Searching the World Over: Applying the Exclusionary Rule to Searches of Aliens by U.S. Agents

Richard Ward*

In a housing project in the Bronx, New York, agents of the United States Drug Enforcement Agency (DEA) arrest an alleged drug dealer. The suspect, a United States citizen, is transported to a holding facility in downtown Manhattan. Later that night, well after midnight, DEA agents return to the suspect's apartment, enter it, and begin an extensive search for evidence of illegal drug sales. The apartment is ransacked. A file cabinet containing personal documents is opened. The agents begin to search the file, but because the hour is late, they decide to take the whole file from the apartment to search through at their leisure. All of this occurs without a search warrant or the exigent circumstances that would justify a warrantless search.

Any evidence found during this search would be inadmissible against the suspect at trial because such a warrantless search violated the suspect's fourth amendment protection against unreasonable searches.[1] This is exactly the type of warrantless search for which the fourth amendment's exclusionary rule was devised.[2]

But what if the facts are changed slightly? The search is still

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* B.A., Carleton College, 1985; J.D., University of Minnesota Law School, 1990.

1. In Mapp v. Ohio, 367 U.S. 643 (1961), the United States Supreme Court held that evidence obtained from a defendant's home by the police without a search warrant and without consent cannot be used against the criminal defendant at trial. *Id.* at 660. A search warrant may not be necessary if police can show that exigent circumstances required the warrantless search. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

The fourth amendment to the U.S. Constitution states:

> 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 and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. In *Mapp*, police conducted a warrantless search of defendant's home. Mapp v. Ohio, 367 U.S. 643, 644 (1961). *Id.* at 644. During the search, police discovered "obscene materials." *Id.* at 645. The defendant's conviction for possession of the materials was overturned by the Supreme Court because the search was conducted without a warrant. *Id.* at 660.

conducted by DEA agents. The search is still late at night. The search is still warrantless and without exigent circumstances. The suspect is still being tried in a United States federal court. The differences are that the search occurs in Mexico and the suspect is a Mexican citizen. Under current Supreme Court doctrine, it is not clear whether the evidence in this search will be admissible against the Mexican suspect. These two situations are almost identical, but their judicial outcomes may be quite different. The American defendant will be afforded fourth amendment protections. The Mexican defendant, who will be tried on the same charge in the same United States court, may not be allowed to invoke those same protections. Such a result is unjust and demeans the judicial process.

This article demonstrates why evidence illegally obtained in foreign searches by United States agents should not be used against alien defendants in prosecutions in the United States. It begins by examining the purposes of the exclusionary rule, purposes that remain valid despite the criticism of some legal scholars. It then reviews Supreme Court decisions that address the extraterritorial application of the Constitution and lower federal court decisions that consider the application of constitutional protections to aliens abroad. This analysis of case law ends with an examination of a recent Ninth Circuit Court of Appeals decision, *United States v. Verdugo-Urquidez*,[3] holding suppression of evidence appropriate when United States agents conduct an unconstitutional search abroad.[4] Finally, this article analyzes the policy arguments supporting application of the exclusionary rule in such cases. Specifically, it considers how the use of illegally obtained evidence may undermine the exclusionary rule in the United States and the positive results that would obtain from increased control over United States agents abroad.

I. Purpose of the Fourth Amendment Exclusionary Rule

To understand why application of the exclusionary rule should be required when United States agents conduct an illegal foreign search, we must first examine the history and purposes of the fourth amendment exclusionary rule. The exclusionary rule suppresses evidence obtained in a search violating the fourth amendment of the United States Constitution.[5] As originally con-

3. 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

4. *Id.* at 1230.

5. Mapp v. Ohio, 367 U.S. 643 (1961).

ceived by the United States Supreme Court, the rule provided a remedy to the criminal defendant whose constitutional rights had been violated[6] and acted as a deterrent against unconstitutional government searches.[7] The rule also preserved the "judicial integrity" of courts by preventing their participation in police misconduct.[8]

In more recent years, the Supreme Court has concentrated on the deterrent effects of the rule, weighing the benefits of applying the rule against the costs to society of suppressing evidence.[9] The Court has held that when the exclusionary rule would not act as a deterrent against police misconduct, it should not be applied.[10]

The exclusionary rule serves several important objectives. First, the rule protects innocent people and fosters social goals by discouraging police from conducting illegal searches:

> The exclusionary rule protects innocent people by eliminating the incentive to search and seize unreasonably. So long as a policeman knows that any evidence he obtains in violation of the fourth amendment will not help secure a conviction he has less reason to violate the amendment and more reason to understand it.[11]

Thus, the exclusionary rule serves to protect all citizens' privacy interests.

The rule also engenders respect for the law. A refusal to provide a remedy for violations of the fourth amendment would signal tacit approval of illegal searches by allowing illegal activity to occur without negative consequences.[12] This in turn would hurt, rather than help, the cause of law enforcement:

> When courts admit evidence obtained by unlawful police conduct they lend color and countenance in some measure to lawlessness. The consequence is to undermine respect not only for the courts but for the law of which the courts are custodians. Respect for the law is the *sine qua non* of effective law enforcement. A widespread lack of it among Americans is, conversely, the most serious impediment to the work of the police; it leads American juries sometimes to reject or discount prosecution evidence precisely because of a suspicion that it was obtained by questionable means. Thus, dubious police methods

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6. *Id.* at 657-58.

7. *Id.* at 656.

8. *Id.* at 659.

9. United States v. Leon, 468 U.S. 897, 909 (1984). In *Leon* the Court held that the exclusionary rule should not apply when the police act in good faith reliance on a warrant. *Id.*

10. *Id.* at 906.

11. Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229, 1266-67 (1983).

12. Alan Barth, The Price of Liberty 99 (1961).

defeat the very purpose for which they are pursued.[13]

No one is pleased when a criminal goes free because relevant evidence must be suppressed. But the alternative is to sanction police misconduct by admitting the evidence, thereby encouraging violations of privacy and engendering disrespect for the law.

Some commentators have advocated elimination of the exclusionary rule altogether.[14] One has suggested that the rule should not apply when the crime involved is serious.[15] The rule has been attacked because it may exclude relevant, incriminating evidence and, thus, allow guilty defendants to go free.[16] Given this result, arguments for the elimination of the exclusionary rule, on the surface, seem persuasive. After all, a guilty criminal defendant would wish to exclude as much incriminating evidence as possible. On its face, the exclusionary rule may appear to protect only the guilty. Such a view, however, ignores the rule's benefits, which include protecting the innocent, discouraging police misconduct, and engendering respect for the law.

The Supreme Court also recognizes these benefits. Although limiting the scope of the exclusionary rule,[17] the Court has generally embraced the rule's underlying legitimacy.[18] The exclusionary rule, therefore, remains a respected sanction which ensures that "[t]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[19] The exclusionary rule continues to be a valid

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13. *Id.* at 99-100.

14. *See, e.g.*, Steven Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence (1977); Malcolm Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule (1982).

15. John Kaplan, *The Limits of the Exculsionary Rule*, 26 Stan. L. Rev. 1027, 1046 (1974). One modification Kaplan proposes is exempting cases of "treason, espionage, murder, armed robbery, and kidnaping by organized groups" from the exclusionary rule's application. *Id.*

16. United States v. Leon, 468 U.S. 897, 907-08 (1984).

17. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (limiting the circumstances under which fourth amendment claims may be raised in federal habeas corpus proceedings); United States v. Janis, 428 U.S. 433 (1976) (illegally seized evidence may be used in federal civil tax proceeding); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness may not refuse to answer questions based on illegally obtained evidence).

18. As the majority said in *Leon*, "The Court has, to be sure, not seriously questioned, 'in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate.' " 468 U.S. at 908-09 (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)).

19. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)).

and effective sanction for unconstitutional government conduct.

