How Sufficient Is the "Sufficient Connection Test" in Granting Fourth Amendment Protections to Nonresident Aliens?: United States v. Verdugo-Urquidez

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HOW SUFFICIENT IS THE “SUFFICIENT CONNECTION TEST” IN GRANTING FOURTH AMENDMENT PROTECTIONS TO NONRESIDENT ALIENS?: UNITED STATES v. VERDUGO-URQUIDEZ

The fourth amendment of the United States Constitution guarantees “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” It was not until 123 years after the amendment’s adoption, however, that the United States Supreme Court, in Weeks v. United States, promulgated what has come to be known as the exclusionary rule of the fourth amendment. Under this rule, evi-

1 U.S. CONST. amend. IV. The fourth amendment, adopted in 1791, states in full: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2 232 U.S. 383 (1914).

3 See id. at 398. In Weeks, the Court held that prejudicial error would be committed by allowing evidence seized unreasonably and without a warrant to be used against a criminal defendant. Id. Writing for the Court, Justice Day stated that the evidence seized by federal officials in violation of the fourth amendment could not be used at trial, but noted that this rule, later termed the “exclusionary rule”, did not apply to evidence seized by state officials. Id.; see Smith v. Maryland, 59 U.S. 71, 76 (1855) (holding fourth amendment restrictions applicable to federal government only).

In 1927, in two separate cases, the Supreme Court expanded the exclusionary rule to include searches conducted by state officials acting with either a federal purpose or federal participation. See Gambino v. United States, 275 U.S. 310, 317 (1927) (fourth amendment applicable to state searches with federal purpose); Byars v. United States, 273 U.S. 28, 33 (1927) (fourth amendment applicable to joint searches by federal and local officials). The principles established in these cases formed what came to be known as the “silver platter” doctrine, under which it would be determined whether federal officials had sufficient involvement in state searches as the basis of a federal proceeding allowing the defendant exclusionary rule protections. See Lustig v. United States, 338 U.S. 74, 78-79 (1949) (“not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter”); see also Note, The International Silver Platter and the “Shocks the Conscience” Test: U.S. Law Enforcement Overseas, 67 WASH. U.L.Q. 489, 493 (1989) (discussing evolution of “silver platter” doctrine).

With the adoption of the fourteenth amendment forbidding the states to “deprive any person of life, liberty, or property, without due process of law,” many constitutional provi-
dence obtained in violation of the fourth amendment is inadmissible in criminal proceedings. Since its inception in Weeks, the ex-

sions became applicable to state as well as federal action. See W. LaFave & J. Israel, Criminal Procedure § 3.1, at 78-79 (1985) [hereinafter LaFave]. In the years following its enactment, most of the guarantees of the first eight amendments were incorporated into the fourteenth amendment and thus became binding upon the states. Id. While holding that the fourth amendment applied to state actions, the Supreme Court concluded that the judicially created exclusionary rule, not explicitly provided for within the language of the fourth amendment, did not apply to state proceedings. Wolf v. Colorado, 338 U.S. 25, 28-33 (1949), overruled by, Mapp v. Ohio, 367 U.S. 643 (1961). Shortly after the Wolf decision, the Court qualified its holding by stating that the fourteenth amendment precludes the introduction of evidence in state proceedings that was obtained using "conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952), overruled by, Mapp v. Ohio, 367 U.S. 643 (1961).

The exclusionary rule was given even broader application when the Court chose to eliminate the "silver platter" doctrine from federal criminal trials. See Elkins v. United States, 364 U.S. 206, 223-24 (1960) ("evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over defendant's timely objection in a federal criminal trial"). In Elkins, the Court reasoned that the "silver platter" doctrine would discourage cooperation between state and federal officials and violate judicial integrity. Id. at 221-23. Shortly after the Elkins decision the Court finally made the exclusionary rule fully applicable to the states. See Mapp v. Ohio, 367 U.S. 643, 657-60 (1961). In Mapp, the Court overruled Wolf, reasoning that to permit states, in state proceedings, to use unlawfully seized evidence would encourage disobedience to the Constitution which the states themselves were bound to uphold. Id. at 657.

