the fifth amendment's equal protection component, reinforcing the longstanding doctrine that only those similarly situated must be treated equally.[70] Since aliens and citizens are not similarly situated the same rules are not necessarily applicable. To hold that nonresident aliens reside on the same constitutional plane as citizens would have grave consequences on the United States foreign policy operations.[71]

Justice Kennedy concurred as the fifth Justice in the majority's opinion. Although he wrote separately, he declared that his views did not "depart in fundamental respects from the opinion of the Court."[72] Kennedy's opinion suggests a far greater schism with the "plurality" than his words suggest. Kennedy specifically rejects Rehnquist's "compact theory" rationale as well

66. 468 U.S. 1032 (1984).

67. *Id.* at 1051.

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

69. *Id.* The Court was not asked to distinguish *Lopez-Mendoza.* The United States did not dispute the proposition that the fourth amendment applies to searches and seizures of foreign nationals in this country. *See* Brief for Petitioner at 24 n.15, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990). The *amicus curiae* brief of the Criminal Justice Legal Foundation, filed in support of Petitioner, concedes that the fourth amendment protects aliens, including illegal aliens, when the search occurs in the United States. Citing *Lopez-Mendoza,* the Foundation states: "[T]he Fourth Amendment does protect aliens inside the United States from unreasonable searches conducted within the United States. . . . Like his other constitutional rights, defendant's Fourth Amendment rights are derived from his presence within the United States." Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 7, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

70. *See Verdugo-Urquidez,* 110 S. Ct. at 1065.

71. *Id.*

72. *Id.* at 1066.

as his restrictive textual reading.[73] Kennedy recognized that the United States is solely a creature of the constitution; however, *Ross v McIntyre*,[74] *The Insular Cases*,[75] and *United States v. Curtiss-Wright Export Corp.*[76] "stand for the proposition that we must interpret constitutional protection in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[77] In deciding when and how to exercise power overseas, Congress must have the flexibility to withhold or restrict some Constitutional guarantees where it is impracticable to extend them.[78] The lack of magistrates to issue warrants abroad, together with dissimilar cultures makes extension of fourth amendment's warrant requirement impracticable outside the United States.[79]

To Kennedy, the real question is what process is due a nonresident alien being prosecuted by the United States. Trial rights are due, but not the right to be free from warrantless or unreasonable extraterritorial searches and seizures by United States officers.[80] Since "[n]othing approaching a violation of due process has occurred in this case," the defendant's fifth amendment rights have not been violated.[81] Importantly, Justice Kennedy never specifically states that the fourth amendment is inapplicable to searches of aliens outside the United States. Twice he "agree[s] that no violation of the fourth amendment has occurred,"[82] but no where does he forthrightly say that the fourth amendment is inapplicable. But, he never forthrightly states that the fourth amendment, in any form, does not extend to foreign searches of aliens.

Justice Stevens and Justice Blackmun both concluded that the probable cause clause of the fourth amendment applied to the search of Verdugo-Urquidez' houses, but they would not extend the warrant clause to these

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73. *Id.* at 1066-67 (Kennedy, J., concurring). In two places, Justice Kennedy hints that he believes that the fourth amendment would apply to a person with a fleeting affiliation with the United States if the search had occurred within its borders. He stated that the majority's discussion of *Lopez-Mendoza* was irrelevant. *See id.* at 1068 n.*. Second, he said that "[i]f the search had occurred in a residence within the United States, I have little doubt that the full protection of the Fourth Amendment would apply." *Id.* at 1067-68.

74. 140 U.S. 453 (1891).

75. *See supra* note 55.

76. 299 U.S. 304 (1936).

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

78. *Id.* (quoting Justice Harlan's concurrence in Reid v. Covert, 354 U.S. 1 (1957)).

79. *Id.*

80. *Id.* at 1068.

81. *Id.*

82. *Id.* at 1066, 1068.

extraterritorial searches.[83] Justice Stevens concurred in judgment because he concluded that the search was not "unreasonable,"[84] and Justice Blackmun dissented because he would have remanded to have the district court decide whether the United States agents possessed the requisite "probable cause" to search.[85]

Justices Brennan and Marshall dissented, arguing that the fourth amendment, including the warrant provision, applied to the search of Verdugo-Urquidez' residences in Mexico.[86] Brennan's dissent forcefully argues that Verdugo-Urquidez is one of "the people" entitled to fourth amendment protection because the United States has, by bringing him to the United States for prosecution, made him one of the governed entitled to the protection of the Bill of Rights.[87] The warrant clause, even though a "dead letter" in another country, should be applied to provide a neutral voice in deciding to invade the privacy of an individual and in determining the scope of the breach of privacy.[88]