II. Application of the Exclusionary Rule to Foreign Searches

A. Supreme Court Cases

Though the exclusionary rule plays an important role in criminal adjudication in this country, the United States Supreme Court has yet to consider its application to searches occurring outside the United States when the defendant is a non-resident alien prosecuted in a United States court.

Until the middle of the twentieth century, the Supreme Court generally held that the protections granted by the United States Constitution did not extend beyond the territorial borders of the United States. In *In re Ross*,[20] the Court ruled that because the Constitution was established for the United States and not for foreign countries, it could "have no operation in another country."[21] In *Ross*, an American seaman, John Ross, was convicted by an American consular tribunal in Japan of murdering an American on a ship in a Japanese harbor.[22] Ross claimed he had been denied his constitutional right to a jury trial,[23] but the Supreme Court upheld his conviction on the grounds that the Constitution's protections "apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad."[24] The Court in *Ross* thus restricted the reach of the Constitution to United States territory.

Although the language of the *Ross* decision appeared to totally block application of the Constitution overseas, later cases offered some protections abroad. A little over a decade after the *Ross* decision, the Court concluded that though an American defendant could be denied a trial by jury in the Philippines, he was still entitled to a "fair trial."[25] United States citizens abroad could be denied the protections of specific provisions of the Constitution, but they could not be denied fundamental "due process."[26]

This strict territorial view of the Constitution began to erode in the 1950's. In *Reid v. Covert*,[27] the wife of a United States Air

20. 140 U.S. 453 (1891).
21. *Id.* at 464.
22. *Id.* at 454.
23. *Id.* at 463.
24. *Id.* at 464 (citing Cook v. United States, 138 U.S. 157, 181 (1891)).
25. Dorr v. United States, 195 U.S. 138, 146 (1904).
26. *See* Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 Va. L. Rev. 649, 655-56 (1986).
27. 354 U.S. 1, 3 (1956).

Force sergeant killed her husband at an air base in England. A military tribunal in England found her guilty of murder.[28] She challenged the tribunal's decision on the ground that the Constitution forbids the trying of civilians in military court.[29] A divided Supreme Court reversed the military tribunal's decision, rejecting at the outset "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[30] Justice Black, writing for the plurality, asserted that the Constitution does apply:

> The United States is entirely a creature of the constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution. When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.[31]

Dismissing the *Ross* case as "a relic from a different era" resting on a "fundamental misconception,"[32] Black explained that the *Ross* ruling that the Constitution cannot extend abroad had "long since been directly repudiated by numerous cases."[33] Black viewed efforts to limit constitutional protections to citizens in the United States as a "very dangerous doctrine" that threatened to "undermine the basis" of the United States government.[34] *Reid* thus signaled that the strict territorial approach of *Ross* was no longer valid and that constitutional protections extended overseas.

The protection given to United States citizens by the Constitution has since been found to include application of the exclusionary rule to foreign searches of United States citizens by United States agents. In *United States v. Stonehill*,[35] Philippine government agents raided the business offices of two Americans living in the Philippines. The agents were searching for evidence for a deportation proceeding.[36] Later, evidence seized in the raid was provided to United States agents for use in an Internal Revenue

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28. *Id.* at 4.

29. *Id.* at 4.

30. *Id.* at 5.

31. *Id.* at 5-6.

32. *Id.* at 12.

33. *Id.* at 12 (citing Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1921); Downes v. Bidwell, 182 U.S. 244, 277 (1900); Mitchell v. Harmony, 13 How. 115, 134 (1851); Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950); Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949), *rev'd on other grounds sub. nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Turney v. United States, 115 F. Supp. 457, 464 (Ct. Cl. 1953)).

34. *Id.* at 14.

35. 405 F.2d 738 (9th Cir. 1968).

36. *Id.* at 740-41.

Service fraud investigation of the defendant, Stonehill.[37] The defendant moved to suppress the documents on the ground that they had been illegally seized.[38] The Court of Appeals for the Ninth Circuit ruled that the evidence could be suppressed if United States agents had "so substantially participated in a raid by foreign officials so as to convert that raid into a joint venture between the United States and the foreign government."[39] Thus, United States courts will apply the exclusionary rule to evidence seized from United States citizens by United States agents on foreign soil. The only requirements are that an unconstitutional search occur, and United States agents play a substantial role in the search.

Though the idea that constitutional protections are restricted to United States soil has been thoroughly repudiated,[40] the extension of constitutional protection to non-citizens outside the United States has not automatically followed. It is generally conceded that the Constitution applies to non-citizens only if they are living in the United States.[41] In *Wong Wing v. United States*,[42] the Supreme Court held that "all persons living within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments."[43] In *United States ex rel. Turner v. Williams*,[44] the Court observed that once aliens enter the United States they are protected by the fifth and sixth amendments.[45] In *Matthews v. Diaz*,[46] the Court explained that invidious discrimination against resident aliens was a violation of their fifth and fourteenth amendment rights.[47] Even in *In re Ross*,[48] which held that constitutional protections do not extend beyond the nation's borders, acknowledged that "citizens and others within the United States, or who are brought here for trial" are entitled to fifth and sixth amendment protection.[49] In these cases, the Supreme Court

37. *Id.* at 742.

38. *Id.*

39. *Id.* at 743. The Court of Appeals for the Ninth Circuit found that U.S. officials had not substantially participated in the search by the Philippine government and therefore the evidence could not be suppressed. *Id.* at 746.

40. Reid v. Covert, 354 U.S. 1, 12 (1956); Cardenas v. Smith, 733 F.2d 909, 913 (D.C. Cir. 1984); Stonehill v. United States, 405 F.2d 738, 751 (9th Cir. 1969).

41. Matthews v. Diaz, 426 U.S. 67, 77 (1982); United States *ex. rel.* Turner v. Williams, 194 U.S. 279, 291 (1904); Wong Wing v. United States, 163 U.S. 228, 238 (1896); *In re* Ross, 140 U.S. 453, 464 (1891).

42. 163 U.S. 228 (1896).

43. *Id.* at 238.

44. 194 U.S. 279 (1904).

45. *Id.* at 291.

46. 426 U.S. 67 (1982).

47. *Id.* at 77.

48. 140 U.S. 453 (1891).

49. *Id.* at 464.

has been willing to grant constitutional protection to aliens; alienage alone cannot justify denying those rights.

United States courts, however, have been more reluctant to apply the full panoply of rights to aliens subjected to violations by United States agents overseas. Although the Supreme Court has rarely addressed this issue, in *Johnson v. Eisentrager*,[50] the Court appeared to reject extending constitutional protections to aliens abroad. In *Eisentrager*, the Court affirmed the dismissal of a writ of *habeas corpus* to inquire into the confinement of enemy aliens captured and prosecuted in China by the United States Army for war crimes.[51] The Court explained that extending the Constitution to protect aliens in the United States did not require extending protections to aliens abroad because it "was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[52] Though it seems that *Eisentrager* would bar extending constitutional protections to aliens, it should not be read so broadly.

The *Eisentrager* Court considered a number of factors in addition to the defendants' alienage. The Court also considered their status as enemies of the United States and as prisoners of war who were at all times incarcerated outside the United States.[53] The Court narrowed the ultimate issue in the case to "one of [the] jurisdiction of civil courts of the United States *vis-a-vis* military authorities in dealing with enemy aliens overseas."[54] Given the numerous extenuating factors weighed by the Court and the narrow issue finally decided, the *Eisentrager* opinion does not bar the assertion of constitutional protection by aliens abroad.[55]

As the previous cases illustrate, the Supreme Court has rejected the notion that the United States Constitution only applies in the United States. But the Court has yet to directly address the issue of whether the Constitution extends to aliens overseas.

