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Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez

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Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After *Verdugo-Urquidez*

*Eric Bentley, Jr.**

ABSTRACT

Should the Fourth Amendment reach abroad to protect noncitizens when United States law enforcement agents conduct searches and seizures in a foreign state? The courts have assumed this to be a closed question since 1990, when the Supreme Court, in a broadly worded plurality opinion by Chief Justice Rehnquist, asserted that the Amendment protects only citizens and other members of the "national community." However, as this Article points out, the Chief Justice's plurality opinion in United States v. Verdugo-Urquidez did not represent the judgment of a majority of the Court and therefore does not foreclose continued consideration of the scope of the Fourth Amendment abroad.

This Article addresses the principal questions that the Verdugo decision and subsequent scholarship have left unresolved: Does the Fourth Amendment's command that searches and seizures be "reasonable" apply to searches of noncitizens abroad? And if so, what does it mean for a search to be "reasonable" in a foreign state? The author argues that the alternatives proposed by the Supreme Court in Verdugo—either confining the Amendment to the water's edge or applying it in full force whenever the United States acts abroad—do not take proper account of the transnational nature of extraterritorial searches. The author proposes

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instead that any determination of the "reasonableness" of foreign searches take into account their transnational nature by reconciling United States search-and-seizure standards with either international law or the laws of the states with which the United States acts jointly abroad.

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I. INTRODUCTION

United States law enforcement takes place increasingly outside national borders, extending to United States citizens and noncitizens alike. What was patently obvious to the Supreme Court a half century ago—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”¹—is today just as patently untrue. Today, United States citizens and foreign nationals both must take care, no matter where on the globe they live or work, not to violate a host of United States laws, ranging from antitrust and securities laws to environmental laws, narcotics laws, and laws pertaining to fraud and violent crimes.² Enforcing such laws against acts committed on foreign soil requires an ever greater share of the resources of United States law enforcement agencies and takes place within an increasingly comprehensive web of international agreements.³ These efforts have made it more and

1. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *accord United States v. Belmont*, 301 U.S. 324, 332 (1937); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909).

2. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279-81 & nn.1-4 (1990) (Brennan, J., dissenting) (listing United States criminal laws applicable to foreign nationals abroad); V. Rock Grundman, *The New Impertalism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257 (1980); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 884-92 (1989); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799 (1992).

3. See generally ETHAN A. NADELMANN, *COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT* (1993) [hereinafter *COPS ACROSS BORDERS*]; Richard A. Martin, *Problems in International Law Enforcement*,

more possible for the United States to reach across borders to nab suspects. With this increasing power, however, comes the threat of abuse, for it is not clear that the rights of suspects in such operations have kept pace with the ability of the United States to apprehend them. As the United States law enforcement sword reaches farther abroad than ever before, it is unclear what kind of shield accompanies it.

The Supreme Court, along with most commentators, generally has divided into two camps on the issue of the degree of constitutional protection to be afforded to suspects apprehended outside United States borders. One side in the debate perceives United States constitutional standards to reach abroad in full force whenever the United States acts abroad; that is, state actions and constitutional protections from these actions are coextensive. The other side sees the Constitution as largely stopping at the water's edge.⁴ This "water's edge" approach appears to be in ascendance, as evidenced by the Supreme Court's recent decisions in both the criminal and civil context, which express the view that the United States can generally operate abroad free from constitutional, statutory, or international law restrictions.⁵ This Article will focus on one of these recent decisions, *United States v. Verdugo-Urquidez*,⁶ which provides the Court's most comprehensive examination of the reach of the Constitution in the law enforcement context.

In *Verdugo*, the Supreme Court addressed whether the Fourth Amendment protects a Mexican suspect from a

14 FORDHAM INT'L L.J. 519 (1990-91); Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37 (1990) [hereinafter *Int'l Enforcement*]. In 1988 alone, for example, DEA agents participated in overseas investigations that culminated in more than 1200 arrests of narcotics traffickers abroad. Brief for the United States, *United States v. Verdugo-Urquidez* (No. 88-1353) at *28, available in LEXIS, Genfed Library, Briefs File (reproduced without original page numbers; * pagination references correspond to LEXIS's pagination of the *Verdugo* briefs) [hereinafter Brief for the United States, Brief for Respondent Verdugo, Reply Brief for the United States] (citing DRUG ENFORCEMENT ADMINISTRATION, 1990 AUTHORIZATION AND BUDGET REQUEST TO THE U.S. CONGRESS 28 (1989)).

4. See *infra* part II.B.

5. See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993) (holding that statute and human rights covenant prohibiting "return" of refugees did not apply to United States action outside United States territorial waters); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (holding that constitutional requirement of due process does not bar United States from kidnapping and prosecuting foreign suspect in violation of extradition treaty); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (domestic statutes presumed not to apply abroad absent "clear statement" of extraterritorial intent); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment does not apply to search of nonresident alien's home in foreign state) (plurality opinion).

6. 494 U.S. 259 (1990).

warrantless search of his home in Mexico by United States and Mexican police. The Court split five ways on the matter, with a four-Justice plurality, in an opinion authored by Chief Justice Rehnquist, concluding that the Fourth Amendment does not reach abroad to protect a foreign suspect who lacks a "substantial connection" with the United States. Two Justices, Stevens and Kennedy, concurred more narrowly, and three Justices dissented, with Justice Brennan arguing in the most substantial dissent that the Fourth Amendment should apply in its totality wherever United States power is exercised.

Verdugo has generated reams of commentary.⁷ Virtually all of that commentary, however, has remained essentially within the framework set forth in the opinions of Justices Rehnquist and Brennan; the former confining the Fourth Amendment essentially to the water's edge, the latter applying the Fourth Amendment in its totality abroad.⁸ This Article questions that framework and suggests an alternative approach to the articulation of Fourth Amendment standards beyond United States borders. It argues that the Supreme Court's method fails because its basic premises, which are part of the Fourth Amendment framework the Court has inherited, are inadequate to the international context. The Court's domestic perspective cramps its analysis and leaves it with a limited and inflexible set of alternatives. A more satisfactory alternative, this Article suggests, is the adoption of an international, or transnational approach, which seeks to harmonize the Fourth Amendment with either international law or the laws of the states with which the United States acts jointly abroad.⁹

7. See sources cited *infra* notes 67, 68.

8. See *id.* The lower federal courts also have failed to grapple adequately with the issues raised by the *Verdugo* opinion. See *infra* note 137.

9. The scope of this Article is limited to nonmilitary searches and seizures of evidence in foreign states. Seizures of persons abroad raise a host of other issues, which have been extensively examined in the literature on the Supreme Court's 1992 decision of *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). See, e.g., Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1993).

Searches by the military likewise raise issues not addressed in this Article. See, e.g., John P. Coffey, Note, *The Navy's Role in Interdicting Narcotics Traffic: War on Drugs or Ambush on the Constitution?*, 75 GEO. L.J. 1947 (1987); Christopher A. Donesa, Note, *Protecting National Interests: The Legal Status of Extraterritorial Law Enforcement by the Military*, 41 DUKE L.J. 867 (1992). Also not addressed, except in passing, are searches or surveillance conducted pursuant to the President's national security power. See *United States v. United States Dist. Ct.*, 407 U.S. 297 (1972); David S. Eggert, Note, *Executive Order 12,333: An Assessment of the Validity of Warrantless National Security Searches*, 1983 DUKE L.J. 611.

Finally, searches on the high seas raise issues distinguishable from searches in foreign states, and will not be addressed in this Article. See, e.g., James S.

This Article proceeds in four main parts. Part II (which follows the Introduction) describes the *Verdugo* case and argues that none of the five opinions that comprise the Court's decision approach the issue of the Fourth Amendment's extraterritorial reach from a sufficiently broad or flexible perspective. This portion of the Article examines the approaches of Justices Brennan and Rehnquist and explores the problems inherent in their sweeping positions and, more broadly, in approaches that view extraterritorial searches solely from the perspective of United States law enforcement agents and United States law. Part II concludes that an approach is needed that is both more flexible and more sensitive to the cooperative and transnational nature of law enforcement beyond United States borders.

Part III sets out the building blocks for an "international" Fourth Amendment. An extraterritorial Fourth Amendment, applicable to United States citizens and noncitizens alike, remains possible after *Verdugo* because a majority of the Supreme Court failed to support the purported holding of Chief Justice Rehnquist—that the Fourth Amendment stops at the water's edge for all except United States citizens and residents. This sweeping position, which lower federal courts have subsequently assumed to be the Court's holding,¹⁰ in fact represents the judgment of only four Justices in *Verdugo*—the Chief Justice plus the three Justices who joined him in the plurality opinion. Neither of the two Justices who concurred (creating a six-Justice majority) joined in the full sweep of the Chief Justice's conclusion; both instead confined themselves to the narrower conclusion that the Amendment's warrant requirement is inapplicable abroad.¹¹ Thus, only four Justices have endorsed the Chief Justice's "water's edge" rule for the Amendment's other, and more central, requirement—that searches and seizures not be "unreasonable." This inconclusive result provides the foundation for the remainder of the Article, which urges the extraterritorial application of the "reasonableness" requirement and attempts a preliminary exploration of what it might mean for searches and seizures to be "reasonable" in a foreign state.

Part IV proposes two alternative transnational approaches for determining the "reasonableness" of extraterritorial searches. The first alternative, drawing on choice-of-law principles, would be to look to the search-and-seizure standards of the jurisdiction in which the search takes place, as well as to those of the United

Carmichael, Comment, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977); Greg Shelton, Note, *The United States Coast Guard's Law Enforcement Authority Under 14 U.S.C. § 89: Smugglers' Blues or Boaters' Nightmare?*, 34 WM. & MARY L. REV. 933 (1993).

10. See *infra* note 137.

11. See *infra* text accompanying notes 29-32.

States, and to declare transnational searches unlawful only when they violate both local and United States standards. The second alternative would be to adopt an international benchmark approach—that is, to construct a Fourth Amendment floor of minimally acceptable conduct out of international human rights norms and the search-and-seizure practices of the world's major legal systems. .

Part V completes the analysis by addressing three issues that must be confronted under either of these two proposed approaches. First, the Article discusses the “joint venture” doctrine, which requires that United States police play a leading role in any foreign search before the Fourth Amendment will be deemed applicable; a loosening of this requirement is urged. Second, in order to protect United States law enforcement agents from being penalized for unlawful acts by their foreign counterparts to which they did not contribute, a limited “good faith” exception is proposed under which unlawfully seized evidence would be admitted if United States agents could show that they neither sanctioned nor encouraged the violation. Finally, the Article briefly reviews the debate over whether, and under what circumstances, separation-of-powers principles should allow the executive branch to ignore constitutional dictates when acting abroad.

II. VERDUGO AND ITS SHORTCOMINGS

The Constitution neither specifies the extent of its geographical reach nor identifies the “people” or “persons” it protects. Both these issues have been the source of disagreement and contention virtually from the moment of the constitutional founding. As the United States expanded and established territories beyond the original colonial states, questions of the Constitution's geographical scope became increasingly relevant. As evidenced by the fierce debates over the Alien and Sedition Acts of 1798, the youthful United States also faced questions about whether the Constitution protected noncitizens *within* its borders.¹² These questions, which had cropped up only sporadically for most of United States history, became increasingly urgent after the Second World War, as the United

12. For a comprehensive discussion of the debate over the scope of the Constitution from the founding to the present, putting the *Verdugo-Urquidez* decision within this context, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

States rapidly increased its efforts to apply United States laws around the world.¹³

One much-noted development in the 1980s gave these questions of geographical and personal scope a particularly sharp edge—the exponential increase in the prosecution of international narcotics traffickers, both on the high seas and in foreign states.¹⁴ Large-scale transnational law enforcement efforts raised questions, not previously fully resolved, about the extraterritorial scope of the Fourth Amendment.¹⁵ While courts for the last century have extended constitutional rights to aliens, including illegal aliens, inside the United States¹⁶ and additionally have extended constitutional rights to United States citizens abroad,¹⁷ they have been slower to resolve the question of aliens' constitutional rights abroad.¹⁸ The question of the Fourth

13. See Grundman, *supra* note 2.

14. See generally STEVEN WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* (1986); Ethan A. Nadelmann, *U.S. Drug Policy: A Bad Export*, 70 *FOREIGN POL'Y*, Spring 1988, at 83.

15. See, e.g., 1986 *ATT'Y GEN. ANN. REP.* (describing international scope of United States law enforcement efforts); Mark Gibney, *Policing the World: The Long Reach of U.S. Law and the Short Arm of the Constitution*, 6 *CONN. J. INT'L L.* 103 (1990); Elizabeth A. Corrandino, Note, *The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far?*, 57 *FORDHAM L. REV.* 617 (1989); Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 *HARV. L. REV.* 1672 (1989) [hereinafter Harvard Note]. See also articles cited *infra* note 77.

16. See, e.g., *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-39 (1987) (illegal aliens entitled to due process before conviction for unlawful reentry into United States); *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal alien children entitled by Fourteenth Amendment to admission to public schools); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (illegal aliens protected by Fifth Amendment from invidious discrimination by federal government); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (all persons within United States territory entitled to protection of Fifth and Sixth amendment trial rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (all persons within United States territory entitled to Fourteenth Amendment protection); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* (1987) [hereinafter *FOREIGN RELATIONS RESTATEMENT*] § 422 cmt. c(iv) (trial rights), § 722 cmt. a & reporters' notes 3, 4, 7, 14 (general rights of aliens in United States). A potential weakening of this commitment is signaled in dicta in Chief Justice Rehnquist's Opinion of the Court in *Verdugo*, 494 U.S. at 270-72. See *infra* notes 75-76 and accompanying text.

17. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957) (extending habeas corpus protection to United States citizens convicted by United States military tribunal abroad).

18. See *United States v. Yunis*, 859 F.2d 953, 970 (D.C. Cir. 1988) (Mikva, J., concurring specially) ("the Supreme Court has never determined whether aliens are entitled to the protections of our Bill of Rights outside the United States"); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1217 (9th Cir. 1988) ("Strangely enough, this question [of aliens' Fourth Amendment rights outside United States territory] has not yet been answered by the Supreme Court or definitively resolved by any circuit court of appeals. Indeed, until this case, we have been content simply to assume that the fourth amendment constrains the

Amendment's applicability to aliens abroad reached the Supreme Court for the first time in *Verdugo*.

A. *The Verdugo Decision*

Rene Martin Verdugo-Urquidez was an alleged leader of a large and violent Mexican drug-smuggling ring and a participant in the notorious torture-murder of United States Drug Enforcement Administration (DEA) special agent Enrique Camarena-Salazar. In 1986, pursuant to a United States warrant for his arrest, Mexican police, allegedly secretly hired by United States law enforcement officials, seized Verdugo and transported him to the United States border in Calexico, California, where he was turned over to United States marshals.¹⁹

After taking custody of Verdugo and moving him to a San Diego jail, DEA agents, seeking evidence related to Verdugo's narcotics trafficking and his involvement in the Camarena murder, contacted Mexican federal police in Mexico City to obtain authorization to search two residences, in Mexicali and San

manner in which the federal government may pursue its extraterritorial law enforcement objectives."), *rev'd*, 494 U.S. 259 (1990). The Supreme Court, however, has determined that nonresident enemy aliens in time of war are not entitled to constitutional protections. *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The *Restatement (Third) of Foreign Relations Law* says only that the issue of aliens' rights outside the United States "has not been authoritatively adjudicated." FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 722 cmt. m. It adds, "at least some actions by the United States in respect of foreign nationals outside the country are . . . subject to constitutional limitations." *Id.*

19. *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1343 (9th Cir. 1991), *vacated*, 112 S.Ct. 2986 (1992). The circumstances of Verdugo's arrest and informal "extradition" provide a point of connection to another, even more publicized case—that of Dr. Humberto Alvarez-Machain, the Mexican doctor, also implicated in the Camarena murder, who was abducted in Mexico and turned over to the DEA by Mexicans whom the DEA had hired for the job. Both Verdugo and Alvarez appealed on the identical ground that they had been illegally abducted in violation of the extradition treaty between the United States and Mexico. Alvarez' case reached the Supreme Court in 1992, producing a highly controversial opinion in which a divided Court held that the circumstances of a defendant's arrest and transportation into the trial court's jurisdiction have no effect on the court's jurisdiction over him. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

Verdugo's appeal followed his 1990 Supreme Court defeat on the Fourth Amendment issue and his subsequent conviction at trial on all charges. His kidnapping allegation was supported by Mexican prosecutors in Baja, who filed kidnapping charges against the six officers who had abducted him, who meanwhile had fled to the United States. The Ninth Circuit concluded that the allegations, if true, would require reversal of Verdugo's conviction and dismissal of the indictment. 939 F.2d at 1362. The Supreme Court, however, held Verdugo's petition in suspense pending its disposition of the *Alvarez-Machain* case, and then summarily vacated and remanded in light of that decision. *United States v. Verdugo-Urquidez*, 112 S. Ct. 2986 (1992).

Felipe, believed to belong to Verdugo.²⁰ The United States agents did not attempt to obtain a warrant for the search, either in the United States or Mexico, but instead sought to obtain less formal authorization over the telephone.²¹ A top Mexican Federal Judicial Police (MFJP) official approved the search by telephone the next day, and authorized the assignment of several MFJP officers.²²

A joint force of four DEA agents and ten to fifteen Mexican officers arrived after dark and proceeded to search the Mexicali and San Felipe houses, in addition to a house in nearby Playa del Sol not mentioned in the original request.²³ Mexican officers took charge of the residential entries; they broke into two of the houses, which were empty, and were admitted into the third by its occupants. According to the findings of the district court, DEA and MFJP officers jointly conducted the searches inside the houses, following oral instructions from the DEA agent in charge. DEA agents took all documentary evidence seized from the houses. Mexican officers seized a 1984 Grand Marquis automobile, some three-wheeled vehicles, and weapons. Although required to do so under United States law, the DEA agents failed to leave a receipt indicating what items had been seized or to promptly inventory the items.

Before trial, Verdugo moved to suppress all evidence seized in the Mexicali and Playa del Sol searches, which included a tally sheet apparently recording drug transactions. The district court granted his motion.²⁴ The court held, first, that the Fourth Amendment protects aliens from United States action abroad and, second, that the Amendment applied to the searches at issue, which were conducted as a joint venture between United States and Mexican officers. The court further held that the searches failed to comply with the Amendment's Warrant Clause, which

20. The searches are described in the district court's unpublished opinion, *United States v. Verdugo-Urquidez*, No. 86-0107-JLI-Crim. (S.D. Cal. Feb. 5, 1987), and, in abbreviated form, in the Ninth Circuit's decision upholding the trial court, 856 F.2d 1214 (9th Cir. 1988). The district court's opinion is available only in unpaginated form, as Appendix B to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *United States v. Verdugo-Urquidez* (No. 88-1353), available in LEXIS, Genfed Library, Briefs File (hereinafter *Verdugo* (S.D. Cal.)).

21. 856 F.2d at 1216 n.2.

22. *Id.* at 1226.

23. *Id.* The Playa del Sol search is not mentioned in the Court of Appeals opinion, but is described in the unpaginated opinion of the district court. *Verdugo* (S.D. Cal.), *supra* note 20. This Article's description of the searches is taken from the district court's findings of fact, which are largely reproduced in the Court of Appeals opinion, 856 F.2d at 1226-27.

24. *Verdugo* (S.D. Cal.), *supra* note 20. The Ninth Circuit summarized the district court's conclusions regarding the Mexicali, but not the Playa del Sol, search. 856 F.2d at 1217.

requires police, except in exceptional circumstances, to obtain warrants for all searches. Even had a warrant not been required, the court held, the execution of the searches nevertheless violated in several ways the Amendment's requirement that searches be conducted "reasonably": the searches were unconstitutionally general in scope; they occurred after midnight; and the agents failed to leave receipts or to prepare contemporaneous inventories.²⁵

The United States filed an interlocutory appeal of the district court's ruling.²⁶ It argued that the Fourth Amendment did not protect Verdugo, a Mexican national, from a United States search in Mexico. In the alternative, the United States argued that, even if the Fourth Amendment extended to Verdugo, the evidence nevertheless should have been admitted, because the DEA agents reasonably relied on assurances of Mexican officials that the search was permissible under Mexican law, and then carried out the search in a reasonable manner.²⁷ A divided Ninth Circuit panel affirmed the district court's ruling,²⁸ and the United States petitioned for certiorari.

The Supreme Court granted certiorari and reversed the Ninth Circuit's holding, with six Justices in three separate opinions concluding that the evidence against Verdugo was wrongfully suppressed.²⁹ Chief Justice Rehnquist (joined by Justices White, O'Connor, Scalia, and Kennedy) wrote the "Opinion of the Court;" Justice Kennedy filed a concurring opinion, and Justice Stevens filed an opinion concurring in the judgment. Justices Brennan and Blackmun wrote separate dissents, with Justice Marshall joining Brennan's opinion.³⁰

The potpourri of opinions leaves the scope and precedential effect of the Court's decision uncertain. The principal problem is the lack of a true majority opinion: the opinion denominated the "Opinion of the Court" was not joined in much of its reasoning, or even in all its conclusions, by a majority of the Court. Only three Justices, White, O'Connor, and Scalia, fully joined the Chief Justice's opinion. Neither of the two Justices who concurred fully agreed with the scope or reasoning of what Chief Justice Rehnquist asserted to be the Court's "holding": Justice Stevens concurred only in the judgment, and Justice Kennedy, who purported to join the Opinion of the Court, nevertheless explicitly

25. 856 F.2d at 1217; *Verdugo* (S.D. Cal.), *supra* note 20.

26. 856 F.2d at 1215.

27. *Id.*

28. *Id.* (majority opinion); *id.* at 1230 (Wallace, J., dissenting).

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

30. *Id.* at 261 (Opinion of the Court); *id.* at 275 (Kennedy, J., concurring); *id.* at 279 (Stevens, J., concurring in judgment); *id.* at 279 (Brennan, J., dissenting); *id.* at 297 (Blackmun, J., dissenting).

repudiated Rehnquist's central argument in favor of a narrower holding.³¹ Consequently, the Court's decision rests on two independent and at least partly irreconcilable rationales—Rehnquist's and Kennedy's—with little apparent common ground between them. Further, even if it represents the judgment of a majority of the Court, the scope of Chief Justice Rehnquist's "holding" and the rationale on which it rests are unclear. For these reasons, the *Verdugo* decision leaves lower courts with a certain amount of flexibility in construing its scope and effect—a flexibility, however, which they have failed to exercise.³²

The two longest and most significant opinions in *Verdugo*, those by the Chief Justice and Justice Brennan, reflect sharply differing traditions of United States constitutionalism. One tradition, embraced by Rehnquist, reads the Constitution narrowly, as a "compact" that extends rights only to "members" of the "national community." The more expansive tradition, embraced by Justice Brennan, would have the Constitution extend its protections wherever the United States wields power. Justice Kennedy's shorter concurring opinion embraces a third tradition, one which proposes a pragmatic and case-specific balancing test that weighs "what process is due" when the United States acts abroad.³³

Chief Justice Rehnquist's opinion begins by distinguishing between Fourth Amendment rights and the trial rights guaranteed by the Fifth Amendment.³⁴ Whereas Fifth Amendment rights are exercised at trial, a violation of the Fourth Amendment is "fully accomplished" at the time a search or seizure takes place. Thus, "if there were a constitutional violation [in the *Verdugo* case], it occurred solely in Mexico."³⁵

The Fourth Amendment is different in another respect, Rehnquist added. In contrast to the Fifth and Sixth Amendments, which extend their protections categorically to all criminal defendants,³⁶ the text of the Fourth Amendment—guaranteeing "[t]he right of the people to be secure

31. See *infra* text accompanying notes 46-51.

32. See *infra* note 137.

33. These approaches are placed in historical context by Neuman, *supra* note 12.

34. *Verdugo*, 494 U.S. at 264.

35. *Id.*

36. The Fifth Amendment provides: "No person . . . shall be held to answer . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V (emphasis added). The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI (emphasis added).

in their persons, houses, papers, and effects, against unreasonable searches and seizures"—“extends its reach only to ‘the people.’” In the Chief Justice’s view, “the people” is a term of art selectively employed in the Constitution to refer to a “class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community.”³⁷ Verdugo, a Mexican national brought unwillingly into the United States as a prisoner shortly before the searches in question, had not developed the kind of substantial connection that could qualify him as a member of this “national community.”³⁸ Rehnquist noted that the framers of the Constitution, as well as their contemporaries, had no such concern for the rights of nonresident aliens, and that courts over the years had declined to extend any such rights.³⁹

Additionally, the Chief Justice concluded, “significant and deleterious consequences” could follow from bestowing Fourth Amendment rights on nonresident aliens.⁴⁰ If the Fourth Amendment could be invoked by criminal defendants such as Verdugo, it also could be invoked against military operations abroad.⁴¹ Moreover, if the Fourth Amendment could be invoked defensively as a means to suppress evidence, it could also be invoked offensively, in the form of actions for damages.⁴² Application of the Fourth Amendment under such circumstances could significantly disrupt the political branches’ ability to respond to foreign situations implicating the national interest.⁴³ Trying to figure out where the courts would draw the line between law enforcement and national security operations would “plunge [the President and Congress] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.”⁴⁴ Given this uncertainty and the risks inherent in the international arena, Chief Justice Rehnquist concluded that restrictions on law enforcement abroad must of necessity be imposed, if at all, by the political branches.⁴⁵

37. *United States v. Verdugo-Urquidez*, 494 U.S. at 265.

38. *Id.* at 271-72.

39. *Id.* at 266-69. As the Chief Justice noted, one line of cases extends constitutional rights to aliens *within* the United States, and a few other cases extend constitutional rights to *citizens* abroad, but no Supreme Court case has extended constitutional rights to aliens outside United States territory. *Id.* at 268-73. Justice Brennan noted in response that, while the Supreme Court had not extended Fourth Amendment protections to aliens abroad, neither has it precluded such an extension. *Id.* at 290 (Brennan, J., dissenting).

40. *Id.* at 273.

41. *Id.*

42. *Id.*

43. *Id.* at 273-74.

44. *Id.* at 274.

45. *Id.* at 275.