These dissenters viewed *The Insular Cases* as relics of a bygone era, to be limited to their specific facts.[89] Instead of the reasoning employed in those cases, they would create a doctrine of "mutuality," requiring the United States government to extend the guarantees found in the Bill of Rights to those nonresident aliens on whom the United States imposes its obligations.[90] Mutuality ensures fundamental fairness, "inculcate[s] the values of law and order," and exports our national values of "privacy and sanctity of the home."[91]

Without stating it directly, the dissent appears to adopt the "natural rights" theory of the Ninth Circuit majority. Brennan states that

> 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 Amend-

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83. *Id.* at 1068 (Stevens, J., concurring); *id.* at 1077 (Blackmun, J., dissenting).

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

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

86. *Id.* at 1075-76 (Brennan, J., joined by Marshall, J., dissenting).

87. *Id.* at 1072.

88. *Id.* at 1077.

89. *Id.* at 1074 (citing Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion) (*The Insular Cases* and the reasoning employed therein should not be expanded)). The dissent also said that the majority mischaracterized Johnson v. Eisentrager, 339 U.S. 763 (1950), because, the dissent contends, *Eisentrager* hinged not on the alien status of the defendants but on the fact that the alien was a wartime enemy. *See Verdugo-Urquidez*, 110 S. Ct. at 1074 (Brennan, J., joined by Marshall, J., dissenting).

90. *Verdugo-Urquidez*, 110 S. Ct. at 1071.

91. *Id.* at 1071-72.

> ment, for example, does not create a new right of security against unreasonable searches and seizures.[92]

These dissenters answer Judge Wallace's argument that though one might have a "natural right" to be free from unreasonable searches and seizures, only those who have given up a portion of their natural rights, that is, those who are part of the compact, receive the protection of those rights as guaranteed by the Constitution, by viewing Verdugo-Urquidez as one of the "governed."[93]

Brennan acknowledged a "purported tension between the Fourth Amendment's strictures and the Executives foreign affairs power."[94] To lessen this tension and to ensure that "the Executive Branch will not be 'plunge[d] . . . into a sea of uncertainty,'" Brennan suggested that "doctrinal exceptions to the general requirements of a warrant and probable cause likely would be applicable more frequently abroad."[95]

IV. FOURTH AMENDMENT SHOULD APPLY TO DOMESTIC SEARCHES AND SEIZURES OF ALIENS

A. Overview of Constitutional Rights of Aliens

Discussion of the constitutional rights of aliens begins with exposing the fallacies inherent in strict adherence to the "social contract" theory of the Constitution.[96] Many commentators have exposed the superficiality of the "social contract" or "compact" theory. Justice Story found it peculiar to think of the Constitution as a contract because constitutions "are not only not founded upon the assent of all the people within the territorial jurisdiction, but that assent is expressly excluded by . . . [restricting] ratification . . . to those,

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92. *Id.* at 1072-73.

93. *Id.* at 1074.

94. *Id.* at 1075.

95. *Id.* Exigent circumstances may eliminate the need for a warrant. *Id.* The boundaries of reasonableness will be determined by the context. *Id.* And, doctrines such as "official immunity" may protect the government's foreign policy interests in extraterritorial searches. *Id.*

96. Judge Wallace devotes two pages of his dissenting opinion to the "social contract" theory of the Constitution. He states: "[T]he fourth amendment protects only the people of the United States [by the fact] that the Constitution was conceived as a 'compact' or 'social contract' among the people of the United States." *Verdugo-Urquidez*, 856 F.2d at 1231 (Wallace, J., dissenting). According to this view, the governed relinquished to the governors certain aspects of liberty in order to preserve other aspects. *Id.* at 1232-33.

who are qualified voters."[97] More importantly, for this discussion, the Court has historically failed to follow the "social contract" theory in its treatment of the constitutional rights of aliens.

In two nineteenth century cases, the Court read the term "person" in the fifth and the fourteenth amendments inclusively, extending constitutional protection to aliens.[98] More recently the Court has said that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to [fifth and fourteenth amendment] protection."[99] Certainly those that find themselves involuntarily within the United States or who have a transitory or illegal presence cannot be said to be members of a constitutional compact. The theory that only those members of the social compact receive constitutional protection fails to explain the myriad of cases extending constitutional rights to those who have the most tenuous connection with the United States.

