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Abstract: The "war on drugs" and the effort to contain international terrorism have raised questions of when the Constitution restricts the actions of the United States government abroad. This Note analyzes United States v. Verdugo-Urquidez, a case in which the Ninth Circuit Court of Appeals held that aliens have fourth amendment rights against United States government searches of their residences abroad. The Note agrees that the court's holding was correct, but suggests the court's "natural rights" theory was too broad to comport with prior Supreme Court limitations of aliens' constitutional rights. Instead, the Note suggests that the relationship between an alien and the United States must be examined before constitutional rights are extended to aliens. The Note concludes that the relationship between alien criminal defendants and the United States government justifies the extension of fourth amendment rights.

The United States Constitution protects citizens when the government acts outside the United States.1 It is unclear, however, whether the Constitution protects an alien in similar circumstances.2 This issue was considered by the Ninth Circuit Court of Appeals in United States v. Verdugo-Urquidez.3 In Verdugo-Urquidez, a divided panel held that the fourth amendment4 protected a Mexican citizen, Rene Verdugo-Urquidez, against a search of his Mexican residence by United States drug enforcement agents.5 The extension of fourth amendment rights in such a situation is unprecedented.6

The majority in Verdugo-Urquidez based its holding on the theory that some rights are "natural" and possessed by all people.7 However, the dissent argued that only people who have made a compact with the government are entitled to the protections of the Constitution.8 Close

1. Reid v. Covert, 354 U.S. 1 (1957); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 721 comment b (1987) [hereinafter RESTATEMENT].

2. RESTATEMENT, supra note 1, § 722 comment m.

3. 856 F.2d 1214 (9th Cir. 1988), cert. granted, 109 S. Ct. 1741 (1989).

4. The fourth amendment provides:

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

U.S. CONST. amend. IV.

5. Verdugo-Urquidez, 856 F.2d at 1224.

6. Id. at 1230 (Wallace, J., dissenting).

7. Id. at 1219–20.

8. Id. at 1231–37.
analysis of *Verdugo-Urquidez* shows that the majority's use of natural rights theory allowed it to reach the correct result, but their analysis does not comport with the Supreme Court's requirement that sufficient ties exist between Verdugo-Urquidez and the government. Scrutiny of those ties reveals that, even applying the dissent's compact theory analysis, the majority's result can be reached. This Note concludes, however, that broader scrutiny of the relationship between Verdugo-Urquidez and the government is preferable, and necessary to make extension of such rights meaningful.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1986, at the request of United States officials and pursuant to a valid United States arrest warrant, Mexican authorities arrested accused drug smuggler, kidnapper, and murderer, Rene Martin Verdugo-Urquidez. The United States Drug Enforcement Agency ("DEA") subsequently received custody of Verdugo-Urquidez in the United States. After receiving custody of Verdugo-Urquidez in the United States, the DEA obtained permission from the Mexican government to search Verdugo-Urquidez's two Mexican residences. The DEA did not seek approval or a warrant for the search from either the United States Justice Department, a United States Attorney's office, or a United States magistrate. DEA agents, with the help of several Mexican Federal Judicial Police officers, searched Verdugo-Urquidez's Mexican residences.

At a subsequent hearing, the United States District Court for the Southern District of California granted Verdugo-Urquidez's motion to suppress the evidence seized from his Mexican residence. The court held that the search violated the fourth amendment because the DEA failed to seek a search warrant and because the DEA's search was unreasonable. On appeal by the United States government, a divided three-member panel of the Ninth Circuit Court of Appeals upheld the district court's ruling.

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9. *Id.* at 1215–17.
10. *Id.* at 1216 n.2.
11. The search disclosed a tally sheet that purportedly reflected the quantities of marijuana smuggled into the United States by Verdugo-Urquidez. *Id.* at 1217.
12. The DEA's conduct was unreasonable because the search was unconstitutionally general, it occurred after midnight, and the DEA failed to leave a contemporaneous inventory of the evidence seized. *Id.*
13. *Id.* at 1230.
II. LEGAL BACKGROUND: HOW CITIZENSHIP AND THE LOCATION OF THE GOVERNMENT ACTION AFFECT INDIVIDUAL RIGHTS

The two most important factors in Verdugo-Urquidez are the citizenship of the defendant and the fact that the government search occurred on foreign soil. This Note first considers Supreme Court decisions involving the rights of aliens within the United States, and then examines the rights of citizens and aliens against government acts abroad.