Justice Kennedy, while purporting to join Rehnquist's Opinion of the Court,⁴⁶ in fact went out of his way to repudiate the Chief Justice's "membership" approach. In his view, the Fourth Amendment's reference to "the right of the people," if anything, served to underscore the importance of the right granted, rather than to restrict the category of persons who might assert it.⁴⁷ Justice Kennedy, however, made even more clear his opposition to the view of constitutional universalists, perhaps including Justice Brennan, who argue "that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."⁴⁸ In between the two poles of Rehnquist and Brennan, Justice Kennedy staked out a flexible middle ground, drawing on a classic concurrence by Justice Harlan:

. . . not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place [T]here is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.⁴⁹

In this case, Justice Kennedy concluded, the circumstances of extraterritorial law enforcement—notably the absence of local judicial officials available to issue warrants, the differing conceptions of reasonableness and privacy prevalent abroad, and the need to cooperate with foreign officials—combined to make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous."⁵⁰

Notably, Justice Kennedy did not reach the broader issues of constitutional scope that occupied Chief Justice Rehnquist. His opinion, having found the warrant requirement "impracticable and anomalous," did not proceed, as the Chief Justice's did, to the conclusion that the entire Fourth Amendment stops at the

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

47. *Id.* at 276.

48. *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). "Universalist" approaches, resting on the natural rights background of the United States constitutional tradition, go beyond municipal law approaches to extend constitutional protections globally, to every person and every place. See generally Neuman, *supra* note 12, at 916-17, 982-84.

49. 494 U.S. at 277-78 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

50. *Id.* at 278.

water's edge for noncitizens.⁵¹ This is true as well of the one-paragraph concurrence filed by Justice Stevens, who confined himself to the proposition that "the Warrant Clause [does not have] any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches."⁵² Because the two concurring Justices confined their holdings to the inapplicability of the Warrant Clause, support for Rehnquist's broad statement of the holding amounts to only four Justices—that is, the Chief Justice and the three Justices (White, O'Connor, and Scalia) who joined the plurality opinion in its entirety.⁵³

Justice Brennan, in dissent, set out a view of the Constitution sharply at variance to those advanced by either Chief Justice Rehnquist or Justice Kennedy. Justice Brennan invoked principles of "mutuality" and "fundamental fairness" in support of the view that the Constitution applies wherever the United States exercises its legal muscle abroad.⁵⁴ "Fundamental fairness," he reasoned, mandates that whenever the United States imposes "societal obligations" on foreign nationals in the form of compliance with the law, the United States is obliged to respect certain correlative rights.⁵⁵ Simply stated, "[i]f we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them."⁵⁶ Verdugo thus was entitled to Fourth Amendment protection because the United States government, in investigating him and then attempting to hold him accountable under United States criminal laws, "has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed."⁵⁷

Justice Brennan's emphasis on the mutuality of societal obligations and rights places his reasoning within what have been dubbed "municipal law"⁵⁸ approaches to the Constitution—those

51. See *id.* (Kennedy, J., concurring); *id.* at 294 n.13 (Brennan, J., dissenting) ("Justice Kennedy . . . never explains why the reasonableness clause, as opposed to the Warrant Clause, would not apply to searches abroad.")

52. *Id.* at 279 (Stevens, J., concurring in the judgment).

53. This point has been made by most commentators on the decision. See, e.g., 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.8(g) (2d ed. 1987 & Supp. 1993); Neuman, *supra* note 12, at 972 & n.378; Ruth Wedgwood, *International Decision*, 84 AM. J. INT'L L. 747, 750 (1990); New York State Bar Ass'n Int'l Litig. Comm., Commercial & Fed. Litig. Section, *The Fourth Amendment Rights of Nonresident Aliens*, 27 STAN. J. INT'L L. 493, 497-98 (1991) [hereinafter New York Bar Report].

54. 494 U.S. at 284 (Brennan, J., dissenting).

55. *Id.*

56. *Id.*

57. *Id.*

58. "Municipal" is used here in its traditional international law sense to mean domestic, as opposed to international, law. See *infra* note 101.

approaches that deem rights to be prerequisites for political or legal obligations.⁵⁹ Like Chief Justice Rehnquist's "membership-based" model, this model derives its force from a social contract understanding of constitutionalism; however, the two models offer different explanations of how one becomes a beneficiary of the social contract. For the Chief Justice, one becomes a beneficiary when one has accumulated sufficient ties to be considered a member of a "national community," which guarantees members particular rights in exchange for certain communal obligations. Under the municipal law approach espoused by Justice Brennan, by contrast, guarantees of rights are not a function of "membership;" rather, rights are extended transaction by transaction, in direct relation to obligations imposed by the government.

In parts of his dissent, Justice Brennan appeared to go beyond the principle of "mutuality"⁶⁰ described above and toward a universalist approach of the sort to which Justice Kennedy objected. At one point, he suggested that freedom from unreasonable searches and seizures might be a natural right, inherent in the people and predating the Bill of Rights.⁶¹ At another point, he also suggested that the Fourth Amendment might apply abroad in situations beyond the law enforcement context, such as to restrict peacetime national security operations abroad.⁶²

Justice Blackmun, in a three-paragraph dissent, accepted Justice Brennan's core principle of "mutuality" but separated himself from his co-dissenter in two ways. First, he tried to rein in the universalist tendencies of Justice Brennan's opinion by sharpening the test of when the Constitution should apply. The limiting principle, Justice Blackmun argued, should be the exercise of "sovereign authority" abroad. The exercise of sovereign authority, as in law enforcement operations, should trigger the Fourth Amendment; the mere "exercise of *power* abroad," as in military operations, should not.⁶³ Second, Justice Blackmun differed from Justice Brennan on the matter of warrants. He

59. See Neuman, *supra* note 12, at 919; see also Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2297-98 (1991) (finding governments "limited by basic principles of political legitimacy whether they consent to these limits or not").

60. 494 U.S. at 284 (Brennan, J., dissenting).

61. *Id.* at 288 (noting that the Framers "did not purport to 'create' rights" but instead "designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing.").

62. *Id.* at 292 (noting that the exception for exigent circumstances would likely minimize the warrant requirement's application to "non-law-enforcement activities . . . implicating national security").

63. 494 U.S. at 297 (Blackmun, J., dissenting).

concluded, as did Justice Stevens, that "an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country."⁶⁴ He nevertheless held that the Fourth Amendment required the search to be "reasonable."⁶⁵ Accordingly, he would have remanded the matter to the trial court for a determination of whether probable cause for the searches existed.

In sum, the outstanding feature of the *Verdugo* decision is the Supreme Court's fragmentation over fundamental issues of the Constitution's nature and scope. Chief Justice Rehnquist's "membership" approach garnered only a plurality of four Justices and is theoretically irreconcilable with Justice Kennedy's contextually sensitive approach. Both, in turn, are fundamentally at odds with the "mutuality" or "sovereignty" approaches of Justices Brennan and Blackmun. Additionally, Chief Justice Rehnquist's purported holding—that the entire Fourth Amendment terminates at the water's edge for individuals lacking "substantial connection" with the United States national community—found support from only three other Justices. The sole proposition to garner a majority of the Justices (seven Justices—all except Justices Brennan and Marshall) was that the Amendment's warrant requirement is inapplicable abroad. The applicability of the Amendment's first clause, guaranteeing "the right of the people to be secure . . . against unreasonable searches and seizures," remained an open question.⁶⁶ Clearly, in *Verdugo*, the Supreme Court had just begun to wrestle with the complexities of searches and seizures abroad.

B. *Evaluating the Court's Approaches*

Commentary on the *Verdugo* decision has been extensive. The vast majority of commentators have taken aim at the Chief Justice's textual reading of the Constitution, arguing, as did Justice Brennan, that the Constitution generally should follow the United States whenever the government acts beyond national

64. *Id.*

65. *Id.*

66. See *infra* note 139.

borders.⁶⁷ The Chief Justice's approach has garnered almost no support.⁶⁸

1. The Rehnquist Approach: "Membership"

Much of the commentary on *Verdugo* has focused on the deficiency of the Chief Justice's reasoning. Three points, in particular, have provided a focus of attack: Rehnquist's textual analysis, finding the phrase "the people" to be a "term of art;"⁶⁹ his freewheeling use of history; and the unnecessarily broad sweep of his opinion, containing language that could threaten the settled rights of aliens within the United States.

67. Articles criticizing the Chief Justice's approach include Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151 (1991) (attacking Rehnquist's approach in context of United States abductions of foreign suspects); Gibney, *supra* note 15 (urging extraterritorial enforcement of domestic constitutional standards); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 455-58, 491-93 (1990) (recommending that United States and foreign law be enforced); Neuman, *supra* note 12, at 976-91 (recommending modified version of Brennan's "mutuality" approach); New York Bar Report, *supra* note 53 (criticizing Rehnquist's textual approach and urging that it not be used to diminish aliens' rights within United States); Wedgwood, *supra* note 53 (recommending "rule of reason").

Student notes and comments criticizing Rehnquist's approach include Jon A. Dobson, Note, *Verdugo-Urquidez: A Move Away from Belief in the Universal Pre-existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Gail T. Kikawa, Note, *How the Majority Stumbled*, 13 HOUS. J. INT'L L. 369 (1991); Janet E. Mitchell, Note, *The Selective Application of the Fourth Amendment*, 41 CATH. U. L. REV. 289 (1991); Mary Lynn Nicholas, Note, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267 (1990-91); Victor C. Romero, Note, *Whatever Happened to the Fourth Amendment?: Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999 (1992).

68. For a rare article expressing (qualified) support of Rehnquist's approach, see Paul B. Stephan, III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. ANN. 133, 134 (hailing plurality opinion as "advanc[ing] a conception of international law as a body of contingent principles derived from intergovernmental bargaining"). Two earlier articles by Professor Stephan appear to have provided some of the theoretical underpinning for the Chief Justice's opinion, and were cited by the Justice Department in its briefs. See Paul B. Stephan, III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987) [hereinafter *Terrorism*]; Paul B. Stephan, III, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT'L L. 777 (1980) [hereinafter *International Rendition*].

In addition, a few student notes published before the Supreme Court's *Verdugo* opinion provided anticipatory support for Rehnquist's approach. See, e.g., Patrick Dooley, Note, *The Unreasonableness of Requiring a Warrant for Searches of Non-resident Aliens in a Foreign Country: United States v. Verdugo-Urquidez*, 20 CAL. W. INT'L L.J. 355 (1990).

69. *United States v. Verdugo-Urquidez*, 494 U.S. at 265.

In analyzing the text of the Constitution, the Chief Justice attempted to distinguish between the framers' use of the words "the people" (in seven places throughout the Constitution) and the alternative use (in the Fifth and Sixth Amendments) of the words "person" and "accused."⁷⁰ The Chief Justice concluded that the use of "the people" by the framers was intended to restrict the scope of the provisions in which it appears to "persons who are part of a national community."⁷¹ As more than one commentator has noted, the text of the Constitution does not support such a conclusion; an analysis of the constitutional text reveals instead that "[t]he framers do not appear to have used the phrase 'the right of the people' in situations involving any rights or privileges that are distinct from other enumerated liberties such that any different scope of application can readily be inferred."⁷²

Other commentators have noted the ahistorical nature of the Chief Justice's "suggestion that the constitutional structure of the United States was meant to have as its beneficiaries only United States citizens and resident aliens."⁷³ As one commentator has noted, while the framers did not extend political rights to aliens, they nevertheless gave attention to protecting aliens' rights under the law of nations. For instance, Article III of the Constitution, by creating foreign diversity jurisdiction, allowed foreign creditors to recover their debts in United States courts; additionally, the first Judiciary Act provided that aliens could sue in federal court for torts under the law of nations.⁷⁴

Others have stressed the destructive impact the Chief Justice's opinion could have on the rights of aliens within the United States—in particular, Rehnquist's remark, in dictum, that case law apparently guaranteeing Fourth Amendment rights to illegal aliens within the United States was in fact "not dispositive" of the matter.⁷⁵ This dictum, implying a reopening of the issue of

70. *Id.* at 265-66.

71. *Id.* at 265.

72. New York Bar Report, *supra* note 53, at 502. For an analysis of the use of the phrase "the people" in the first ten amendments, see *id.* at 500-03. See also Abramovsky, *supra* note 67, at 184; Nicholas, *supra* note 67, at 296.

73. Wedgwood, *supra* note 53, at 753; see also Neuman, *supra* note 12, at 927-38 (drafters of Bill of Rights did not take care to distinguish between respective rights of citizens and persons; the issue was not raised sharply until a decade later in response to the Alien and Sedition Acts of 1798).

74. Wedgwood, *supra* note 53, at 753 & nn.26-27. The Alien Tort Statute is codified at 28 U.S.C. § 1350 (1988).

75. *United States v. Verdugo-Urquidez*, 494 U.S. at 272 (stating that Court's previous opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), "where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States," was not "dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us."). The Chief Justice's suggestion that the Court

aliens' previously settled rights, suggests the potential latent in Chief Justice Rehnquist's social compact approach for a full-fledged assault on the rights of noncitizens within, as well as outside, the United States.⁷⁶

Perhaps the most disturbing aspects of the Chief Justice's opinion, however, lie not in the specific deficiencies of its reasoning, but instead are inherent in his approach. First, the Chief Justice resurrected a disturbing tradition of constitutional interpretation that would confine constitutional protections solely to those who are "members" of the national community, leaving nonmembers without a remedy. Second (a concern that has not received the attention of commentators but which is at the heart of this Article's critique), by leaving the targets of transnational law enforcement efforts not only outside the United States "social compact" but outside the law of any state, the Chief Justice essentially would place these individuals outside the realm of law. While any number of states may search their homes or seize their belongings, they may invoke the legal protections of no state in the United States courts.

a. The Membership Tradition

The "membership" tradition that the Chief Justice invoked is one of two or three dominant traditions that have developed over the last two centuries in response to basic questions of constitutional scope.⁷⁷ These traditions, it should be noted, rely more on political theory, on broad interpretations of the nature and character of the Constitution as a whole, than on any

reconsider the application of the Fourth Amendment to aliens within the United States is vigorously critiqued in New York Bar Report, *supra* note 53, at 498-513, and in Romero, *supra* note 67.

76. See Abramovsky, *supra* note 67, at 184.

77. These traditions have been analyzed extensively in recent years in response to the expansion of United States law enforcement activity abroad. For articles written before the Supreme Court's *Verdugo* decision that explore these traditions, see, e.g., Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Jules Lobel, *Rights—Here and There: The Constitution Abroad*, 83 AM. J. INT'L L. 871 (1989); John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT'L L. & POLY 287 (1985); Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980); Stephan, *Terrorism*, *supra* note 68; Stephan, *International Rendition*, *supra* note 68; Roszell Dulany Hunter, IV, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649 (1986). In the discussion that follows I rely on the more recent, and more comprehensive, analysis of Professor Gerald Neuman following the *Verdugo* decision. Neuman, *supra* note 12. Neuman analyzes three traditions (which he dubs the "membership," "global due process," and "municipal-law" traditions) which provide the theoretical grounding for the opinions by Justices Rehnquist, Kennedy, and Brennan respectively.

particular constitutional provisions, for the Constitution itself provides little, if any, textual guidance in this area.⁷⁸ Chief Justice Rehnquist's membership approach, in particular, represents a restrictive version of the social contract tradition that identifies a prescribed class of "members" as the proper beneficiaries of the contract. Undergirding the membership⁷⁹ tradition are Hobbesian notions: that international relations constitute a state of war; that a state's only external obligations are those resulting from explicit promises; that rights are granted exclusively to members; that, until granted membership, aliens are outsiders to the social contract of a particular state, and thus in a condition of war.⁸⁰

The membership view of the Constitution has been invoked on numerous occasions throughout United States history, many of which have acquired notoriety with the clarity of hindsight.⁸¹ Echoes of Chief Justice Rehnquist's language sound, for instance, in the arguments of the Federalists in support of the Alien and Sedition Acts of 1798, during which Federalist representatives announced to Congress that "the Constitution was made for citizens, not for aliens, who of consequence have no rights under it."⁸² Echoes can be heard again in Chief Justice Taney's opinion in the *Dred Scott* case, in which he drew on social contract analysis to conclude that blacks could never be part of "the people" protected under the Constitution.⁸³ The California legislature repeatedly attempted to implement a similar approach to noncitizens during the latter half of the nineteenth century, passing scores of measures intended to relegate Chinese immigrants to second-class status—an effort decisively repudiated

78. See Henkin, *supra* note 77, at 30. Chief Justice Rehnquist, of course, tried to ground his approach in textual exegesis, but his apparent failure to do so convincingly underscores the lack of textual support for such attempts.

79. The Chief Justice did not refer by name to any such tradition. Others have generally referred to the tradition that the Chief Justice invoked as the "social compact" tradition. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218-21 (9th Cir. 1988); Abramovsky, *supra* note 67, at 181-90; Stephan, *International Rendition*, *supra* note 68, at 783-85. Since I follow Neuman in finding both Rehnquist's and Brennan's approaches to be versions of social contract theory, I prefer to use the term "membership" to avoid confusion when describing the Chief Justice's approach.

80. See Neuman, *supra* note 12, at 923, 984-87; and see THOMAS HOBBS, *LEVIATHAN* 360 (C.B. MacPherson ed., 1985) ("the infliction of what evil soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Commonwealth, and without violation of any former Covenant, is no breach of the Law of Nature").

81. See Neuman, *supra* note 12, at 917-18, 929-34, 940-41.

82. 9 ANNALS OF CONGRESS 2987 (1799). See also Neuman, *supra* note 12, at 929-34.

83. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

by the Supreme Court in groundbreaking cases such as *Yick Wo v. Hopkins*⁸⁴ and *Wong Wing v. United States*.⁸⁵

The membership tradition has provided a crucial foundation not only for efforts to deny rights to aliens and non-whites within the United States, but also for Supreme Court efforts confining the reach of the Constitution to the mainland United States. Membership reasoning provides the underpinning for Supreme Court decisions in this area such as the *Insular Cases*⁸⁶ (establishing a framework of second-class status for overseas territories), *In re Ross*⁸⁷ (upholding the summary trial of a United States seaman before an offshore consular court on the ground that "[t]he Constitution can have no operation in another country"),⁸⁸ and *Johnson v. Eisentrager*⁸⁹ (denying enemy soldiers imprisoned abroad access to United States courts).⁹⁰

Kinship with this Hobbesian tradition, as Gerald Neuman notes, is not hard to find in Chief Justice Rehnquist's *Verdugo* opinion: in his reliance, for example, on "the people" as demarcating "a class of persons who are part of a national community,"⁹¹ and in his insistence on the rightlessness of those who are not members.⁹² It may also be perceived in Rehnquist's invocation of the *Insular Cases*, *In re Ross*, and *Johnson v.*

84. 118 U.S. 356 (1886).

85. 163 U.S. 228 (1896); see also Neuman, *supra* note 12, at 941-42 & nn.174-80.

86. This refers to the series of cases, from *DeLima v. Bidwell*, 182 U.S. 1 (1901), to *Balzac v. Porto Rico*, 258 U.S. 298 (1922), that established the constitutional and legal status of the overseas territories, including Puerto Rico and the Philippines. See Neuman, *supra* note 12, at 957-64.

87. 140 U.S. 453 (1891).

88. *Id.* at 464.

89. 339 U.S. 763 (1950).

90. The principal defender of the tradition in recent years has been Professor Paul Stephan. In a series of articles over the last decade and a half (cited *supra* note 68), he has argued for the members-only approach as the appropriately hard-headed response to the threats of international terrorism and drug trafficking. Stephan invokes the "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." Stephan, *International Rendition*, *supra* note 68, at 783. Taking the contract metaphor literally and drawing on modern contract theory, Stephan queries whether the compact should be seen "as obligating the government to assume a duty with respect to some class of third parties, thereby creating rights in the latter." His answer is that "[t]he benefits to the people of the United States derived from the government's assumption of such a duty should be substantial and unmitigated before that duty is imposed," and that in fact "the benefits . . . might not be great while the costs could be considerable." *Id.* at 783-84. See also *United States v. Verdugo-Urquidez*, 856 F.2d at 1231-37 (Wallace, J., dissenting).

91. *United States v. Verdugo-Urquidez*, 494 U.S. at 265.

92. *Id.*

Eisenrager,⁹³ and in his insistence that the only limitations on United States actions abroad should be self-imposed,⁹⁴ and that “deleterious consequences” will result if the United States accepts constitutional restrictions on its freedom of action abroad.⁹⁵

b. Outside the Realm of Law?

The second general area of concern mentioned above relates to *Verdugo*'s effect from an international, rather than a constitutional, perspective. This concern, which has not previously been explored in the academic literature, provides the foundation for this Article's critique. The *Verdugo* Court, and subsequent commentators, have approached the problems raised by the case from an essentially domestic perspective—that is, they have looked at the United States constitutional framework in a vacuum and have asked whether the framework should be expanded or contracted to encompass the factual situation presented in *Verdugo*.

The perspective this Article proposes is a different one. It suggests examining *Verdugo*'s situation from an international, rather than a national, perspective, and taking note that *Verdugo*, as a Mexican target of United States law enforcement, exists within two legal frameworks, not one, and is acted upon by two sets of state actors, not one. From this perspective, the impact of Chief Justice Rehnquist's opinion on *Verdugo*'s situation appears even more dire. *Verdugo* and subsequent targets of United States-instigated, transnational law enforcement efforts, will find themselves not merely outside the ambit of the United States Bill of Rights, but also outside the ambit of whatever protections the search-and-seizure law of their own state provides. At least as far as searches and seizures are concerned, these defendants will find themselves in a uniquely unprotected position: They will lack the protection not only of the law of the state that is prosecuting them (the United States), but of the law of their own state as well. This rightlessness occurs because, as discussed in Part IV below, United States courts do not apply the Fourth Amendment to the acts of foreign officials and do not enforce foreign search-and-seizure laws.⁹⁶

That defendants in *Verdugo*'s position are now essentially international outcasts carries more than theoretical force. In *Verdugo*, for example, the search of *Verdugo*'s residences, on its face, violated the Mexican Constitution, Article 16 of which states:

93. *Id.* at 268-69.

94. *Id.* at 274-75.

95. *Id.* at 273.

96. See *infra* part IV.A.1.

No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. . . . Every search warrant . . . can be issued only by judicial authority and . . . must be in writing.⁹⁷

The district court briefly addressed the potential applicability of the Mexican Constitution to the *Verdugo* case and concluded that DEA agents should have sought advice on Mexican constitutional law, in particular on whether "exigent circumstances" excused the need for obtaining a warrant.⁹⁸ *Verdugo's* attorney raised this argument in his brief to the Supreme Court,⁹⁹ but the Supreme Court did not address the issue. As a result, a search that apparently violated the domestic search-and-seizure standards of both the United States and Mexico was held to neither standard. Essentially, the Court concluded, no law applied.

2. The Brennan Approach: "Mutuality"

Justice Brennan's approach, stressing the mutuality of obligations and rights under the Constitution, springs from a tradition equally longstanding, and somewhat less tarnished, than that invoked by the Chief Justice. As applied by Justice Brennan to the Fourth Amendment context, however, the approach is equally problematic, as discussed below.

a. The Municipal Law Tradition

The "municipal law" tradition¹⁰⁰ is rooted, like the membership approach, in the social contract tradition. Unlike the membership approach, however, which views the Constitution as a compact bestowing benefits on "members" and excluding "outsiders," the municipal law approach views the Constitution as "fundamental municipal law,"¹⁰¹ imposing limitations on

97. MEX. CONST. art. 16, reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gilbert H. Flanz eds. 1988). The Department of Justice perfunctorily contested the illegality of the search under Mexican law on the ground that a further clause of Article 16 permits "administrative officials" to enter private homes "for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with." Reply Brief for the United States, *supra* note 3, at *10-11.

98. *Verdugo* (S.D. Cal.), *supra* note 20.

99. Brief for Respondent *Verdugo*, *supra* note 3, at *22-24.

100. Labeled so by Professor Neuman. Neuman, *supra* note 12, at 918-19 & *passim*. For other invocations or examinations of this tradition, although not by this name, see the articles cited *supra* note 77.

101. As noted above, *supra* note 58, the term "municipal law" in this context is used in the sense of the domestic law of a given state, as opposed to

government coextensive with the powers it grants. Under this model, the Constitution extends its protections, by virtue of what Brennan calls "mutuality" or "fundamental fairness," to any who fall under the reach of municipal law. Constitutional protections are extended on a transaction-by-transaction basis; as far as power is exercised, just so far are constitutional strictures imposed. Thus, the constitutional "sword" and "shield" are coextensive.

This municipal law tradition harks back to the Jeffersonian Republicans, who developed the position in response to the Federalists' arguments on behalf of the Alien and Sedition Acts.¹⁰² It finds its fullest expression in two seminal opinions, one from the 1880s, the other from the 1950s. These two opinions, *Yick Wo v. Hopkins*¹⁰³ and *Reid v. Covert*,¹⁰⁴ have provided the foundation for much of the subsequent jurisprudence regarding the Constitution's reach.

Yick Wo, which clearly established the rights of aliens within the United States,¹⁰⁵ represented the culmination of a long struggle between the federal courts and California over the rights of Chinese immigrants. Overturning yet another California attempt to persecute the Chinese, the Supreme Court ruled that the Fourteenth Amendment is not confined to the protection of citizens.¹⁰⁶ Rather, its guarantees are universal in their application, extending to all persons within the United States, regardless of race, color, or nationality.¹⁰⁷

What *Yick Wo* accomplished for resident aliens, *Reid v. Covert*¹⁰⁸ did for United States citizens abroad, decisively rejecting the Hobbesian tradition embodied in *In re Ross*.¹⁰⁹ In *Reid*, the Supreme Court took up the habeas corpus petitions of two widows of servicemen in England and Japan who had been convicted by courts martial of murdering their husbands. Examining the argument of *Ross* that the Constitution does not apply abroad, Justice Black rejected the idea "that when the United States acts against citizens abroad it can do so free of the

international or natural law. Neuman derives the term as a description of a model of constitutionalism from the Jeffersonians' use of the term in the debates on the Alien Act. See Neuman, *supra* note 12, at 918 n.42.

102. *Id.* at 927-29, 934-38.

103. 118 U.S. 356 (1886).

104. 354 U.S. 1 (1957).

105. See Henkin, *supra* note 77, at 15-18.

106. *Yick Wo*, 118 U.S. at 369.

107. *Id.*

108. 354 U.S. 1 (1957).

109. 140 U.S. 453 (1891).