4 See supra note 3 and accompanying text (outlining development of exclusionary rule). Under the Constitution, for a valid search to take place, probable cause must exist. U.S. Const. amend. IV. This standard must be satisfied for searches with or without a warrant. See LaFave, supra note 3, § 3.31, at 110. However, the Supreme Court has recognized that in situations where the existence of probable cause is brought into question, the presence of a warrant may tip the scales in favor of concluding that probable cause exists. See United States v. Ventresca, 380 U.S. 102, 109 (1965) ("resolution of doubtful or marginal cases in this area [probable cause] should be largely determined by the preference accorded to warrants"). This conclusion merely reflects the general principle that a warrant will be required in searches of private places absent extenuating circumstances. See Payton v. New York, 445 U.S. 573, 587-88 (1980) ("long-settled premise that, absent exigent circumstances, a warrantless entry to search" a private home is unconstitutional). The presence of a warrant is preferred mainly because it allows a search to take place only when its reasonableness has been determined by an impartial magistrate. See United States v. Jeffers, 342 U.S. 48, 51 (1951) (fourth amendment “interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purpose intended”).

The exclusionary rule was developed in an attempt to ensure that fourth amendment guarantees were enforced. See Mapp, 367 U.S. at 648 (exclusionary rule is “clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard”). However, there have been several theories as to how this goal is best accomplished. See LaFave, supra note 3, § 3.1, at 81-84. It has been suggested that the exclusionary rule serves as a deterrent to illegal police conduct, see Linkletter v. Walker, 381 U.S. 618, 636 (1965); that it prevents the judiciary from becoming accomplices to illegal police action, see Elkins, 364 U.S. at 223; that it prevents the government from benefitting from its own unlawful conduct, see Terry v. Ohio, 392 U.S. 1, 12-13 (1968); and, that it prevents searches from being conducted solely
clusionary rule has been applied to United States citizens regardless of whether they reside within the country or abroad.

at the discretion of police officers, see Johnson v. United States, 333 U.S. 10, 14 (1948). However, the exclusionary rule has not been universally supported. See generally LAFave supra note 3, § 3.1, at 81-84 (examining arguments against exclusionary rule). Chief Justice Burger, dissenting in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), expressed dissatisfaction with the exclusionary rule. Id. at 415 (Burger, C.J., dissenting). In declaring the exclusionary rule “both conceptually sterile and practically ineffective,” Chief Justice Burger suggested that the rule did little to deter unlawful police conduct. Id. at 416 (Burger, C.J., dissenting). He further argued that the exclusionary rule hinders the prosecution’s effort to build a case. Id. at 417 (Burger, C.J., dissenting). Chief Justice Burger reasoned that any theory that assumes police misconduct would be deterred under the exclusionary rule assumes incorrectly that law enforcement is a “monolithic governmental enterprise.” Id. at 416-17 (Burger, C.J., dissenting).

In reaction to arguments such as Chief Justice Burger’s, the Court chose to create a “good faith” exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922-24 (1984). In Leon, the Court decided that the exclusionary rule was flexible enough to allow law enforcement officials to rely on a warrant issued by a neutral detached magistrate even though the warrant ultimately was found to be lacking in probable cause. See id. at 922. The Court, however, was unwilling to create a sweeping “good faith” exception applicable in all situations in which a warrant is present. Id. at 922-23. The Court stated that a police officer’s “reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable.” Id. at 922. In fact, the Court identified three situations in which reliance would not be objectively reasonable, rendering the good faith exception inapplicable. Id. at 923. First, this exception would not allow reliance on a magistrate’s finding of probable cause if that finding was based on an affidavit of known falsity, or upon which its determination of truth was recklessly based. Id. Second, the exception would not apply where the magistrate has “wholly abandoned his judicial role,” merely acting as a “rubber stamp” for the police when issuing warrants. Id. Finally, the “good faith” exception will not permit an officer to rely on a warrant based on an affidavit so lacking in indicia of probability as to render reliance upon it unreasonable. Id.