Similarly, the Court's attempt to distinguish between the use of the term "people" in the first, second, fourth, ninth, and tenth amendments and the use of the terms "person" and "accused" in the fifth and sixth amendments is unconvincing. In *Verdugo-Urquidez*, the Court states:

> While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the . . . First . . . Amendment . . . refers to a class of persons who are part of the 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.[100]

This strained textual exegesis fails under the weight of a litany of Supreme Court cases acknowledging various constitutional rights of aliens without resort to scrutinizing the nouns chosen by this nation's founders. Justice Douglas enumerated the rights of aliens:

> An alien's property (provided he is not an enemy alien), may not be taken without just compensation. He is entitled to habeas corpus to test the legality of his restraint, to the protection of the Fifth and Sixth Amend-

97. *Id.* at 1220 (majority opinion) (quoting 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 327, at 296-97 (Boston 1833)).

98. *See* Wong Wing v. United States, 163 U.S. 228 (1896) (fifth and sixth amendments protected deportable alien in criminal trial); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Equal Protection Clause of the fourteenth amendment prohibited municipality from discriminating against aliens).

99. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

100. *Verdugo-Urquidez*, 110 S. Ct. at 1061 (citations omitted).

> ments in criminal trials, and to the right of free speech as guaranteed by the First Amendment.[101]

The alien considered by Douglas appeared to be both a "person" and one of the "people" protected by the United States Constitution.

To expose the weaknesses in the "compact theory" and the Court's textual exegesis or to conclude that aliens are entitled to some measure of constitutional protection is not to answer the more probing question of what constitutional protections extend to aliens. *Mathews* specifically recognized this problem:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.[102]

The rich precedent in the field of law affecting aliens provides a backdrop upon which one can begin to answer the probing questions of what constitutional provisions apply to aliens, to which aliens do they apply, and in what fashion do they apply.

Justice Marshall, in discussing the fourteenth amendment's equal protection clause, stated that "[a] principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative" of that clause.[103] Similarly, the Court "has applied a spectrum of standards" when reviewing the Constitutional rights of aliens.[104] Unlike the level of scrutiny applied in equal protection cases, which fluctuates depending on the importance of the individual's interest at stake or the invidiousness of the law's classification, the level of scrutiny in

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101. Harisiades v. Shaughnessy, 342 U.S. 580, 599 (1952) (citations omitted) (Douglas, J., dissenting). *See also id.* at 586 (majority states that "[u]nder our law, the alien in several respects stands on equal footing with citizens").

102. *Mathews*, 426 U.S. at 78-79 (footnotes omitted).

103. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

104. For a more complete treatment of these standards applied to aliens, see Scaperlanda, *The Paradox of a Title: Discrimination within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1057-80.

cases involving aliens changes inversely with the importance of the governmental interest at stake; as the governmental interest increases, the courts apply less scrutiny to government action adversely affecting aliens.[105]

B. The Constitution, Aliens, and State Classifications

The Court has applied three articulated standards in reviewing *state*, as opposed to *federal*, governmental classifications based on alienage. In reviewing state classifications, the Court most often employs strict scrutiny review. This follows from the determination "that classifications based on alienage, like those based on nationality or race, are inherently suspect. . . . Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[106] Therefore, most state action discriminatorily classifying aliens will not withstand constitutional scrutiny unless the action advances a compelling state interest by the least restrictive means.[107]

A state possesses a compelling interest to engage with unfettered discretion in the shaping of its own identity as a political community. Given that aliens bear the label "discrete and insular" minority it should follow that the state's important interest in defining the political community when exercised in a manner discriminating against aliens would be tested under a strict scrutiny analysis. However, the nature of the governmental interest rather than the invidious nature of the classification dictates the standard of judicial review. Instead of applying strict judicial scrutiny, the courts employ a more deferential standard. This "political function" exception to strict scrutiny review "applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."[108] In these situations, where a state discriminates for allegedly political reasons, the Court substitutes

105. Equal protection jurisprudence as applied to aliens is reviewed on the following pages because it provides a conceptual framework to understand the relationship between the government's interest and the individual alien's interest in determining the level of deference that the Court will give the government when the government acts adversely to an alien's interest.

106. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (citations omitted).

107. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984).

108. *Id.* at 220.

a two-pronged judicial review standard.[109] A broad range of employment opportunities have been closed to aliens pursuant to this doctrine.[110]

Finally, the court utilized a middle-tier or intermediate standard of review in striking down a state law barring illegal aliens from a free public education.[111] Since the class of "illegal aliens" is both voluntary and unlawful, the Court refused to treat it as a "suspect class" and apply strict scrutiny review.[112] The Court, however, did not employ the rational basis test in reviewing the state statute because "certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State."[113]

C. The Constitution, the Alien, and the Federal Government

In contrast to the strict scrutiny review of state alienage classifications, the Court's review of federal action that uniquely and adversely affects aliens is extremely deferential. Aliens retain their character as a suspect class; it

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109. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982). The two-pronged test, as set forth in *Cabell* requires as follows:

> First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to 'persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, execution, or review of broad public policy' and hence 'perform functions that go to the heart of representative government.'