A. Constitutional Protections of Aliens Against Government Actions in the United States

Aliens within the United States enjoy substantial constitutional rights. As early as 1886, in Yick Wo v. Hopkins,14 the Supreme Court noted that the portions of the fourteenth amendment referring to "persons" were "universal in their application, to all persons within the territorial jurisdiction" of the United States.15 Similarly, in Wong Wing v. United States, the Court held that deportable aliens are protected by the sixth amendment protections reserved to all "accused."16 More recently, however, in Mathews v. Diaz,17 the Court accepted the reasoning of Yick Wo and Wong Wing, but suggested that aliens are not entitled to all of the protections and provisions of the Constitution.18 Further, the Court stated that all aliens need not be treated alike under all circumstances.19 The Court listed examples of constitutional and statutory provisions that apply expressly to citizens,20 and distinctions that the law has drawn among aliens.21

The Court has never stated that the constitutional provisions reserved to "the people"22 in the Constitution protect only citizens. The distinction was not made in Mathews, even though that case

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15. Yick Wo, 118 U.S. at 369.
16. 163 U.S. 228, 238 (1895).
18. Id. at 78–79.
19. Id. The Court said:
   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.
   Id. at 78.
20. Id. at 78 n.12.
21. Id. at 79 n.13.
22. See U.S. CONST. amend. I, II, IV, IX, X.
discussed the distinction between the constitutional rights of aliens and citizens. Recently, in *Immigration & Naturalization Serv. v. Lopez-Mendoza*, the Court indicated that the fourth amendment rights reserved to "the people" are possessed by undocumented aliens within the United States.

While the cases discussed above show that aliens within the United States have substantial constitutional rights, they shed little light on whether those protections follow aliens abroad. Court decisions involving the exclusion of aliens from the United States have implied that aliens have no constitutional rights until they enter the country. However, these cases are premised on the view that Congress possesses a plenary power inherent in any sovereign to decide who can pass through its borders. That power may not apply outside of the immigration setting. More recent Court language indicates that aliens seeking admission lack constitutional rights only in regard to their admission.

**B. The Scope of Constitutional Protections when the United States Acts Abroad**

**I. The Constitutional Protections of Citizens Against United States Government Actions Abroad**

At one time the Constitution did not protect either citizens or aliens outside the territory of the United States. For example, in 1891 the

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23. See supra notes 17–22 and accompanying text.
25. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (plurality opinion) (holding that the fourth amendment exclusionary rule does not apply in a deportation proceeding); see also id. at 1051 (Brennan, J., dissenting); id. at 1032, 1055 (White, J., joined in pertinent part by Stevens, J., dissenting); id. at 1060 (Marshall, J., dissenting).
27. See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 603–04 (1889).
Supreme Court held that an American seaman, accused of murder in Japanese waters and being tried by the American consul in Japan, was not entitled to the jury trial guaranteed by the Constitution. The Court stated that "[t]he Constitution can have no operation in another country." In 1957, the Court abandoned Ross' strict territorial limit to the Constitution's scope. Reid v. Covert involved court martial proceedings against a United States citizen accused of killing her husband while residing on a United States armed forces base in England. The Court held that the defendant could not be tried by military authorities because a military trial denied her the protections of article III and the fifth and sixth amendments of the Constitution.

Justice Black's plurality opinion in Reid rejected the Court's previous rule that the Constitution has no effect in a foreign country. However, two concurring opinions limited the extension of rights to the circumstances in the case—citizens accused of capital crimes during peacetime. Even so, Reid is regarded as sound precedent for the proposition that the Constitution protects citizens against government actions abroad.

2. Constitutional Protections of Aliens Against United States Government Actions Abroad

In United States v. Curtiss-Wright Export Corp., the Supreme Court stated in dicta that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." However, the issue in Curtiss-Wright

32. Id. In a series of cases following Ross, the Court concluded that inhabitants of lands possessed by the United States were protected by the Constitution only if Congress had decided to "incorporate" the territory into the United States, rather than govern it as a territory outside the Union. See Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).
34. Id.
35. Id. at 3.
36. Id. at 18-19.
37. Id. at 12.
38. Id. at 64 (Frankfurter, J., concurring); id. at 75-76 (Harlan, J., concurring). While the concurring justices did not rule out the possibility that constitutional rights might apply in other circumstances abroad, both reserved judgment on what circumstances warranted the extension of such rights.
39. See RESTATEMENT, supra note 1, § 721 comment b & Reporters' notes 1-2.
40. 299 U.S. 304 (1936).
41. Id. at 318; see also United States v. Belmont, 301 U.S. 324 (1937) (executive agreement regarding recognition of a foreign country takes precedence over conflicting state policy).
was not whether the Constitution protected aliens abroad, but the breadth of powers Congress may delegate to the Executive Branch regarding foreign affairs. The case has not been considered authority for denying constitutional protections to aliens abroad.

Subsequent to Curtiss-Wright, in Johnson v. Eisentrager, the Court held that nonresident enemy aliens who had served a government at war with the United States did not have a constitutional right to a jury trial. The defendants in Eisentrager were World War II war criminals, imprisoned in Germany, seeking writs of habeas corpus in United States courts after being convicted by a military tribunal.

In Eisentrager, the defendants' status as enemy aliens was a key factor in the Court's decision to deny constitutional protections to them. The Court stated that nonhostile aliens are accorded a "generous and ascending scale of rights" as their identity with United States society increases. However, the opinion contained dicta that undermine the argument for constitutional protections of nonenemy aliens in foreign lands. The Court rejected the argument that protections of the Constitution extend to all persons in all circumstances, and indicated that the Constitution only protects aliens who are physically present within the territorial jurisdiction of the United States.