See, e.g., United States v. Conroy, 588 F.2d 1258, 1264 (5th Cir.) (fourth amendment rights guaranteed to United States citizens residing abroad), cert. denied, 444 U.S. 831 (1979). The Constitution has not always been interpreted so broadly. Earlier in its history, the Supreme Court was not willing to apply constitutional protections extraterritorially. See Ross v. McIntyre, 140 U.S. 453, 464 (1891). In Ross, the Court held that the Constitution had no application in foreign countries and that the authority of the United States government could be exercised only to the extent that both countries agreed. Id. The Court later renounced its decision in Ross, stating that “[w]hen 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.” Reid v. Covert, 354 U.S. 1, 6 (1957) (plurality opinion). Although Reid was merely a plurality opinion, its principles generally have been accepted. See Restatement (Third) of Foreign Relations Law § 721 comment b (1988). Comment b states...
Aliens residing within the United States, whether legally and illegally, have received a significant number of constitutional protections.7 The nature of the fourth amendment protections afforded these aliens, however, remained largely unsettled8 until the Supreme Court's recent decision in United States v. Verdugo-Urquidez.9 In Verdugo-Urquidez, the Court held that nonresident aliens are not entitled to the protections of the exclusionary rule absent a "sufficient connection" between the nonresident alien and the United States.10

This Note will explore the exclusionary rule as it applies to United States citizens while living abroad as well as to aliens, residing both within and outside the United States. Part One will trace the historical development of the exclusionary rule. Part Two will review the Verdugo-Urquidez decision and explore the potential ramifications of applying a "sufficient connection" standard to noncitizens residing abroad. Finally, Part Three will outline the various factors which should be considered in determining whether a noncitizen is entitled to fourth amendment protections under the "sufficient connection" test articulated in Verdugo-Urquidez.

I. HISTORICAL DEVELOPMENT OF THE EXCLUSIONARY RULE

A. Constitutional Protections Afforded United States Citizens Abroad

For a substantial period of time, the Supreme Court, failing to distinguish between aliens and citizens, refused to extend the protections of the United States Constitution beyond the boundaries in pertinent part: "The Constitution governs the exercise of authority by the United States government over United States citizens outside United States territory, for example on the high seas, and even on foreign soil." Id.

7 See infra note 18 and accompanying text (discussion of constitutional protections afforded aliens).

8 See infra note 19-27 and accompanying text (discussing development of Court's views concerning constitutional rights of aliens within the United States).


10 Id. at 1064. This decision ended speculation that the fourth amendment would apply extraterritorially to nonresident aliens. See, e.g., Restatement, supra note 6. The Restatement states in pertinent part: "Although the matter has not been definitely adjudicated, the Constitution probably governs also at least some exercises of authority by the United States in respect of some aliens abroad." Id. However, the Verdugo-Urquidez Court emphasized that as of yet, no determination had been made as to whether resident aliens would receive fourth amendment protections. Verdugo-Urquidez, 110 S. Ct. at 1064-65.
of the United States.\textsuperscript{11} In fact, the Court did not expressly repudiate this stance with respect to United States citizens until its 1957 decision in \textit{Reid v. Covert}.\textsuperscript{12} In \textit{Reid}, a consolidation of two cases, each defendant was charged with murdering her husband in a foreign country.\textsuperscript{13} Although both women were United States citizens, each was tried and convicted in a non-jury court martial proceeding because of her status as the wife of a military officer.\textsuperscript{14} A plurality of the Court determined that a United States citizen, even while abroad, was entitled under the United States Constitution to a trial by jury.\textsuperscript{15} The Court reasoned that an individual should not forfeit her constitutional rights merely because she is in a foreign land.\textsuperscript{16} Although only a plurality opinion, \textit{Reid} generally is regarded as precedent for granting constitutional protections to United States citizens traveling or residing outside the country.\textsuperscript{17}

\textbf{B. Constitutional Protections Afforded Aliens Within the United States}

Despite its reluctance to apply the Constitution extraterritorially, the Supreme Court has been more liberal in granting constitutional protections to aliens residing within the United States.\textsuperscript{18} As