Bill of Rights."¹¹⁰ He stated, in words that have been widely quoted:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.¹¹¹

Yick Wo and *Reid* have provided the foundation on which rest the current protections, respectively, for aliens within the United States and for United States citizens abroad.¹¹² With his opinion in *Verdugo*, Justice Brennan placed himself squarely within this "municipal law" tradition. Citing *Reid* for the proposition that the United States "can only act in accordance with all the limitations imposed by the Constitution,"¹¹³ Justice Brennan deduced the principle of mutuality: that Verdugo is entitled to Fourth Amendment protections because the United States "has treated him as a member of our community for purposes of enforcing our laws."¹¹⁴ Rather than ask, as did Chief Justice Rehnquist, whether the defendant is a "member of our national community" and thus deserving of constitutional protection, Justice Brennan asked: Has the United States imposed obligations on this particular individual in this particular transaction? If the answer is "yes," Justice Brennan concluded, then for purposes of that particular transaction that individual is "one of the governed" and accordingly entitled to the full range of United States constitutional protections.

b. Problems of Application

Justice Brennan's approach, requiring a mutuality of rights and obligations in each transaction between the United States and "the governed," is a more generous approach than Chief Justice Rehnquist's members-only approach, and one seemingly more consonant with the web of mutual rights and obligations

110. *Reid*, 354 U.S. at 5 (Black, J., joined by Warren, C.J., Douglas, J., and Brennan, J.) (footnotes omitted).

111. *Id.* at 6.

112. See Henkin, *supra* note 77, at 15-18, 22-24.

113. *United States v. Verdugo-Urquidez*, 494 U.S. at 281 (Brennan, J., dissenting).

114. *Id.* at 284.

that make up our "constituted" system of government.¹¹⁵ As Chief Justice Rehnquist and Justice Kennedy pointed out, however, the approach, as applied in this context, is highly problematic. Justice Brennan apparently assumed that, because the Fourth Amendment is to apply abroad, it should apply in its entirety, with all the detailed rules and practices applicable to searches within the United States.¹¹⁶ By insisting on a wholesale transplantation of the Fourth Amendment abroad, Justice Brennan provided a comfortable target for Chief Justice Rehnquist's and Justice Kennedy's policy arguments.

i. Warrants

Chief Justice Rehnquist's and Justice Kennedy's primary focus was the warrant requirement for foreign searches. These Justices, however, did not direct their heaviest fire at the most vulnerable aspects of extraterritorial warrants, but aimed instead at less vulnerable aspects. For example, as one of three reasons why the warrant requirement should not apply in Mexico, Justice Kennedy cited "[t]he absence of local judges or magistrates available to issue warrants."¹¹⁷ This objection loses much of its force in light of the availability of "telephone warrants" under Federal Rule of Criminal Procedure 41. A provision of this rule, promulgated in 1977 and recently expanded, allows warrants to be issued upon sworn oral testimony over the telephone, instead of upon written affidavit, "[i]f the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit."¹¹⁸ Although law enforcement agents overseas still

115. See articles cited *supra* note 67. Chief Justice Rehnquist's approach, leaving criminal defendants wholly outside the search-and-seizure laws of their own state and of the United States, invites a response such as that made by Justice Black in his dissent in *Eisentrager*: "Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies completely free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy." *Johnson v. Eisentrager*, 339 U.S. 763, 797-98 (1950) (Black, J., dissenting).

116. See *Verdugo*, 494 U.S. at 294 ("[t]he Warrant Clause would serve the same primary functions abroad as it does domestically, and I see no reason to distinguish between foreign and domestic searches."). In applying domestic standards to extraterritorial searches, Justice Brennan merely followed the Ninth Circuit's opinion in *Verdugo*, which asserted that to do otherwise "would be to treat foreign searches differently from domestic searches just because they are foreign." 856 F.2d at 1230.

117. 494 U.S. at 278.

118. FED. R. CRIM. P. 41(c)(2)(A). Under this procedure, the affiant may give a sworn oral statement to the magistrate over the telephone, or may, following a 1993 amendment to the rule, transmit a sworn statement by facsimile transmission. *Id.* & 1993 advisory committee note. The statement is recorded and transcribed, and is deemed an affidavit for purposes of issuing the search warrant. If the magistrate approves the issuance of the warrant, he causes an

would face the difficulty of obtaining secure telephone lines to transmit sensitive information to magistrates in the United States, nonetheless the availability of this device should alleviate much of the burden of obtaining warrants overseas.¹¹⁹

A second objection, raised by Justices Stevens and Blackmun as well as Chief Justice Rehnquist, also lacks substance. This is the argument that the Warrant Clause cannot be read as mandating warrants in foreign jurisdictions because United States magistrates lack the power to issue extraterritorial warrants.¹²⁰ The Justices were referring to the fact that the Federal Rules of Criminal Procedure authorize federal judges and magistrates to issue search warrants only within their own federal districts, with a limited exception for persons or property fleeing from the district.¹²¹ However, as Justice Brennan correctly responded, this statutory restriction cannot be seen as restricting the scope of a constitutional requirement. "Congress," Justice Brennan noted, "cannot define the contours of the Constitution. If the Warrant Clause applies, Congress cannot excise the Clause from the Constitution by failing to provide a means for United States agents to obtain a warrant."¹²²

original search warrant to be prepared, and he also orally authorizes the officer requesting the warrant to prepare a "duplicate original warrant," which may be used to execute the search as if it were the original warrant. *Id.* See generally 2 LAFAYE, *supra* note 53, § 4.3(c); Paul D. Beecher, Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 UCLA L. REV. 691 (1974).

119. See FED. R. CRIM. P. 41(c)(2)(A), 1993 advisory committee note ("the Rule should thus encourage law enforcement officers to seek a warrant"); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 160 (D.D.C. 1976) (requiring telephone warrant by United States officials prior to wiretap overseas). It should be noted, however, that while the Advisory Committee and the courts have been enthusiastic about this procedure, some prosecutors have apparently been reluctant to employ it. See *United States v. Berick*, 710 F.2d 1035, 1038-40 & nn.4, 10 (5th Cir. 1983), *cert. denied*, 464 U.S. 899, 918 (1983).

120. 494 U.S. at 279 (Stevens, J., concurring); *id.* at 297 (Blackmun, J., dissenting); and see *id.* at 274 (Rehnquist, C.J.) (warrant would be "dead letter" outside United States).

121. FED. R. CRIM. P. 41(a); see also 1990 advisory committee note (explaining rule); *United States v. Conroy*, 589 F.2d 1258, 1268 n.15 (5th Cir. 1979) (federal prosecutor "may wish to draw to the attention of the Congress that, apparently, it has never given authority to any magistrate to issue warrants outside the confines of a judicial district."). The Military Rules of Evidence, in contrast, provide guidance for searches of military personnel and property, as well as nonmilitary property, in foreign states. MIL. R. EVID. 315.

122. 494 U.S. at 295 (Brennan, J., dissenting); accord *Best v. United States*, 184 F.2d 131, 138 (1st Cir. 1950) ("Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant."), *cert. denied*, 340 U.S. 939 (1951). See also *United States v. New York Tel. Co.*, 434 U.S. 159, 168 n.14 (1977) (recognizing, in a different context, the court's "inherent power . . . to issue search warrants under circumstances conforming to the Fourth Amendment."); Wedgwood, *supra* note 53, at 749 n.10.

The fact that these objections are unpersuasive, however, should not be taken to minimize the very real hardships that would be involved in obtaining warrants for foreign searches. To obtain a warrant, law enforcement officers must prepare, and present to a magistrate, sworn affidavits articulating specific facts sufficient to constitute probable cause for a search.¹²³ While this requirement has been routinely incorporated into the cost of law enforcement in the United States,¹²⁴ such a requirement could prove burdensome in a volatile foreign setting, where United States agents would face language, communication, and informational barriers. In addition, United States agents would lack the support networks on which they can rely in the United States, and would have to work instead with local police who would most likely lack familiarity with United States probable cause standards.¹²⁵ A warrant requirement would be particularly cumbersome in joint operations led by local police, especially in operations initiated by foreign authorities and joined at a subsequent stage by United States agents.

The combination of these circumstances lends support to the *Verdugo* Court's holding that the warrant requirement be waived for foreign-state searches; this conclusion may be considered essentially a categorical addition to the "exigent circumstances" exception, under which police may conduct warrantless searches in circumstances when procurement of a warrant might put them at risk or cause the loss of evidence.¹²⁶ On the other hand, the

Following the Supreme Court's decision in *Verdugo*, the Judicial Conference of the United States proposed an addition to Rule 41 that would have granted federal magistrates authority to issue warrants for searches of property outside the United States. See FED. R. CRIM. P. 41(a), 1990 advisory committee note (discussing proposed Rule 41(a)(3)). The Supreme Court, however, did not adopt the amendment, concluding that it required further consideration. *Id.*

123. See generally 3 CHARLES A. WRIGHT, ARTHUR R. MILLER, ET AL., FEDERAL PRACTICE AND PROCEDURE, §§ 662, 670 (1982 & 1993 Supp.) [hereinafter WRIGHT & MILLER].

124. See *Steagald v. United States*, 451 U.S. 204, 222 (1981) ("the inconvenience incurred by the police [in obtaining a warrant] is generally insignificant"). But see *Robbins v. California*, 453 U.S. 420, 433-39 (1981) (Rehnquist, J., dissenting) (arguing that even within the United States differences among localities make strict application of the warrant requirement impractical in many areas where "the nearest magistrate may be 25 or even 50 miles away").

125. Rehnquist and Kennedy make this point. *United States v. Verdugo-Urquidez*, 494 U.S. at 274; *id.* at 278 (Kennedy, J., concurring). Judge Wallace also addressed the issue in his Ninth Circuit *Verdugo* dissent. 856 F.2d 1214, 1248-49 (9th Cir. 1988) (Wallace, J., dissenting).

126. See, e.g., *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979). Justice Brennan noted that exceptions to the warrant requirement, such as for exigent circumstances, "likely would be applicable more frequently abroad." 494 U.S. at 286 (Brennan, J., dissenting). However, he would not have waived the warrant requirement for law enforcement operations such as that against *Verdugo*, but

Supreme Court's holding entails substantial costs¹²⁷ and may not be supported by the experience of United States agencies abroad.¹²⁸ Given the flexibility conferred by the telephone warrant procedure (which the Court did not examine), as well as the also-unexamined possibility that some flexible variant of the warrant requirement could be devised for foreign-state searches,¹²⁹ the appropriateness of the Court's blanket dismissal of extraterritorial warrants may be open to dispute.

ii. Imposing Domestic Standards Abroad

The burdens inherent in obtaining warrants abroad, however, represent just one aspect of what is problematic about Justice Brennan's approach. The more fundamental problem with Justice Brennan's approach, as with the Chief Justice's, is its inherently categorical, wholesale nature. While Chief Justice Rehnquist would confine the Fourth Amendment strictly within United States borders and to United States citizens abroad, Justice Brennan would transplant it in its entirety whenever United States law enforcement operates overseas—imposing not only its warrant requirement but also the host of per se rules that govern domestic searches and seizures. While the principle of

would have confined the exception instead to "non-law-enforcement activities . . . implicating national security." *Id.*

For the suggestion that warrants be waived generally for foreign-state searches under the exigent circumstances exception, see Harvard Note, *supra* note 15, at 1690. Warrantless surveillance clearly may be constitutional when conducted pursuant to the President's national security power, in particular when it involves surveillance of foreign powers. See *United States v. United States Dist. Ct.*, 407 U.S. 297, 322 n.20 (1972).

127. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."); see also Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409-39 (1974) (comprehensive defense of warrant requirement and exclusionary rule); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852-56 (1994) (warrant requirement ensures that fact-finding on probable cause is done prior to search, thus preventing police perjury and hindsight evaluation, and ensuring the "triumph of rules over standards"); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

128. As Justice Brennan noted, the United States Army requires extraterritorial warrants for certain military searches. *Verdugo*, 494 U.S. at 286 n.14. Army regulations require the Army to seek a warrant from a United States court whenever the Army seeks to intercept certain nonmilitary wire or oral communications outside United States territory. ARMY REGULATION 190-53 ¶ 2-2(b) (1986).

129. See *infra* note 243.

mutuality driving the extension of the Fourth Amendment abroad may be sound, the consequences of a wholesale application of this principle in the Fourth Amendment context are highly troublesome.

Chief Justice Rehnquist identified one troubling aspect of Brennan's approach—the concerns discussed above about impeding United States sovereignty abroad, which implicate a host of related concerns regarding national security and separation of powers.¹³⁰ Another concern, however, not directly articulated in the *Verdugo* decision or examined in the academic commentary, provides the chief basis of this Article's critique of Justice Brennan's approach and the foundation for the responses suggested in Part IV—a concern for the transnational context of extraterritorial searches and seizures.

Extraterritorial law enforcement operations are, with very few exceptions, joint operations conducted in conjunction with, and generally under the direction of, local police.¹³¹ Because these operations are conducted jointly by the police of two separate jurisdictions, they are necessarily conducted under the guidance of two distinct legal frameworks: United States law governing the United States police, and local law governing the local police. Thus, there are both two sets of actors and two sets of laws.

The *Verdugo* case illustrates the transnational aspects inherent in such enforcement operations. DEA agents did not attempt to search Verdugo's homes by themselves. Instead, in accordance with DEA internal procedures,¹³² the agents sought authorization from a top official of the Mexican Federal Judicial Police (MFJP) in Mexico City.¹³³ The agents then conducted the searches in conjunction with a team of MFJP officers. Mexican officers actually conducted the entries and searches, but in doing so, followed oral instructions from the DEA agent in charge. Both Mexican and United States officers removed evidence from the premises.¹³⁴

130. See *United States v. Verdugo-Urquidez*, 494 U.S. at 273-75; *United States v. Verdugo-Urquidez*, 856 F.2d at 1248-49 (Wallace, J., dissenting). Chief Justice Rehnquist's concerns are discussed *supra* text accompanying notes 40-45; the issue is explored more fully *infra*, in part V.C.

131. Judge Wallace made this point in his Ninth Circuit *Verdugo* dissent, 856 F.2d at 1242, 1248. For a fuller examination of the transnational law enforcement context, see *infra* part III.B.

132. See DEA AGENTS MANUAL subch. 652, at 192 (1988) (requiring DEA agents to obtain prior approval for investigations and searches in Mexico from the top officials of the Mexican Federal Judicial Police, and to conduct the searches in cooperation with the MFJP), *cited in* Brief for the United States, *supra* note 3, at *28 n.29.

133. See *supra* notes 20-22 and accompanying text.

134. See *supra* note 23 and accompanying text.

Not only was the search in *Verdugo* conducted jointly by two separate police forces, but these police forces were bound, as noted above, by two separate sets of search-and-seizure laws. This aspect of extraterritorial searches highlights problems inherent in Justice Brennan's approach that are distinct from the previously noted concern with national sovereignty—problems having less to do with burdens imposed on United States police than with burdens imposed on foreign police and with the rights of foreign suspects vis-à-vis their own governments. These concerns seem to have played little or no role in Justice Brennan's analysis, and little or no role in Chief Justice Rehnquist's critique of Justice Brennan's reasoning. Instead, with the limited exception of Justice Kennedy's opinion, the Supreme Court's analysis of the Fourth Amendment's reach appears to have taken place essentially in a vacuum, focusing entirely on the relationship between the United States and the individuals against whom it takes action and applying domestic search-and-seizure standards to this relationship, with little consideration for other relevant participants or legal systems.

C. *All or Nothing?: The Need for an Alternative Approach*

Both Chief Justice Rehnquist and Justice Brennan took sweeping, whole-cloth approaches to the application of Fourth Amendment protections abroad. Both approaches are rooted in broad theories of constitutional interpretation that seemingly exist in a vacuum, disengaged from the transnational context in which they must be applied. For both Justices, the Fourth Amendment is either transplanted in its entirety or denied in its entirety, and local laws and local law enforcement play no role in their jurisprudential considerations. Chief Justice Rehnquist's absolutist approach, drawing bright lines based on notions of membership, poses a threat not only to the reach of constitutional protections abroad, but also to the constitutional rights of aliens within the United States. Justice Brennan, on the other hand, would impose United States search-and-seizure law in its entirety, including its warrant requirement and the full panoply of its detailed, per se rules, whenever United States law enforcement agents operate overseas. Whereas Chief Justice Rehnquist would create a "law-free zone" for extraterritorial searches and seizures, Justice Brennan would unilaterally impose United States law on the world. These approaches leave the Court with unpalatable choices: either the Fourth Amendment applies in its totality, or it does not apply at all. Neither approach is likely to serve as a promising model if and when the issue resurfaces before the Supreme Court.

III. BEYOND VERDUGO: "REASONABLE SEARCHES" ABROAD

As noted previously, the Chief Justice's "Opinion of the Court" in *Verdugo* was adopted in its entirety by only four Justices.¹³⁵ Thus, only four Justices stood behind the broad proposition that Chief Justice Rehnquist advanced: that the Fourth Amendment terminates at the water's edge for all except United States citizens and resident aliens. Seven Justices (all except Brennan and Marshall) supported the far more limited proposition that the Amendment's warrant clause is inapplicable to searches of noncitizens abroad. Left unresolved was the extraterritorial applicability and significance of the Amendment's first clause, guaranteeing "the right of the people to be secure . . . against unreasonable searches and seizures."¹³⁶

The Supreme Court has not returned to this question in the four years since *Verdugo*, and the lower federal courts have ignored the issue, assuming instead that the plurality's purported holding spoke for a majority of the Court.¹³⁷ Nevertheless, the issue is bound to arise. Although foreign nationals like *Verdugo* may no longer claim that a warrant was required for a search of their homes, they may still seek to exclude evidence on the

135. See *supra* part II.A.

136. Numerous commentators have made this point. See *supra* note 53.

137. Although numerous commentators have addressed the limited scope of the *Verdugo* holding, see *supra* note 53, every federal court that has referred to *Verdugo*'s "holding" has simply assumed, without analysis, that the holding was that proclaimed by Chief Justice Rehnquist: that is, the Fourth Amendment is inapplicable in its entirety to searches of nonresident aliens in a foreign state. See *United States v. Cardenas*, 9 F.3d 1139, 1157 n.8 (5th Cir. 1993) ("We note that neither probable cause nor a search warrant was required to search [a hotel room in Juarez, Mexico]. The Fourth Amendment does not apply to searches or seizures conducted on foreign soil, even if the search involves agents of the United States government."); *Lamont v. Woods*, 948 F.2d 825, 834 (2d Cir. 1991) ("the Court [in *Verdugo*] held that the Fourth Amendment does not apply to a search and seizure by United States officials of property that is owned by a nonresident alien and located in a foreign country"); *United States v. Alkins*, 946 F.2d 608, 613 (9th Cir. 1990) (same); *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991) (same); *United States v. Davis*, 905 F.2d 245, 250-51 (9th Cir. 1990) (Fourth Amendment does not apply to nonresident aliens in international waters); *United States v. Iribe*, 806 F. Supp. 917, 919 (D. Colo. 1992) (same regarding searches in foreign state); *United States v. Norlega*, 746 F. Supp. 1506, 1532 n.28 (S.D. Fla. 1990) (same); *Narisma v. United States*, 738 F. Supp. 548, 551 n.8 (D.D.C. 1990) (same), *rev'd on other grounds*, 928 F.2d 1154 (D.C. Cir. 1991); see also *United States v. Tehrani*, 826 F. Supp. 789, 793 (D. Vt. 1993) (determining what constitutes "substantial connection" with United States sufficient to trigger Fourth Amendment rights for alien attempting to challenge extraterritorial search of his property); *United States v. Juda*, 797 F. Supp. 774, 782 (N.D. Cal. 1992) (concluding that, since *Verdugo* does not apply to searches of United States citizens in foreign states, United States citizens and resident aliens are entitled to same Fourth Amendment protections abroad as they enjoy within United States).

ground that the search was "unreasonable," whether because it was undertaken without probable cause or because it was executed unreasonably. Such a challenge would give the Supreme Court the opportunity to confront the question left open in *Verdugo*: Should the "unreasonable searches" clause of the Fourth Amendment govern extraterritorial searches of foreign nationals? If the Justices decide that the answer to this question is yes, they then will have to answer the next question: What is an "unreasonable search" outside United States territory?¹³⁸

Applying the Unreasonable Searches Clause abroad, of course, would not be consistent with the reasoning of the *Verdugo* plurality. However, it would be consistent with, although not compelled by, the positions taken by the other five Justices in *Verdugo*,¹³⁹ pre-*Verdugo* Supreme Court authority,¹⁴⁰ numerous opinions by the federal courts of appeals prior to *Verdugo*,¹⁴¹ and the overwhelming weight of commentary on the *Verdugo* decision.¹⁴²

138. This issue was left essentially untouched by the five opinions in *Verdugo*. The most significant opinions—those by Justices Rehnquist, Brennan, and Kennedy—did not stray near the question of "reasonableness" abroad. Rehnquist dismissed the Fourth Amendment *in toto*; Brennan adopted the entire Amendment; and Kennedy addressed only the Warrant Clause. The two Justices who touched briefly on the "reasonableness" requirement, Stevens and Blackmun, both did so summarily, with no inquiry into the niceties of its meaning overseas. Justice Stevens assumed that reasonableness was required, but concluded (on grounds that his opinion does not make explicit) that the search "was not 'unreasonable' as that term is used in the first clause of the Amendment." *United States v. Verdugo-Urquidez*, 494 U.S. at 279. Justice Blackmun summarily concluded that the reasonableness requirement applies abroad and that it consists of a probable cause requirement. *Id.* at 297-98.

139. Applying the "reasonableness" requirement would be consistent with the opinions of Justice Brennan (who, with Justice Marshall, would have applied the entire Amendment), Justices Blackmun and Stevens (who both specifically concluded that "reasonableness" applied), and Justice Kennedy (who did not address the "reasonableness" requirement but did not rule it out either, and whose "due process" approach is supportive of a "reasonableness" analysis).

140. *E.g.*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957). See *supra* text accompanying notes 108-11.

141. *E.g.*, *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979); *United States v. Tiede*, 86 F.R.D. 227, 259 (U.S. Ct. Berlin 1979); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978); *United States v. Winter*, 509 F.2d 975, 989 n.45 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); *United States v. Toscanino*, 500 F.2d 267, 280 (2d Cir. 1974); see also cases cited *infra* note 195 (assuming Fourth Amendment applies to searches of aliens abroad under "joint venture" rule).

142. See articles and student commentary cited *supra* note 67 (criticizing a "water's edge" rule for the Fourth Amendment). For commentary specifically advocating a "reasonableness" standard abroad, see Wedgwood, *supra* note 53; Harvard Note, *supra* note 15. For a recent article arguing that reasonableness, not warrants or probable cause, should be understood as the Amendment's

A. *Picking Up Where Kennedy Left Off: "Reasonable Searches"*

As to how the Court might construe the meaning of unreasonable searches in the context of actions taken abroad, Justice Kennedy's opinion in *Verdugo* suggests a promising approach, albeit one that Justice Kennedy himself did not pursue beyond the warrant context.¹⁴³ In his opposition to "rigid and abstract rule[s]" and in his insistence on tailoring the Constitution's strictures to "the particular circumstances of a particular case,"¹⁴⁴ Justice Kennedy demonstrated greater responsiveness to the peculiar problems and nuances of the case's transnational context than did the other members of the Court. Doing what Justice Kennedy declined to do in *Verdugo*, that is, applying his analytical framework to the broader question of the meaning of "reasonableness" abroad, is one option available to the Court.

Thus, the Supreme Court could give flesh to the concept of reasonableness by asking (to quote Justice Kennedy): "What process is 'due' a defendant in the particular circumstances of a particular case?"¹⁴⁵ By adopting this balancing approach to the

central concern, see Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

A recent article by Lea Brilmayer, which attempts a theoretical reconception of the international practice of United States courts, also offers indirect support for viewing Fourth Amendment protections transnationally. See Brilmayer, *supra* note 59. Distinguishing between "horizontal" cases (between competing sovereigns) and "vertical" cases (between states and individuals), Brilmayer argues that transnational relationships between one state and the citizens of another state ("diagonal" relationships) "implicate questions of state/individual legitimacy" in the same way as traditional "vertical" cases between a state and its citizens:

There are limits on what states may properly do to individuals, whether the individuals are citizens or noncitizens The point of a vertical analysis of international law is that state/individual relationships raise issues of the legitimacy of coercion even when they cross jurisdictional lines. The mere fact that diagonal relations cross state borders does not mean that they are automatically exempt from the norms of political propriety that would apply to purely vertical relationships.

Id. at 2296-97.

143. Justice Kennedy, as noted above, *supra* text accompanying note 51, did not examine what restrictions reasonableness would impose on searches abroad, but instead confined his analysis to the applicability of the Warrant Clause in Mexico, despite the parties' briefing of the reasonableness issue. See Brief for the United States, *supra* note 3, at *23-24; Brief for Respondent *Verdugo*, *supra* note 3, at *22-24.

144. *United States v. Verdugo-Urquidez*, 494 U.S. at 278 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (Harlan, J., concurring)).

145. *Id.* This approach belongs to the third tradition of constitutional interpretation, previously mentioned only in passing, which was advanced by Justice Harlan in the *Reid v. Covert* concurrence and from which Justice Kennedy borrowed liberally in his *Verdugo* concurrence. Professor Neuman has dubbed

meaning of "reasonable searches" abroad, the Court could apply the Amendment in a simplified manner, dispensing with some or all of the per se rules that characterize domestic Fourth Amendment jurisprudence. The Department of Justice suggested such an approach as its fallback position in *Verdugo*, in the event that the Court did not agree that the entire Amendment was inapplicable,¹⁴⁶ and the approach has drawn some scholarly support.¹⁴⁷ This approach would be responsive to the concerns of Justices Rehnquist and Kennedy regarding the risks of law enforcement abroad and the danger and inappropriateness of tying the hands of the executive branch when it takes action outside United States borders.

This approach would rely on the inherently flexible nature of the Fourth Amendment, rooted in the Amendment's text, which imposes no restrictions beyond reasonableness and certain standards for obtaining a warrant.¹⁴⁸ As the Supreme Court has noted, "the Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."¹⁴⁹ Ordinarily, the Amendment requires probable cause and a warrant, but exceptions to these requirements are permitted "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."¹⁵⁰

this approach the "global due process" tradition. Neuman, *supra* note 12, at 919-20, 987-90. This Article suggests use of Justice Kennedy's approach only as the second part of a two-part analysis. That is, the Article accepts Justice Brennan's fundamental contention that constitutional protections extend as far as the obligations imposed by United States laws. Justice Kennedy's balancing approach, however, comes into play in determining the extent of the rights that are granted.

146. See Brief for the United States, *supra* note 3, at *23-28 ("agents conducting investigations overseas should at most be bound by the more flexible Fourth Amendment requirement of reasonableness").