B. Lower Court Decisions

Some lower federal courts have spoken to the issue of the application of constitutional protections to aliens when the United States acts abroad. These courts have acknowledged that constitutional protections extend to aliens abroad. These cases are important examples of how an expansive reading of the fourth

50. 339 U.S. 763 (1950).
51. *Id.* at 763-65.
52. *Id.* at 771.
53. *Id.* at 777-78.
54. *Id.* at 765.
55. *See* Note, *supra* note 26, at 656 n.40.

amendment is necessary to protect aliens from overreaching by United States agents.

In *Toscanino v. United States*,[56] the Court of Appeals for the Second Circuit held that an alien may invoke the fourth amendment prohibition against illegal searches and seizures conducted by the United States government even if the illegal search occurs abroad.[57] In *Toscanino*, an Italian citizen, Francisco Toscanino, suspected of narcotics violations, alleged that he had been abducted by United States agents in Uruguay, tortured and brought to the United States against his will.[58] Toscanino also claimed that the United States agents had obtained incriminating evidence against him through the use of illegal electronic surveillance.[59] The court ordered an evidentiary hearing in which Toscanino's allegations could be investigated:[60]

> [W]hen an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct . . . in violation of the fourth amendment . . . [and, therefore,] the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*.[61]

The court relied on the fact that the government's behavior in the case "shocks the conscience."[62] The "shocks the conscience" test is applied when police behavior is so egregious that evidence obtained as a result of the behavior must be suppressed.[63] The *Toscanino* court extended that principle to encompass outrageous police conduct that could bar prosecution altogether.[64]

The *Toscanino* court also ruled that Toscanino could invoke the fourth amendment's protection against unreasonable searches in response to the alleged illegal wiretapping.[65] The court reasoned that "an alien may invoke the [f]ourth [a]mendment's protection against an unreasonable search conducted in the United States"[66] and "[n]o sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional

56. 500 F.2d 267 (2d Cir. 1974).
57. *Id.* at 280.
58. *Id.* at 268.
59. *Id.* at 268.
60. *Id.* at 281.
61. *Id.* at 275.
62. *Id.* at 273 (citing Rochin v. California, 342 U.S. 165 (1952)).
63. Rochin v. California, 342 U.S. 165, 172-73 (1952).
64. 500 F.2d at 274.
65. *Id.* at 280-81.
66. *Id.* at 280 (citing Au Yi Lau v. United States Immigration & Naturalization Serv., 445 F.2d 217, 223 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971)).

action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."[67] Thus, the *Toscanino* court seemed to imply that, at least when the United States government seeks to use tainted evidence against an alien within the United States, the fourth amendment works to exclude the evidence.[68]

Because *Toscanino* involved United States government behavior that "shocked the conscience" of the court, it is arguable that the holding should apply only when government behavior is particularly outrageous. A Second Circuit decision following soon after *Toscanino, United States ex. rel. Lujan v. Gengler*,[69] implies such a limitation. In *Lujan*, the court limited the *Toscanino* holding to cases involving egregious government conduct.[70] Lujan was an Argentine citizen who alleged he was lured into Bolivia, arrested by agents hired by the United States, and placed on a plane bound for New York, where he was arrested and prosecuted for drug violations.[71] Lujan challenged the manner in which he was brought to the United States and argued that because he was illegally abducted, the district court did not have jurisdiction over him.[72] The Court of Appeals for the Second Circuit affirmed the district court's refusal to divest itself of jurisdiction, arguing that, unlike Toscanino, Lujan had not alleged any outrageous government conduct justifying divestment.[73] The court argued that "not every violation by prosecution or police is so egregious that . . . [it] requires nullification of the indictment."[74] Thus, the Court of Appeals for the Second Circuit seems to have limited *Toscanino* to its facts, requiring outrageous government conduct to divest the court's jurisdiction.

Despite the holding in *Lujan*, a question remains as to whether outrageous government conduct is necessary to trigger other constitutional protections. Because *Lujan* did not involve a fourth amendment violation, the court did not consider whether outrageous government conduct is required for the *Toscanino* holding that aliens abroad are entitled to fourth amendment protection to apply. This remains an open question after *Lujan*.

The fourth amendment has been held to extend to aliens who

67. *Id.*
68. *See* Note, *supra* note 26, at 668-69.
69. 510 F.2d 62 (2d Cir. 1975).
70. *Id.* at 66.
71. *Id.* at 63.
72. *Id.*
73. *Id.* at 66.
74. *Id.*

are subject to unconstitutional searches on the high seas. In *United States v. Cadena*,[75] the Coast Guard boarded a vessel suspected of carrying a large quantity of marijuana and arrested thirteen of the ship's Columbian crew members. A search of the vessel turned up approximately fifty-four tons of marijuana.[76] The Columbians challenged the search as unconstitutional because the Coast Guard did not have a search warrant.[77] The Court of Appeals for the Fifth Circuit ruled that the search was proper because there were exigent circumstances obviating the need for a warrant.[78] However, the court acknowledged that fourth amendment protections extend to aliens at sea[79] and concluded that the protections of the fourth amendment are "not limited to domestic vessels or to our citizens; once we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the [f]ourth [a]mendment."[80] In other words, when the United States government acts abroad, the Constitution applies to any resulting prosecution within the United States.

Another federal court has applied sixth amendment protections to aliens overseas. A recent opinion of the United States District Court for the District of Columbia held that constitutional protections apply to overseas interrogations of aliens by United States agents. In *United States v. Yunis*,[81] the court ruled that a confession made by an alien abroad to United States agents is not admissible if the alien has not voluntarily and knowingly waived the sixth amendment right to counsel.[82] In *Yunis*, Federal Bureau of Investigation (FBI) agents captured Yunis, a Lebanese citizen, in international waters.[83] Yunis was suspected of terrorist activi-

75. 585 F.2d 1252 (5th Cir. 1978).

76. *Id.* at 1255-56.

77. *Id.*

78. *Id.* at 1262-63.

79. *Id.* at 1262.

80. *Id.* The Fifth Circuit later disapproved of the *Cadena* court's endorsement of requiring search warrants for searches of vessels at sea. United States v. Williams, 617 F.2d 1063, 1087 (5th Cir. 1980). But the *Williams* court based its disagreement with the *Cadena* court on the difference between searches of national vessels and searches of vehicles and buildings on land. *Id.* at 1087. The court asserted that "[t]he Constitution mandates a less restrictive standard to govern searches on the high seas than searches on land because of the substantial and long-recognized differences between nautical vessels and vehicles and buildings on land." *Id.* Thus the *Williams* court did not question the *Cadena* court's reasoning that fourth amendment protections should extend to aliens. The *Williams* court based its criticism on the differences between land searches and sea searches.

81. 681 F. Supp. 909 (D.D.C.), *rev'd*, 859 F.2d 953, 957 (D.C. Cir. 1988).

82. *Id.* at 929.

83. *Id.* at 911.

ties.[84] While transporting Yunis to the United States for trial, FBI agents aboard the ship extracted a confession from him.[85] The district court ruled that Yunis had not voluntarily and knowingly waived his right to counsel because he was suffering from two broken wrists and seasickness during the interrogation.[86] The court also noted that the Arabic translation of the *Miranda* warnings was faulty and that the FBI had not recorded the interrogation.[87]

The Court of Appeals for the District of Columbia reversed the district court's holding on the ground that Yunis had knowingly and voluntarily waived his right to counsel.[88] But the court acknowledged at the outset that fifth amendment protections extended to Yunis even though he was an alien and the interrogation occurred outside the United States.[89]

As *Toscanino*, *Cadena*, and *Yunis* illustrate, lower federal courts have been inclined to exclude evidence obtained in violation of the Constitution, even if the victim of the violation is an alien and even if the violation occurs overseas.