Id. (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

110. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (state law prohibiting aliens from becoming probation officers upheld); Ambach v. Norwick, 441 U.S. 68 (1979) (state law prohibiting aliens from becoming school teachers upheld); *Sugarman,* 413 U.S. 634 (1973) (state law prohibiting aliens from joining police force upheld). *But see* Bernal v. Fainter, 467 U.S. 216 (1984) (state law prohibiting aliens from becoming notary publics struck down).

111. *See* Plyler v. Doe, 457 U.S. 202 (1982). The Court recognized that "an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Id.* at 210.

112. *See id.* at 219 n.19.

113. *Id.* at 217-18.

would be a nonsequitur to conclude that the inherent nature of aliens in this society changes when federal governmental action is involved. The national government's interests, however, justify deferential treatment of federal classifications affecting this "discrete and insular minority." The federal government can discriminate against and between aliens in ways that would be unjustified if undertaken by a state because of its interest as sovereign in issues of admission, exclusion, and deportation of aliens. The Court has "repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[114] Because of "countervailing considerations," however, this power is not "so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[115]

Cases reviewing federal classification of aliens reveal that the Court applies varying standards of review depending on the governmental interest involved. Every alien, even those "whose presence in this country is unlawful, involuntary, or transitory" is entitled to at least minimal fifth amendment and fourteenth amendment protection.[116] The trend emerging from the Court's treatment of federal alienage classifications is that deference is at its greatest when the issue concerns the admission, exclusion, or deportation of aliens or in some other way implicates foreign policy considerations. When, however, the issue involves primarily domestic concerns of the federal government, less deference is warranted.

This central proposition becomes evident by examining the political branches' national security powers in both the domestic and international arenas. In the international exercise of foreign policy, the judicial branch normally takes the sideline, handing virtually plenary discretion to the political branches.[117] The Court is willing, however, to play a greater role when the

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114. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 329 (1909)). Congress does not possess a monopoly on power in this area; the executive branch has some inherent powers to deal with foreign affairs. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950). "It is an accepted maxim of international law that every sovereign nation has the power . . . to forbid the entrance of foreigners . . ., or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government." Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

115. Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976) (Court struck down civil service rule prohibiting noncitizens from employment in the civil service).

116. Mathews v. Diaz, 426 U.S. 67, 77 (1976).

117. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). In addition to deciding foreign policy questions on the merits, giving great deference to the political branches, the Court often abstains from resolving foreign relations

federal government's exercise of foreign policy has primarily domestic implications. In *United States v. Curtiss-Wright Corp.*, cited by the Supreme Court in *Verdugo-Urquidez*, the Court stated: "[W]e first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted."[118] The Constitution served as the instrument by which the states ceded power over domestic affairs to the national government.[119] The foreign affairs powers, on the other hand, preceded the Constitution and accrued to the Union, not the States, upon separation from Great Britain.[120] Although the foreign affairs power derives not from the Constitution but from the United States' membership in the community of nations, the President's exercise of such power, while broad, is, to some extent, limited by the Constitution.[121] Justice Jackson's famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[122] exploring the breadth of executive power, illuminates this point further:

> I should indulge the widest latitude of interpretation to sustain [the executive's] exclusive function to command the instruments of national force, at least when *turned against the outside world* for the security of our society. But, when it is turned inward, not because of rebellion . . ., it should have no such indulgence.[123]

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questions under the political question doctrine. *See* Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) (judicial inquiry into foreign affairs questions is improper because those matters have been constitutionally committed to the political branches). Justice Brennan, for the Court, explored the limits of the political question doctrine:

> Yet it is error to suppose that every case . . . which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. 186, 211-12 (1962).

118. 299 U.S. 304, 315 (1936) (case upheld congressional delegation of power to executive branch to declare arms embargo).

119. *See id.* at 316.

120. *See id.*

121. *See id.* at 320.

122. 343 U.S. 579 (1952).

123. *Id.* at 645 (emphasis added). *Accord* Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985), *aff'd*, 800 F.2d 812 (8th Cir. 1986) (en banc), *aff'd*, 485 U.S. 264 (1988) (in action for damages resulting from alleged fourth amendment violation, court recognized that military's role in domestic and civilian affairs is limited by the

The dichotomy between the political branches' power to address domestic and foreign national security threats has been addressed in the fourth amendment context. While the *Verdugo-Urquidez* Court held that a warrantless search of a criminal defendant's foreign residence did not violate the fourth amendment, the Court has also held the warrant clause of the fourth amendment applicable to *internal* or *domestic national security searches.*[124]

Similarly, in its discussions of the constitutional rights of aliens, the Court has distinguished between situations implicating foreign affairs and

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Constitution, by Congress, and by the courts).