147. See Wedgwood, *supra* note 53, at 754 (advocating "rule of reason," requiring extraterritorial search to be "reasonable," to be evaluated upon a totality of the circumstances, with none of the per se rules of domestic Fourth Amendment jurisprudence, and with evidence to be excluded only where conduct is grossly unreasonable"); Harvard Note, *supra* note 15.

148. See Amar, *supra* note 142, at 761-85 (concluding that warrant and probable cause requirements cannot be traced to text of the Fourth Amendment).

149. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); see also *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place"); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) ("the specific content and incidents of [the right to be free from unreasonable searches and seizures] must be shaped by the context in which it is asserted").

150. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). Thus, the "exigent circumstances" exception allows police to conduct warrantless searches in situations when the procurement of a warrant might put them at risk or cause the loss of potential evidence. *Arkansas v. Sanders*, 442 U.S. 753, 759-

A flexible approach of this sort, responding to the "special needs" of United States agents conducting extraterritorial searches, would be more realistic than Justice Brennan's requirement that Fourth Amendment standards be exported wholesale wherever United States agents may be found. At the same time, it would provide suspects like Verdugo with at least a minimum of protection against unreasonable searches and seizures.

This approach, however, addresses only one of the concerns articulated above, the concern about inflexibility. While it provides a promising alternative to the categorical, whole-cloth approaches of Justices Rehnquist and Brennan, it does not address concerns about the transnational character of searches in foreign states—concerns either about the joint nature of these searches or about the diversity of laws, cultures, and political systems that they implicate.

B. *The Transnational Law Enforcement Context*

As the Justice Department noted in its brief to the Supreme Court in *Verdugo*, searches and seizures in foreign states are of necessity a cooperative endeavor, with United States agents routinely cast in the supporting role.¹⁵¹ In the "typical case," of which *Verdugo* provides an example, "the foreign officials are the ones who decide the scope of and reasonableness of any proposed search," and United States agents "must comply with the demands of their hosts."¹⁵² The reasons for this are both legal and practical.

60 (1979). Additionally, warrantless searches may be conducted of automobiles, *United States v. Chadwick*, 433 U.S. 1 (1977); incident to arrest, *United States v. Robinson*, 414 U.S. 218 (1973); or under circumstances "where it was concluded that the public interest required some flexibility in the application of the general rule that a valid warrant is a prerequisite for a search." *Sanders*, 442 U.S. at 759.

Probable cause may also be dispensed with under appropriate circumstances—e.g., for "stop-and-frisks," *Terry v. Ohio*, 392 U.S. 1 (1968); administrative inspections, *Camara v. Municipal Court*, 387 U.S. 523 (1967); searches in public schools, *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985); border searches, *United States v. Montoya de Hernandez*, 473 U.S. 531, 537-41 (1985); searches at sea, *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); and searches in a host of other circumstances involving enhanced security concerns. See generally LAFAYE, *supra* note 53, §§ 4.1(a), 6.5, 9.1, 10.1-11.

151. Brief for the United States, *supra* note 3, at *25-28. The Justice Department's posture in the *Verdugo* case, of course, contrasts sharply with its stance in *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992), where it argued that the United States reserves the right to "snatch" criminal suspects unilaterally in a foreign state. See *infra* notes 154-59 and accompanying text.

152. Brief for the United States, *supra* note 3, at *26-27. Judge Wallace also made this point in dissent to the Ninth Circuit's *Verdugo* opinion. 856 F.2d 1214, 1249 (9th Cir. 1988) (Wallace, J., dissenting); and see *infra* notes 161-75 and accompanying text.

It is a settled principle of international law that law enforcement operations are exclusively entrusted to each state within its own jurisdiction, and that when one state sends police to another state to conduct a search, it may conduct the search only with the permission, and conforming to the laws, of the host state.¹⁵³ The force of this principle may be obscured by a few recent, highly publicized examples of unilateral United States law enforcement abroad, notably the much-celebrated United States invasion of Panama in order to capture Panamanian strongman Manuel Noriega¹⁵⁴ and the abduction from Mexico of Dr. Humberto Alvarez-Machain, wanted as an accessory to the torture and murder of DEA agent Enrique Camarena.¹⁵⁵ The uproar that these episodes produced, however, only serves to underscore their extraordinary nature.¹⁵⁶ These two cases do not throw into

153. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188, 2201-02, 2206 (1992) (Stevens, J., dissenting) (it is a breach of international law to "perform acts of sovereignty in the territory of another state," including sending agents into another state to apprehend criminal suspects); *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 556-57 (1987) (Blackmun, J., concurring in part) ("Under the classic view of territorial sovereignty, each state has a monopoly on the exercise of governmental power within its borders and no state may perform an act in the territory of a foreign state without consent"); *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824) (United States entry into foreign port for purpose of seizing foreign vessel which violated United States laws is "clear violation of the laws of nations"); *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812) (jurisdiction of state within its own territory is "necessarily exclusive and absolute . . . One sovereign . . . can be supposed to enter a foreign territory only under an express license, or . . . by implication"); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66-68 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975) (abduction of defendant from another state violates international law if the offended state objects); *United States v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1974) (abduction of person in foreign territory violates that state's sovereignty and is redressable by the return of the defendant); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10, at 19 (Sept. 7) ("the first and foremost restriction imposed by international law upon a State is that . . . it may not exercise its power in any form in the territory of another State"); *Opinion of the Inter-American Juridical Committee on Alvarez-Machain*, O.A.S. CJI/Res. II-15/92, Aug. 15, 1992, *reprinted in* 13 Hum. Rts. L.J., No. 9-10, at 395 (1992); FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 432-33 (United States authorities may exercise their functions in the territory of another state only with the other state's consent); J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 162 (Humphrey Waldock ed., 6th ed. 1963); IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 280, 284 (2d ed. 1973); Jordan J. Paust, *After Alvarez-Machain: Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551, 568 n.65 (1993) (listing additional authorities).

154. See *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990); Symposium, *The Panamanian Revolution* (pts. 1 & 2), 84 AM. SOC'Y INT'L L. PROC. 182, 236 (1990).

155. See *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

156. The Noriega and Alvarez-Machain episodes constituted unusually aggressive examples of what is known as "irregular rendition"—the seizure of

doubt the general principle of territorial sovereignty;¹⁵⁷ they demonstrate merely that the principle is subject to occasional exceptions.¹⁵⁸ While the Justice Department reserves the right to conduct unilateral operations abroad on exceptional occasions,¹⁵⁹ it has nonetheless embraced, in the internal guidelines it promulgates for United States law enforcement agencies, the rule of territorial sovereignty as the guiding principle for law enforcement operations in foreign states.¹⁶⁰

fugitives from abroad by means other than those provided for in extradition treaties. See generally NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 436-57. Despite their "irregular" nature, most irregular renditions are cooperative efforts between United States and local police. *Id.* at 442-43. The Noriega and Alvarez operations reflect the more aggressive, and more unilateral, approach to international rendition adopted by the United States in the late 1980s, driven by concerns over international terrorism and drug trafficking. See *id.* at 445-57; and see *infra* note 159. The heavy dose of international goodwill that these two operations expended provides one reason why such actions are likely to remain extremely rare occurrences. See Bush, *supra* note 9, at 968-71.

157. While Justice Stevens denounced extraterritorial abduction as "monstrous" in his *Alvarez* dissent, 112 S. Ct. at 2201, 2206, the *Alvarez* majority did not contest the illegality of the practice. See 112 S. Ct. at 2196 ("Respondent and his *amici* may be correct that respondent's abduction . . . may be in violation of general international law principles"). The majority confined itself instead to construing the terms of the U.S.-Mexican extradition treaty.

As for the Noriega operation, the district court likewise declined to address the underlying legality of the General's capture; instead, it concluded that Noriega, as an unrecognized head of state, lacked standing to challenge the invasion as a violation of international law in the absence of a protest from Panama's legitimate government. *United States v. Noriega*, 746 F. Supp. 1506, 1533-35 (S.D. Fla. 1990).

158. The Supreme Court did not explore these exceptions in *Alvarez* since it confined itself to construing the United States-Mexico extradition treaty, but commentators have addressed the issue in response. See Bush, *supra* note 9, at 977-82; Paust, *supra* note 153, at 563-67. Possible exceptions include: an "Eichmann exception" allowing for unilateral response to "crimes against humanity;" a "self defense" exception, allowing unilateral action when necessary against, for example, international terrorism; a "humanitarian intervention" exception, allowing states to respond with force to violations of the U.N. Charter; and an exception (invoked by defenders of the United States action against Alvarez-Machain) for situations of overriding national interest. Bush, *supra*, at 977-82; Paust, *supra*, at 563-67.

159. The Justice Department's Office of Legal Counsel (OLC) concluded in an opinion issued in 1989, the year before the abduction of Alvarez-Machain, that the President has inherent constitutional authority to order the FBI to carry out investigations and arrests in foreign states even if those actions violate international law. See Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 195 (1989), 1989 OLC LEXIS 19 [hereinafter OLC Opinion]. The 1989 opinion, which was not released to the public until 1993, reversed a 1980 OLC opinion on the same topic, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543 (1980).

160. For example, internal DEA guidelines (which are not made available to the public) provide that in general "DEA representatives will not engage or

It is not only international law, but practical realities as well, that prevent the United States from conducting unilateral law enforcement operations in foreign states.¹⁶¹ United States law enforcement agents operating in a foreign state must try to accomplish their objectives while stripped of most of the powers of search and arrest that they wield in the United States.¹⁶² To accomplish anything, they generally must engage the cooperation of local authorities at one level or another.¹⁶³ In attempting to do so, they face additional hurdles, in the form of alien legal and political systems, divergent law enforcement cultures, and diplomatic frictions.¹⁶⁴

As a result, United States extraterritorial law enforcement now takes place within an elaborate framework of international cooperation, at all levels of formality. At the informal level, United States law enforcement agents go to great lengths to establish and

participate in unilateral investigative operations or other activities outside the scope of the formal or informal agreement developed between the United States and the host government unless these activities have the express and explicit approval of a responsible host government official." *DEA Agents Manual*, subch. 651, at 181 (1988), *quoted in* Brief for the United States, *supra* note 3, at *26 n.25. For investigations or searches in Mexico, prior approval must come from top officials of the Mexican Federal Judicial Police, and searches must then be conducted in cooperation with the MFJP. *See supra* note 132.

See also United States Attorneys' Manual, §§ 9-13.500 *et seq.* (1988) (setting guidelines for obtaining evidence abroad, generally through methods that respect host state's sovereignty, such as letters rogatory, requests pursuant to treaties or executive agreements, or informal requests; only in exceptional circumstances by unilateral action such as subpoena).

161. For overviews of United States extraterritorial law enforcement, see MICHAEL ABBELL & BRUNO A. RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE: CRIMINAL* (3 vols.) (1990); *INTERNATIONAL CRIMINAL LAW: PROCEDURE* (M. Cherif Bassiouni ed., 1986); NADELMANN, *COPS ACROSS BORDERS*, *supra* note 3; Martin, *supra* note 3; Nadelmann, *Int'l Enforcement*, *supra* note 3.

162. *See* NADELMANN, *COPS ACROSS BORDERS*, *supra* note 3, at 4-10, 200.

163. *See* Nadelmann, *Int'l Enforcement*, *supra* note 3, at 46-57 (describing extraterritorial activities of the DEA, FBI, Customs Service, Immigration and Naturalization Service, Secret Service, Postal Inspection Service, Bureau of Alcohol, Tobacco, and Firearms, IRS, United States Marshals Service, state and local agencies, and the criminal investigative branches of the United States military). The DEA, for instance, which maintains by far the largest international presence among United States civilian law enforcement agencies (about two hundred fifty agents stationed in forty-four foreign states), devotes only a small fraction of its resources to unilateral activities. *See id.* at 48-50. DEA agents stationed abroad act as liaisons with local police, providing intelligence on international drug trafficking, promoting broader cooperation and the pursuance of United States anti-narcotics objectives, and lobbying for changes in local laws to facilitate United States goals; unilateral law enforcement activities are generally confined to surveillance and recruitment of informants. DEA agents may also accompany local police in joint drug enforcement operations, although even this activity was denied them by Congress until recently. *Id.*

164. NADELMANN, *COPS ACROSS BORDERS*, *supra* note 3, at 4-10 & *passim*.

maintain productive working relationships with local police;¹⁶⁵ this frequently takes the form, especially where local police are underfunded or corrupt, of providing funding and training for elite drug enforcement units composed of local police.¹⁶⁶ At the more formal level, efforts to obtain information, locate persons, serve documents, execute investigative requests, and conduct joint and individual investigations are coordinated through Interpol, the international police agency.¹⁶⁷ Assistance is provided at the prosecutorial and judicial level as well, as United States law enforcement agents must rely on local courts to issue search warrants, to immobilize targeted assets, to compel witnesses to testify or produce documents, and to extradite criminal defendants.¹⁶⁸

Increasingly, transnational cooperation has been formalized through mutual legal assistance treaties between the United States and its allies.¹⁶⁹ Mutual assistance between the United States and Mexico is now governed by such a treaty,¹⁷⁰ although it was signed and ratified only after the Verdugo incident.¹⁷¹ Under the United States-Mexico treaty, which parallels the majority of the United States other mutual-assistance treaties in most significant respects,¹⁷² both state parties are obligated to "tak[e] all appropriate measures that they have legal authority to take" to provide mutual assistance to the other in criminal matters, including executing requests for searches and seizures.¹⁷³ The treaty requires that searches and seizures be carried out by the "requested party" (the host state) "in

165. See *id.* at 190-91, 199-207, 288-90.

166. See *id.* at 291-97.

167. See 3 ABBELL & RISTAU, *supra* note 161, §§ 12-1-2, 12-3-1; NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 181-86.

168. See 3 ABBELL & RISTAU, *supra* note 161, § 12-1-3; NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 313-24, 397-436.

169. See 3 ABBELL & RISTAU, *supra* note 161, §§ 12-4-1 to 12-4-8; NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 324-84. Since the entry into force of the first mutual-assistance treaty in 1977—with Switzerland—the United States as of 1992 had signed similar treaties with seventeen other states: Argentina, the Bahamas, Belgium, Canada, Colombia, Italy, Jamaica, Mexico, Morocco, the Netherlands, Nigeria, Panama, Spain, Thailand, Turkey, the United Kingdom (Cayman Islands), and Uruguay. NADELMANN, *supra*, app. E.

170. Mutual Legal Assistance Cooperation Treaty, Dec. 9, 1987, U.S.-Mex., entered into force May 3, 1991, 27 I.L.M. 447 (1988) [hereinafter U.S.-Mexico Assistance Treaty].

171. The searches of Verdugo's residences took place on January 25-26, 1986. *Verdugo* (S.D. Cal.), *supra* note 20. (The Ninth Circuit erroneously reported the date as January 25, 1988. 856 F.2d at 1216).

172. See NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 378-79.

173. U.S.-Mexico Assistance Treaty, *supra* note 170, art. 1.

accordance with its constitutional and other legal provisions."¹⁷⁴ Additionally, it provides that nothing in the treaty "empower[s] one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations."¹⁷⁵

Thus, whether under formal or informal arrangements, and whether governed by customary international law or treaty law, United States agents almost always play a supporting or advisory role to local police. Against this backdrop, a unilateral imposition of United States search-and-seizure law such as Justice Brennan envisioned appears entirely inappropriate—although no less inappropriate than Chief Justice Rehnquist's unilateral abdication of responsibility for the targets of such operations.¹⁷⁶ The challenge is to formulate an alternative approach that balances a concern for the transnational context of overseas searches and the legitimate interests of United States extraterritorial law enforcement with a concern that defendants in such operations not find themselves entirely outside the realm of law. That is the purpose of Parts IV and V of this Article.

IV. TOWARD AN INTERNATIONAL FOURTH AMENDMENT

To respond to the concerns articulated above, a transnational approach to "reasonable searches" abroad could take one of two basic directions—it could look to local law to inform its conception of what searches are "reasonable" in any given foreign state, or it could look to international norms to create a more uniform standard.¹⁷⁷ The two sections in this Part explore these

174. *Id.* art. 1(4)(e). Note, however, that, like most of the United States other mutual assistance treaties, the Mexico treaty expressly precludes any private right of action based on the treaty. *Id.* art. 1(5).

175. *Id.* art. 1(2).

176. The Chief Justice's approach, as noted above, is consistent with the approach the Supreme Court has adopted toward international affairs in several important opinions in recent years. See cases cited *supra* note 5.

177. While the focus of this Article is on judicial implementation of these approaches, either approach could, even more appropriately, be implemented by statute. This would accord with Chief Justice Rehnquist's suggestion in *Verdugo* that, in light of concerns about restricting United States freedom of action abroad, restrictions on law enforcement abroad would be best left to Congress and the President. 494 U.S. at 275. It would also accord with the suggestions of commentators in this regard. See Harold H. Koh, *Civil Remedies for Unctivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 189-93 (1987) (Congress is branch best suited to creating remedies for extraterritorial wrongs; in absence of congressional action, courts may create second-best solution); Paust, *supra* note 153, at 574-77 (recommending legislation prohibiting extraterritorial abduction in wake of Supreme Court's

alternatives. Section A explores the "local law," or "binational," approach, which incorporates elements of the search-and-seizure law of the host state into the definition of reasonableness. This approach runs strongly against the grain of United States practice, but it nevertheless responds effectively to many of the concerns expressed above. Section B explores the "international" approach: the adoption of a minimum international benchmark for transnational searches and seizures, fashioned out of international human rights norms and the search-and-seizure practices of the world's major legal systems.¹⁷⁸

A. *The Choice-of-Law Approach: A Binational Standard*

A binational approach, incorporating the search-and-seizure standards of the search jurisdiction into the definition of a "reasonable search" abroad, would be a natural response to the joint nature of transnational law enforcement. Because searches abroad implicate the laws of the host state and since, almost without exception, they involve the police of both the prosecuting and host states, one would expect the law of the search jurisdiction to be an essential element in any determination of the reasonableness of a transnational search. This section will propose such an approach—specifically, that evidence seized in a joint search abroad be excluded only if it violates the search-and-seizure laws of both the United States and the state in which the search is conducted.

failure to enforce international law prohibition of same in *Alvarez-Machain*). This legislation could incorporate international law by reference. See, e.g., 28 U.S.C. § 1350 (1988); 18 U.S.C. § 1651 (1988); 10 U.S.C. §§ 818, 821 (1988).

178. Under neither approach does this Article's analysis depend on the citizenship of the individuals searched. Thus, it is recommended that the courts apply the binational or international standard equally to citizens and noncitizens alike. This nationality-blind approach, of course, would be counter to the reasoning of the *Verdugo* plurality, to Justice Brennan's dissent, and to some cases in the lower courts that have assumed that the Fourth Amendment's full domestic proscriptions apply abroad. But, as with this Article's recommendations in general, it would not be barred by Supreme Court precedent. See *Reid v. Covert*, 354 U.S. 1 (1957) (holding that Constitution protects citizens abroad, but not addressing specifics of citizens' extraterritorial Fourth Amendment rights); cf. *Verdugo*, 494 U.S. at 283 n.7 (Brennan, J., dissenting) (noting that plurality does not "question[] the validity of the rule, accepted by every Court of Appeals to have considered the question," that full Fourth Amendment protections apply to searches of United States citizens abroad).

An exception would have to be made for military personnel and their relatives, as well as any individuals who are abroad in an official capacity or who are otherwise in an agency relationship to the United States government that would make them deserving of full domestic protections. See MIL. R. EVID. 311 (extending full Fourth Amendment protections to military personnel regardless of location).

This approach would be a departure for United States courts, which previously have not consulted foreign law in determining the legality of searches abroad. Almost uniformly, United States courts have proceeded on the assumption, as Justice Brennan did in *Verdugo*,¹⁷⁹ that United States law applies in its totality abroad, if any law does, and that the relationship of the search to local law is "irrelevant."¹⁸⁰ The doctrine chiefly responsible for this approach is known as the "international silver platter."

1. The "International Silver Platter"

Before *Verdugo*, United States courts faced with extraterritorial searches "assumed," as the Ninth Circuit put it in its *Verdugo* decision, "that the fourth amendment constrains the manner in which the federal government may pursue its extraterritorial law enforcement objectives."¹⁸¹ Courts were able to proceed on this assumption without unduly constraining the pursuit and prosecution of criminals beyond United States shores because of a framework principle which, in its effect, ensured that the Fourth Amendment essentially never applied. That principle is that "fourth amendment principles do not apply to searches by foreign authorities in their own countries."¹⁸² The consequence

179. *United States v. Verdugo-Urquidez*, 494 U.S. at 294 ("I see no reason to distinguish between foreign and domestic searches").

180. *See Verdugo*, 856 F.2d 1214, 1229 (9th Cir. 1988) (concluding that the relevant standard is that imposed within the United States by the Fourth Amendment, and that "whether [the search] may also have violated Mexican law is irrelevant"); *United States v. Conroy*, 589 F.2d 1258, 1265 (5th Cir.) ("The mere consent of foreign authorities to a seizure that would be unconstitutional in the United States does not dissipate its illegality even though the search would be valid under local law."), *cert. denied*, 444 U.S. 831 (1979); *United States v. Cotroni*, 527 F.2d 708, 711 (2d Cir. 1975) ("[a]ppellants' rights vis-à-vis their own government are not defined by the provisions of the United States Constitution and are therefore 'no legal concern of an American court'"), *cert. denied*, 426 U.S. 906 (1976).

One court that has invoked foreign law is the Court of Military Appeals. *See infra* notes 344-49. However, research for this Article turned up only a handful of cases in which nonmilitary courts have looked to foreign search-and-seizure law to inform their understanding of a search's legality. *See United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987); *United States v. Phillips*, 479 F. Supp. 423 (M.D. Fla. 1979). *Peterson* is discussed *infra*, note 205.

181. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1217 (9th Cir. 1988).

182. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987). The principle has been articulated by the Supreme Court only in dicta in a footnote. *United States v. Janis*, 428 U.S. 433, 455 n.31 (1976). Every federal court of appeals that has addressed the issue has reached the same conclusion. *See, e.g., United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); *United States v. Hawkins*, 661 F.2d 436, 455-56 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); *Stowe v. Devoy*, 588 F.2d 336 (2d Cir. 1978), *cert. denied*, 442 U.S. 931 (1979);

has been that United States courts, as did the Supreme Court in *Verdugo*, have focused entirely on the conduct of United States police, to the more or less complete exclusion of the conduct of foreign police under whose guidance these searches almost always have been conducted. With foreign police relegated essentially to the status of "private individuals," their participation in extraterritorial searches has been ignored, along with the relevance of the local laws binding these police.

a. "Private Searches:" The *Burdeau* Rule

The principle that the Fourth Amendment "does not apply to searches by foreign authorities in their own countries" is derived from the 70-year-old rule, first set out by the Supreme Court in *Burdeau v. McDowell*,¹⁸³ that "private searches" are beyond the scope of the Fourth Amendment.¹⁸⁴ In *Burdeau*, the Supreme Court held that, since the Fourth Amendment "was not intended to be a limitation upon other than governmental agencies," searches by private detectives or other "private" individuals were beyond its scope;¹⁸⁵ consequently, evidence obtained illegally by private individuals and subsequently turned over to the authorities need not be excluded from a criminal trial.

Debate about the *Burdeau* rule generally centers, not on the validity of the rule, which is universally accepted,¹⁸⁶ but on its

United States v. Rose, 570 F.2d 1358, 1361-62 (9th Cir. 1978); United States v. Marzano, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); Birdsell v. United States, 346 F.2d 775, 782-83 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965). See also FOREIGN RELATIONS STATEMENT, *supra* note 16, § 433(3).

183. 256 U.S. 465 (1921).

184. The link between *Burdeau's* "private searches" rule and the "foreign searches" rule was noted by the Supreme Court on the one occasion on which it articulated, albeit briefly, the "foreign searches" rule. United States v. Janis, 428 U.S. 433, 455 n.31 (1976) ("It is well established, of course, that the exclusionary rule . . . is not applicable where a private party or a foreign government commits the offending act.") (emphasis added); see also United States v. Marzano, 537 F.2d 257, 269 (7th Cir. 1976) (applying *Burdeau* standard to foreign search).

185. 256 U.S. at 475.

186. The rule is still good law, despite significant change in much of Fourth Amendment law since the time of *Burdeau*, and it has been applied to a broad variety of circumstances. See 1 LAFAYE, *supra* note 53, § 1.8(a). For example, courts have admitted evidence obtained when a landlord searched his tenant's possessions, when a telephone company monitored calls, when an airline employee searched an unclaimed bag, and when a burglar who discovered evidence of his victim's criminality sent it to the police. See *id.* § 1.8(a), at 177.

Arguments for the rule generally stress the various purposes that are served when courts exclude evidence which has been wrongfully seized by government officials, but which would not be served when the search was by a private individual. See *id.* § 1.8(a). First, exclusion is said to deter police misconduct.

scope—precisely what it takes to put a search outside the “private” category. Thus, for instance, a search is not private if it has been ordered or requested by a government official, even if a private individual carries it out.¹⁸⁷ Many cases of private-official cooperation, of course, fall into a gray area, where courts must ascertain whether enough cooperation or understanding existed between government officials and private individuals (including, for instance, private security guards and private detectives) to turn the “private” search into an “official” one. The courts deem evidence excludable if the search was a “joint endeavor” between a private person and a government official.¹⁸⁸ This is so whether or not the government official “originated the idea or joined in it while the search was in progress;” it is sufficient that the official “was in it before the object of the search was completely accomplished.”¹⁸⁹ The notion of “joint endeavors” is central to the issues that arise when the *Burdeau* rule is applied to searches by foreign officials.

b. From Private to Foreign Searches

The *Burdeau* rule has given rise to a number of variants, collectively known as the “silver platter” doctrine, which allow officials of one jurisdiction to receive evidence from an external illegal source without also receiving the taint—as if the evidence had been handed over “on a silver platter.”¹⁹⁰ It is just a small

When evidence has been obtained by private individuals, on the other hand, exclusion is unlikely to have a deterrent effect: first, the private searcher is likely to be motivated by reasons other than a desire to secure criminal conviction; second, he is not as likely to be a repeat player who will feel the sting of exclusion. Exclusion, secondly, is said to prevent government from “profiting from its own wrongdoing.” Obviously, when a search is private, the wrongdoing from which the government profits will not be its own (for whatever that distinction is worth). And third, exclusion is said to serve the “imperative of judicial integrity” by preventing courts from becoming “accomplices” in official wrongdoing. When the search is by a private individual, the courts of course do not condone *official* wrongdoing (though they arguably compromise their integrity by appearing perhaps to condone *individual* wrongdoing). *Id.*

187. *Id.* § 1.8(b), at 178.