C. United States Constitution: Contract or Natural Rights?

The basis for a limited extension of constitutional protections to aliens abroad rests on the assumption that aliens, like United States citizens, have certain natural rights that cannot be infringed upon by the United States government. The government is restricted by the Constitution, which instead of endowing rights upon people, simply recognizes those natural rights and enjoins the government from infringing upon them.[90]

Some commentators have suggested that a natural rights view of the Constitution runs contrary to a "traditional view of the Constitution as a compact between the people of the United States and its government, creating enforceable rights and duties running between each of the parties."[91] This approach stems from the view that the Constitution was created as a social contract through

84. *Id.* at 912-13.
85. *Id.* at 914.
86. *Id.* at 922-24.
87. *Id.* at 924-25.
88. United States v. Yunis, 859 F.2d 953, 955 (D.C. Cir. 1988).
89. *Id.* at 957.
90. Note, *supra* note 26, at 651-52; *see also* Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405 (1979); Louis Henkin, *Rights: Here and There*, 81 Colum. L. Rev. 1582, 1584-90 (1981); Steven Burr, *Immigration and the First Amendment*, 73 Calif. L. Rev. 1889, 1914 (1985).
91. Paul Stephan III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 Va. J. Int'l L. 777, 783 (1980) (citing The Federalist Nos. 39, 43-44 (James Madison) and No. 22 (Alexander Hamilton)).

which the governed agreed to submit to the government's rule in exchange for certain rights and liberties.[92] This social contract between the governed and the government implies that aliens outside the United States are necessarily excluded from constitutional protection.[93]

Natural rights theorists, however, argue that the contractual qualities of the Constitution do not justify limiting its protections to residents of the United States.[94] A purely contractual approach to the Constitution is not consistent with the view that the Constitution was meant to protect certain "unalienable" or "natural" rights, rights that are basic to a "right to survival."[95] These rights are common to all people and cannot be restricted solely to United States residents.[96] Our own Declaration of Independence reflects this natural rights philosophy by stating that "all [persons] . . . are endowed by their Creator with certain Unalienable Rights, that among these, are Life, Liberty and the pursuit of Happiness."[97]

Even if one accepts that the Constitution is a compact between citizens and their government, one may view it as a compact by which the government is required to respect the rights of all people, citizens and non-citizens alike.[98] Thus, though the Constitution does not necessarily apply everywhere, it must apply whenever and wherever the United States government acts.[99] Because a natural rights interpretation of the Constitution views rights as universal and unalienable, it allows an extension of constitutional protections to aliens abroad. This view of constitutional rights requires the United States government to treat all people equally regardless of nationality.

D. Explicit Extension to Aliens Abroad: United States v. Verdugo-Urquidez

The natural rights view of the Constitution is shared by the majority in *United States v. Verdugo-Urquidez*,[100] a recent Ninth

92. *Id.* at 783-84.

93. *Id.*; *see also* United States v. Verdugo-Urquidez, 856 F.2d 1214, 1231 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353). *But see* Fong Yue Ting v. United States, 149 U.S. 698, 749 (1892) (Field, J., dissenting).

94. Note, *supra* note 26, at 653.

95. *Id.* at 651-52.

96. *Id.* at 653.

97. *Id.* at 652 n.11 (citing The Declaration of Independence para. 2 (U.S. 1776)).

98. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 Wm. & Mary L. Rev. 11, 32 (1985).

99. *Id.*

100. 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

Circuit opinion which concluded that aliens may assert fourth amendment rights even if the violation of the alien's rights occurs outside the United States. In *Verdugo-Urquidez*, a suspected drug kingpin, Rene Verdugo-Urquidez, was arrested in Mexico and transported to the United States for trial on drug charges.[101] United States DEA officers then searched Verdugo-Urquidez's Mexican home.[102] The officers did not obtain a search warrant and claimed no exigent circumstances justifying a warrantless search.[103] The search was conducted after midnight, and the officers, realizing they would not have time to search all the defendant's files at his home, simply gathered all the files together and removed them.[104]

A divided panel of three judges ruled that the fourth amendment exclusionary rule applied to the search. Because the search was an unconstitutional, warrantless search, the evidence obtained was properly suppressed by the district court.[105] The majority begins by noting that the Constitution limits actions of United States government agents abroad,[106] citing extensively from *Reid v. Covert*.[107] However, the court fails to mention that *Reid* applied specifically to United States citizens abroad and not to aliens.[108] The court addresses this factual discrepancy by giving further reasons why aliens abroad should be protected.

The court rejects the notion that the Constitution is a contract that protects only those who are parties to it.[109] While acknowledging that there are several eighteenth and nineteenth century Supreme Court opinions that refer to the Constitution as a contract or compact,[110] the court notes that the historical evidence

101. *Id.* at 1216. Defendant Rene Verdugo-Urguidez has since been sentenced to life imprisonment plus 240 years for his role in a separate incident involving the death of a U.S. DEA agent, Enrique Camarena. *See* Los Angeles Times, Oct. 28, 1988, part 2, at 3, col. 1.

102. 856 F.2d at 1216-17.

103. *Id.* at 1226, 1230.

104. *Id.* at 1227.

105. *Id.* at 1230.

106. *Id.* at 1217-18.

107. 354 U.S. 1 (1956).

108. *See supra* notes 27-34 and accompanying text.

109. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1218-19 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

110. *Id.* at 1219 (citing Chisholm v. Georgia, 2 U.S. (2 Dall) 419, 471 (1793) (opinion of Jay., C.J.) ("[T]he constitution of the United States is likewise a compact made by the people of the United States, to govern themselves, as to general objects, in a certain manner."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404 (1819) (Marshall, C.J.) ("The government of the Union . . . is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); League v. DeYoung, 52 U.S. (11 How.) 185, 202 (1850)

supporting contract theory is "equivocal" and that other "sources may be cited in support of a broader interpretation of the Constitution."[111] The court also notes that the cases cited in support of contract theory do not address the problem of extraterritorial application of the Constitution, and that more recent Supreme Court cases extending constitutional protections to aliens in other contexts have made contract-based interpretations of the Constitution obsolete.[112] The Court of Appeals for the Ninth Circuit distinguishes the early Supreme Court opinions that describe the Constitution as a contract or compact.[113] At issue in three of those cases was the relationship between the federal government and the states.[114] Thus, those cases did not consider the extraterritorial application of the Constitution and are not on point.[115] Although *Ross* did address this issue,[116] it has since been overruled by *Reid v. Covert*[117] and therefore does not control.[118]

In examining the historical record, the court, while acknowledging the historical support for contract theory,[119] found equally compelling evidence of the contrary philosophical belief underlying the Constitution, the belief in the " 'natural rights' of [persons]."[120] Natural rights theory permeates early United States political documents, including the Declaration of Independence,[121]

("The Constitution of the United States was made by, and for the protection of, the people of the United States."); *In re* Ross, 140 U.S. 453, 464 (1891) ("By the Constitution a government is ordained and established 'for the United States of America, and not for the countries outside of their limits. . . . The Constitution can have no operation in another country.")).

111. *Id.* at 1219.

112. *Id.* at 1220-22.

113. *See* cases cited *supra* note 110.

114. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1220 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353). The *Chisholm* Court "consider[ed] whether a state may be sued in the Supreme Court by an individual citizen of another state." *Id.* at 1220-21 (citing Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)). The *McCulloch* court "[held] that a state may not tax an instrumentality of the federal government created by Congress in pursuit of an enumerated power." *Id.* at 1221 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)). The *De Young* court "[held] that a statute passed pursuant to the Constitution of the Republic of Texas could not be challenged as unconstitutional because, until Texas joined the Union, it was a sovereign power not bound by the United States Constitution. *Id.* (citing League v. De Young, 52 U.S. (11 How.) 185 (1850)).

115. *Verdugo-Urquidez*, 856 F.2d at 1221.

116. *See supra* note 24 and accompanying text.

117. *See supra* note 33 and accompanying text.

118. *Verdugo-Urquidez*, 856 F.2d at 1221.

119. *Id.* at 1219.