124. United States v. United States Dist. Ct., 407 U.S. 297, 320 (1972). In that case, the Court stated:

> As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression . . . .
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> . . . .
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> . . . These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent. . . . There is, no doubt, pragmatic force to the Government's position.
>
> But we do not think a case has been made for the requested departure from Fourth Amendment standards. . . . Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. . . . We recognize . . . the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

Id. at 314-20.

This case did not address the issue of the fourth amendment's applicability to domestic surveillance of foreign powers when foreign implications of national security are at issue. *Id.* at 308. The circuits have split over whether the government may conduct a warrantless wiretap of citizens or domestic organizations for foreign intelligence purposes. *Compare* Zweibon v. Mitchell, 516 F.2d 594, 614-15 (D.C. Cir. 1975) (warrantless wiretap of domestic organization in the name of foreign intelligence gathering improper, with suggestion that *all* electronic surveillance conducted for foreign intelligence gathering purposes must meet warrant requirement), *cert. denied,* 425 U.S. 944 (1976) *with* United States v. Butenko, 494 F.2d 593 (3d Cir. 1974) (en banc) (warrantless electronic surveillance lawful if for gathering foreign intelligence), *cert. denied sub nom.* Ivanov v. United States, 419 U.S. 881 (1974); United States v. Brown, 484 F.2d 418 (5th Cir. 1973) (holding the same as *Butenko*), *cert. denied,* 415 U.S. 960 (1974).

those involving purely domestic concerns. When the context involves foreign affairs, that is, admission, deportation, exclusion, and national foreign policy or security, the alien's rights often give way to an overriding government interest. Where, however, the governmental interest is domestic, the alien's rights remain secure because of the lessened governmental interest. This clearly is the Court's justification for its varied levels of reviewing state alienage classifications. Although the justifications for the disparate results of the Court's review of federal treatment of aliens is less clearly delineated, a review of those cases reveals the same result.

The Court has a long and continuous history of distinguishing between *deportation hearings* and *criminal trials.* Even though the Court recognizes that an alien is entitled to constitutional due process prior to deportation,[125] the Court has treated the deportation process as a civil proceeding thus diminishing, in many respects, the process due the alien.[126] The distinction arises because, although it often "bristles with severities," deportation is "a power inherent in every sovereign state" as embedded in international law, whereas criminal proceedings affect the sovereign domestically, not directly as a member of the community of nations.[127]

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125. *See, e.g.,* The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903).

126. *See, e.g.,* Bugajewitz v. Adams, 228 U.S. 585 (1913). Justice Holmes, for the Court, stated:

> It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.

Id. at 591.

Justice Douglas provides a contrary, although not judicially accepted, view:

> The right to be immune from arbitrary decrees of banishment certainly may be more important to 'liberty' than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the 'liberty' they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a . . . family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay.

Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

127. *Harisaides,* 342 U.S. at 586-88 (although not part of the political community "the alien in several respects stands on an equal footing with citizens"). "[V]isitors and foreign nationals . . . are entitled in their persons and effects to the protection of our laws. So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel."

In *Wong Wing v. United States*,[128] a case in which an alien residing unlawfully within this country was sentenced to sixty days' hard labor upon a summary administrative hearing to establish deportability, the Court recognized that the sovereign right and political decision to deport aliens involve fundamentally different interests than the governmental interest in prosecuting criminals. The Court reasoned:

> We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment, . . . expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.
>
> But when congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, *must provide for a judicial trial to establish the guilt of the accused.*[129]

The Court concluded that the alien defendant was entitled to the protection of the fifth and sixth amendments in a criminal prosecution.[130]

Although the Constitution prohibits the passage of *ex post facto* laws,[131] this proscription of *ex post facto* laws is inapplicable in a deportation hearing because of its civil nature.[132] In *Harisaides,* the Court apparently assumed that an attempted criminal prosecution of an alien based on the retroactive use of a criminal statute would be constitutionally infirm. This is especially true since that Court recognized that aliens had fifth amendment rights in criminal proceedings.[133] Certainly the "concept of ordered liberty" embedded in the fifth amendment's due process prohibits criminal punishment *ex post facto.*

Questions concerning an alien's right to bail receive different treatment depending on whether the alien is detained pending resolution of a purely domestic criminal proceeding or pending resolution of a deportation hearing, where the political branches' foreign affairs powers are implicated. In the

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Carlson v. Landon, 342 U.S. 524, 534 (1952).