188. *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966). See also 1 LAFAVE, *supra* note 53, § 1.8(b), at 179.

189. *Lustig v. United States*, 338 U.S. 74, 79 (1949). This case concerned the state-to-federal silver platter, but the standard has been invoked by courts applying *Burdeau*.

190. The phrase was coined in *Lustig v. United States*, 338 U.S. 74 (1949), twelve years before the Court extended the Fourth Amendment exclusionary rule to searches by state officials in *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Lustig*, the Supreme Court concluded that evidence unconstitutionally seized by state officers without federal participation could be introduced in a federal trial, since “a search is . . . not a search by a federal official if evidence secured by state

step from the *Burdeau* rule immunizing "private" searches, and the now-defunct state-to-federal silver platter immunizing state searches,¹⁹¹ to a rule extending the silver platter to officials of foreign states.

Foreign police are, of course, not "private individuals," but for purposes of the Fourth Amendment they are treated as if they were. This "international silver platter"¹⁹² is activated when foreign police conduct a search that, if it were conducted in the United States, would not meet Fourth Amendment standards. If the foreign police then hand over the fruits of the search to United States authorities, and they are offered into evidence in a United States court, United States courts agree that the evidence may be admitted.¹⁹³

The rationale for the international silver platter is expressed in very few cases. On the rare occasions when courts have attempted an explanation, they have focused on the purported lack of deterrent effect that excluding such evidence would have. As the Ninth Circuit opined in its *Verdugo* decision:

Because the fourth amendment does not itself require exclusion of unlawfully obtained evidence, and because excluding reliable evidence will not force foreign officers to

authorities is turned over to the federal authorities on a silver platter." 338 U.S. at 78-79.

The state-to-federal silver platter was eliminated in *Elkins v. United States*, 364 U.S. 206 (1960), one year before *Mapp* made the issue moot. Other silver platters still remain today—the "interstate silver platter" (which allows the courts of one state to admit evidence seized in another state in violation of that state's law), the "private (*Burdeau*) silver platter," and the "international silver platter." See generally 1 LAFAVE, *supra* note 53, §§ 1.5(c) (interstate silver platter), 1.8(a)-(f) (private silver platter), 1.8(g) (international silver platter).

191. See *supra* note 190.

192. This phrase is used, e.g., in 1 LAFAVE, *supra* note 53, § 1.8(g), and in Note, *The New International "Silver Platter" Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country*, 2 N.Y.U. J. INT'L L. & POL. 280 (1969) [hereinafter Note, *The New International "Silver Platter" Doctrine*].

193. See cases cited *supra* note 182. For general discussions of the international silver platter, see 1 LAFAVE, *supra* note 53, § 1.8(g); Keith Raffel, *Searches and Seizures Abroad in the Federal Courts*, 38 MD. L. REV. 689 (1979); Saltzburg, *supra* note 77; Harry S. Chandler, Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials*, 53 CORNELL L. REV. 886 (1968); Steven M. Kaplan, Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495 (1977); Robert L. King, Note, *The International Silver Platter and the "Shocks the Conscience" Test: U.S. Law Enforcement Overseas*, 67 WASH. U. L.Q. 489 (1989); Charles E.M. Kolb, Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 VA. J. INT'L L. 515 (1977); Steven H. Thelsen, Note, *Evidence Seized in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?*, 25 WM. & MARY L. REV. 161 (1983); Note, *The New International "Silver Platter" Doctrine*, *supra* note 192.

abide by the norms of the fourth amendment, the exclusionary rule has no application to searches conducted solely by a foreign government.¹⁹⁴

Courts have carved out a limited exception to this rule, which makes the Fourth Amendment and its exclusionary rule applicable to foreign-conducted searches "if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and foreign officials."¹⁹⁵ This exception, known as the "joint venture" or "joint participation" exception,¹⁹⁶ is the reason that *Verdugo* made it to the Supreme Court. Had the district court not concluded that DEA agents conducted a "joint venture" with the Mexican police,¹⁹⁷ *Verdugo's* motion to suppress would have been summarily dismissed, and the broader Fourth Amendment question would never have reached the High Court.

The exception, however, has been construed extremely narrowly. The district and circuit court decisions in *Verdugo* were

194. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1224 (9th Cir. 1988). See also *United States v. Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985) ("It is obvious . . . that since United States courts cannot be expected to police law enforcement practices around the world, let alone to conform such practices to Fourth Amendment standards by means of deterrence, the exclusionary rule does not normally apply to foreign searches conducted by foreign officials"); *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968) ("there is nothing our courts can do that will require foreign officers to abide by our Constitution"), *cert. denied*, 395 U.S. 960 (1969). The Second Circuit has expressed a broader rule—the non-applicability of the entire Bill of Rights to acts by foreign officials: "Although the Bill of Rights does apply extraterritorially to protect American citizens against the illegal conduct of United States agents, it does not and cannot protect our citizens from the acts of a foreign sovereign committed within its territory." *Rosado v. Civiletti*, 621 F.2d 1179, 1189 (2d Cir.) (citations omitted) (regarding due process claim), *cert. denied*, 449 U.S. 856 (1980).

195. *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); see also *Verdugo*, 856 F.2d 1214, 1224-25 (9th Cir. 1988); *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987); *United States v. Rosenthal*, 793 F.2d 1214, 1231 (11th Cir. 1986), *modified*, 801 F.2d 378 (1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); *United States v. Hawkins*, 661 F.2d 436, 455-56 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); *United States v. Heller*, 625 F.2d 594, 599-600 (5th Cir. 1980); *United States v. Marzano*, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

196. See generally articles cited *supra* note 193.

197. The district court concluded that the searches met all the criteria for a joint venture: "The DEA agents initiated the searches in order to obtain evidence relevant to a criminal prosecution pending in the United States. The searches were unrelated to any pending or contemplated Mexican criminal prosecution and would not have been conducted by the [Mexican police] absent encouragement from the DEA The DEA agents participated extensively in the searches themselves" *Verdugo* (S.D. Cal.), *supra* note 20.

rare departures from the federal courts' "virtually unanimous"¹⁹⁸ practice of rejecting claims of joint participation. Research for this Article uncovered only a handful of cases in which a nonmilitary court¹⁹⁹ has found joint participation,²⁰⁰ and only one case prior to the Ninth Circuit's decision in *Verdugo* in which a Court of Appeals upheld a trial court's exclusion of evidence seized abroad.²⁰¹ Thus, the "international silver platter" has placed almost all searches in foreign states outside the Fourth Amendment, effectively treating foreign officials as if they were private citizens.²⁰²

This "privatizing" of foreign officials, not surprisingly, has contributed to the marginalizing of foreign law: if foreign officials are, for Fourth Amendment purposes, no more than "private individuals," then the laws by which they conduct their searches necessarily must be immaterial to the Fourth Amendment

198. *Verdugo*, 856 F.2d at 1225 (citing *United States v. Morrow*, 537 F.2d 120, 140 (5th Cir. 1976)).

199. For a discussion of the different approaches taken by nonmilitary courts, see *infra* notes 344-49 and accompanying text.

200. *Verdugo*, 856 F.2d 1214, 1225 (9th Cir. 1988); *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.) (finding joint venture was "close question" where Coast Guard initiated high-seas chase of suspected drug-smuggling vessel, asked for Canadian assistance, provided back up as Canadians boarded, and then participated in second search of the vessel), *cert. denied*, 461 U.S. 958 (1983); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) (holding that Fourth Amendment applied to Air Force discharge proceeding in Japan, where Air Force investigators requested and obtained Japanese search warrant and then joined Japanese officers in executing it at Air Force Employee's off-base dwelling); *United States v. Juda*, 797 F. Supp. 774, 781-82 (N.D. Cal. 1992) (finding United States participation sufficient because beeper was installed at request of United States agents and investigation was directed at United States citizens); *Lau v. United States*, 778 F. Supp. 98, 100-01 (D. P.R. 1991) (finding joint venture in joint United States-Dutch search where "sole purpose" of foreign search was to obtain evidence for United States prosecution), *aff'd*, 976 F.2d 724 (1st Cir. 1992); *United States v. Orman*, 417 F. Supp. 1126 (D. Colo. 1976). For a description of the broad range of circumstances in which United States courts have refused to find joint participation, see *infra* part V.A.

201. *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966).

202. As the Fifth Circuit has noted, "Fourth Amendment rights are generally inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials are present and cooperate in some degree." *Government of Canal Zone v. Sierra*, 594 F.2d 60, 72 (5th Cir. 1979).

This is not true of searches and seizures on the high seas, which differ from foreign-state searches in that they generally are conducted unilaterally by United States agents and their high-seas location does not fall within the territorial jurisdiction of another state. Thus, the concerns noted above about dual sovereigns and dual laws do not arise. See generally Saltzburg, *supra* note 77; Carmichael, *supra* note 9. But see *United States v. Davis*, 905 F.2d 245, 251 (9th Cir. 1990) (assuming no distinction between foreign-state and high-seas searches, citing *Verdugo* for proposition that Fourth Amendment does not apply to searches of nonresident aliens in either location).

inquiry. As one court has noted, weaving these two conceptual threads together, "the Fourth Amendment does not apply to arrests and searches made by Mexican officials in Mexico for violation of Mexican law."²⁰³ On the rare occasions when it does apply, the federal courts' governing assumption has been that expressed by the Ninth Circuit in *Verdugo* and subsequently echoed by Justice Brennan—that the Amendment applies in full force, with all the per se rules that would govern a domestic search, and "whether [the search] may also have violated [foreign] law is irrelevant."²⁰⁴

2. Abandoning the Silver Platter: The Double-Illegality Approach

The binational approach would part with this practice. Under this approach, an extraterritorial search by United States agents would be declared constitutionally "unreasonable" only if it were conducted in violation of both the Fourth Amendment domestic standard and the law of the search jurisdiction—in other words, "double illegality" would be required.²⁰⁵ At the same time, the requirement of joint participation would be relaxed: a

203. *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

204. *Verdugo*, 856 F.2d 1214, 1229 (9th Cir. 1988); *see also* 494 U.S. at 294 (Brennan, J., dissenting).

205. A similar approach was proposed in Harvard Note, *supra* note 15, at 1686-92. The closest the federal courts have come to such an approach is one Ninth Circuit opinion by then-Judge Kennedy, which the Ninth Circuit has subsequently declined to follow, which stated without citation that search jurisdiction law should be incorporated into the definition of Fourth Amendment reasonableness. *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987). In *Peterson*, which concerned a joint investigation conducted by United States and Philippine authorities, then-Judge Kennedy advanced the proposition that if "United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials, the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable." *Id.* at 490. If the search were to violate that law, the court concluded, it would be, "as a result, not reasonable under the fourth amendment." *Id.* at 491. Although he found the search unreasonable, Judge Kennedy refused nonetheless to exclude the search's fruits, drawing on a "good faith" standard from the warrant context. *See part V.B infra.*

Judge Kennedy's suggestion was entirely unsupported by case law and has not been followed. *See* Jonathan J. Cheatwood, Recent Development, 21 VAND. J. TRANSNAT'L L. 631 (1988) (concluding that *Peterson* approach ignores precedent and is bad policy). In *Verdugo*, the Ninth Circuit, while not overruling *Peterson*, expressly declined the parties' invitation to follow its approach, concluding instead that the only relevant question before it was whether the search of Verdugo's residence violated domestic Fourth Amendment standards. If the search violated the Fourth Amendment, the court concluded, "whether it also may have violated Mexican law is irrelevant." 856 F.2d at 1229. The parties briefed the Mexican law issue again before the Supreme Court, but the Justices did not address the issue.

more routine level of involvement by United States law enforcement would trigger the reduced "reasonableness" standard.²⁰⁶

A double-illegality requirement would respond to some of the concerns, canvassed above, of Justices Rehnquist and Kennedy about the problems inherent in applying the Fourth Amendment in a foreign state.²⁰⁷ First, a binational approach would be directly responsive to Justice Kennedy's complaint about the "impracticable and anomalous" aspects of applying United States search-and-seizure standards abroad. Justice Kennedy objected that imposing a United States warrant requirement for foreign searches would be to impose foreign standards and foreign procedures on local police, with whom United States police must work cooperatively.²⁰⁸ A "double-illegality" approach would address these concerns directly. By excluding the fruit only of "doubly illegal" searches, United States courts would refrain from imposing on the search jurisdiction Fourth Amendment standards that conflicted with local law. Instead, they would impose only search-and-seizure standards and procedures that were common to both states. Justice Kennedy's concerns would be addressed, as would considerations of comity.²⁰⁹ Additionally, the approach would facilitate cooperative transnational police work and the gradual harmonization and regularization of transnational criminal procedures.²¹⁰ Local police could carry out searches

206. Relaxation of the joint participation standard is examined *infra* part V.A.

207. See *supra* notes 34-51 and accompanying text.

208. See *United States v. Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

209. Comity is the principle of interstate and international relations "under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Ct.*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part). As Justice Blackmun noted, "[w]hen there is a conflict [between domestic and foreign law], a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws." *Id.*; see also *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (declining to extend United States maritime statute where it would conflict with Danish law, taking into account the aims of "stability and order" in international and maritime law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) & cmt. d (1971) (listing "the needs of the interstate and international system" first among seven governing factors in choice-of-law analysis). At least one federal court has embraced a similar line of thought in the search-and-seizure context. See *United States v. Phillips*, 479 F. Supp. 423, 437-38 (M.D. Fla. 1979) (holding that, even though suppression was not constitutionally required, "considerations of comity" required suppression of wiretap evidence obtained illegally by Canadian police).

210. Ethan Nadelmann has described the harmonization of divergent law enforcement systems as one of the chief goals of transnational law enforcement. NADELMANN, *COPS ACROSS BORDERS*, *supra* note 3, at 10 & *passim*. Harmonization encompasses three kinds of processes: *regularization* of relations among law enforcement officials of different states, *accommodation* among systems that still

requested by the United States in accordance with their own local procedures (as required, for instance, by mutual assistance treaties)²¹¹ without fear that the evidence would be thrown out of a United States court because they failed to follow some detail of United States search-and-seizure procedure.

While the binational approach would part with the general practice of the federal courts,²¹² the kind of approach it embodies would not be entirely foreign to United States courts. It would not be incompatible, for instance, with the choice-of-law methodologies employed by state courts in response to searches that cross state lines.²¹³ And it would be responsive, additionally, to concerns about the nature of the Fourth Amendment and the privacy interests that it protects.²¹⁴ Justice Brennan's approach, imposing United States search-and-seizure standards around the globe, embodies the assumption that the Fourth Amendment right to privacy is a universal right, uniform wherever it is

retain their essential differences, and *homogenization* of systems toward a common norm. *Id.* at 10.

211. See *supra* note 174 and accompanying text.

212. See *supra* part IV.A.1. But see *United States v. Salim*, 663 F. Supp. 682, 688 (E.D.N.Y. 1987) (Weinstein, J.) ("judicial notice of the nature of a foreign judicial system is appropriate on a motion to suppress evidence gathered abroad.").

213. Since *Mapp v. Ohio*, 367 U.S. 643 (1961), searches and seizures by state police have been governed by a uniform federal constitutional standard; states, however, have been free to develop their own individual constitutional or statutory standards so long as these standards pass the minimal federal threshold. This promulgation of state-by-state standards creates the potential for clashes among states that have selected standards of varying stringency. When these clashes occur, choice-of-law issues are raised that are similar to those raised in the transnational context.

While state courts have not employed consistent methodologies in struggling with the questions that arise in this context, they have at least grappled with the choice-of-law issues in a way that has not happened in the transnational context. State courts have not categorically concluded, as have federal courts considering extraterritorial searches, that the only applicable law is that of the forum. Instead, they have employed a variety of methodologies, borrowed from civil choice-of-law jurisprudence, to assess whether forum or search-jurisdiction law should be applied in a particular interstate search context. In particular, the cases show that a straight forum-law approach need not necessarily and unavoidably be employed. Instead, search-jurisdiction law may on occasion be employed when the interests of the two jurisdictions (however calculated) so indicate. Or neither of the two standards may be employed, when application of the federal standard is judged more appropriate. See generally 1 LAFAYE, *supra* note 53, § 1.5(c); John B. Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217 (1985); William H. Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, TENN. L. REV. 1043, 1060-61 (1977); Richard Tullis & Linda Ludlow, *Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule*, U.S.F. L. REV. 87, 88 (1975).

214. Justice Kennedy alluded to these concerns when he noted "the differing . . . conceptions of reasonableness and privacy that prevail abroad." 494 U.S. at 278 (Kennedy, J., concurring).

imposed; in fact, this misconstrues the nature of the privacy that the Fourth Amendment protects. While the principle of "mutuality" that Brennan invokes is sound—individuals acquire rights against the United States when United States agents seek to enforce United States law against them²¹⁵—it is not necessarily the case that these rights remain the same regardless of the location of United States action.²¹⁶ The expectations of privacy that the Fourth Amendment protects are not, as the Department of Justice noted in its brief in *Verdugo*, "free-floating concepts capable of universal application."²¹⁷ Instead, they are particularized, socially determined expectations—"expectations," as the Supreme Court put it in the landmark case of *Katz v. United States*,²¹⁸ "that society is prepared to consider reasonable."²¹⁹ These expectations "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."²²⁰

Thus, while the Fourth Amendment protects individuals from "unreasonable searches and seizures," what is "unreasonable" in the United States²²¹ may not be unreasonable in Mexico or Sri Lanka.²²² Each society's determination of what searches it will

215. See *supra* part II.B.2.

216. Justice Kennedy raised this point in his *Verdugo* concurrence. See 494 U.S. at 277 ("there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place") (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

217. Brief for the United States, *supra* note 3, at *20.

218. 389 U.S. 347 (1967).

219. *Id.* at 361 (Harlan, J., concurring), *adopted by a majority of the court in Smith v. Maryland*, 442 U.S. 735, 740 (1979).

220. *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1978). As Justice Harlan has noted, "[o]ur expectations [of privacy], and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). See generally BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* (1984); see also Arnold Simmel, *Privacy Is Not an Isolated Freedom*, in *NOMOS XIII: PRIVACY* 71, 71 (J.R. Pennock & John W. Chapman eds., 1971) ("As a value privacy does not exist in isolation, but is part and parcel of the system of values that regulates action in society."); Note, 6 U. MICH. J.L. REF. 154, 179-80 (1972) ("the realization of privacy is itself very much a product of life in a human community, made possible through the operation of socialization and social controls. The quantity and quality of seclusion available to an individual or group are socially and culturally determined, and in that sense society and culture may be said to dictate what sorts of privacy one may reasonably expect.").

221. It should be noted that the Fourth Amendment imposes a national, not local, standard of reasonableness; potential local differences, such as a "reasonable expectation of privacy" in New York City versus a reasonable expectation in Des Moines, are not taken into account. Harvard Note, *supra* note 15, at 1686.

222. It is "obvious that the political system in each society will be a fundamental force in shaping its balance of privacy, since certain patterns of

consider unreasonable is the product of a highly individualized calculus, the result of balancing the amount of individual privacy and security that society is "prepared to consider reasonable" against the legitimate needs of government and law enforcement.²²³ These societal understandings should not travel with the government to foreign states, as Justice Brennan (and some commentators)²²⁴ would have it; rather, they should remain embedded in the locale in which each individual finds himself. A foreign citizen, or even a United States citizen in a foreign state, should not be able to claim the same expectation of privacy abroad that he could claim in the United States; if he can have no legitimate expectation that Mexican police will not break into his house without a warrant, then why should he be accorded a greater expectation of privacy as against United States police?²²⁵

privacy, disclosure, and surveillance are functional necessities for particular kinds of political regime." ALAN F. WESTIN, *PRIVACY AND FREEDOM* 23 (1967). "American patterns of privacy are, in the main, the end products of a long period of cultural development" and "it is very clear that our view of privacy as a set of rules against intrusion and surveillance focused on the household occupied by a nuclear family is a conception which is not to be found universally in all societies." John M. Roberts & Thomas Gregor, *Privacy: A Cultural View*, in *NOMOS XIII: PRIVACY* 199, 224-25 (J.R. Pennock & John W. Chapman eds., 1971).

223. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) ("the nature of a particular practice and the likely extent of its impact on the individual's sense of security [must be] balanced against the utility of the conduct as a technique of law enforcement"). A court cannot usually make such an assessment without conducting a broad-ranging inquiry encompassing not only legal precedent but, in many cases, contemporary and historical social practices, customs and understandings, and fundamental social values. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7-22 (1985) (concluding, in light of the common law (going back to Blackstone), criminological studies, the changing technology of law enforcement, and analyses of state laws and the policies of various police departments, that the use of deadly force to prevent the escape of an apparently unarmed suspected felon constitutes an unreasonable seizure); *Oliver v. United States*, 466 U.S. 170, 177-80 (1984) (examining the Framers' intent, the language of the Fourth Amendment and its origins in the common law, "societal understandings," values "embedded in our traditions," and historical and contemporary uses of open fields, in assessing the continuing validity of the "open fields" doctrine, which allows police to search open fields without a warrant).

224. E.g., Saltzburg, *supra* note 77, at 763.

225. An additional objection may be addressed here—the argument that United States courts should not exclude evidence for violations of foreign search-and-seizure laws when the state whose law is violated does not itself employ the exclusionary remedy. See Saltzburg, *supra* note 77, at 765 ("The failure of most foreign countries to suppress illegally seized evidence in their own courts . . . strongly suggests that U.S. courts do them a disservice by excluding the same evidence."). This argument should be rejected, however, just as the Supreme Court rejected the same argument in the federal-state context. In *Elkins v. United States*, 364 U.S. 206 (1960), the Court abolished the state-to-federal silver platter and instituted the exclusionary remedy in federal court for evidence seized unconstitutionally by state police. In so doing, it concluded that it would make no difference whether the state in question had adopted the exclusionary rule, for "[i]n states which have not adopted the exclusionary rule, . . . it would work no

To do so is to violate the principle, familiar to Fourth Amendment law, that an individual can have no greater legitimate expectation of privacy against the government than he has against the rest of the world.²²⁶ It is also to provide United States law enforcement agents with a powerful inducement for subterfuge and evasion—the inducement to hand off their search authority to local police in an attempt to evade the constitutional standards to which they are held accountable.²²⁷

3. Implementing the Double-Illegality Approach

A binational approach need not be unduly burdensome. The heart of the approach, as noted above, is that foreign searches would be declared unlawful only if they violated both Fourth Amendment domestic standards and the laws of the search jurisdiction. This requirement could be implemented through a bifurcated suppression hearing at which the defendant would have the opportunity to demonstrate the “double illegality” of the search. Unlike suppression hearings for domestic searches, the burden of demonstrating that the search violated both jurisdictions’ standards would fall on the defendant.²²⁸ The government, in response, would need to show only that the defendant had failed to meet his burden of proof with regard to one or the other of these contentions.

conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. [The Court’s remedy] affects not at all the freedom of the states to develop and apply their own sanctions in their own way.” *Id.* at 221. The Court’s reasoning is equally applicable to the transnational context, particularly in light of the fact that both the binational and international approaches enforce only policies common to both states.

226. See *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding that, because individuals have no reasonable expectation of privacy in garbage as against garbage collectors, they have no such interest as against police); *California v. Ciraolo*, 476 U.S. 207, 213-14 (1986) (holding that, since individual had no reasonable expectation that his backyard would be secure from aerial surveillance by commercial aircraft, he had no such legitimate expectation against aerial police surveillance). Accord Harvard Note, *supra* note 15, at 1688.

227. See *infra* notes 349-52 and accompanying text.

228. This allocation of the burden of proof would differ somewhat from the burden in motions to suppress evidence obtained within the United States. In domestic suppression hearings, the defendant carries the burden of proof of demonstrating illegality only if the search was conducted pursuant to a warrant. 3 WRIGHT & MILLER, *supra* note 123, § 675, at 782-83. Where the defendant challenges a warrantless search, the burden falls on the United States to bring the case within one of the exceptions to the warrant requirement. *Id.* For foreign searches, however, placing the burden on the government to demonstrate the “reasonableness” of its search would be less appropriate in light of separation-of-powers concerns about judicial involvement in foreign affairs, see *infra* part V.C., as well as concerns about proving foreign law, see *infra* this section.

The primary element that would be added to the suppression proceedings, along with the shifting of the burden of proof, would be the need to prove foreign law. Proof of foreign law, while not a practice that has always been enthusiastically embraced by United States courts,²²⁹ is nevertheless now an accepted and regular part of the courts' business.²³⁰ Since 1966, the federal rules of civil and criminal procedure²³¹ have provided courts with a relatively informal and effective procedure for determining foreign law, replacing the previous, highly cumbersome approach in which courts treated questions of foreign law as issues of fact, to be pleaded and proved in accordance with the rules of evidence.²³²

The "fact" approach was fundamentally changed by the promulgation of Civil Rule 44.1 and Criminal Rule 26.1. These rules allow courts to consider any relevant source of information, without regard to whether it is submitted by a party or whether it would be admissible under the Federal Rules of Evidence.²³³ Additionally, they allow courts to conduct their own research into

229. For the classic statement on the alien and indecipherable nature of foreign law, see *Diaz v. Gonzalez y Lugo*, 261 U.S. 102, 106 (1923) (Holmes, J.) ("When we contemplate such a system [the law of Puerto Rico] from the outside it seems like a wall of stone . . . except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.").

230. See WRIGHT & MILLER, *supra* note 123, § 431 (proof of foreign law in criminal cases), §§ 2441-47 (civil cases); John R. Brown, 44.1 *Ways to Prove Foreign Law*, 9 MAR. LAW. 179, 196 (1984) (view of court of appeals judge that revised rules of procedure have "untied the hands of judges"); Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 634 (1967) (conclusion by drafter of new rules that judicial attitudes toward proving foreign law had softened); Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470 (1978) (federal trial judge's view that proof of foreign law is workable under revised rules); Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97 (1981) (same by academic commentator).

231. FED. R. CRIM. P. 26.1 (governs proof of foreign law in criminal matters); FED. R. CIV. P. 44.1 (virtually identical, governs in civil matters).

232. Brown, *supra* note 230, at 180-83. Proof was usually made by examination and cross-examination of expert witnesses on the law of the foreign state. This approach was inefficient, expensive, and highly constrictive. *Id.* at 181-82.