120. *Id.*

121. The Declaration of Independence refers to "the laws of nature" and "inalienable rights." *Id.* (citing Declaration of Independence (U.S. 1776), *reprinted in* Bernard Schwartz, 1 The Bill of Rights: A Documentary History 251-52 (1971)).

state declarations of rights,[122] and the writings of legal scholars.[123] Citing Justice Story, the court advocates natural rights theory over contract theory:

> It would, indeed, be an extraordinary use of language to consider a declaration of rights in a constitution, and especially of rights, which it proclaims to be "unalienable and indefeasible," to be a matter of *contract*, and resting on such a basis, rather than a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence, and incapable of being transferred or surrendered.[124]

The Ninth Circuit's final argument in support of applying the fourth amendment's protections to aliens abroad relies on the Supreme Court cases in which the Constitution has been found to apply to aliens within the United States.[125] The court reasons that because resident aliens are afforded protection under the United States Constitution[126] even though they are not United States citizens, the Constitution cannot be viewed as a contract applying solely to United States citizens.[127]

The court also points out that the Supreme Court has also allowed aliens constitutional protections without distinguishing between residents and visitors or those in the United States legally or illegally.[128] Because aliens are protected even though they may

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122. United States v. Verdugo-Urguidez, 856 F.2d 1214, 1219-20 (9th Cir. 1988) (citing Vermont Declaration of Rights (1977), *reprinted in* 1 Schwartz, *supra* note 121, at 319 (1971)), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

123. *Id.* at 1220 (citing 2 James Kent, Commentaries on American Law 1 (New York 1827); 3 Bernard Schwartz, A Commentary on the Constitution of the United States: Rights of the Person (Volume 1), at 170 (1968); Thomas Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843 (1978); Louis Henkin, *Rights: Here and There*, 81 Colum. L. Rev. 1582, 1584-90 (1981); Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 Va. L. Rev. 649, 650 (1986)).

124. *Id.* (quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 340, at 309 (Boston 1833)).

125. *Id.* at 1221-23.

126. The Supreme Court "extend[ed] fourteenth amendment [protection] to resident aliens because that amendment 'is not confined to the protection of citizens.'" *Id.* at 1221 (quoting Yick Wo v. United States, 118 U.S. 356, 369 (1886)). "[A]mong the protections enjoyed by resident aliens are first, fifth, and fourteenth amendment rights." *Id.* (citing Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)). "[A] resident alien is a 'person' within the meaning of the fifth amendment." *Id.* (citing Kwang Hai Chew v. Colding, 344 U.S. 590, 596 (1953)).

127. *Id.* at 1222.

128. *Id.* The fourteenth amendment applies "to all persons within the territorial jurisdiction [of the United States]." *Id.* (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). "Although [the] fifth and sixth amendments do not apply to trials conducted in consular courts, their guarantees apply to 'citizens and others within the United States, or who are brought here for trial.'" *Id.* (quoting *In re* Ross, 140 U.S. 453, 464 (1891)). "All persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments." *Id.* (quoting Wong Wing v. United States, 163 U.S. 228, 238 (1896)). The "fifth and sixth amend-

only be visitors or may be in the United States illegally, extension of protection to them cannot simply be explained as a *quid pro quo* for "accepting the obligation of allegiance" to the United States.[129] Thus, the court argues, contract analysis is not adequate to explain this extension of constitutional protection.[130]

The Court of Appeals for the Ninth Circuit rejects the argument that fourth amendment protections should not extend to aliens because the language of the fourth amendment is limited to "the people" while other amendments that have been found to extend to aliens are not thus limited.[131] The court chooses to interpret the words "the people" broadly.[132]

The majority also cites *Immigration & Naturalization Service v. Lopez-Mendoza*[133] as proof that the Supreme Court would extend fourth amendment protection to illegal aliens.[134] In *Lopez-Mendoza*, the Court held that deportation hearings are not criminal proceedings and, therefore, the exclusionary rule is not applicable to them.[135] Eight of nine justices, however, agreed in dicta that illegal aliens are protected by the fourth amendment.[136] The *Verdugo-Urquidez* majority finds incongruous the possibility that the Supreme Court would apply the fourth amendment to illegal aliens but deny protection to Verdugo-Urquidez, an alien in the United States legally, but against his will.[137]

Having found contract theory wanting, the majority concludes that the constitutional protections of the fourth amendment are not limited to United States residents.[138] The court's argument in summary is: First, American citizens abroad are protected

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ments protect aliens once they are in this country." *Id.* (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904)). "[A]ll aliens within the jurisdiction of the United States enjoy the protections of the fifth and fourteenth amendments and may not be invidiously discriminated against by the federal government." *Id.* (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976)). The Supreme Court "[held] that under the Equal Protection Clause of the fourteenth amendment, states may not discriminate against illegal aliens by withholding free public education; [the Court] reject[ed] [the] argument that illegal aliens are not within the jurisdiction of the states or the federal government and therefore are not entitled to equal protection rights." *Id.* (citing Plyler v. Doe, 457 U.S. 202, 211 (1982)).

129. *Id.*

130. *Id.*

131. *Id.* at 1223.

132. *Id.*

133. 468 U.S. 1032 (1984).

134. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1223 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

135. 468 U.S. at 1038.

136. 856 F.2d at 1223 (citing Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984)).

137. *Id.* at 1223-24.

138. *Id.* at 1224.

by the Constitution. Second, aliens, even those in this country illegally, are protected in the United States. Third, contract theory is an inadequate explanation of who receives constitutional protection. Therefore, there is nothing to prevent applying fourth amendment protections to aliens living abroad.[139]

In *Verdugo-Urquidez*, the majority also had to decide whether or not the United States government had substantially participated in the search, thereby activating fourth amendment protection under the *Stonehill* doctrine.[140] After reviewing the facts,[141] the court concluded that this was clearly a United States government operation and that United States participation was substantial enough to activate the fourth amendment.[142] The court held that because the search was conducted without a search warrant[143] and without exigent circumstances,[144] the evidence obtained in the search must be suppressed.[145] The court noted that although a search warrant would be a "dead-letter" in Mexico and would give United States agents no authority to search,[146] a warrant was required because the defendant was being prosecuted in the United States.[147]

In his dissent, Judge Wallace rejects the majority's conclusion that fourth amendment protections extend to aliens abroad.[148] He begins by acknowledging that because there is no Supreme Court precedent addressing the issue of the fourth amendment rights of aliens abroad, it is necessary to decide this case by examining the language and history of the Constitution and the Supreme Court cases addressing the rights of aliens in the United States.[149] After analyzing these sources, Wallace concludes that they do not confer constitutional protections upon aliens abroad.[150]

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139. *See id.* at 1230-31 (Wallace, J., dissenting).

140. *Id.* at 1225. For discussion of *Stonehill* doctrine, see *supra* text accompanying notes 35-39.

141. The search was conducted to obtain evidence for a U.S. prosecution. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1225 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353). The decision to conduct the search was made by a U.S. agent. *Id.* at 1226. There was a "low degree" of Mexican interest in the search. *Id.* at 1227. The Mexican government allowed the DEA to keep all the evidence found in the search. *Id.* at 1228. All the documents were kept by the DEA. *Id.*

142. *Id.* at 1228.

143. *Id.* (citing Mincey v. Arizona, 437 U.S. 385, 390 (1978)).

144. *Id.* (citing Steagland v. United States, 451 U.S. 204, 212 (1981)).

145. *Id.* at 1230.

146. *Id.* at 1229-30.

147. *Id.* at 1230.

148. *Id.* at 1231 (Wallace, J., dissenting).

149. *Id.* (Wallace, J., dissenting).

150. *Id.* (Wallace, J., dissenting).