Justice Black dissented in Eisentrager, arguing that some constitutional protections were "not for citizens alone, but for all persons coming within the ambit of our power." Justice Black acknowledged that there may be some limit to the extension of these rights, especially

 Belmont, the Court referred to Curtiss-Wright and stated, once again in dicta: "[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens." Belmont, 301 U.S. at 332. However, the Court was merely pointing out that the Constitution does not govern the acts of other countries.

42. Although Justice Sutherland's dicta in Curtiss-Wright implied that the source of the foreign affairs powers of the President and Congress are extra-constitutional, this view has been criticized. See, e.g., L. Tribe, American Constitutional Law § 5-16, at 361 (2d. ed 1988). Moreover, Sutherland's opinion also stated that such powers, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." Curtiss-Wright, 299 U.S. at 320; see L. Henkin, Foreign Affairs and the Constitution 252-53 (1972).

43. See Restatement, supra note 1, § 722 comment m & Reporters' note 16.
45. Id. at 785.
46. Id. at 765–66.
47. Id. at 771.
48. Id. at 770. In contrast, citizens in post-war situations may not be subjected to military justice except in areas where armed hostilities have made enforcement of civil law impossible. See Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
49. Eisentrager, 339 U.S. at 782–85.
50. Id. at 771 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).
51. Id. at 791 (Black, J., dissenting).
to alien enemies, but he argued that the Constitution is not “wholly inapplicable in foreign territory that we occupy and govern.” Seven years later, in Reid, Black convinced a majority of the Court to extend extraterritorial constitutional protections to citizens. However, because the statements in Reid, Curtiss-Wright, and Eisentrager concerning nonenemy aliens’ rights were dicta, the scope of aliens’ constitutional rights abroad is still uncertain.

C. Subsequent Developments in the Lower Courts

Even though the Supreme Court has not clearly determined the constitutional rights of aliens outside the United States, many federal courts have extended such rights to aliens against government actions outside the United States. The most relevant of these cases to Verdugo-Urquidez is United States v. Toscanino. In Toscanino, a three-judge panel held that an alien defendant’s fourth amendment rights were violated when the government facilitated his seizure and torture in South America and brought him to the United States for trial. Toscanino broadly implied that aliens are protected by the fourth amendment whenever the federal government acts abroad in connection with a criminal proceeding.

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52. Id. at 796.
53. Id. at 796–97.
55. See, e.g., Cardenas v. Smith, 733 F.2d 909, 915–17 (D.C. Cir. 1984) (dicta that the universe of nonresident aliens who can invoke the Constitution is not limited to situations in which the res is subject to the court’s jurisdiction); United States v. Demanett, 629 F.2d 862, 866–69 (3d Cir. 1980) (court assumed that fourth amendment protected both citizens and aliens aboard a vessel on high seas, but search was not in violation of the fourth amendment), cert. denied, 450 U.S. 910 (1981); United States v. Cortes, 588 F.2d 106, 110–11 (5th Cir. 1979) (once aliens become subject to liability under United States law, they have right to benefit from protection of fourth amendment, but search of foreign vessel on high seas by United States Coast Guard complied with fourth amendment restrictions); United States v. Tiede, 86 F.R.D. 227, 260 (U.S. Ct. Berlin 1979) (alien civilians charged with nonmilitary offenses must be provided with same constitutional safeguards in United States court in Berlin that are provided to civilian defendants in any other United States court).
56. 500 F.2d 267 (2d Cir. 1974).
57. Id. at 275.
58. Id. at 280. In a discussion of protections against searches and seizures on foreign soil, the court stated: “No sound basis is offered in support of a different rule with respect to aliens who are the victims of unconstitutional 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.” Id.
III. THE NINTH CIRCUIT'S ANALYSIS IN VERDUGO-URQUIDEZ

In Verdugo-Urquidez, the Ninth Circuit answered affirmatively the threshold question of whether the fourth amendment protects aliens, in custody in the United States, against government searches of their residences outside the United States. The following part of this Note will discuss the rationale of the majority and dissenting opinions regarding the existence of Verdugo-Urquidez's fourth amendment rights.

A. The Majority Opinion

Judge Thompson's majority opinion in Verdugo-Urquidez relied on the extraterritorial constitutional protections granted to citizens in Reid to conclude that the Constitution imposes substantive constraints upon the federal government when it acts abroad. From that proposition, the court concluded that nonresident aliens can challenge the government's action abroad by invoking the fourth amendment.

The majority rejected the use of compact theory, relied upon by the dissent, to determine extraterritorial constitutional rights of aliens. Compact theory suggests that the protections and privileges of the Constitution are reserved for those persons who make a social compact with the government. The majority acknowledged that compact theory has been used by the Supreme Court to explain aspects of federalism, but not to define the extraterritorial reach of the Constitution. According to the majority, compact theory would deny aliens constitutional rights against government actions abroad because that theory excludes them from "the people" to whom the promise of the Constitution runs.

59. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1224 (9th Cir. 1988), cert. granted, 109 S. Ct. 1741 (1989). After answering that question, the court explored what actions are sufficient to qualify as government acts abroad and what the fourth amendment requires in such instances. Id. at 1224-30. These latter issues are beyond the scope of this Note.