128. 163 U.S. 228 (1896).

129. *Id.* at 237 (emphasis added).

130. *Id.* at 238.

131. U.S. CONST. art. I, § 9, cl. 3.

132. *E.g., Harisiades,* 342 U.S. at 594 (deportation of three long standing legal resident aliens because of their membership in Communist Party upheld even though their membership terminated prior to the enactment of the Alien Registration Act of 1940, which made membership in certain organizations grounds for deportation, regardless of when the alien was a member).

133. *Id.* at 586 n.9.

deportation context, the Court has upheld, under both fifth amendment and eighth amendment challenges, the Attorney General's discretionary denial of bail to aliens who posed no flight risks pending the outcome of their deportation hearings.[134] Bail could be denied on finding that the aliens were "a menace to the public interest."[135] "If these aliens, instead of awaiting deportation proceedings, were held for trial . . . they could not be denied bail merely because of the indictment."[136]

Apart from the deportation context, it has been assumed that aliens have the same right to bail as citizens.[137] Even in the deportation context, a current controversy wages over the power of Congress to deny statutorily certain aliens the right to bail pending the outcome of deportation hearings.[138] Some courts have held the statute unconstitutional under the fifth and eighth amendments.[139] Two courts have held the statute constitutional.[140] In *Morrobel,* the court directly addressed the distinction between bail in criminal proceedings and deportation proceedings: "[B]ecause the deportation proceedings are unlike those in the criminal context and because Congress has broad discretion in controlling immigration law, the test for determining the constitutionality of the statute at issue is simply whether it is based upon a 'facially legitimate and bona fide reason.'"[141] All of the cases

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134. *See* Carlson v. Landon, 342 U.S. 524 (1952) (aliens faced deportation because of membership in Communist Party).

135. *Id.* at 541.

136. *Id.* at 562 (Frankfurter, J., dissenting) (citing Stack v. Boyle, 342 U.S. 1 (1951)).

137. *E.g., id.*; United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) (criminal defendant's alienage was a factor in assessing flight risk, but no suggestion that aliens had no right to bail in criminal proceeding).

138. Pending the outcome of a deportation hearing, "[t]he Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction . . . the Attorney General shall not release such felon from custody." 8 U.S.C. § 1252(a)(2) (1988).

139. *See* Paxton v. INS, 745 F. Supp. 1261 (E.D. Mich. 1990) (statute unconstitutional because no individualized determination of right to bail); Agunobi v. Thornburgh, 745 F. Supp. 533 (N.D. Ill. 1990) (1252(a)(2) violates both fifth and eighth amendments); Leader v. Blackman, 744 F. Supp. 500 (S.D.N.Y. 1990) (distinguishing *Carlson,* court found statute unconstitutional because it prevented individualized determination of risk associated with release).

140. *See* Morrobel v. Thornburgh, 745 F. Supp. 725 (E.D. Va. 1990); Eden v. Thornburgh, No. 90-1473-CIV (S.D. Fla. July 23, 1990).

141. *Morrobel,* 744 F. Supp. at 728 (quoting Fiallo v. Ball, 430 U.S. 787, 794 (1977)). The court went on to conclude:

> In exercising it's [sic] plenary power over immigration decisions, Congress has determined that it is in the interest of the United States to

have presumed that aliens possess the eighth amendment right not to be burdened with excessive bail in the criminal context. The modern courts split over whether this right extends to deportation proceedings. The point of departure for those district courts that follow *Carlson* and do not extend bail rights to aliens in the deportation context is the political branches' plenary power over the admission and exclusion of aliens.

Similarly, the first amendment rights of aliens fluctuate depending on whether the context involves immigration concerns. Aliens outside the United States possess no first amendment rights. Excluding an alien from this country because he is an anarchist does not violate the first amendment.[142]

> If the word 'anarchists' should be interpreted as including those aliens whose anarchistic views are professed as those of political philosophers, innocent of evil intent, it would follow that Congress was of the opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population.[143]

Even the first amendment rights of citizens diminish in the context of the admission and exclusion of aliens. In *Kleindienst v. Mandel,*[144] the Court addressed the issue of whether the exclusion of a Marxist journalist, who had been invited to speak in the United States, violated first amendment rights of citizens to whom he was to address.[145] The Court recognized that this amendment protected not only the right to speak but also the right to receive information.[146] In upholding the exclusion, the Court stated:

> expeditiously remove, and detain during the pendency of their deportation proceedings, aliens who have committed aggravated felonies. The decision to detain these criminal aliens is based on the reasonable assertion that they pose a threat to the safety and welfare of the citizens of the United States and are likely to abscond before the completion of the deportation proceedings. Clearly there is a reasonable foundation to support the statute which obviates any Eighth Amendment concerns.