Wallace argues that because the fourth amendment provides protection only to "the people" of the United States, the defendant can be given protection only if he is "one of the people of the United States."[151] His conclusion is grounded in a view of the Constitution as a "contract" or "compact" between the people of the United States and their government.[152]

Wallace cites several sources in support of "contract theory." He writes that the concept of social contract pervaded early American political philosophy,[153] illustrated by the Mayflower Compact[154] and the Fundamental Orders of Connecticut.[155] John Locke, a highly influential political philosopher at the time of the writing of the Constitution, viewed government as the result of a "political compact."[156] The Declaration of Independence and some early state constitutions saw government as an agreement between the government and the governed.[157] Wallace asserts that the Framers drew on all these sources when drafting the Constitution,[158] and they understood that the Constitution was an agreement by which "the people give up some degree of liberty in order for them to secure others in return."[159] Wallace does not see natural rights and contract theory as mutually exclusive; the contract simply requires that some "natural" rights be given up "to create a central government capable of preserving the rest."[160]

Wallace also cites a number of Supreme Court cases to support his view of the Constitution as a contract.[161] These cases[162] are rejected by the majority because they either did not address the issue of the extraterritorial application of the Constitution[163] or had been overruled.[164] However, Wallace sees these cases as reflecting "an understanding of the Constitution as a blanket of protections covering only the 'people' who endowed their government with its powers and who remain physically present within the

151. *Id.* (Wallace, J., dissenting).
152. *Id.* (Wallace, J., dissenting).
153. *Id.* (Wallace, J., dissenting).
154. *Id.* (Wallace, J., dissenting).
155. *Id.* at 1232 (Wallace, J., dissenting).
156. *Id.* (Wallace, J., dissenting).
157. *Id.* (Wallace, J., dissenting).
158. *Id.* (Wallace, J., dissenting).
159. *Id.* (Wallace, J., dissenting).
160. *Id.* (Wallace, J., dissenting).
161. *Id.* (Wallace, J., dissenting).
162. *In re* Ross, 140 U.S. 453 (1891); League v. DeYoung, 52 U.S. (11 How.) 185 (1850); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
163. *See supra* note 115 and accompanying text.
164. *See supra* note 33 and accompanying text.

[United States]."[165] The "people" are United States residents or others within United States territory.

Wallace explains the application of the Constitution to aliens within the United States as arising from the aliens' presence within United States territory.[166] This presence within the United States requires the alien to shoulder certain obligations toward the United States[167] in exchange for which the alien receives constitutional protections.[168] Wallace concedes, however, that Verdugo-Urquidez deserves the protections of the fifth and sixth amendments, which have been held to apply "to 'all persons within the territory of the United States.' "[169] This application of constitutional protections, however, does not include the fourth amendment.

Because Verdugo-Urquidez is entitled to fourth amendment protection only if he has attained "residence status" within the United States, Wallace next considers whether he has attained that status. He concludes that because the search complained of occurred on foreign soil, Verdugo-Urquidez's presence in the United States at the time has no significance.[170] He also points out that while the majority cites several cases in which constitutional protections are extended to aliens whose rights were violated in the United States, the majority cites no authority supporting extension of protection to aliens when their rights were violated outside the United States, as occurred in the instant case.[171] Thus, Wallace concludes that constitutional protections cannot extend to extraterritorial violations.[172] Moreover, Wallace does not attach any special significance to the fact that Verdugo-Urquidez was being prosecuted in a United States court when the search occurred.[173] He distinguishes or dismisses cases that suggest that constitutional protections should be afforded aliens who are tried in United States courts.[174]

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165. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1234 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

166. *Id.* at 1235-36 (Wallace, J., dissenting).

167. *Id.* at 1236 (Wallace, J., dissenting).

168. *Id.* (Wallace, J., dissenting).

169. *Id.* at 1237 (Wallace, J., dissenting) (quoting Wong Wing v. United States, 163 U.S. 228, 238 (1896)).

170. *Id.* at 1240 (Wallace, J., dissenting).

171. *Id.* (Wallace, J., dissenting).

172. *Id.* (Wallace, J., dissenting).

173. *Id.* at 1241 (Wallace, J., dissenting).

174. Wallace distinguished cases granting aliens fifth and sixth amendment rights because those amendments ensure fairness in the trial process itself. *Id.* at 1241. He dismissed the Ninth Circuit's decision in United States v. Peterson, 812 F.2d 486 (9th Cir. 1987), which discussed the extraterritorial application of the Con-

Wallace also concludes that the evidence obtained in the search of Verdugo-Urquidez's home cannot be suppressed on any grounds other than a fourth amendment challenge. He rejects the Second Circuit's conclusion in *United States v. Toscanino*[175] that the Bill of Rights prevents the government from "exploit[ing] the fruits of its unlawful conduct in a criminal proceeding against [an] alien in the United States."[176] He reasons that *Toscanino* "presented a unique fact situation" involving allegations of torture[177] and that in the later case *Lujan v. Gengler*[178] the Second Circuit admitted that its ruling in *Toscanino* was influenced by the outrageousness of the government's conduct.[179] Thus, while the "shock the conscience" test might work to suppress evidence in a "proper case," it does not apply to the search of Verdugo-Urquidez's home because that search did not involve outrageous conduct by United States agents.[180] Finally, Wallace analyzes whether the district court possessed the "inherent supervisory power" to suppress the evidence seized.[181] He concludes that because courts have no authority to impose the exclusionary rule unless there is a fourth amendment violation, the suppression of evidence through supervisory power is inappropriate in this

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stitution. Because *Peterson* involved American citizens, the court assumed the fourth amendment applied, and the misconduct was excused under the "good faith" exception to the exclusionary rule. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1241 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353). Wallace dismissed suggestions in cases that aliens might have standing to challenge violations of fourth and fifth amendments as "mere dictum." *Id.* at 1241-42 (Wallace, J., dissenting) (citing Cardenas v. Smith, 733 F.2d 909, 915-17 (D.C. Cir. 1984); Jean v. Nelson, 727 F.2d 957, 973 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985)). Wallace distinguished cases involving searches on the high seas because they "raise unique questions of sovereigty." *Id.* at 1242 (Wallace, J., dissenting) (citing United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979); United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981)). He distinguished a Ninth Circuit case granting alien plaintiffs standing to challenge the constitutionality of a Warsaw Convention provision because aliens given a right to sue in the U.S. should also "have standing to object to statutes that deprive them of damages." The violations occurred in the U.S. and the "fifth amendment would not permit 'the application of different rules of decision to residents and nonresidents suing on the same cause of action in the same court.'" *Id.* at 1243 (Wallace, J., dissenting) (quoting *In re* Aircrash in Bali, Indonesia on April 22, 1974, 684 F.2d 1301, 1308 (9th Cir. 1982)).

175. 500 F.2d 267, 286 (2d Cir. 1974).

176. *Verdugo-Urquidez*, 856 F.2d at 1243 (Wallace, J., dissenting), *cert. granted* 109 S. Ct. 1741 (1989) (No. 88-1353).

177. *Id.* at 1244 (Wallace, J., dissenting).

178. 510 F.2d 62 (2d Cir. 1975).

179. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1245 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353) (citing *Lujan*, 510 F.2d at 65-66).

180. *Id.* at 1245 (Wallace, J., dissenting).

181. *Id.* at 1246 (Wallace, J., dissenting).

case.[182]

Wallace also sees the majority's imposition of a warrant requirement for foreign searches as troublesome for four other reasons. First, it conflicts with Ninth Circuit precedent.[183] Second, such a requirement forces judges to issue advisory opinions in violation of article III of the Constitution.[184] Third, it "breaches the separation-of-powers between the judicial and executive branches of our government."[185] Fourth, it "ignores" the fact the foreign officials control how foreign searches are conducted.[186]

One can attack the *Verdugo-Urquidez* dissent on several grounds. Even if one accepts the view that only those persons who are parties to the "constitutional contract" may invoke constitutional protections, one can still argue that an alien being prosecuted in a United States court has become a party to that contract and thus deserves the protection of the fourth amendment's exclusionary rule. A criminal defendant in United States court is, in effect, consenting to the rule of the United States government. The defendant must accept the decision of a United States court, and, if convicted, must serve time in a United States prison. Under these circumstances, the defendant has been forced to accept certain obligations toward the United States government. He has essentially become a party to the constitutional contract.[187] As the *Verdugo-Urquidez* dissent concedes, alien defendants who are tried in the United States must be afforded fifth and sixth amendment protections.[188] It follows that fourth amendment protections should also be extended to aliens.