60. Id. at 1218.

61. Id.

62. Id. at 1219.

63. Id. at 1218-21. The persons who are party to this compact sacrifice some of their natural rights in order to create a central government capable of preserving the rest of those rights. Compact theory explains the Constitution as a compact between "the people" mentioned in the preamble to the Constitution and the federal government. Only "the people" receive the protections of the Constitution. See 1 J. Story, Commentaries on the Constitution of the United States §§ 306-72 (1970) (reprint of 1st ed. 1833); Stephan, Constitutional Limits on International Rendition of Criminal Suspects, 20 Va. J. Int'l L. 777, 783-85 (1980).

64. Verdugo-Urquidez, 856 F.2d at 1220.

65. Id. at 1218-19.
The majority argued that, while compact theory can explain the constitutional rights of citizens, legal resident aliens, and aliens seeking admission to the United States, it fails to explain Supreme Court cases which have extended constitutional protections to undocumented aliens in the United States. The court turned instead to natural rights theory to explain aliens' rights. The majority argued that natural rights are possessed by all persons, are inalienable, and cannot be encroached upon arbitrarily by government. Because the Supreme Court has indicated that undocumented aliens who are voluntarily in the United States have fourth amendment rights, the majority reasoned that an alien who is in the United States involuntarily, such as Verdugo-Urquidez, also possesses such rights.

B. The Dissent

Judge Wallace, in dissent, criticized the majority's reasoning and holding. He argued that the majority opinion relied on a line of cases establishing citizens' constitutional rights abroad, and another line of cases establishing constitutional protections for aliens against government actions in the United States, to conclude, improperly, that an alien has constitutional protections against government actions abroad. The dissent noted that the majority failed to cite any Supreme Court case that suggests the Constitution limits government action against aliens in territory under foreign dominion.

The dissent asserted that the majority ignored the Supreme Court language in Curtis-Wright that limits the extraterritorial protections of the Constitution to citizens. It further argued that the Supreme Court has supported the concept of the Constitution as compact between the people of the United States and the government. The dissent maintained that the compact requires those people to sacrifice a modicum of their "natural rights" in order to create a central

66. Id. at 1222.
69. Id. at 1223 (discussing Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984)).
70. Id. at 1224.
71. Id. at 1230 (Wallace, J., dissenting).
72. Id. at 1230–31.
73. Id. at 1235.
74. Id; see supra notes 40–43 and accompanying text.
75. Verdugo-Urquidez, 856 F.2d at 1233 (quoting Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793)).
government capable of preserving their remaining rights.76 In the dissent's view, the individuals who are party to that compact differ depending on the rights in question. Supreme Court precedent makes it clear that all individuals within the United States receive the protections of the fifth and fourteenth amendments reserved to "persons."77 However, the dissent argued that the class of "the people" mentioned in the fourth amendment is more limited.78 The dissent asserted that a government search or seizure abroad is only restricted by the fourth amendment when the target of the search or seizure is a United States citizen or, possibly, an alien with extensive ties correlating to allegiance to the United States.79

IV. ANALYSIS OF VERDUGO-URQUIDEZ

Careful analysis suggests that, while the majority's result in Verdugo-Urquidez was correct, its use of natural rights theory does not comport with limits placed on constitutional rights by the Supreme Court. However, neither can the dissent's use of compact theory be persuasively harmonized with Supreme Court cases. Determining aliens' constitutional rights requires a broader examination of the ties between the aliens and the government.

A. Natural Rights Theory Does Not Explain Supreme Court Decisions Regarding Constitutional Rights of Aliens

The majority's natural rights theory ignores indications from the Supreme Court that aliens must have some type of significant tie to this country to possess constitutional rights. Fifth and fourteenth amendment rights are reserved to "persons" and have been interpreted as applying to all aliens within the jurisdiction of the United States.80 However, in Landon v. Plascencia,81 the Court endorsed the view that aliens seeking initial admission have no due process rights regarding their applications.82 Similarly, in Johnson v. Eisentrager,83 the Court explained that an alien is "accorded a generous and ascending scale of rights as he increases his identity with our society,"84 but that enemy

76. Id.
77. See supra notes 14–21 and accompanying text.
78. Verdugo-Urquidez, 856 F.2d at 1239 (Wallace, J., dissenting).
79. Id. at 1234–36.
82. Id. at 32.
84. Id. at 770.
aliens outside the United States could possess no constitutional rights to a jury trial.\(^{85}\)

These exceptions demonstrate that constitutional protections are not inalienable and natural. Their existence depends upon an individual's relationship with the United States. If the constitutional rights reserved to "persons" are not natural, it is doubtful that fourth amendment rights reserved to the seemingly more restrictive class of "the people" are natural. To be consistent, natural rights advocates must argue that the exceptions are inappropriate. This argument is laudable,\(^{86}\) but, because the Supreme Court does not recognize the existence of constitutional rights in all individuals, natural rights theory does not provide an adequate framework for determining when those rights exist.