233. Both the civil and criminal rules provide that "[t]he court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." FED. R. CRIM. P. 26.1; FED. R. CIV. P. 44.1; see also 9 WRIGHT & MILLER, *supra* note 123, § 2444.

foreign law, just as they do with domestic law.²³⁴ The purpose of these changes is to make the process of determining foreign law as similar as possible to the process of determining domestic law.²³⁵ The court may consider any material the parties wish to present. The most frequently used method of proof is submission of experts' affidavits along with copies of relevant foreign statutes and judicial decisions in the original as well as in English translation.²³⁶

The key to a workable binational approach to extraterritorial searches and seizures would be to place on the defendant, who is seeking to suppress evidence as a violation of foreign search-and-seizure law, not only the burden of proof²³⁷ but also the burden of submitting sufficient evidence of foreign law to provide clear substantiation of his claim.²³⁸ United States courts lack the resources and the skills, both linguistic and juridical, to conduct their own inquiries into foreign law;²³⁹ additionally, principles of comity should make United States courts leery of issuing pronouncements on the meaning of other states' laws unless they are supported by unequivocal pronouncements from the foreign states' legislatures or courts. Accordingly, the foreign law-finding

234. FED. R. CRIM. P. 26.1; FED. R. CIV. P. 44.1; *see also* 9 WRIGHT & MILLER, *supra* note 123, § 2444.

235. 9 WRIGHT & MILLER, *supra* note 123, § 2444; *see also* Pollack, *supra* note 230, at 473 (suggesting that advocates argue foreign law "just as you would with domestic law").

236. Sass, *supra* note 230, at 108 & n.53. *See, e.g.*, *Argyll Shipping Co. v. Hanover Ins. Co.*, 297 F. Supp. 125, 128 (S.D.N.Y. 1968) (English translation of Japanese Commercial Code and affidavits of Japanese attorneys). Where the law appears clear, courts have sometimes been willing to dispense with affidavits of foreign counsel and base their judgments of foreign law solely on secondary sources, such as treatises on foreign law. *E.g.*, *Forzley v. Avco Corp. Electronics Div.*, 826 F.2d 974 (11th Cir. 1987) (relying solely on treatise to determine Saudi law).

A significant additional tool for determining foreign law is available to European courts under the European Convention on Information on Foreign Law, 1968, Europ. T.S. No. 62. Under the Convention, each of the participating countries establishes a "national liaison body," usually within the Ministry of Justice, to respond to requests from foreign courts for determinations on the law of that state. *Id.* Accession to the treaty by the United States would significantly expedite the process of determining foreign law.

237. *See supra* note 228 and accompanying text.

238. *See* Pollack, *supra* note 230, at 475 ("A lawyer relying on the law of a foreign country has a distinctive burden with respect to furnishing legal material to the court."); *see also* *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 n.3 (2d Cir. 1968) (Friendly, J.) ("Though new Rule 44.1 establishes that courts may, in their discretion, examine foreign legal sources independently, it does not require them to do so in the absence of any . . . help from the parties.").

239. *See* Pollack, *supra* note 230, at 470-72 ("judges with few exceptions don't know foreign law, and generally lack an informed idea of how to find it out on their own"); Sass, *supra* note 230, at 109-10 (concluding that courts have been reluctant to engage in their own research of foreign law).

burden should be shifted to the defendant, and evidence should be suppressed only when the defendant has produced clear evidence of the illegality of the search under foreign law in the form of a clear statutory or judicial pronouncement on the matter.²⁴⁰ By requiring clear proof of illegality, United States courts would be able to avoid entangling themselves in broad-ranging inquiries into other societies' fundamental values and "expectations of privacy," of the sort common to domestic Fourth Amendment jurisprudence.²⁴¹ If a defendant failed to submit clear proof of illegality, the court could admit the challenged evidence on the ground that the defendant had failed to carry his burden.²⁴²

Various issues, of course, would remain to be faced under a double-illegality approach. One such issue would concern extraterritorial warrants;²⁴³ another, what weight to give to foreign search-and-seizure laws that are on the books but which go routinely unenforced;²⁴⁴ a third, the possibility that foreign-

240. For cases in which courts have dismissed claims for lack of clear proof of foreign law, see, e.g., *Esso Standard Oil v. S.S. Gasbras Sul*, 387 F.2d 573, 580 (2d Cir. 1967) (rejecting claim because no Guatemalan case was presented construing provisions of Guatemalan Accident Law on which expert testimony conflicted), *cert. denied*, 391 U.S. 914 (1968); *Gates v. P.F. Collier, Inc.*, 256 F. Supp. 204, 213 (D. Haw. 1966) (dismissing for failure to prove applicability of Japanese statute to case's particular facts by citing Japanese cases or administrative decisions), *aff'd*, 378 F.2d 888 (9th Cir. 1967), *cert. denied*, 389 U.S. 1038 (1968); see also *Sass*, *supra* note 230, at 111-12.

241. See *supra* note 223.

242. Pollack, *supra* note 230, at 472 (citations omitted) ("If the foreign law is asserted but not adequately demonstrated, the Court is entitled to ask the parties for more material. If the response is unsatisfactory, there is venerable authority for concluding that the party relying on the foreign law has failed to prove his claim or defense.")

243. See *supra* text accompanying notes 117-29. *Verdugo*, of course, dispensed with the warrant requirement for extraterritorial searches of noncitizens. Nevertheless, if the courts were to adopt the double-illegality approach, a rethinking of the *Verdugo* rule on warrants would be in order. A rule more consonant with the double-illegality approach, in situations in which the laws of both states required a warrant, would be to require that a magistrate of one state or the other issue a warrant. See *Stonehill v. United States*, 405 F.2d 738, 746 (9th Cir. 1968) (acknowledging that Philippine warrant, if "properly prepared, might have satisfied Constitutional requirements"), *cert. denied*, 395 U.S. 960 (1969); Raffel, *supra* note 193, at 715-17 (arguing constitutionality of foreign warrants meeting Fourth Amendment standards). As with the binational approach generally, this is a rule that might most easily be implemented by statute.

244. Nonenforcement may be the result of systemic corruption. For a comprehensive discussion of how United States drug enforcement agents work with corrupt foreign police, see NADELMANN, *COPS ACROSS BORDERS*, *supra* note 3, at 251-312. Conceivably, when faced with such "paper laws," the government might be allowed to rebut the defendant's case by submitting evidence of non-enforcement of the local law.

state searches could be conducted in compliance with local law and yet nonetheless offend minimal standards of decency.²⁴⁵ Nonetheless, by transferring the law-finding burden to defendants who seek to suppress evidence on the grounds of foreign-law violations, courts would so substantially reduce their own burden of proving foreign law that the difficulties of implementation would appear eminently surmountable.

B. *The Human Rights Approach: An International Benchmark*

An alternative approach would be to incorporate fundamental principles of international human rights law into the Fourth Amendment's standard of reasonableness—to create a truly "international Fourth Amendment" governing extraterritorial searches and seizures, a benchmark founded on fundamental international human rights norms and on the shared search-and-seizure standards of the world's major legal systems. Such an approach would, like the binational approach, be responsive to the concerns expressed in Part II that United States courts should not have to choose between imposing a foreign standard on the search jurisdiction or applying no law at all. Courts instead could apply a standard shared by both states—a standard derived from globally accepted norms of conduct.

An international benchmark approach would enjoy some advantages over the binational approach discussed above. Most obviously, it would relieve United States courts of the burden of construing dozens of foreign search-and-seizure laws and of applying a different standard for every state within which United States agents operate. Instead, a unitary standard would be developed. This would have at least two advantages.²⁴⁶ First, development of the standard could readily be entrusted to a commission or other scholarly organization,²⁴⁷ and an international organization, such as Interpol, could coordinate training of police in the standard. Second, and perhaps more significantly, the case law construing the international

245. United States courts recognize a hypothetical exception to the international silver platter for searches in which foreign officials engage in conduct that "shocks the conscience." See *United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); *Birdsell v. United States*, 346 F.2d 775, 782 n.10 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965). A similar exception to the double-illegality rule should be construed for situations in which local search-and-seizure law diverges fundamentally from Fourth Amendment principles.

246. On the debit side, of course, would be the difficulties involved in construing a unitary standard. See discussion *infra* notes 267-77 and accompanying text.

247. See *infra* note 277.

benchmark, unlike the binational approach, would have a "prescriptive" effect—that is, every judicial opinion construing the legality of a transnational search or seizure would contribute to a growing case law defining permissible global standards of conduct for transnational searches and seizures. This unitary standard would apply to transnational searches and seizures everywhere and could contribute to the rationalization and harmonization of world search-and-seizure law.

An international benchmark approach would be novel, but not unprecedented, in United States jurisprudence.²⁴⁸ United States courts on a number of occasions in recent years have looked to international human rights norms either directly, as a source of rights for individual plaintiffs, or indirectly, as a means of giving substance to broad constitutional or statutory rights.²⁴⁹

248. International law has been considered part of United States law since the founding. The classic statement of the place of international law in United States courts is *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination").

249. See *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992), *cert. denied sub nom. Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993) (affirming judgment against daughter of former Philippine president for torture of plaintiff's son, as violation of peremptory norm of international law); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-17 (9th Cir. 1992) (finding state-sponsored torture to be violation of peremptory norm of international law); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (examining whether United States failure to abide by decision of International Court of Justice was violation of international law); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (opinion of Edwards, J.) (finding state-sponsored torture to be violation of peremptory norm of international law), *cert. denied*, 470 U.S. 1003 (1985); *id.* at 820 (opinion of Bork, J.) (same); *Filaritiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding peremptory international norm against state-sponsored torture, thus conferring federal jurisdiction under Allen Tort Claims Act over suit against Paraguayan official for torture committed in Paraguay); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (peremptory norm forbids official torture), *modified*, 694 F. Supp. 707 (N.D. Cal. 1988); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) (finding extended detention of Cuban "Marielito" pending deportation to be violation of international law norms prohibiting arbitrary detention), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

See generally Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1992); Brillmayer, *supra* note 59; Harold H. Koh, *Civil Remedies for Unctivil Wrongs*, *supra* note 177; Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Richard B. Lillich, *International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982).

Reference to international law is particularly appropriate when the issue under consideration involves actions outside United States territory or a determination of the rights of noncitizens.²⁵⁰ A few commentators have suggested that an international-law-based approach might be a productive alternative to the approaches assayed by the *Verdugo* Court.²⁵¹ This section will explore briefly how such an approach might work.

1. The Foundation of the International Benchmark: The International Covenant on Civil and Political Rights

Three principal sources of international law are generally recognized:²⁵² 1) international agreements; 2) customary

It bears repeating that the Supreme Court has been less hospitable in recent years to claims of violation of international law. See *Sale v. Haitian Centers Council*, 113 S. Ct. 2549 (1993) (holding that human rights covenant prohibiting "return" of refugees did not apply to United States action outside United States territorial waters); *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (deciding claim of illegal abduction on narrow grounds of treaty interpretation and declining to reach broader claim that defendant's rights under customary international law had been violated).

250. See *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (noting that Supreme Court has turned to international law when addressing rights of aliens); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) ("By the law of nations . . . aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there . . . and may invoke its protection against other nations . . ."); *Lau Ow Bew v. United States*, 144 U.S. 47, 61-62 (1892) ("By general international law, foreigners who have become domiciled in a country other than their own, acquire rights . . ."); see also *New York Bar Report*, *supra* note 53, at 508-10 (above-cited decisions "suggest that the Court should look to international human rights law in the course of applying the Bill of Rights to non-citizens").

251. See *Neuman*, *supra* note 12, at 989 (raising, but not endorsing, the idea); *New York Bar Report*, *supra* note 53, at 509-13; *Wedgwood*, *supra* note 53, at 755. These commentators do not explore how such an approach might be attempted.

252. See *Statute of the International Court of Justice*, art. 38; *FOREIGN RELATIONS RESTATEMENT*, *supra* note 16, § 102. According to the *Foreign Relations Restatement*, these sources produce obligations upon states to respect human rights: "A state is obligated to respect the human rights of persons subject to its jurisdiction (a) that it has undertaken to respect by international agreement; (b) that states generally are bound to respect as a matter of customary international law; and (c) that it is required to respect under general principles of law common to the major legal systems of the world." *Id.* § 701.

For the Supreme Court's classic statement of the sources of international law in United States courts, see *The Paquete Habana*, 175 U.S. 677, 700 (1900): "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."

international law;²⁵³ and 3) "general principles of law recognized by civilized nations."²⁵⁴ An international benchmark approach would draw primarily on the first of these, relying on the United States recent ratification of the International Covenant on Civil and Political Rights.²⁵⁵

Most of the contemporary international law of human rights rests on multilateral conventions and declarations adopted after World War II, purporting to guarantee certain basic rights to all people.²⁵⁶ Primary among these, and often described, collectively or individually, as the "International Bill of Rights,"²⁵⁷ are the United Nations Charter, the Universal Declaration of Human Rights,²⁵⁸ and the International Covenant on Civil and Political Rights.²⁵⁹

253. Customary international law is said to result from a "general and consistent practice of states followed by them from a sense of legal obligation." FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 102(2). On customary international law generally, see Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988); ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); Arthur M. Welsburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

254. Statute of the International Court of Justice, art. 38(1); FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 102(4). See also Howard S. Schrader, Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751 (1982). This source of international norms is traditionally accorded a peripheral, "gap-filling" role. See Statute of the International Court of Justice, art. 38(1)(d) (general principles as a "subsidiary means for the determination of rules of law"); Schrader, *supra*, at 769-79.

255. International Covenant on Civil and Political Rights, Dec. 16, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200, U.N. Doc. A/6316 (1966), 6 I.L.M. 368 (1967) [hereinafter *International Covenant*]. The United States ratified in 1992. See *infra* notes 263-64. Although treaties, as one form of state practice, may constitute customary international law, see Welsburd, *supra* note 253, the United States ratification of the International Covenant has made it unnecessary to determine whether the Covenant's provisions rise to this level. On this subject, see FOREIGN RELATIONS RESTATEMENT, *supra* note 16, Part VII, intro. note (principles in Universal Declaration and International Covenant may constitute customary international law since United States has frequently reiterated its acceptance of these principles and has also generally followed them). Any attempt to construe a customary international law of searches and seizures would face severe hurdles, as United States courts have reserved the appellation for only the most heinous international wrongs. See *id.* § 702; Trimble, *supra* note 253, at 684-87. The methodology associated with customary international law, however, may be used to give concrete meaning to the Covenant's broad provisions. See *infra* notes 275-76 and accompanying text.

256. See generally LOUIS HENKIN, *THE AGE OF RIGHTS* 1-29 (1989).

257. See *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (Louis Henkin ed., 1981).

258. Signed Dec. 10, 1948, G.A. Res. 217A, U.N. Doc. A/810 (1948).

259. International Covenant, *supra* note 255. In addition, the United Nations has drafted more than thirty human rights conventions since the Universal

The Universal Declaration and the International Covenant purport to guarantee to all individuals a broad range of fundamental rights, not unlike those guaranteed by the United States Bill of Rights, including: self-determination; the right to vote; the right to life, liberty, and security of person; the right to a fair trial; freedom of conscience, expression, and assembly; and equal protection of the law.²⁶⁰ The Universal Declaration, drafted in the wake of the Nuremberg trials and the creation of the United Nations and approved without dissent by all member states, was conceived not as binding law but as "a common standard of achievement" to which all states might aspire.²⁶¹ The International Covenant was to be the vehicle by which these ideals would be converted into binding covenant.

The drafting and adoption of the Covenant however, proved to be a case study in delay. The drafting took eighteen years, and produced a bifurcation of the originally envisioned document into two covenants.²⁶² It was not until 1975 that the Covenant obtained the number of adherents necessary to bring it into effect,²⁶³ and not until 1977 that the United States signed the Covenant and President Carter transmitted it to the Senate. The Covenant then stalled in Congress for fifteen years until 1992 when, with the Cold War over, the Senate finally provided the necessary advice and consent. President Bush ratified the Covenant,²⁶⁴ and it entered into force for the United States on September 8, 1992.²⁶⁵ Thus, beginning on that date, the ideals of the Universal Declaration, which before then had legal force in the United States, if at all, as customary international law,²⁶⁶ became, in modified form, binding treaty provisions.

Declaration, and has issued an equal number of human rights declarations and resolutions. International human rights are conferred as well by regional human rights charters and agreements, such as the Organization of American States Charter and the American Declaration of the Rights and Duties of Man. This Article will not examine the possibility of an international search-and-seizure standard based on regional agreements.

260. See Universal Declaration of Human Rights, *supra* note 258, arts. 2-20; International Covenant, *supra* note 255, arts. 1-19, 21-22. Both documents also include a number of provisions that go beyond those set out in the Bill of Rights. See, e.g., Universal Declaration, *supra*, arts. 22 (right to social security), 23 (right to work), 25 (right to adequate standard of living), 26 (right to education).

261. See Louis Henkin, *Introduction*, in INTERNATIONAL BILL OF RIGHTS, *supra* note 257, at 9.

262. *Id.* at 8-11.

263. *Id.* at 11.

264. See SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 2 (1992), reprinted in 31 I.L.M. 645, 649 (1992) [hereinafter SENATE REPORT].

265. *Id.*, 31 I.L.M. at 645. The Senate gave its advice and consent on April 2, 1992, and on June 8, 1992 the Bush administration deposited its instrument of ratification. *Id.*

266. See *infra* note 255.

Construing the Covenant, however, is a thorny proposition, and, as of the date of this writing, no state or federal court had engaged in such an exercise.²⁶⁷ Two issues are of foremost importance in this regard: first, giving concrete meaning to the Covenant's broad generalities; and second, addressing the declaration by the United States that the Covenant is not self-executing.

Nothing in the language of the Covenant directly resembles the Fourth Amendment's warrant requirement or its right "to be secure . . . against unreasonable searches and seizures."²⁶⁸ Two provisions, however, touch in a general way on the area of searches and seizures. Article 17 (incorporated from Article 12 of the Universal Declaration) provides that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. . . . Everyone has the right to the protection of the law against such interference or attacks."²⁶⁹ Additionally, Article 9(1) states that "[n]o one shall be subjected to arbitrary arrest or detention."²⁷⁰

The meaning of these provisions, in the absence of case law interpreting them, is of course far from clear. A right to be free from "arbitrary or unlawful interference with [one's] privacy, family, home or correspondence" is every bit as cryptic as the Fourth Amendment's protection against "unreasonable searches and seizures," and the Article lacks the Fourth Amendment's additional warrant requirement.²⁷¹ A court that wanted to find significant protections in Article 17 certainly could conclude, for example, that a warrantless search is an "arbitrary or unlawful interference with [one's] privacy." On the other hand, a court could reasonably refuse to deem a search "arbitrary" as long as the police had some rational basis for their action. It is clear that the meaning of these provisions will have to be built on a case by case basis with help from outside the document itself.

The problem would be similar in some respects to that historically faced by the federal courts in determining whether the Fourteenth Amendment incorporated particular provisions of the

267. A search of the MEGA file in the LEXIS database revealed no opinions in any state or federal court construing the International Covenant since its ratification by the United States. For a representative treatment of the International Covenant prior to its ratification, which would apply equally following its entry into force, see *DeNegri v. Republic of Chile*, Civ. No. 86-3085, 1992 U.S. Dist. LEXIS 4233, at *7-9 (D.D.C. Apr. 6, 1992) (concluding that International Covenant does not set forth cause of action or provide waiver of immunity against foreign state in United States courts).

268. U.S. CONST. amend. IV.

269. International Covenant, *supra* note 255, art. 17.

270. *Id.* art. 9(1).

271. U.S. CONST. amend. IV.

Bill of Rights against the states.²⁷² Just as the federal courts determined what provisions of the Bill of Rights were "implicit in the concept of ordered liberty"²⁷³ or "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"²⁷⁴ so too the courts would need to determine what search-and-seizure standards have become part of the "general and consistent practice of states."²⁷⁵ The endeavor, of course, would be significantly more complex than the Fourteenth Amendment inquiry, given that United States courts would not merely be construing one legal/cultural tradition but instead looking for standards common to many. The courts would need to employ a methodology traditionally used by courts construing customary international law or "general principles of law" and examine the search-and-seizure practices of the world's major legal systems, with an eye for shared practices that embody common principles.²⁷⁶ In this endeavor they might be assisted by the

272. The Senate Committee on Foreign Relations noted in its report on the International Covenant that "[t]he rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights." SENATE REPORT, *supra* note 264, at 2.

273. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (reviewing provisions of Bill of Rights which Fourteenth Amendment incorporates against the states as "implicit in the concept of ordered liberty"); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause").

274. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

275. This phrase, of course, constitutes one of the two requirements for customary international law, the other being that the state practice is "followed by them from a sense of legal obligation." See *supra* note 253. I do not suggest that courts must conclude that particular search-and-seizure standards have reached the status of customary international law; that burden has been lifted by the United States ratification of the International Covenant. Instead, it is suggested that courts turn to the general practice of states, as they do in construing customary international law or general principles, for illumination of the Covenant's broad meanings. See *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 99 (9th Cir. 1974) (for guidance in construing vague terms of international agreement, court may look to relevant statutes and to "the relevant principles of international law . . . which have achieved a substantial degree of codification and consensus").

276. Courts occasionally have employed this methodology as a subsidiary means of finding customary international law. See, e.g., *The Scotia*, 81 U.S. (14 Wall.) 170, 188 (1872) (concluding that certain rules of navigation, having been accepted by the two states involved in the case and "accepted as obligatory rules by more than thirty of the principle commercial states of the world," had accordingly become, "in part at least . . . the laws of the sea"); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (taking note that torture had been banned in over fifty-five national constitutions, in concluding that official torture was violation of customary international law).

One comparative study suggests that a considerable number of states have adopted provisions comparable in some respects to the Fourth Amendment. See

Human Rights Committee, the quasi-judicial body established under the Covenant to monitor compliance with its provisions.²⁷⁷

The second major difficulty United States courts would face in attempting to build an international benchmark from the Covenant would be the United States understanding of it as a "non-self-executing" treaty. In its resolution of ratification, the United States declared that the Covenant would be non-self-executing; that is, it would not create a private cause of action in United States courts.²⁷⁸ This declaration accords with the prevailing understanding in United States courts that human rights conventions, even if adopted by the United States, are not

SANDRA HERTZBERG & CARMELA ZAMMUTO, *THE PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL PROCESS UNDER INTERNATIONAL INSTRUMENTS AND NATIONAL CONSTITUTIONS* 42 & chart IV (1981). Fewer states (as of 1980, only thirty-five, about one-fifth of the states of the world) have adopted some kind of exclusionary rule. The total rises to sixty-seven states (forty-two percent of the world's states) when one adds the states that have adopted international human rights instruments that embrace an exclusionary rule. *Id.* On comparative criminal procedure generally, see JOHN LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); Mirjan Damaska, *The Structure of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* 480 (1975); R. Thomas Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States*, 29 *MIAMI L. REV.* 491 (1975).

277. See generally D. MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* (1991). The Committee is an eighteen-member body elected for four-year terms by the state parties to the Covenant. Among other duties, it reviews the reports that the state parties are required to submit on the measures they have adopted to give effect to the Covenant, and it may consider complaints of violations lodged against accepting states. See also SENATE REPORT, *supra* note 264, at 3, 31 *I.L.M.* at 649 (noting that United States accepts Committee's competence to hear states' complaints about noncompliance).

278. SENATE REPORT, *supra* note 264, at 23, 31 *I.L.M.* at 659. The declaration is as follows: "[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant [those articles that guarantee rights and prohibit activities] are not self-executing." *Id.* As the Bush Administration explained, "[t]he intent is to clarify that the Covenant will not create a private cause of action in U.S. courts." *Id.* at 19, 31 *I.L.M.* at 657. The declaration was one of the four declarations, five reservations, and a five-point "understanding" that were included in the United States instrument of ratification. None of these other conditions related to searches and seizures. *Id.* at 6-21, 31 *I.L.M.* at 651-58. Additionally, a proviso was appended to the Senate's resolution of ratification but not included in the instrument of ratification deposited by President Bush. It provides that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *Id.* at 24, 31 *I.L.M.* at 660. The proviso is in accord with the overall understanding, expressed throughout the Senate report and instrument of ratification, that ratification of the Covenant should work no change in existing domestic standards of human rights within the United States, but rather that, where the Covenant differs from existing United States law, a reservation is to make clear that the United States incurs no new human rights obligations by ratifying. *Id.* at 4, 31 *I.L.M.* at 650 ("The overwhelming majority of the provisions in the Covenant are compatible with the existing United States domestic law. In those few areas where the two diverge, the Administration has proposed a reservation or other form of condition to clarify the nature of the obligation being undertaken by the United States.").

generally enforceable through a private right of action unless the instrument, explicitly or implicitly, provides for one.²⁷⁹

This declaration clearly would prevent both aliens and United States citizens from suing in United States courts on causes of action derived from the Covenant.²⁸⁰ It would not, however, prevent a nonresident alien from invoking the Covenant as an aid to interpretation of the Fourth Amendment's reasonableness requirement. United States courts have been far more receptive to international law when it has been raised not as a source of rights in opposition to United States legislative or executive action but as an aid in the interpretation of constitutional or statutory standards.²⁸¹ This approach—the so-called “indirect incorporation” of international law²⁸²—is consistent with the settled principle that domestic law should be construed to avoid a violation of international law.²⁸³ United States courts have looked to international standards, for instance, as an aid to interpreting the Eighth and Fourteenth Amendments' commandments regarding prison conditions;²⁸⁴ to construing the Eighth Amendment's prohibition of cruel and unusual punishment,²⁸⁵

279. See FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 907 & cmt. a (“international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts”). See also *Sei Fujii v. California*, 242 P.2d 617, 621-22 (Cal. 1952) (United Nations Charter held to “lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification”); FOREIGN RELATIONS RESTATEMENT, *supra* note 16, § 701 and reporters' note 5.

280. See *supra* notes 278-79.

281. See Bayefsky & Fitzpatrick, *supra* note 249, at 23-27, 72-80; Lillich, *supra* note 249, at 408-12; Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 42 VAND. L. REV. 1103 (1990).

282. Lillich, *supra* note 249, at 408.

283. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”).

284. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103-04 n.8 (1976) (looking to United Nations Standard Minimum Rules for the Treatment of Prisoners in reaching conclusion that deliberate indifference to serious medical needs of prisoners is proscribed by Eighth Amendment); *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980) (applying United Nations Standard Minimum Rules for the Treatment of Prisoners to prison overcrowding governed by Fourteenth Amendment due process standard, and concluding that these rules were relevant to the “canons of decency and fairness which express the notions of justice” embodied in the Due Process Clause), *aff'd in part & modified in part*, 651 F.2d 96 (2d Cir. 1981).