Id.

142. United States *ex rel.* Turner, 194 U.S. 279, 292 (1903). *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (first amendment did not prevent deportation).

143. *Turner,* 194 U.S. at 294.

144. 408 U.S. 753 (1972).

145. *Id.* at 762.

146. *Id. See also* Lamont v. Postmaster General, 381 U.S. 301 (1965) (withholding political mailings from abroad violated addressees first amendment rights).

> Recognition that First Amendment rights [of citizens] are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of international law . . . the power to exclude aliens is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government.[147]

When the political branches' foreign affairs powers are not implicated, however, an alien has the same first amendment rights as citizens.[148] Recognizing the heightened rights of aliens in the deportation context as opposed to the admission or exclusion context, one district court has held that it is impermissible to deport aliens engaging in protected speech.[149] The court said:

> [I]t is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting. Under a lower First Amendment standard, and without the constitutional protection against ex post facto laws, the Government could conceivably pass a law allowing for the deportation of aliens for statements made several decades earlier. *An alien would have no way of knowing whether his or her speech would someday become a ground for deportation and consequently would be chilled from speaking at all.*[150]

A pattern emerges from these cases, suggesting that the Bill of Rights cloaks an alien with its protective armor when the government attacks with

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147. *Kleindienst*, 408 U.S. at 765.

148. *See* Bridges v. State of California, 314 U.S. 252 (1941) (alien's adjudication of guilt for criminal contempt overturned because criminal contempt citation violated alien's first amendment rights). *See also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953); Bridges v. Waxon, 326 U.S. 135, 148 (1945).

149. *See* American Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1082-83 (C.D. Cal. 1989) (provisions of McCarran-Walter Act that allow for deportation of those aliens who affiliate with organizations that, among other things espouse the doctrines of world communism, is unconstitutionally overbroad in that it allows for the deportation of aliens who engage in protected speech). The court saw no inconsistency between its holding and the holding in *Harisaides* in which the Supreme Court said that the first amendment did not bar deportation in that case. In *American Arab Anti-Discrimination Comm.*, the court said that the Supreme Court in *Harisaides* had applied the first amendment, with full force, to the deportation context and merely concluded that the deportation would not violate the first amendment rights of the aliens. *Id.* at 1081.

150. *Id.* at 1081-82 (emphasis added).

purely domestic powers, but when the political branches' foreign affairs powers are unleashed, the armor pierces easily.

D. Aliens and the Fourth Amendment

The *Verdugo-Urquidez* decision can be fully and adequately explained as an extension of the line of cases standing for the proposition that the Bill of Rights does not protect aliens (or provides only diminished protection) when foreign affairs concerns are implicated. The three major opinions, Renhquist's majority opinion,[151] Kennedy's concurrence,[152] and Brennan's dissent[153] all recognize the foreign policy implications. Chief Justice Rehnquist, for the majority, concluded:

> 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.' . . . 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.*[154]

Unfortunately, the Court did not rest solely on the rationale that the fourth amendment rights of aliens in a foreign land succumb to the international security powers of the United States' political branches. At least four members of the majority seem willing to reexamine the previously unchallenged assumption that illegal aliens had fourth amendment rights in the United States.[155] Since this is premised on the view that "aliens receive constitutional protection when they have come within the territory of the United States and developed *substantial connections* with this country,"[156] other aliens, who, although legally here, have no substantial tie to the United States, could be denied fourth amendment rights in the context of domestic searches. This result for legal as well as illegal aliens would be a travesty of

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

152. *See id.* at 1067 (Kennedy, J., concurring).

153. *Id.* at 1075 (Brennan, J., joined by Marshall, J., dissenting).

154. *Id.* at 1066 (emphasis added) (citation omitted).

155. *Id.* at 1064-65. The tenor of Justice Kennedy's concurrence makes it unlikely that he agrees with the majority on this point. *See id.* at 1066-68 (Kennedy, J., concurring). With Justice Brennan's retirement, his replacement, Justice Souter, could supply the crucial voice if this question reaches the Court.

156. *Id.* at 1064 (emphasis added).

justice. Further, to reach this result the Court would have to ignore a host of cases applying the Bill of Right's protection to aliens when foreign affairs concerns are not raised.