**B. The Dissent's Compact Theory Does Not Adequately Explain the Existence of Constitutional Rights**

The Supreme Court has explained the Constitution as a compact,\(^{87}\) but has not used the theory to deny rights to aliens. The compact theory used by the dissent in *Verdugo-Urquidez* requires that persons give up some of their rights in order to have the government protect their remaining rights.\(^{88}\) The framers of the Bill of Rights did not clarify to whom the phrase "the people" in the fourth amendment referred, nor has the Supreme Court defined the phrase. However, the Supreme Court has indicated that undocumented aliens within the United States have fourth amendment rights.\(^{89}\)

According to the dissent in *Verdugo-Urquidez*, two distinctions explain how undocumented aliens can be part of the constitutional compact from which the dissent would exclude Verdugo-Urquidez. First, undocumented aliens have different types of ties to the country than did Verdugo-Urquidez.\(^{90}\) Second, the search of Verdugo-

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85. *Id.* at 785.

86. Henkin, *supra* note 30, at 27-34. Professor Henkin argues that individual rights are antecedent to the Constitution and, therefore, exceptions to their existence are anomalies that should be overturned. He concludes that the Constitution requires the government to respect not only the rights of the people who are party to the compact, but also the rights of all others within the jurisdiction of the United States.


Urquidez's homes took place outside the United States.\textsuperscript{91} However, scrutiny shows that neither distinction is persuasive.

\textit{1. Undocumented Aliens and Criminal Defendants Do Not Have Substantially Different Ties to the Country}

The Supreme Court has never fully identified which rights vest in an alien immediately upon entry and which require more ties with the country. However, \textit{Immigration & Naturalization Service v. Lopez-Mendoza}\textsuperscript{92} indicates that the ties undocumented aliens have with the country suffice to extend fourth amendment rights to them.\textsuperscript{93} Verdugo-Urquidez's ties to the United States are similar to those of many undocumented aliens. The only significant difference is that Verdugo-Urquidez entered the country involuntarily, while undocumented aliens enter voluntarily. However, undocumented aliens have made no compact with our government that Verdugo-Urquidez did not make. Undocumented aliens have made no express promise to give up any of their rights. While they may be said to have made an implied promise to obey our laws, the same implied promise is required of criminal defendants such as Verdugo-Urquidez. Indeed, Verdugo-Urquidez is accused of breaking that promise, whereas, by definition, undocumented aliens have already broken it.

Nor is there a meaningful distinction between the future intentions of undocumented aliens to establish permanent ties to the country and Verdugo-Urquidez. Many undocumented aliens are in the country temporarily, with no intention of becoming citizens or even establishing long-term connections to the United States. However, the Court has made it clear that even a transitory presence in the country may cause certain constitutional rights to vest in an alien.\textsuperscript{94}

The differences between the ties to our society of Verdugo-Urquidez and many undocumented aliens do not warrant withholding fourth amendment rights from the former while extending them to the latter. If the Constitution is to be viewed as a compact between the government and individuals with sufficient ties to the United States, that

\textsuperscript{91} Id. at 1239–40.

\textsuperscript{92} 468 U.S. 1032 (1984).

\textsuperscript{93} Id. at 1050.

\textsuperscript{94} See Mathews v. Diaz, 426 U.S. 67, 77 (1976). While the Court in \textit{Mathews} was referring to rights associated with amendments reserved to "persons" rather than "the people," the Court has never chosen to restrict the phrase "the people" to exclude aliens of any kind. Several federal courts have interpreted the language to include nonresident aliens who are the subject of government actions outside the United States. See, e.g., United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974); United States v. Demanett, 629 F.2d 862, 866 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981).
compact must also extend to aliens in Verdugo-Urquidez's circumstances. At a minimum, the fourth amendment should apply to foreign searches of an alien's residences if the alien is physically present in the country's jurisdiction when the search occurs.

2. Location of the Government Action Should Not Affect the Existence of Rights of Aliens

A second basis for distinction between undocumented aliens in the United States and Verdugo-Urquidez is the location of the government action. The dissent agreed that undocumented aliens within the United States have constitutional rights against government actions in this country. However, the dissent argued that Verdugo-Urquidez should be denied fourth amendment rights because the search of his residences occurred abroad.

The dissent relied on Curtiss-Wright and Eisentrager to argue that the government is not restrained by the Constitution when it acts against aliens abroad. However, as the majority correctly points out, Curtiss-Wright involved the breadth of powers that Congress may delegate to the Executive Branch in foreign affairs, not the constitutional rights of aliens abroad. Similarly, in Eisentrager, the aliens involved were enemies of the United States accused of war crimes, and the Court indicated that these characteristics were crucial factors affecting the decision to deny them constitutional rights.