The dissent's wholesale reliance on a contractual view of the United States Constitution is also misplaced. As the majority points out, all previous Supreme Court rulings on this issue either fail to address the extraterritorial application of the Constitution

182. *Id.* at 1247 (Wallace, J., dissenting).

183. *Id.* at 1248-49 (Wallace, J., dissenting) (citing United States v. Peterson, 812 F.2d 486, 490-92 (9th Cir. 1987) (warrant not required for foreign searches)). In *Peterson*, however, the search was a wiretap conducted by Philippine authorities, *not* by U.S. agents. The court ruled that U.S. agents should not be held to a "strict liability standard for failings of their foreign associates." *Peterson*, 812 F.2d at 492.

184. Wallace expresses concern that because a warrant can have no effect in a foreign country, its issuance would be an advisory opinion. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1249 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

185. *Id.* (Wallace, J., dissenting). The executive branch traditionally controls the behavior of U.S. government agents abroad. *Id.*

186. *Id.* (Wallace, J., dissenting).

187. *See* Bruce Bryan, *The Constitutional Rights of Nonresident Aliens Prosecuted in the United States*, 3 Fordham Int'l L.J. 221, 232 (1980).

188. *Verdugo-Urquidez*, 856 F.2d at 1237 (Wallace, J., dissenting).

or have been overruled.[189] The historical evidence, while providing some support for either a contractual or natural rights view of the Constitution, does not conclusively support either position. Given this ambiguity and lack of Supreme Court precedent, contract theory does not preclude extension of the Constitution to aliens abroad.

The dissent also attaches much importance to the "locus" of the government action in this case.[190] Wallace concludes that the fact that the government misconduct occurred outside the United States bars extension of the Constitution to the search.[191] Such a view, however, ignores the rejection of such strict territoriality in *Reid v. Covert*.[192] Given the Supreme Court's rejection of territoriality in *Reid*, the locus of the government misconduct has little if any significance.

Finally, the dissent misinterprets the Second Circuit's limitation on the holding in *Toscanino* as explained in *Lujan*.[193] As the dissent admits, in *Lujan*, the Second Circuit only addressed the issue of whether government misconduct could divest the district court of jurisdiction over an alien.[194] The court interpreted *Toscanino* as standing for the proposition that government misconduct must be outrageous to divest the court of this jurisdiction.[195] The dissent acknowledges that the *Lujan* court did not address the fourth amendment issue raised in *Toscanino*.[196] Thus, though the dissent refuses to acknowledge it, the *Toscanino* holding that fourth amendment protection does extend to aliens abroad survives the *Lujan* ruling.

The *Verdugo-Urquidez* majority chooses not to rely on *Toscanino* or a basic fairness argument in holding that fourth amendment protections extend to aliens abroad. Instead, the majority points out that because the Constitution has been extended overseas,[197] constitutional protections have been extended to aliens, both legal and illegal, in the United States,[198] and a contractual view of the Constitution is of dubious validity,[199] there is no valid

189. *See supra* notes 115-117 and accompanying text.
190. *See supra* notes 171-173 and accompanying text.
191. *See supra* note 172 and accompanying text.
192. *See supra* notes 27-34 and accompanying text.
193. *See supra* notes 69-74 and accompanying text.
194. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1245 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).
195. *Id.* (Wallace, J., dissenting).
196. *Id.* (Wallace, J., dissenting).
197. *See supra* notes 30-34 and accompanying text.
198. *See supra* notes 126-138 and accompanying text.
199. *See supra* notes 109-124 and accompanying text.

reason not to extend the Constitution to aliens abroad as well.[200] Given that the Supreme Court has not spoken on this issue, this is a valid interpretation of ambiguous precedent.

While the *Verdugo-Urquidez* majority cites a number of reasons for extending fourth amendment protections to aliens abroad, there are additional arguments for extending such constitutional protections to aliens abroad. Both the changing role of United States courts in prosecuting aliens and a growing awareness of United States responsibilities abroad call for extending fourth amendment protections to foreign searches by United States agents when the defendant alien is to be prosecuted in the United States.

III. Indirect Effects on the Use of the Exclusionary Rule in Prosecutions of United States Citizens

Refusing to extend the protections of the fourth amendment to non-resident aliens who are prosecuted in United States courts may indirectly contribute to the erosion of fourth amendment protections for United States citizens. The federal government is pouring millions of dollars into increased drug enforcement both in the United States and abroad.[201] Increased enforcement and interdiction will lead to increased foreign operations involving United States agents. These operations will inevitably include arrests of foreign nationals, searches on foreign soil, and more trials of foreign nationals in the United States. Denial of fourth amendment protections to these aliens may have an indirect effect on protection of United States citizens in United States courts, and may reduce the deterrent effects of the exclusionary rule.

As United States drug enforcement activity in foreign countries increases, cases that do not allow use of the exclusionary rule to suppress evidence may very well alter domestic behavior. Though the search occurs in a foreign country, the denial of the exclusionary rule will occur in a United States court. This denial further contributes to an erosion of the exclusionary rule in the United States by legitimizing the current movement toward "deconstitutionalizing" the rule, illustrated most blatantly by the Supreme Court's decision in *United States v. Leon*.[202] In *Leon*, the Court ruled that the exclusionary rule is a judicially created remedy, and that therefore the failure to apply the rule to unconstitu-

200. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1224 (9th Cir. 1988), *cert. granted*, 109 S. Ct. 1741 (1989) (No. 88-1353).

201. *See* N.Y. Times, Oct. 30, 1988, at 21, col. 1.

202. 468 U.S. 897 (1984).

tionally obtained evidence is *not* a violation of the fourth amendment.[203] This rationale allowed the Court to carve out a good faith exception to the exclusionary rule that applies when a police officer acts in good faith reliance on a warrant.[204]

This ruling has been criticized on several grounds.[205] One of these criticisms is that the devaluation of the exclusionary rule will tempt the Court to extend the *Leon* rationale (that the exclusion of illegally obtained evidence is not required by the Constitution) to allow warrantless searches based on the individual police officer's own reasonable belief that probable cause exists.[206] These criticisms reflect the fear that devaluation of the exclusionary rule in the name of expediency will simply lead to further devaluations and eventually toll a "heavy price" on society in the form of lost liberty.[207]

The denial of fourth amendment protection to aliens would further signal an erosion of the legitimacy of the exclusionary rule in the cause of expediency. There might be little to worry about if the number of trials of aliens remained small. As one commentator has argued, constitutional protections need not be afforded aliens because misconduct by United States agents abroad has little chance of increasing the possibility of misconduct against United States citizens at home. "Physical separation from our country, lesser notoriety, and the fact that government personnel generally are compartmentalized along foreign/domestic lines all tend to prevent 'infection' of domestic government behavior by foreign misconduct."[208] But given increased international drug enforcement activities, the number of trials of aliens is likely to grow and the risk of "infection" will increase as well.

Furthermore, denial of protection to aliens will reduce the deterrent value of the exclusionary rule. The Supreme Court considers deterrence to be the most important result of the exclusionary rule.[209] This deterrent effect would be considerably blunted if DEA officers were allowed to conduct illegal searches abroad but were prevented from conducting similar searches in the United

203. *Id.* at 906.

204. *Id.* at 926.