285. *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (plurality opinion) (concluding that punishment of loss of nationality for military desertion violated Eighth Amendment's prohibition of cruel and unusual punishment, in light of fact that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”).

particularly with reference to the death penalty;²⁸⁶ to interpreting immigration laws;²⁸⁷ and to interpreting the bounds of due process,²⁸⁸ among other topics.²⁸⁹ Such incorporation of international norms has been resisted by United States courts on occasions when to do so would have placed Congress in violation of international law.²⁹⁰ But this would not be the likely result of an international search-and-seizure benchmark, since any standard construed from the common elements of the world's search-and-seizure laws would, almost by definition, be less demanding than domestic Fourth Amendment requirements. Accordingly, United States courts would have scant justification for resisting the incorporation of standards derived from the International Covenant into the determination of Fourth Amendment "reasonableness" abroad.

This conclusion is given additional weight by the circumstances of the United States ratification of the International Covenant. Ratification, at the close of the Cold War

286. *Thompson v. Oklahoma*, 487 U.S. 815, 830, 831 n.34 (1988) (plurality opinion) (looking to human rights treaties, including International Covenant, as well as laws of other foreign states, in concluding that it would "offend civilized standards of decency" to execute defendant who was less than 16 years old at time of offense); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (plurality opinion) (considering "[t]he climate of international opinion concerning the acceptability of a particular punishment" and noting laws of other foreign states in reaching conclusion that Eighth Amendment prohibited imposing death penalty on defendant for felony murder); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (same, in holding that death sentence for crime of rape of adult woman was excessive punishment forbidden by Eighth Amendment). *But see* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (plurality opinion) (Scalia, J.) (disagreeing with dissenters' reference to international and foreign standards to determine "evolving standards of decency"; emphasizing instead "that it is American conceptions of decency that are dispositive"). *See generally* Joan F. Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. Cin. L. Rev. 655 (1983).

287. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388-89 (10th Cir. 1981) (looking to international law prohibition against arbitrary imprisonment in construing Immigration and Naturalization Act, and concluding that "[i]t seems proper to consider international law principles for notions of fairness as to propriety of holding aliens in detention"); *In re Naturalization of Wetzman*, 426 F.2d 439 (8th Cir. 1970) (per curiam) (looking to Nuremberg principles and to Universal Declaration of Human Rights to construe provision of naturalization laws).

288. *United States v. Stanley*, 483 U.S. 669, 709-10 (1987) (O'Connor, J., dissenting in part) (referring to Nuremberg principles in concluding that drug experiments on serviceman constituted "conduct . . . beyond the bounds of human decency" and thus prohibited by Due Process Clause); *see also* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983).

289. For a thorough canvassing of the topic, see Bayefsky & Fitzpatrick, *supra* note 249, at 72-80.

290. *See id.* at 26 nn. 136-39.

and the birth of the self-proclaimed "New World Order,"²⁹¹ constituted a declaration by the political branches of renewed United States commitment to an international human rights process, a commitment to joining the rest of the world in constructing a basic minimum standard of international due process.²⁹² Incorporation of the Covenant's standards into Fourth Amendment "reasonableness" could thus credibly be seen as a judicial ratification of congressional and executive intent.²⁹³

2. Evaluating the International Benchmark

The international benchmark approach would offer a viable alternative to current United States practice, and a way of addressing some of the concerns articulated in Part II without requiring the kind of ad hoc interpretation of foreign law that the binational approach would require. By adding substantive, globally shared content to the nebulous concept of "reasonableness" in transnational searches, the approach would be responsive to concerns about United States unilateralism. By fostering the creation of a unitary global standard for transnational searches and seizures, this approach could have a powerful prescriptive effect that a binational approach would lack. The difficulties involved in such an approach, however, would be significant, even beyond the difficulties associated with construing a binding legal standard. These would include problems of administrability and of rights.

291. For insightful commentary on the impact of the end of the Cold War on the status of international law, see W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859 (1990).

292. See Letter from President George Bush to Hon. Claiborne Pell, Chairman, Senate Foreign Relations Committee (Aug. 8, 1991), reprinted in SENATE REPORT, *supra* note 264, 31 I.L.M. at 660 (1992) ("The end of the Cold War offers great opportunities for the forces of democracy and the rule of law throughout the world United States ratification . . . at this moment in history would underscore our natural commitment to fostering democratic values through international law [and] would also strengthen our ability to influence the development of appropriate human rights principles in the international community"); SENATE REPORT, *supra* note 264, at 3 ("ratification will remove doubts about the seriousness of the United States commitment to human rights and strengthen the impact of United States efforts in the human rights field").

293. As noted above, *supra* note 278, the proviso and reservations in the instruments of ratification require that nothing in the Covenant be construed to impose standards on the United States government more stringent than those already required by domestic law. Incorporation of an international search-and-seizure benchmark into Fourth Amendment "reasonableness" abroad would be consistent with this intention, as it would essentially lower United States extraterritorial search-and-seizure standards to the level of the rest of the world rather than raising United States standards to some higher international standard.

First would be the practical difficulties that an international benchmark standard would impose on police. The problem would be similar to that which foreign police would face if United States courts were to begin vigorously enforcing a unilateral Fourth Amendment standard abroad. For instance, Mexican police, trained in conducting searches according to Mexican law, would be faced with a different set of rules if foreign police joined them in a search. Compounding the difficulty, they would not necessarily know when they conducted a search whether to conform their efforts to the standards of Mexican law or to the international standard; they might begin a search for use in Mexican courts only to have United States agents either join them or simply request the fruits of the search for use in United States courts.

A more fundamental problem inheres in the international benchmark approach. At the heart of this approach is the notion of a unitary standard, valid for the whole world, incorporating the minimum protections of the world's major legal systems. The standard is thus, from the perspective of the participating states, an abstract one, standing alone, divorced from the contexts of the participants. The approach rests on the assumption that the search-and-seizure standards of the world are fundamentally similar; that the differences are merely in the particulars and not in the core underlying conceptions of privacy—on the assumption, that is, that each state has more in common than not regarding its conception of the scope and nature of the individual realm and of how this should be balanced against the prerogatives of the state.²⁹⁴ Problems in applying the standard would arise in relation to the extent that each state's laws diverged from the international benchmark.

What if, for instance, the benchmark in a given case were more stringent than the laws of both participating states? This might be the case, for example, in less-developed states with poorly developed conceptions, and little history, of civil liberties. The result would be that the police of both states would have to meet a higher standard for a bi-state search than they would have had to if either state had acted on its own. If this higher international standard did not apply to searches wholly within the boundaries of one state or the other, it is hard to see by what theory a higher standard could apply simply because the search involved both states. A far more probable scenario, on the other hand, would be one in which the international benchmark was more permissive than the laws of either participating state.²⁹⁵ In

294. See discussion *supra* notes 217-23 and accompanying text.

295. This would certainly be the case, for example, for a cross-border United States-Canadian prosecution.

such a situation, the defendant, rather than the police, would have reason to object. Why should he not have the protection of either his own state's laws or the laws of the state that is prosecuting him? Why should the fact that the police crossed a border deprive him of the protections of both states? These complaints, of course, are minor in relation to the valid complaints that defendants of extraterritorial searches now have in the wake of the *Verdugo* decision. Nevertheless, they point out a key conceptual flaw in the international benchmark approach, one from which the binational approach does not suffer.

V. FINE-TUNING THE INTERNATIONAL FOURTH AMENDMENT

This final portion of the Article briefly addresses three issues that must be resolved if either of the proposed approaches is to be adopted. These issues are: (1) What level of United States participation should be required before the Fourth Amendment is triggered by a joint search abroad? (2) Should the courts recognize a "good faith" exception that would excuse Fourth Amendment violations if United States law enforcement agents attempted in good faith to comply with local law? (3) Under what circumstances, if at all, should the executive branch be able to ignore constitutional or international law strictures when acting abroad?

A. *How Much United States Participation Is Enough?*

Implementation of either the binational or the international approach would give United States courts an opportunity to reassess their current, excessively severe interpretation of the joint participation requirement.²⁹⁶ Reassessment would be particularly appropriate in light of the way in which both these approaches address the concerns of United States courts regarding an extraterritorial Fourth Amendment. Specifically, as both approaches would make the Amendment less "impracticable and anomalous," and far less of an imposition on local police and local laws, courts should find correspondingly less reason to require so high a level of United States participation before the Amendment is triggered.

296. The courts, of course, will have this opportunity to some degree whether or not this Article's proposals are adopted, since the Fourth Amendment continues to protect United States citizens and resident aliens abroad after *Verdugo*. See *United States v. Juda*, 797 F. Supp. 774, 781-83 (N.D. Cal. 1992) (applying Fourth Amendment requirements to searches of United States citizens and resident aliens in foreign states and on high seas).

1. The Failed Joint Venture Standard

To date, as noted above, courts have found United States participation in foreign searches sufficient to trigger the Fourth Amendment in only a handful of cases.²⁹⁷ Among the activities which have been held not to rise to the requisite level of participation are: requesting, but not participating in, a foreign search,²⁹⁸ or otherwise "triggering the interest" of foreign authorities who subsequently conduct a search and pass the evidence on to United States authorities;²⁹⁹ passing on tips which prompt foreign police to initiate an investigation;³⁰⁰ passing on information requested by foreign governments;³⁰¹ joining foreign police in a foreign-initiated search;³⁰² participating in foreign wiretaps, as long as United States agents do not "initiate, supervise, control or direct" them;³⁰³ using information from an illegal foreign wiretap to support a United States search warrant;³⁰⁴ and even, in a few cases, triggering *and then participating* in a foreign search.³⁰⁵

If these decisions embody a coherent standard on joint participation, it is difficult to perceive.³⁰⁶ While most courts have

297. See *supra* notes 198-202. The one court that has taken a liberal approach to joint participation has been the Court of Military Appeals. See *infra* notes 344-49 and accompanying text.

298. *State v. Barajas*, 238 N.W.2d 913 (Neb. 1976).

299. *United States v. Wolfish*, 535 F.2d 457, 463 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976).

300. *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Morrow*, 537 F.2d 120, 139-40 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

301. *United States v. Delaplane*, 778 F.2d 570, 572 (10th Cir. 1985), *cert. denied*, 479 U.S. 827 (1986); *United States v. Phillips*, 479 F. Supp. 423, 431-32 (M.D. Fla. 1979).

302. *United States v. Rosenthal*, 793 F.2d 1214, 1230-31 (11th Cir. 1986); *United States v. Benedict*, 647 F.2d 928, 930 (9th Cir. 1981).

303. *United States v. Cotroni*, 527 F.2d 708, 712 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976).

304. *United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981).

305. *United States v. Marzano*, 537 F.2d 257, 270-71 (7th Cir. 1976); *Stonehill v. United States*, 405 F.2d 738, 749-50 (9th Cir. 1968) (Browning, J., dissenting), *cert. denied*, 395 U.S. 960 (1969).

306. Judge Browning pointed to the ambiguity inherent in the standard in his dissent in *Stonehill*, 405 F.2d at 748, when he described the majority as holding that "federal officers may participate in undertakings violative of Fourth Amendment standards so long as they do not participate too much." The standard appears to have acquired little clarity in the twenty-six years since that time. As the Ninth Circuit noted in its *Verdugo* opinion, the courts "have not been unanimous in their choice of the precise test to be applied—though they have as a statistical matter been virtually unanimous in rejecting claims of undue participation." 856 F.2d at 1225 (quoting *United States v. Morrow*, 537 F.2d 120, 140 (5th Cir. 1976)). Commentators have been no more charitable in their

followed the test set out in *Stonehill v. United States*³⁰⁷—that “Federal agents so substantially participated in the raids so as to convert them into joint ventures”³⁰⁸—or language essentially to that effect;³⁰⁹ they have failed to articulate what this test entails in any coherent fashion, instead applying the test in an ad hoc, apparently result-oriented manner to the facts of the case at hand.³¹⁰ Thus, in circumstances where the foreign search was conducted at the request or suggestion of United States officials, courts have emphasized that direct United States participation in searches was “insignificant;”³¹¹ in other cases in which United States officials participated more substantially in the searches, courts have focused on other factors, concluding, for instance, that the raid was “instigated and planned” by foreign authorities,³¹² or that its “purpose” was to gather evidence for a foreign investigation (even though the evidence was later used in

evaluation. See Raffel, *supra* note 193, at 702-03; King, *supra* note 193, at 504-05; Thelsen, *supra* note 193, at 174-81; Harvard Note, *supra* note 15, at 1683-85.

307. *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

308. *Id.* at 743; *followed in Verdugo*, 856 F.2d 1214, 1224-25 (1988); *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987); *United States v. Rosenthal*, 793 F.2d 1214, 1230-31 (11th Cir. 1986). At least one court has criticized the *Stonehill* approach. See *United States v. Mundt*, 508 F.2d 904, 907 (10th Cir. 1974) (in Fifth Amendment context, rejecting “joint venture” as “a vague, indefinite term and . . . in our view, unreliable”).

309. Some courts, without specifically invoking “joint ventures” or spelling out what level of participation is required, have required that United States officers “participate” in the search or that foreign officers “act as agents” for the United States officers. See *United States v. Delaplane*, 778 F.2d 570, 573 (10th Cir. 1985); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Morrow*, 537 F.2d 120, 140 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977). Another court has said that United States officers must have “participated in some significant way.” *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985).

310. *Accord* King, *supra* note 193, at 504-05.

311. *E.g.*, *United States v. Marzano*, 537 F.2d 257, 270-71 (7th Cir. 1976) (FBI agents traced suspects to Grand Cayman Island, notified local police, and accompanied local police on arrest and seizure; held, no joint venture because “there is no evidence that they took an active part in interrogating or searching the suspects or in selecting evidence to seize”); *United States v. Wolfish*, 525 F.2d 457, 463 (2d Cir. 1975) (finding United States participation insufficient in search by Israeli police even though United States officials “triggered the interests” of the Israelis and search appears to have been conducted entirely for use in United States courts; insufficient because search “does not appear to have been suggested, requested, or directed by any American official”), *cert. denied*, 423 U.S. 1059 (1976).

312. *Stonehill*, 405 F.2d at 746. Judge Browning’s dissent, *id.* at 749-50, points out that United States agents’ participation in the raids was not, as the majority contended, insignificant.

a United States court).³¹³ Whatever factors courts have focused on, the result has been the same: courts have found insufficient United States participation in all but the most indisputable circumstances. If one had to judge by the few cases in which joint participation has been found, one would have to conclude that the Fourth Amendment does not apply abroad unless United States officials both initiate the search and then continue to participate actively as it unfolds.³¹⁴

This near-elimination of Fourth Amendment liability cannot have been intended by the Supreme Court when it formulated the doctrine on which the joint venture standard was based. That doctrine was the so-called "state-to-federal silver platter," developed by the Supreme Court in the period between 1914, when *Weeks v. United States*³¹⁵ established the exclusionary rule for unlawful searches by federal officials, and 1960-1961, when *Elkins v. United States*³¹⁶ and *Mapp v. Ohio*³¹⁷ extended the rule to searches by state police. During this period, evidence unlawfully seized by state police occupied essentially the same position as evidence illegally seized by foreign police or private individuals

313. *United States v. Delaplane*, 778 F.2d 570, 573-74 (10th Cir. 1985); *United States v. Mundt*, 508 F.2d 904, 906-07 (10th Cir. 1974); *Stonehill*, 405 F.2d at 746.

314. That, at least, has been the circumstance in those few cases in which joint participation has been found. For a discussion of the *Verdugo* search, see *supra* text accompanying note 23. The *Verdugo* majority noted that the DEA's involvement in the search was so great that "no court could logically conclude anything other than that the search was an American operation from start to finish." 856 F.2d at 1225. In *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987), DEA agents initiated the investigation by alerting Philippine authorities and then participated extensively in the wiretapping that ensued. *Id.* at 488-90. In *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983), the court found the question of a joint venture to be a "close" one where United States agents initiated a high-seas chase and then provided armed backup as the Canadians boarded. See also *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966) (holding that Fourth Amendment applied to Air Force discharge proceeding in Japan, where Air Force investigators requested and obtained Japanese search warrant and then joined Japanese officers in executing it at Air Force employee's off-base dwelling); *United States v. Orman*, 417 F. Supp. 1126, 1131 (D.Colo. 1976) (finding Fourth Amendment triggered where United States agents were "full partners" with Turkish police in placing wiretap on defendant's telephone in Istanbul). A somewhat more liberal approach to United States participation was taken in one post-*Verdugo* case concerning an extraterritorial search of United States citizens. In *United States v. Juda*, 797 F. Supp. 774 (N.D. Cal. 1992), the court concluded that the Fourth Amendment was triggered by the fact that a beeper used to track the location of a narcotics smuggling vessel and installed in the vessel by Australian authorities was installed at the request of United States officials. *Id.* at 782.

315. 232 U.S. 383 (1914).

316. 364 U.S. 206 (1960) (extending exclusionary rule to evidence unlawfully seized by state officials and offered in federal court).

317. 364 U.S. 643 (1961) (same for evidence offered in state court).

occupies today.³¹⁸ In three decisions, the Supreme Court addressed whether federal participation in a search had been substantial enough to make the search federal, and its fruits inadmissible, or whether instead the fruits of the search had been handed over to federal officials "on a silver platter."³¹⁹

The Supreme Court's two 1927 decisions, *Byars v. United States*³²⁰ and *Gambino v. United States*,³²¹ did not enunciate a standard by which this question was to be addressed. In *Byars*, a federal prohibition agent who had been invited to participate in a state search, discovered counterfeit whiskey stamps, for which the defendant was prosecuted in federal court. The Court concluded that the federal agent had been "asked to participate and did participate as a federal enforcement officer, upon the chance . . . that something would be disclosed of official interest to him."³²² The agent's participation in the search, the Court concluded, "was under color of his federal office and . . . the search in substance and effect was a joint operation of the local and federal officers"; accordingly, "the effect is the same as though he had engaged in the undertaking as one exclusively his own."³²³ Although the Court used the term "joint operation," it did so to describe the facts of the case rather than to articulate a standard by which federal involvement must be assessed. The opinion is ambiguous on this point, but the dispositive fact for the Court appeared to have been that the agent "participate[d] as a federal enforcement officer" in the search.³²⁴

The Supreme Court attempted to clarify these ambiguous guidelines in 1949 in *Lustig v. United States*.³²⁵ *Lustig* involved a fact pattern strikingly similar to the typical foreign search, and one which is notable, moreover, for the absence of a level of participation that would constitute a joint venture today. The

318. "Private searches" are discussed *supra* part IV.A.1.a.

319. *Lustig v. United States*, 338 U.S. 74 (1949); *Gambino v. United States*, 275 U.S. 310 (1927); *Byars v. United States*, 273 U.S. 28 (1927). The "silver platter" phrase is Justice Frankfurter's in *Lustig*, 338 U.S. at 79. The most comprehensive discussion of these cases, and of the lower federal courts' struggle to apply them, can be found in Yale Kamisar, Wolf and *Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959).

320. 273 U.S. 28 (1927).

321. 275 U.S. 310 (1927). In *Gambino*, the Court held that evidence unlawfully obtained by state police must be excluded, even when no federal official was present at the search, if the state police carried out the search "solely for the purpose of aiding in [a] federal prosecution." *Id.* at 315.

322. 273 U.S. at 32.

323. *Id.* at 33.

324. *Id.* at 32; see also *id.* at 33 (evidence must be excluded "when the federal government itself, through its agents acting as such, participates in the wrongful search and seizure").

325. 338 U.S. 74 (1949).

case involved the search of a hotel room, initiated by local police³²⁶ but joined in the middle by a Secret Service agent after local police found evidence of counterfeiting activities. The federal agent did not participate in the search itself but only (in the manner of a DEA agent abroad) "exercised [his] expert's discretion"³²⁷ in selecting and examining evidence. Local police removed the evidence to the local police station, and only later turned it over to federal authorities.³²⁸

In articulating the level of federal participation needed to trigger the Fourth Amendment, Justice Frankfurter rejected the trial court's conclusion that the lack of federal involvement in the planning or execution of the search made it solely a state operation.³²⁹ A search, Frankfurter stated, is a "functional, not merely a physical, process," one that is not severable into discrete parts encompassing the planning, search, and analysis stages. "The crux of [the *Byars*] doctrine," the Court declared, "is that a search is a search by a federal official if he had a hand in it."³³⁰ The decisive factor is "the actuality of a share by a federal official in the total enterprise."³³¹ In determining the "actuality of a share," it is "immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."³³²

It was to these cases that the lower federal courts turned when first faced with the problems of foreign searches. In *Stonehill v. United States*,³³³ the leading case on joint participation and the case in which the joint venture standard was first articulated, the Ninth Circuit turned to *Byars* and *Lustig* for its guiding principles.³³⁴ It concluded that the Fourth Amendment applied to searches by foreign officials "only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials."³³⁵ This conclusion was, as Judge Browning pointed out

326. Although the federal agent alerted local police initially to the potential lawbreaking, the Court "accept[ed] as a fact" that he "was not the moving force of the search," and that the search was thus a locally-initiated search in enforcement of local law. *Id.* at 78.

327. *Id.* at 79.

328. *Id.* at 77.

329. *Id.* at 78.

330. *Id.*

331. *Id.* at 79.

332. *Id.*

333. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

334. *Id.* at 743-44.

335. *Id.* at 743.

in dissent,³³⁶ a serious misreading of the Supreme Court precedent. As Judge Browning noted, the reference to a "joint operation" in *Byars* is simply a description of the facts in that case, not a formulation of a general standard: "If this was not clear in *Byars* itself, the Supreme Court made it so in *Lustig*."³³⁷

Stonehill's "joint venture" test remains the standard employed by the lower courts for foreign searches.³³⁸ But it clearly diverges radically from the standard set out by the Court in *Lustig*. Rather than require that a federal official both initiate the search and then take an active role in carrying it out, as the lower courts have required for foreign searches,³³⁹ the Supreme Court in *Lustig* required only that the officer "ha[ve] a hand in it," "a share . . . in the total enterprise . . . before the object of the search was completely accomplished."³⁴⁰ This "share in the total enterprise," as the facts of *Lustig* made clear, does not have to be the kind of active lead role that the foreign joint-participation cases have required, but can consist of merely advising local police in the selection and analysis of evidence.³⁴¹ Thus, the lower courts, without announcing that they were doing so,³⁴² have diverged strongly in practice from the Supreme Court guidelines they have claimed to follow.³⁴³

2. A Proposed Standard

This Article proposes that United States courts remain more faithful to the Supreme Court's guidance in *Lustig* when determining what level of United States participation will trigger the Fourth Amendment. A kindred approach has been employed by the United States Court of Military Appeals. In *United States v. Jordan*,³⁴⁴ the Court of Military Appeals, the nation's highest

336. *Id.* at 747-49 (Browning, J., dissenting). Judge Browning's conclusion on this matter is supported by the commentators. See Kaplan, *supra* note 193, at 503-04; Raffel, *supra* note 193, at 697; Thelsen, *supra* note 193, at 176-78.

337. 405 F.2d at 748. The Supreme Court left no doubt: it stated that "[t]he crux of the [*Byars*] doctrine" is that the exclusionary rule is triggered if a federal officer "had a hand in it." 338 U.S. at 78.

338. See *supra* notes 308-09.

339. See *supra* note 314.

340. 338 U.S. at 78-79.

341. *Id.* Compare this with the foreign search cases cited *supra* notes 298-305.

342. Research for this Article has turned up no case in which a court has expressly announced that it was departing from *Lustig* in order to construct a narrower standard for foreign searches.

343. Accord 1 LAFAVE, *supra* note 53, § 1.8(g), at 216; Raffel, *supra* note 193, at 695. LaFave finds the divergence justified by the difference between domestic and foreign searches. 1 LAFAVE, *supra*, at 217-18.

344. 1 M.J. 334 (C.M.A. 1976) (on reconsideration).

military tribunal,³⁴⁵ concluded that the Fourth Amendment would be triggered in trials by court-martial "whenever American officials are present at the scene of a foreign search, or even though not present, *provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search.*"³⁴⁶ This standard, subsequently narrowed so that mere presence, without participation or instigation, does not trigger the Amendment,³⁴⁷ provides a helpful approach directed at preventing evasion of Fourth Amendment requirements by United States officials.³⁴⁸

The *Jordan* court reached its conclusion on the persuasive ground that construing the vague joint venture standard had constituted an "unending judicial dilemma" for the federal courts, and had given United States law enforcement agents an unfortunate incentive to "test the limits of the [joint participation] doctrine" by delegating primary authority to foreign police to gather evidence for use in United States courts.³⁴⁹ As the court pointed out,³⁵⁰ similar considerations played a role in the Supreme Court's decision in *Elkins*³⁵¹ to abandon the state-to-federal silver platter. The *Elkins* Court concluded that eliminating

345. The Court of Military Appeals (C.M.A.) is the nation's military court of last resort, comprising the third and highest tier of the military justice system. Trials by court-martial in each of the armed services are conducted pursuant to the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*, the Manual for Courts-Martial, and the Military Rules of Evidence, which follow the Federal Rules of Evidence in most respects. Trial judgments are appealable to the Courts of Military Review of the Army, Air Force, Coast Guard, and Navy-Marine Corps, and from there to the C.M.A. The C.M.A.'s judgments are appealable to the United States Supreme Court. See generally STEPHEN A. SALTZBURG, ET AL., MILITARY RULES OF EVIDENCE MANUAL x-xii (2d ed. 1986); Kolb, *supra* note 193.

346. 1 M.J. at 338 (emphasis added). Interestingly, the court required in such situations, much along the lines of the binational approach proposed by this Article, that the government demonstrate that the foreign search was lawful under local, not United States, law. *Id.* This aspect of *Jordan* has been superseded by the Military Rules of Evidence, implemented in 1980; the definition of "unlawful" searches and seizures in Rule 311(c) is restricted to searches in violation of United States laws and searches by foreign officials which "subjected the accused to gross and brutal maltreatment." MIL. R. EVID. 311(c); see also *id.*, drafters' analysis, reprinted in SALTZBURG, ET AL., *supra* note 345, at 199-200.

347. *United States v. Morrison*, 12 M.J. 272, 276-79 (C.M.A. 1982) (relying in part on 1980 implementation of Military Rules of Evidence); followed in *United States v. Porter*, 36 M.J. 812, 815-16 (A.C.M.R. 1993); *United States v. Coleman*, 25 M.J. 679, 685 (A.C.M.R. 1987).

348. See *Morrison*, 12 M.J. at 278 (basic purpose of *Jordan* was to prevent evasion of constitutional requirements through recruitment of foreign police to conduct searches); *Coleman*, 25 M.J. at 685 (*Jordan* and *Morrison* require that foreign action not be conducted, instigated, or participated in by United States officials, or used as subterfuge to circumvent constitutional protections).