The indications in Curtiss-Wright and Eisentrager that the Constitution does not protect aliens against government actions abroad is also weakened by the Court's subsequent decision in Reid v. Covert. Of course, Reid only involved citizens abroad, and Justice Black's statement that the government "can only act in accordance with all the limitations imposed by the Constitution" begs the question whether those limitations protect aliens abroad. However, Reid is a cornerstone on which to build the case for aliens' constitutional rights against extraterritorial government acts. Reid rejected the idea that

95. Verdugo-Urquidez, 856 F.2d at 1237 (Wallace, J., dissenting).
96. Id. at 1239-40.
97. Id. at 1240.
98. Id. at 1224 n.3.
99. See supra notes 40-42 and accompanying text.
101. Id. at 771. The Court stated: "[C]ourts in peace time have little occasion to inquire whether litigants before them are alien or citizen. It is war that exposes the relative vulnerability of the alien's status." Id.
103. Id. at 5-6.
constitutional protections stop at the boundaries of the United States. Moreover, lack of citizenship is not a barrier to granting constitutional rights to resident aliens.\textsuperscript{104} Therefore, lack of citizenship should not be a bar to constitutional rights of aliens against government actions abroad.\textsuperscript{105}

Finally, a long series of Supreme Court cases discussed above indicates that it is the aliens' ties to the country that is the source of their rights.\textsuperscript{106} Even \textit{Johnson v. Eisentrager}\textsuperscript{107} was based on the fact that the enemy alien defendants were not within the territorial jurisdiction of United States courts and had no other ties to the country.\textsuperscript{108} The mere fact that a government action occurs outside the country does not lessen the substantiality or nature of the ties an alien has established with our country, and should not automatically negate an alien's constitutional rights.\textsuperscript{109}

\textbf{C. Broadening the Basis for Aliens' Constitutional Rights: Balancing Benefits and Costs}

The majority's natural rights theory is too expansive to comport with Supreme Court limits on aliens' constitutional rights.\textsuperscript{110} However, the extension of fourth amendment rights to Verdugo-Urquidez can be harmonized with both Supreme Court precedent and the dissent's compact theory by focusing on Verdugo-Urquidez's presence in the United States when the search occurred.\textsuperscript{111} By itself, however, presence within the United States is a poor foundation on which to base fourth amendment rights of nonresident aliens. Such a prerequisite would be easily circumvented by overzealous prosecutors and government officials.

\textsuperscript{104} See \textit{supra}, notes 14--29 and accompanying text.
\textsuperscript{106} See, e.g., Landon v. Plascencia, 459 U.S. 21, 32 (1982); Mathews v. Diaz, 426 U.S. 67, 78–79 (1976). The dissent points out that these cases do not involve extraterritorial government action. However, a number of federal courts have refused to erect a territorial limit to the fourth amendment. See, e.g., \textit{supra} notes 55–58 and accompanying text.
\textsuperscript{107} 339 U.S. 763 (1950).
\textsuperscript{108} Id. at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.").
\textsuperscript{109} See United States v. Caltex, Inc., 344 U.S. 149 (1952) (implying that the fifth amendment would have protected alien corporations' property in the Philippines, except for the fact that destruction of the property by the United States was a necessity of war).
\textsuperscript{110} See \textit{supra} notes 80–86 and accompanying text.
\textsuperscript{111} See \textit{supra} notes 91–109 and accompanying text.
For example, the government could have waited until the search of Verdugo-Urquidez's residences was completed before having him brought to the United States. Because some Supreme Court dicta indicate that aliens must enter the country before constitutional protections vest in them,112 such a search might have been legal.113 If so, basing aliens' fourth amendment rights solely upon their presence in the United States provides them with little actual protection against searches abroad.

To avoid the problem of extending empty rights, the examination of the relationship between aliens and the government should be broadened. An alien's "ascending scale of rights" referred to in Eisentrager114 should not require a formalistic minimum tie of being present in United States territory. Instead of focusing only on the ties the alien has established with the United States, the ties established by extraterritorial government actions against the alien should also be examined.115 Constitutional rights should then be extended if the benefits of doing so exceed the costs.116 Extending fourth amendment

112. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953); see also supra notes 26–29 and accompanying text.


115. See Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). In that case, a Russian corporation was not "within the United States," and, thus was legally a nonresident alien. The Court held that the fifth amendment's protections applied to the government's taking of the corporation's United States property. Id. at 489; see also United States v. Caltex, Inc., 344 U.S. 149 (1952).

Russian Volunteer Fleet can be interpreted as an example of the Court extending constitutional rights to a nonresident alien because of the relative gravity of the government action involved. The implication in Caltex that, except for war necessities, the fifth amendment would have protected alien corporations' property in the Philippines further supports this view. This can be contrasted with the view that aliens seeking admission to the country do not have constitutional rights regarding their stay in the United States until they enter the country. See supra notes 26–29 and accompanying text. Aliens seeking admission to the country are seeking a privilege, not a right. See Landon v. Plascencia, 459 U.S. 21, 32 (1982). The Court has emphasized the limited scope of judicial review in the area of immigration. See Fiallo v. Bell, 430 U.S. 787, 792–95 (1977). However, in other areas of law, such as takings of property or search and seizure, courts should feel freer to extend more substantive and procedural rights to aliens. See L. TRIBE, supra note 42, § 5-16, at 360.