205. *See generally* United States v. Leon, 468 U.S. 897, 928-60 (1984) (Brennan, J., dissenting); Wayne LaFave, *"The Seductive Call of Expediency": United States v. Leon, Its Rationale and Ramifications*, 1984 U. Ill. L. Rev. 895 (1984).

206. *Leon*, 468 U.S. at 959 (Brennan, J., dissenting); LaFave, *supra* note 205, at 930.

207. *Leon*, 468 U.S. at 959 (Brennan, J., dissenting).

208. Stephan, *supra* note 91, at 784.

209. *Leon*, 468 U.S. at 909.

States.[210] How are the officers to learn the "rules" if those rules are in conflict? The desirability of deterrence counsels for a consistent rule.

The risks of further erosion of the exclusionary rule are exacerbated by current attitudes toward the rule, illustrated by recent congressional efforts to improve drug enforcement. One of the most serious social problems of the last decade has been the explosion of drug abuse and trafficking in this country.[211] The political reaction to this problem, while for the most part well-intentioned, has often emphasized short-term solutions at the expense of personal freedom and civil liberties.[212]

Recent debate in Congress over a major drug bill reflects this growing resentment toward the exclusionary rule. The bill, H.R. 5210, as it passed the House of Representatives, contained a provision which would have extended the good faith exception to the exclusionary rule developed in *United States v. Leon*[213] to all searches conducted in "an objective, reasonable, good faith belief" that the search was in conformity with the fourth amendment.[214] This provision, which was offered by Representative Lungren as an amendment to H.R. 5210,[215] was characterized by opponents in debate on the House floor as "a wholesale assault on the Constitution."[216] The provision would have allowed the admission of evidence that was obtained through a warrantless search if the police

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210. The DEA has both domestic and international operations. N.Y. Times, Aug. 24, 1980, § 4, at 4, col. 5.

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

212. *Id.* at 925. One bill introduced in Congress even suggested eliminating the exclusionary rule altogether. H.R. 4259, 97th Cong., 1st Sess., 127 Cong. Rec. 17,251 (1981).

213. *See supra* note 9 and accompanying text.

214. H.R. 5210, 100th Cong., 2d Sess. § 3408, 134 Cong. Rec. H7299 (daily ed. Sept. 8, 1988). The full text of the exclusionary rule provision read:

> § 6801 LIMITATION OF THE FOURTH AMENDMENT EXCLUSIONARY RULE.
> (a) IN GENERAL—Chapter 223 of title 18, United States Code, is amended by adding at the end the following new section:
> § 3508. Limitation of the fourth amendment exclusionary rule
> Except as specifically provided by law, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in an objective, reasonable, good faith belief that it was in conformity with the fourth amendment to the Constitution. A showing that the evidence was obtained pursuant to and within the scope of a warrant consitutes prima facie evidence of such an objective, reasonable, good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

Id.

215. *Id.* (statement of Rep. Lungren).

216. *Id.* at H7302 (statement of Rep. Rodino).

could later prove their "good faith" in attempting to conform with the fourth amendment. The provision thus ignored the interests protected by search warrant requirements and would have allowed the police to justify a warrantless search by reconstructing the facts after the search had occurred, thus creating an incentive for police officers to search indiscriminately and later make up facts to justify the search.[217] Apparently the nearness of election day weighed more heavily on the House's collective mind than the threat to constitutional protections. The Lungren amendment passed the House by a 259-134 vote.[218] But in the less politically-charged atmosphere of the House-Senate Conference Committee, the Lungren provision was cut from the bill, and therefore the provision was not included in the final version of the bill.[219]

Though the emasculation of the exclusionary rule represented by the Lungren amendment was eventually rejected, the fact that it passed the House of Representatives by a wide margin is ample evidence of the disdain with which the rule is held by legislators and the general public. Given the current hysteria over drugs, there are many temptations to give less than full effect to the exclusionary rule in the area of drug enforcement. To deny the rule's protections to aliens being tried in this country's courts would add to those temptations by further devaluing fourth amendment protections.

IV. Controlling Behavior of United States Agents Abroad

Applying the exclusionary rule to foreign searches by United States agents would help temper misconduct by United States agents abroad. The exclusionary rule's main purpose is to deter misconduct by government agents.[220] Drug agents should not be allowed to take advantage of searches that would be unconstitutional if conducted in the United States. To allow such searches would encourage drug agents to go on "fishing expeditions," ransacking the homes of innocent suspects. While applying the exclusionary rule to such searches would not provide a remedy to the innocent, it would deter United States agents from conducting illegal searches in the first place and would encourage searches of only legitimate suspects.[221]

Controlling the behavior of agents abroad would also improve

217. *Id.* at H7303 (statement of Rep. Rodino).

218. *Id.* at H7304.

219. 134 Cong. Rec. H11,243 (daily ed. Oct. 22, 1988) (statement of Rep. Jeffords); *see also* 134 Cong. Rec. S17,303 (daily ed. Oct. 22, 1988) (statement of Senator Dole).

220. United States v. Leon, 468 U.S. 897, 906-909 (1984).

221. Loewy, *supra* note 11, at 1266-67.

United States relations with other countries and promote democratic values around the world. In turn, major United States foreign policy goals would be fostered. Preventing aliens on trial in United States courts from asserting rights held by United States citizens is akin to saying those aliens are not as worthy of protection. This only serves to confirm the beliefs held by many foreign governments and citizens that the United States sees itself as superior to all other nations and that United States citizens are somehow more important than all other citizens. Granting fourth amendment rights to aliens would also help the United States avoid confrontations with countries whose citizens are being tried in United States courts. If aliens are allowed all the rights granted United States citizens in United States courts, it is likely that their home countries will be more amenable to allowing the prosecution of their citizens in the United States. Those countries will also be more likely to join forces with the United States in the drug interdiction effort if they know their citizens will be fairly treated if prosecuted in the United States.

Finally, allowing aliens fourth amendment protection in United States courts will promote democracy abroad. What better way to encourage democratic change than to hold up our own Constitution as a model for other governments to follow? Moreover, what view of our Constitution are other countries getting if United States courts allow United States government agents to ransack homes without warrants and use the evidence with impunity? Such activity leads to a distorted view of the United States which will not attract freedom-lovers to our cause. Instead, such a view is more likely to attract tyrants.

Thus, there are several important policy arguments for extending protection to aliens. In combination with an expansive, natural rights view of the Constitution, these policy arguments counsel for judicial recognition of the fourth amendment rights of aliens abroad.

V. Conclusion

The *Verdugo-Urquidez* court did not consider the effect of denying protection to aliens abroad on the erosion of the effectiveness of the exclusionary rule in the United States, on United States foreign policy, or on the promotion of democratic values worldwide when it found that the exclusionary rule acts to suppress evidence obtained in an illegal search conducted outside the United States when the suspect is a non-resident alien being tried in a United States court. But these policy arguments provide fur-

ther evidence of why the "constitutional contract" view of our Constitution is too restrictive when it denies that there are "certain inalienable rights" that are afforded all persons, whether United States citizen or not.

This article does not attempt to define what those inalienable rights are or under what circumstances they must be recognized. However, this article does demonstrate that fourth amendment rights should be afforded to an alien being tried in a United States court. Perhaps the most important and most compelling reason for allowing fourth amendment protections to aliens tried in United States courts is the simplest and most obvious reason of all: simple fairness. Recall the two hypotheticals that began this article. Putting all constitutional and political analysis aside, one is left with a simple fact—the place of one's residence may decide the kind of justice one can get in a United States court. Such a result is unjust and demeans the judicial process. In a country that prides itself on the motto "equal justice under law," such a result is unacceptable. When one also considers that application to aliens will protect the exclusionary rule from erosion, control behavior of United States agents abroad, improve United States relations with other countries, and promote democratic ideals worldwide, such a result is also bad policy.