349. 1 M.J. at 337.

350. *Id.* at 338.

351. *Elkins v. United States*, 364 U.S. 206 (1960).

the silver platter would eliminate the "inducement to subterfuge and evasion" that the silver platter offered—the inducement to "encourage state officers in the disregard of constitutionally protected freedom."³⁵²

Elkins, of course, concerned domestic searches, and United States courts have displayed a markedly different attitude toward searches abroad. The international silver platter is rooted in the courts' firm conviction that foreign police remain entirely beyond their ability to deter.³⁵³ This conviction, however, is belied by the realities of transnational law enforcement.³⁵⁴ While exclusion of evidence by a United States court may not *directly* affect the behavior of foreign police, it certainly affects the behavior of United States law enforcement agents; and United States agents in turn possess considerable ability to influence the behavior of foreign police. Stripped of their power to act effectively on their own, United States police acquire the power to take effective action overseas only to the extent that they learn to work with, and influence the behavior of, their foreign counterparts.³⁵⁵ This they are able to do through a variety of methods, variously involving appeals to professional pride, cultivation of longterm working relationships, and the powerful carrot-and-stick diplomatic leverage that the United States is capable of wielding abroad.³⁵⁶ Thus, the application by United States courts of the exclusionary remedy to foreign searches in which United States police had a hand, will cause those police to exercise care that the searches are carried out legally, not only by themselves but by their foreign colleagues as well.

Determining the level of United States participation at which the Fourth Amendment should be triggered is, of course, a tricky business, but the approaches laid out in *Lustig* and *Jordan*, requiring a "share in the total enterprise," provide a useful starting point. A "share in the enterprise" standard would

352. *Id.* at 221-22. The Court also relied on other reasons which do not apply to foreign searches—in particular, that *Wolf v. Colorado*, 338 U.S. 25 (1949), had made the Fourth Amendment applicable to the states, thus undermining the foundation on which the admissibility of state-seized evidence rested. *Elkins*, 364 U.S. at 213.

353. See *supra* note 194 and accompanying text.

354. See *supra* part III.B. I do not, of course, mean to suggest that foreign and domestic searches should be treated as if they were entirely the same, only that some common ground exists. Foreign searches, obviously, differ in crucial ways from the joint state-and-federal searches with which *Elkins* was concerned, as part III.B describes. Most notably, there is no common Constitution and no Supremacy Clause abroad. Part V.B *infra* provides a response to these differences.

355. See *supra* notes 162-66 and accompanying text.

356. See NADELMANN, COPS ACROSS BORDERS, *supra* note 3, at 190-91, 288-91, 297-307.

require, following *Jordan*, that the Fourth Amendment be triggered by provision of "any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search."³⁵⁷ The mere presence of a United States official would not by itself trigger the Amendment.³⁵⁸ But any action that led to a search³⁵⁹ and any participation in the search beyond mere presence³⁶⁰ would be sufficient—in short, any sign that the foreign search was used by United States officials to evade constitutional requirements. The fact that evidence seized in a foreign search is offered in a United States court should create a presumption that United States agents "had a hand in it" or influenced the search in some way with an eye for later use of the evidence. The government should be able to rebut this presumption by demonstrating that it took no action to trigger the search or otherwise influence its outcome, other than action taken solely to protect the rights of those present.

This approach would set the level of United States participation at a more appropriate level than the joint venture standard. The current standard allows United States officials to instigate³⁶¹ or influence³⁶² a search without being bound by the Fourth Amendment, thus accomplishing by indirection what they could not accomplish directly. In contrast, a "share in the enterprise" standard would identify more accurately those circumstances in which United States sovereign power was being exercised—those circumstances in which (in Justice Brennan's

357. *Jordan*, 1 M.J. at 338.

358. Even though a "mere presence" rule would greatly simplify the process of determining United States participation, it should be rejected, following the lead of MIL. R. EVID. 311(c)(3) (specifying that a search "is not 'participated in' merely because a [United States official] is present") and the Court of Military Appeals in *United States v. Morrison*, 12 M.J. 272, 276-78 (C.M.A. 1982). As both the *Morrison* court and Professor Saltzburg have noted, the presence of United States officials at a foreign search can have a significant restraining effect on foreign police. *Id.* at 278; Saltzburg, *supra* note 77, at 766. Implementing a mere-presence rule would have the effect of inducing United States law enforcement officials to stay away from foreign searches so as to avoid suppression of the fruits, and thus could "deny U.S. citizens abroad a friend at a time when they most need one." Saltzburg, *supra*, at 766.

359. As in the cases cited *supra* notes 298-300.

360. As in the cases cited *supra* notes 302-03, 305. I would accept the general conclusion of Justice Reed, dissenting in *Lustig*, 338 U.S. at 83, that merely analyzing evidence after a search has been completed should not constitute participation. However, when this analysis has taken place at the search site, as in *Lustig*, it raises a strong presumption that the officer was on hand to influence the direction of the search.

361. See *supra* notes 298-300.

362. See *supra* notes 302-03, 305.

words) "fundamental notions of fairness" require that constitutional protections be extended.³⁶³

One serious concern, however, must be raised. While the *Lustig* approach would be far less susceptible to evasion than the joint venture standard, it would raise the possibility that United States law enforcement agents could be penalized for violations by foreign police in which they themselves had not participated, either expressly or tacitly. This concern would arise most acutely in searches which United States officials had triggered in some way but in which they subsequently had not participated.³⁶⁴ While this Article has argued that such searches should not fall beyond the reach of the Fourth Amendment, nevertheless a mechanism would be needed to protect United States law enforcement agents from being penalized in such circumstances where their participation was entirely unrelated to the violation and where they were not in a position to stop the violation. Such a mechanism could be provided by adoption of a limited "good faith" exception to the exclusionary rule, as discussed below.

B. Good Faith Compliance

A good faith exception for foreign searches would be addressed to circumstances in which United States officials relied in good faith, but erroneously, on the representations of foreign officials that a particular search complied with local law. The exception would represent an extension of a similar rule in the warrant context, the good faith doctrine enunciated in *United States v. Leon*.³⁶⁵ In *Leon*, the Supreme Court held that the fruit of a search should not be suppressed when officers conducted the search in reasonable reliance on a facially valid search warrant and only later discovered that the warrant was invalid. *Leon's* reasoning subsequently was adopted for the foreign-search context by the Ninth Circuit in *United States v. Peterson*.³⁶⁶

363. See *supra* notes 54-60 and accompanying text.

364. *E.g.*, the cases cited *supra* notes 298-300.

365. 468 U.S. 897 (1984). For a general discussion of *Leon* and its effect, see 1 LAFAVE, *supra* note 53, § 1.3.

366. 812 F.2d 486 (9th Cir. 1987). For a discussion of the case, see *supra* note 205. *Peterson's* good faith exception has been followed by the few courts that have addressed the issue. *United States v. Juda*, 797 F. Supp. 774, 782-83 (N.D. Cal. 1992); *Lau v. United States*, 778 F. Supp. 98, 101 (D.P.R. 1991); *United States v. Staino*, 690 F. Supp. 406, 410-11 (E.D. Pa. 1988), *aff'd*, 888 F.2d 1383 (3d Cir. 1989). The approach has also received some academic support. See Wedgwood, *supra* note 53, at 754 (not citing *Peterson*, but advocating "totality of the circumstances" approach to Fourth Amendment abroad, taking into consideration "good faith attempt to comply with the search procedures of foreign law").

Leon's rationale was that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates"³⁶⁷—that magistrates, who are not "adjuncts to the law enforcement team," but rather neutral judicial officers with no stake in the outcome of the cases they oversee, will not be benefited in their decisionmaking process by the threat of exclusion.³⁶⁸ In *Peterson*, then-Judge Kennedy stretched *Leon's* scope to address the difficulties faced by United States law enforcement officers in the foreign search context. The exclusionary rule, he reasoned, "does not function as a deterrent in cases in which the law enforcement officers acted on a reasonable belief that their conduct was legal."³⁶⁹ American law enforcement officers in the Philippines "were not in an advantageous position to judge whether the search was lawful, as would have been the case in a domestic setting."³⁷⁰ Consequently, "[h]olding them to a strict liability standard for failings of their foreign associates would be even more incongruous than holding law enforcement officials to a strict liability standard as to the adequacy of domestic warrants."³⁷¹ Instead, Kennedy concluded, American officials should be allowed to "reasonabl[y] rel[y]" on representations by foreign police that a particular search complied with local law.³⁷² DEA agents' reliance in *Peterson* was "objectively reasonable," Judge Kennedy concluded, because they sought and received assurances (later found to be erroneous) from high-ranking law enforcement authorities in the Philippines that the wiretap on which the search was based had been obtained in compliance with Philippine law.³⁷³

Peterson represents a specific application of the broader suggestion, which has been made by Justice White among others, that *Leon's* good faith exception be extended generally to the nonwarrant context. Thus, Justice White has suggested that where law enforcement officers conducting warrantless searches were "acting in objective good faith," even though unlawfully, then the fruits of their search should not be suppressed.³⁷⁴ While

367. *Leon*, 468 U.S. at 916.

368. *Id.* at 917. For a thoughtful evaluation of *Leon's* probable effect on the warrant-issuing process, offering a mixed prognosis, see Abraham S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173 (1987).

369. 812 F.2d at 492.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1056 (1984) (White, J., dissenting); cf. *Leon*, 468 U.S. at 959 (Brennan, J., dissenting) ("I am not at all

such attempts to extend *Leon* beyond the warrant context have been justifiably attacked by commentators,³⁷⁵ the critiques carry less force in the foreign search context, where the need for a good faith exception is greater.

As the commentators have pointed out, the rule of *Leon* is grounded in a key distinction, between deterrence of police misconduct and of judicial error. Exclusion is a remedy aimed at the police; as the *Leon* Court noted, magistrates operate by a different set of incentives.³⁷⁶ The threat of exclusion carries no weight for a magistrate. Instead, a magistrate's incentive to take care in signing warrants is provided by the possibility that a reviewing court will find error in his or her determination of probable cause—a threat which remains good whether or not the exclusionary remedy is applied.³⁷⁷

Additionally, *Leon's* good faith rule provides one clear incidental benefit—a strong incentive for police to obtain and rely on judicial warrants.³⁷⁸ Warrants, of course, carry the substantial benefit of interposing a neutral and detached decisionmaker between the police and their law enforcement goals. Extending *Leon* beyond the warrant context would eliminate this benefit and instead induce police to test the limits of courts' tolerance for dubious conduct; courts then would be forced to defer to the result-driven judgments of police instead of to the presumably neutral judgments of a magistrate.³⁷⁹

confident that the exception unleashed today will remain so confined. Indeed, the full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights.”).

375. See 1 LAFAVE, *supra* note 53, § 1.3(g); Craig M. Bradley, *The “Good Faith Exception” Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 298-99 (1985); Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 944-47 (1986); William W. Greenhalgh, *The Warrantless Good Faith Exception: Unprecedented, Indefensible, and Devoid of Necessity*, 26 SO. TEX. L.J. 129 (1985); Robert L. Misner, *Limiting Leon: A Mistake of Law Analogy*, 77 J. CRIM. L. & CRIMINOLOGY 507, 508 (1986); David R. Childress, Note, *Maryland v. Garrison: Extending the Good Faith Exception to Warrantless Searches*, 40 BAYLOR L. REV. 151 (1988).

376. *United States v. Leon*, 468 U.S. 897, 917 (1984).

377. *Id.*; accord 1 LAFAVE, *supra* note 206, § 1.3(g), at 78.

378. 1 LAFAVE, *supra* note 53, § 1.3(g), at 78; Bradley, *supra* note 375, at 299; Dripps, *supra* note 375, at 946-47.

379. Police officers would be likely to set standards for their future conduct, not by the traditional Fourth Amendment standards of probable cause, exigent circumstances, and so on, but rather by whatever level of conduct happened to pass the good faith test in court. 1 LAFAVE, *supra* note 53, § 1.3(g), at 79; Dripps, *supra* note 375, at 946. Judicial determination of whether probable cause or exigent circumstances existed would be replaced, additionally, by the vastly more

These general critiques, however, are only partially applicable to the foreign-search context. The problem of judicial deference to police judgments, of course, would remain, but the approach would rest on far stronger justification. Courts would be deferring not to the judgments of United States police about the legality of their own searches under United States law, but to assurances by foreign police that a search was being conducted in compliance with foreign law. While this would not be a result to be encouraged, its costs would have to be balanced against the costs of not having a good faith exception abroad. Failure to implement the exception for foreign searches would mean that United States law enforcement agents could be penalized by exclusion in situations in which they had not in any way participated in the violation and were in no position to stop it.³⁸⁰

In order, then, to protect the good faith efforts of United States law enforcement agents, while at the same time not undermining entirely the effect of a relaxed joint participation standard, a careful balance would need to be struck. If care were not taken, a good faith rule could prove as easily manipulated by law enforcement and the courts as the joint venture standard and as *Peterson's* essentially standardless proposal. Unless the exception were governed by a workable procedure, a good faith exception would encourage, at best, a careless attitude toward detail, and at worst, willful ignorance or collusion between United States and foreign police.

To strike this balance, United States law enforcement agents should carry the burden of demonstrating that they made a good faith effort to ensure that the search was lawful. United States officials could be required, for instance, in any search in which they intended to keep open the possibility of good faith reliance, to make an official request for assistance from their foreign counterparts.³⁸¹ This request, made in writing whenever possible,³⁸² could state specifically what action was requested: what place was to be searched, upon what factual basis, in what manner, and what specific items were to be seized. Such a

slippery determination of whether police "reasonably thought" probable cause or exigent circumstances existed. 1 LAFAYE, *supra*, at 78.

380. This would be most likely to occur in situations in which United States police requested a search but did not participate in carrying it out. See, e.g., the cases cited *supra* notes 298-300.

381. This idea is adapted from a similar proposal in Saltzburg, *supra* note 77, at 771 & n.150.

382. A variation on the "telephone warrant" technique could be employed if conveying a written request were burdensome under the circumstances. See *supra* notes 118-19 and accompanying text. That is, United States officials could read a written request over the telephone and also record and transcribe the telephone conversation for later admission in court.

request, of course, like an extraterritorial warrant,³⁸³ would not obligate foreign officials to comply. Nonetheless, like a warrant, it would serve as a tool by which to judge the legitimacy of United States action. If foreign police diverged from United States officials' instructions and conducted an unlawful search as a result, the evidence could nevertheless be admitted under the good faith exception so long as action pursuant to the request would have been lawful.³⁸⁴

C. *The Limits of Executive Power*

The final issue to be resolved in implementing an international Fourth Amendment concerns the degree to which the executive branch may be bound by constitutional restrictions when acting pursuant to its broad power to conduct foreign affairs: To what degree is the foreign affairs power committed to the President exclusively, at the expense of Congress and the courts? Chief Justice Rehnquist drew heavily on concerns of this nature in concluding, in his Opinion of the Court in *Verdugo*, that the United States could not afford to extend the Fourth Amendment's protections to noncitizens overseas.³⁸⁵ He concluded that restrictions on searches and seizures abroad must be imposed, if at all, by the political branches, given the "significant and deleterious consequences" to presidential freedom abroad that could result from judicial interference in foreign affairs.³⁸⁶

The Chief Justice's conclusion was the product of two related jurisprudential traditions—the Hobbesian "membership" approach to civil liberties, discussed above,³⁸⁷ and the foreign affairs tradition embodied in *United States v. Curtiss-Wright Export Corp.*³⁸⁸ that views the President as the "sole organ of the nation" in the broad external realm.³⁸⁹ Just as the Chief Justice's

383. See *supra* part II.B.2.b.1.

384. Probably defendants should be allowed to rebut United States agents' showing of good faith by evidence that they colluded with foreign police to conduct a search beyond the scope of the request.

385. See *supra* notes 40-45 and accompanying text.

386. 494 U.S. at 273-75. Such consequences, he concluded, could include even the prospect of aliens suing the United States in wartime for violations of their civil rights. *Id.* at 274.

387. See *supra* part II.B.1.

388. 299 U.S. 304 (1936).

389. *Id.* at 319; see also *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). Chief Justice Rehnquist's opinion in *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992), may be seen as the latest expression of this tradition, although the Court did not cite *Curtiss-Wright* directly. For a critical overview of the *Curtiss-Wright* tradition, see HAROLD H. KOH, *THE NATIONAL*

membership approach finds its opposing counterpart in the municipal law approach embraced by Justice Brennan,³⁹⁰ so the *Curtiss-Wright* tradition finds its counterpart in the competing tradition embodied in *Youngstown Sheet and Tube Co. v. Sawyer*³⁹¹ which views Congress, the President, and the courts as joint participants in the foreign affairs field.³⁹² This Article, however, has attempted to sidestep the need for resolution of these larger structural constitutional questions to some degree, by demonstrating the underlying legitimacy of Justice Brennan's "mutuality" approach while at the same time addressing the Chief Justice's legitimate practical concerns about its application. The "international Fourth Amendment" would strike a balance between Chief Justice Rehnquist's water's edge rule and Justice Brennan's wholesale transplantation of the Fourth Amendment abroad, while at the same time addressing the transnational context of searches abroad.

One pragmatic concern, however, remains to be addressed—the concern, expressed by the Chief Justice, that an extraterritorial Fourth Amendment would hamper national security operations conducted by the military overseas.³⁹³ This need not be a problem as far as pure military operations without law enforcement objectives are concerned; as Justice Brennan pointed out, the Fourth Amendment simply would not reach such operations.³⁹⁴ The "mutuality" principle extends constitutional protections only to those whom the government treats as "the governed," for example by investigating and prosecuting them;³⁹⁵ since enemy aliens in wartime have no claim to such a status,³⁹⁶ Chief Justice Rehnquist's doomsday scenario of a multitude of

SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 93-100, 134-46 (1990).

390. See *supra* part II.B.2.

391. 343 U.S. 579 (1952).

392. The classic expression of this tradition is Justice Jackson's concurring opinion in *Youngstown, Id.* at 634, 635-38. *Youngstown* has been echoed in such cases as *Kent v. Dulles*, 357 U.S. 116 (1958) (requiring clear statutory statement of congressional authorization before condoning executive infringement on individual's constitutional right to travel), and *United States v. Robel*, 389 U.S. 258, 263 (1967) (refusing to accept executive invocation of congressional war power as "talismanic incantation" to support violation of constitutional rights). An extended argument in favor of this tradition is made in KOH, *supra* note 389, at 105-13 & *passim*.

393. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990).

394. *Id.* at 291-92 (Brennan, J., dissenting).

395. *Id.* Justice Blackmun attempted to clarify Justice Brennan's somewhat slippery distinction by distinguishing between the government's "exercise of power abroad," which "does not ordinarily implicate the Fourth Amendment," and "the enforcement of domestic criminal law, which seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey." *Id.* at 297 (Blackmun, J., dissenting).

396. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

hostile aliens bringing suit in United States courts to enforce the Fourth Amendment is unfounded. Additionally, as Justice Brennan noted, courts could limit invocation of the Fourth Amendment by nonresident aliens to defensive use, via the exclusionary rule, and preclude offensive use of the Amendment through so-called *Bivens* suits for damages.³⁹⁷

The Chief Justice's concern has more force when it is applied to "mixed" operations encompassing both law enforcement and national security objectives. Such operations became more common through the 1980s as the United States, responding to the global threats of narcotics trafficking and terrorism, relied increasingly on the military as a kind of extraterritorial police force.³⁹⁸ Examples include the Noriega operation,³⁹⁹ the massive anti-narcotics operations conducted by the military in Latin America, and the recent humanitarian operation in Somalia.⁴⁰⁰ Drawing lines between "law enforcement" and "national security" in such situations would indeed be one of the most difficult challenges that the courts would face in construing an international Fourth Amendment.

Courts, however, would not be entirely without resources to deal with such circumstances. They could look in such situations

397. 494 U.S. at 292-93 (following *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971) (precluding actions for damages for Fourth Amendment violations where there are "special factors counselling hesitation")); accord *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (concluding that "the special needs of foreign affairs" preclude creation of damage remedies against United States officials for constitutional injuries of noncitizens abroad). As at least one commentator has noted, defensive use of the Fourth Amendment by noncitizens does not pose the same threat of embarrassment to the political branches that offensive use would. Harvard Note, *supra* note 15, at 1680-81. The only individuals in a position to use the defensive remedy would be those whom the United States chooses to prosecute; such prosecution would substantially strengthen the nexus between those individuals and the United States government, entitling them to constitutional defenses.

398. Or "911 for the world," in Rep. Patricia Schroeder's phrase. *Confrontation in the Gulf*, N.Y. TIMES, Aug. 13, 1990, at A10. For general discussions of the military's increasing involvement in law enforcement overseas, and of the legal issues this raises, see *Doneso*, *supra* note 9; *Coffey*, *supra* note 9.

399. See *supra* notes 154-57. The Noriega trial was pending at the time that the Supreme Court decided *Verdugo*, and, although it was not mentioned by the Court, the possibility that General Noriega might be able to invoke the Fourth Amendment must have been on the Justices' minds as they considered *Verdugo*. The *Noriega* court subsequently referred to *Verdugo* in rejecting General Noriega's Fifth Amendment due process claims. See *United States v. Noriega*, 746 F. Supp. 1506, 1532 n.28 (S.D. Fla. 1990).

400. For one court's effort to untangle the elements in such a "mixed" situation abroad, see *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (application of Fifth Amendment to "taking" of Honduran cattle ranch by United States Army for use as camp to train Salvadoran soldiers), *vacated and remanded as moot*, 471 U.S. 1113 (1985). See also *Wedgwood*, *supra* note 53, at 751-53.

to traditional "doctrines of restraint" such as the political question and separation-of-powers doctrines.⁴⁰¹ (A third doctrine, concerning the relation between customary international law and "controlling executive acts," is discussed in the margin.)⁴⁰² An operation that crossed the line separating law enforcement from acts of war, such as the operation against General Noriega, would trigger serious justiciability concerns.⁴⁰³ Additionally, as Justice

401. For an incisive examination of how such doctrinal bars may be used to winnow the appropriate from the inappropriate transnational cases on courts' dockets, see Koh, *Transnational Public Law Litigation*, *supra* note 249, at 2382-94 (urging selective targeting of separation-of-powers, judicial competence, and comity concerns). See also *Ramirez de Arellano*, 745 F.2d at 1511-15 (examining justiciability of extraterritorial "taking" by United States military); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (opinions of Edwards, Bork, & Robb, JJ.) (employing three different rationales to dismiss suit brought under Alien Tort Statute by Israeli citizens who had been subjected to PLO torture and terrorism in Israel), *cert. denied*, 470 U.S. 1003 (1985).

402. Under this doctrine, which would arise only in response to the international benchmark approach, the President may, through a "controlling act," effectively supersede otherwise-controlling customary international law. Thus, he could announce that a particular operation (the mission to seize General Noriega, for instance) was intended to be a "controlling act" by which he overrode the minimal search-and-seizure standards imposed by the international benchmark. See generally Lobel, *The Limits of Constitutional Power*, *supra* note 249, at 116-20; *May the President Violate Customary International Law?* (*cont'd*), 81 AM. J. INT'L L. 371 (1987) (comments by Frederick L. Kirgis, Jr., Anthony D'Amato, and Jordan J. Paust); OLC Opinion, *supra* note 159.

The "controlling act" doctrine derives from dictum in Justice Gray's turn-of-the-century classic opinion *The Paquete Habana*, 175 U.S. 677 (1900). After stating that international law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction," Justice Gray added that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Id.* at 700. Scholars differ sharply over the scope and meaning to be given to this cryptic statement. The general weight of scholarly opinion stands behind the proposition that the President may override customary international law only when acting jointly with Congress, see Lobel, *supra*, at 1114-21, or when functioning in his role as chief diplomat or commander in chief of the armed forces, see Kirgis, *supra*, at 373-75. Some courts and the Department of Justice, on the other hand, have interpreted the President's power more broadly. See *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (upholding Justice Department decision to incarcerate Mariel Cuban refugees indefinitely without hearings, in violation of international law, on ground that DOJ decision constituted "controlling executive act," despite lack of express authorization by the President); OLC Opinion, *supra* note 159. If construed somewhat more narrowly than the Eleventh Circuit's interpretation, the doctrine could serve as a useful limitation on the binding nature of an international benchmark standard. That is, like the political question or separation-of-powers doctrines, if judiciously applied, it could provide a necessary safety valve freeing the President from international law constraints in moments of political import, although not in the ordinary course of business.

403. See *United States v. Noriega*, 746 F. Supp. 1506, 1537-40 (S.D. Fla. 1990) (concluding that claim of government misconduct in invading Panama and capturing Noriega was nonjusticiable challenge to conduct of foreign policy,

Brennan suggested in *Verdugo*, a Fourth Amendment reasonableness standard would necessarily take into account "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."⁴⁰⁴ In other words, while some kinds of extraterritorial operations may indeed give courts pause in applying an extraterritorial Fourth Amendment, and a few cases may present close questions, there is no reason to believe courts would lack the tools to draw the appropriate distinctions between garden-variety extraterritorial law enforcement, such as the operation against *Verdugo*, to which the Fourth Amendment would apply, and operations implicating broader and more inherently political questions of national policy, to which it would not.

VI. CONCLUSION

The Supreme Court's inconclusive tangle with extraterritorial searches and seizures in *Verdugo* represents the beginning, not the end, of the task that the Court faces in articulating a workable response to the complex realities of modern transnational law enforcement. This Article has tried to steer a middle path between the concerns of those who, like the Chief Justice, would confine the Fourth Amendment to the "water's edge" and those who, like Justice Brennan, would blanket the world with the Bill of Rights. It has tried to examine those concerns from a perspective more attuned to the transnational context within which extraterritorial searches take place. The binational and international approaches that are proposed, it is hoped, will constitute useful suggestions for the start of the daunting process of laying out judicial guidelines in this most difficult of areas, at the intersection of a host of diverse concerns, values, laws, and participants. United States courts cannot continue, as in *Verdugo*, to view extraterritorial searches and seizures from preconceived domestic perspectives, but must begin the hard task of mapping out a judicial role for searches and seizures abroad—a role that may be necessarily more limited in scope than the role of the courts in monitoring domestic searches, but not a role that, as Chief Justice Rehnquist would have it, can be abandoned entirely.

barred by political question doctrine and separation of powers); cf. *Ramirez de Arellano*, 745 F.2d at 1512 ("[I]ssues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs").

404. *United States v. Verdugo-Urquidez*, 494 U.S. at 292 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