116. This approach is not inconsistent with viewing the Constitution as a compact. If extending the elements of a compact to nonparties results in benefits flowing to the parties of the compact that exceed the costs of doing so, it behooves the parties to extend those elements. It is because the dissent viewed compact theory as an inflexible contract requiring consideration that it prohibited the extension of constitutional rights to aliens based on
rights to aliens who are the subjects of extraterritorial government searches, at least if connected with criminal investigations, is one instance when those benefits exceed the costs.

I. The Benefits of One Standard of Criminal Justice

Without fourth amendment rights, alien defendants cannot use the exclusionary rule to exclude evidence at a criminal trial. Withholding the use of the exclusionary rule from aliens, and granting it to citizens, sets up an unacceptable double standard of justice in our courts.

In his dissenting opinion in *Eisentrager*, Justice Black stated "citizenship is enriched beyond price by our goal of equal justice under law—equal justice not for citizens alone, but for all persons coming within the ambit of our power." From this, the converse follows logically: The value of citizenship is lessened greatly when persons are arbitrarily subjected to different standards of justice. This is especially so in criminal matters, where an individual's life and liberty may be at stake. One standard of justice enhances the strength of our judicial system and enhances our status in the world community.

When the Bill of Rights was written, it is doubtful that the framers of that document foresaw the role the country would play in the international arena. Some Supreme Court dicta, especially in older cases, indicate a reluctance to extend extraterritorial protections to aliens. However, the Court has also explained that the nature of constitutional rights changes with time. With increased United States intervention in the international arena comes the responsibility to treat the people of foreign lands fairly. The benefit of doing so, and the cost of failing to do so, has increased with our level of international influence. Whenever possible, the United States must avoid setting one standard of restraint for our government when it interferes with individual rights of citizens, and a lesser standard for interference with the rights of individuals who are not citizens.

formalistic distinctions. See J. Story, supra note 63, § 340, at 309 (arguing that the Constitution, especially as it applies to rights, does not rest solely on the basis of contract). Even using the dissent's approach, criminal accusation, incarceration, and trial should be more than enough consideration for fourth amendment rights.

117. See supra note 113.
119. See supra notes 40–50 and accompanying text.
120. See, e.g., Reid v. Covert, 354 U.S. 1, 51 (1957) (Frankfurter, J., concurring) (especially in constitutional controversies, rules must yield to the impact of unforeseen facts); Wolf v. Colorado, 338 U.S. 25, 27 (1949) (constitutional rights "do not become petrified as of any one time").
In addition to the benefits for our country's judicial system and international status, requiring our government to apply the same procedures in a foreign search as it does with a domestic search also helps deter the arbitrary invasion of aliens' lives. Withholding fourth amendment rights from nonresident aliens gives the government carte blanche to search foreign residences, no matter how intrusive the search or how attenuated the circumstances. The government would be free to search how, where, and when it pleases, as long as it does not run afoul of foreign government requirements—requirements that are often less protective of individuals than those we demand of our government.

The dissent in Verdugo-Urquidez suggests that, because a warrant from a United States official is a "dead letter" in a foreign country, the benefits of requiring the government to obtain one before searching abroad do not justify the costs. However, this argument overlooks the fact that the search is connected with a trial that takes place in the United States. The deterrent effect of the warrant requirement does not flow from the warrant's validity in a foreign country. Rather, the effect stems from having to demonstrate probable cause to an official of the judicial system that will ultimately use the evidence. The deterrent effect is identical to the deterrent effect the warrant requirement has on domestic searches.

The rule "when in Rome, do as the Romans do" makes sense for tourists, but is bad policy for criminal procedure. The United States...

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121. The Supreme Court has stated that the point of the fourth amendment's requirement that a warrant be issued by a neutral judge or magistrate is to deter law enforcement officers from arbitrarily intruding on an individual's right to privacy in their zeal to ferret out crime. See Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973).


124. The fourth amendment protects only against unreasonable searches and seizures. Generally, a search is reasonable if made in connection with a warrant that meets the requirements stated in the amendment itself. See supra note 4. However, warrantless searches may be reasonable, and thus comply with the fourth amendment, in exceptional cases. These exceptions include hot pursuit and emergency circumstances. See 2 W. LAFAVE, supra note 113, at § 4.1; L. HENKIN, supra note 42, at 235 & n.19 (1972). The district court from which the government appealed this case ruled that, even if a warrant was not required to search Verdugo-Urquidez's residences, the search was still unreasonable. 856 F.2d at 1217. See also supra note 12.
prides itself as the standard bearer for the world against government encroachment on individuals' lives. By extending the fourth amendment to aliens abroad, the benefits of equal justice accrue to the United States, and the costs of arbitrary intrusion into individuals' lives are avoided.

2. Costs of Extraterritorial Extension of the Fourth Amendment

Recognizing fourth amendment rights in aliens against government searches abroad is not without costs. However, the increased costs do not outweigh the benefits that accrue from applying one standard of justice to all individuals whom we accuse of crimes against our country. It has been argued that the cost of recognizing extraterritorial rights in aliens is unacceptably high. The cost would include a weakening of our ability to impede drug trafficking, combat terrorism, and protect our own citizens overseas from foreign governments. These are all vital concerns. However, none of them justifies the greater cost of applying an unequal standard of criminal justice in this country.