It is true that as an alien's affinity to the United States grows she is endowed with greater rights and privileges.[157] Once the government grants an alien certain rights, the alien is entitled to use the constitution to protect those rights.[158] As an alien moves along the continuum from total stranger to citizen, she is entitled to greater constitutional protection simply because she has been granted greater social and economic rights, requiring such protection. In this sense, an alien's constitutional rights increase as the connections with this country become more substantial. When, however, the constitutional right at stake is fundamental and does not emanate from some antecedent grant of rights, and when the government's countervailing interest is purely domestic, with no foreign affairs implications, the alien's constitutional rights have never been made dependant on an alien obtaining a *substantial connection* with the United States. This is true of the right to speak freely, to presentment or indictment, to compensation for property taken by the government, to a jury trial in criminal cases, and to nonexcessive bail. In *Russian Volunteer Fleet v. United States,*[159] which was cited by the *Verdugo-Urquidez* Court, the alien corporation had no apparent connection to the United States, yet the Court held that it was entitled to compensation under the fifth amendment.

Aliens, including illegal aliens, although an intricate part of our economic community, have a muted voice in national affairs since they do not belong to the political community. Throughout our history, they have been subject to persecution and discrimination to the point where the Court declared them, as a class, a discrete and insular minority requiring special protection against oppressive governmental action. Certainly, fourth amendment rights as viewed through the prism of the fourteenth amendment should protect *all* aliens from unwarranted state searches and seizures. Since immigration and foreign affairs policy are not within a state's domain, and since the ability to conduct a

157. *See* Mathews v. Diaz, 426 U.S. 67, 80 (1976) ("The decision to share [this nation's] bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.").

158. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976) (once alien is granted right to work in this country, alien possesses liberty interest in right to seek employment that cannot be deprived without due process). *See also* DiPasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947) (Judge Learned Hand stated: "[Our] hospitality once granted, shall not be subject to meaningless and irrational hazards.").

159. 282 U.S. 481, 492 (1931) (Russian corporation entitled to fifth amendment right to compensation upon governmental taking of shipping contract for public use).

search is not related to a state's special interest in defining its political community, the strict standard of judicial review applicable to state actions discriminating against aliens should be applied to any state action denying aliens fourth amendment protection. Under a strict scrutiny analysis any such discriminatory treatment would fail.

When the federal government's purely *domestic* police powers are implicated, the Court's long line of precedent compel the conclusion that *all aliens* receive the same protection from the Bill of Rights as citizens. The Supreme Court has previously presumed that this protection included the protection found in the fourth amendment.[160] The government apparently has never challenged that presumption. An argument that aliens, at least those not possessing the status of permanent resident, have no fourth amendment rights in domestic searches and seizures lacks justification in both precedent and policy. To rest such a deprivation of rights on an argument that the alien is not part of our "social compact," has not developed a "substantial connection" with this country, or is not part of the "people" within the fourth amendment results in a tortuous revision of the history of the constitutional rights of aliens.

The Court should distinguish domestic searches and seizures from those conducted on foreign soil based on the federal government's overriding national interest and power in the field of foreign affairs. In the domestic sphere an alien should have the same fourth amendment protection as a citizen. There is no justification for treating the searches of two criminal defendants differently simply because one of the defendants happens to be an alien. Similarly, no justification exists, outside the deportation context, for treating an alien differently than a citizen in the context of an administrative search. In short, since the federal government has no justifiable interest in treating aliens and citizens differently in a domestic search, no plausible reason exists for denying aliens fourth amendment protection in this context.

V. CONCLUSION

Employing the criminal laws of the United States to counter international terrorism and the drug trade strengthens an already powerful diverse arsenal for ensuring national security. The political branches of the federal government collectively have the means and the authority to carry out security measures resulting in much graver consequences than the warrantless search of Verdugo-Urquidez' Mexican residences. Certainly, the authority to conduct the search should be questioned cautiously when viewed in this light. The *Verdugo-Urquidez* opinion can be explained as the Court's unwillingness to

160. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Abel v. United States, 362 U.S. 217 (1960).

inject itself into the foreign affairs arena, an arena that has been traditionally left to the political branches.

The dicta in *Verdugo-Urquidez* suggesting that aliens who are searched domestically may not have fourth amendment rights cannot be easily explained as an extension of the political branches' plenary power over national security and foreign affairs. Where foreign affairs concerns are absent, the Court, without fail, has extended the protection of the Bill of Rights to aliens. There is no logical basis for excluding from this protective bundle of rights the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[161] Hopefully the language in *Verdugo-Urquidez* suggesting that some aliens might not be protected from unreasonable domestic searches will remain forever dicta.

161. U.S. CONST. amend. IV.