Drugs are smuggled by United States citizens as well as noncitizens. Terrorism is simply individuals committing crimes against the government. The same pitfalls of false accusation and erroneous conviction exist, whether the crimes are committed inside or outside the country, and whether the individual is a citizen or an alien. Once we justify "irregular" government conduct against aliens, it is a short slide down the slippery slope to citizens.

Lack of reciprocity is another basis for arguing that the costs of extraterritorial rights for aliens are too high. It is argued that imposing restrictions unilaterally upon our government will deny it a "bargaining chip" for encouraging better treatment of our citizens by other governments. While international human rights agreements should be encouraged, they should not prevent our courts from applying standards that exceed such agreements. The moral high ground of one standard of criminal justice for all accused may not be cost-free, but abandoning it for an ad hoc, "tit for tat" criminal justice system in

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125. Stephan, *supra* note 63, at 784–85.
126. *Id.*
129. *Id.* at 784–85.
130. *Id.* at 785.
a world of unstable governments carries a heavy price. Using aliens' rights as "bargaining chips" by subjecting them to an arbitrary standard of criminal justice—and basing that standard on how the aliens' government treat our citizens abroad, a practice over which the aliens have no control—is repugnant to any system that respects human rights and fairness and should be flatly rejected.\footnote{131}

The costs of extending fourth amendment rights to aliens abroad will be held in check by the same rules that hold down the costs of administering the fourth amendment in the United States. The same exceptions to the warrant requirement and exclusionary rule that are available to the government when it acts within the United States would be at its disposal when it acts abroad.\footnote{132} Courts can find that exigent circumstances surrounding certain foreign searches justify the searches, even absent a warrant.\footnote{133} Further, the fourth amendment would only apply if the United States is sufficiently involved in the action to trigger its protections.\footnote{134}

There may be instances when the costs of extending the fourth amendment's protections to aliens abroad outweigh the benefits of doing so. Situations involving nonresident aliens that are allied with enemy governments during war may be one such instance.\footnote{135} Extra-territorial searches that are not connected with a criminal investigation may be another.\footnote{136} However, criminal accusation and conviction

\footnote{131. Of course, there are instances besides criminal prosecution when reciprocity may be an appropriate tool. \textit{See}, e.g., 28 U.S.C. § 2502 (1982) (reciprocity statute regarding an alien's privilege to sue in United States courts). The Court has indicated that a circumstance involving constitutional rights is not one of those instances. \textit{See} Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931).}

\footnote{132. \textit{See supra} note 123.}

\footnote{133. \textit{See} United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc). In holding that a warrantless search of a foreign vessel on the high seas by the Coast Guard with reasonable suspicion was "reasonable" under the fourth amendment, the court noted that it could consider the substantial differences between seizures and searches on land and those on the high seas. \textit{Id.} at 1074 & n.10. Similarly, it is foreseeable that the factors determining the "reasonableness" of a search may differ between searches on foreign soil and those within the United States.}

\footnote{134. A subsequent section of the \textit{Verdugo-Urquidez} opinion discussed this issue. The Ninth Circuit requires that the United States be sufficiently involved in the action to make it at least a "joint venture" between the United States government and the foreign government. \textit{See} United States v. Verdugo-Urquidez, 856 F.2d 1214, 1224–25 (9th Cir. 1988), \textit{cert. granted}, 109 S. Ct. 1741 (1989).}

\footnote{135. \textit{See} Johnson v. Eisentrager, 339 U.S. 763 (1950).}

\footnote{136. \textit{See} Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976) (nonresident alien did not have standing to challenge alleged extraterritorial government fourth amendment violations). \textit{Rumsfeld} involved government electronic surveillance of an Austrian national in Germany and was not connected with a criminal investigation. The court distinguished between cases in which an alien is prosecuted for a criminal violation and situations in which the alien is a plaintiff in a civil suit against the government for alleged fourth amendment violations. \textit{Id.} at
threaten the life and liberty of individuals. There is a large societal cost associated with arbitrary criminal justice standards. Therefore, we should bear the costs of extending the fourth amendment abroad to nonenemy aliens who are the subject of criminal investigations.

V. CONCLUSION

The Supreme Court has made it clear that constitutional rights are not naturally possessed by aliens. The Court has required “sufficient” ties between aliens and the United States before such rights have been extended to them. Historically, the necessary ties have been found if the alien is physically present, or the government action occurred, in the territory of the United States.

Requiring territorial ties in an era when our government is increasing the use of its police powers abroad results in arbitrary intrusions into aliens’ lives by our government, and a double standard of justice at home. Instead, an examination of all ties between aliens and the United States should determine what constitutional rights they possess. At a minimum, the Bill of Rights should restrict the government when its police powers are exercised abroad in connection with criminal investigations.

Richard J. Dolan

152–53. In the latter instance, the court decided that aliens lack sufficient ties with the United States legal system to challenge alleged fourth amendment violations. Id. at 153.