\begin{enumerate}
\item See Ross v. McIntyre, 140 U.S. 453, 464 (1891) (citing Cook v. United States, 138 U.S. 157, 181 (1891)). In \textit{Ross}, the Supreme Court refused to grant constitutional protections to a defendant who had committed a murder on an American ship within a Japanese harbor. \textit{Id.} at 454. Ross was convicted by an American consular tribunal and claimed that his sixth amendment right to trial by jury and his fifth amendment right to be indicted by a grand jury had been violated. \textit{Id.} at 458. In reaching its decision, the Court concluded that the Constitution applied only within the United States and, thus, had no force abroad. \textit{Id.} at 464.
\item 364 U.S. 1 (1957).
\item \textit{Id.} at 3-4.
\item \textit{Id.}
\item \textit{Id.} at 18-19. After granting the petitioners a rehearing, the Court vacated its previous decision denying the petitioners a jury trial and recognized a defendant’s right under article III and the fifth and sixth amendments of the Constitution to a jury trial, even in an action outside the United States. \textit{Id.} at 5.
\item \textit{Id.} at 6. The Court refused to adhere to previous decisions which granted the protection to only those rights deemed “fundamental.” \textit{Id.} at 9. Specifically, the Court repudiated its decision in \textit{Ross} v. McIntyre, 140 U.S. 453 (1891). \textit{Reid}, 354 U.S. at 10. The \textit{Reid} court criticized the holding in \textit{Ross} as resting on a “fundamental misconception” and characterized as an historic accident consular jurisdiction’s antedating of the Constitution. \textit{Id.} at 12.
\item See supra note 6 (discussing Restatement (Third) of Foreign Relations Law and its incorporation of \textit{Reid} decision).
\item See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950) (procedural due process requirement applies to deportable aliens); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (same fifth and sixth amendment protections guaranteed to deportable
early as 1886, in *Yick Wo v. Hopkins*, the Court recognized that the fourteenth amendment's protection extended to all "persons" within the United States, and not merely United States citizens. In *Mathews v. Diaz*, however, the Court suggested that the entitlement of all "persons" to due process protection does not necessarily mean that each alien may enjoy every advantage of citizenship. The Court recognized the validity of many constitutional and statutory provisions distinguishing between aliens and citizens.

Notwithstanding the *Mathews* decision, in *I.N.S. v. Lopez-*
Mendoza, the Court suggested that illegal aliens fall within the broad classification of the term "the people" and, therefore, possessed the same fourth amendment rights as did citizens and legal aliens. In Verdugo-Urquidez, however, the Court downplayed the significance of its statements in Lopez-Mendoza by characterizing them as merely incidental to its decision.

II. THE Verdugo-Urquidez DECISION

In Verdugo-Urquidez, the defendant, a Mexican citizen, was apprehended by Mexican police, who transported him to California, where United States Marshals arrested him on narcotics charges. Following Verdugo-Urquidez's arrest, agents of the United States Drug Enforcement Administration ("DEA"), operating in conjunction with the Mexican Federal Judicial Police, conducted a warrantless search of the defendant's Mexican residences. The search uncovered a tally sheet, indicating the quantities of marijuana allegedly smuggled by the defendant into the United States, which government prosecutors hoped to introduce as evidence. In a pretrial motion, Verdugo-Urquidez argued against the admissibility of the evidence, claiming that the search violated his fourth amendment right to be free from unreasonable searches. The district court agreed and, accordingly, suppressed
the evidence pursuant to the exclusionary rule.33 The affirmation by the Ninth Circuit Court of Appeals34 was reversed by the Supreme Court, which found that the defendant was not protected by the fourth amendment.35

Writing for the majority, Chief Justice Rehnquist reviewed the history of the fourth amendment and determined that it was not meant to "restrain the actions of the Federal Government against aliens outside of the United States territory."36 Chief Justice Rehnquist further reasoned that while the fourth amendment pro-

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33 Id.
35 See Verdugo-Urquidez, 110 S. Ct. at 1066.
36 Id. at 1061. The majority noted that, originally, the Framers purposely excluded a provision restricting searches and seizures because they believed that the federal government had no authority to conduct such activities. Id. (citing C. Warren, The Making of the Constitution 508-09 (1928); The Federalist No. 84, at 513 (A. Hamilton) (C. Rossiter ed. 1961); 1 Annals of Cong. 437 (J. Gales ed.1789) (statement of J. Madison)). Ultimately, an amendment restricting unreasonable searches and seizures was deemed necessary to protect the people of the United States from arbitrary governmental action, but, in the majority's view, it was never intended to apply to searches outside of the territory of the United States. Id. To illustrate his point further, Chief Justice Rehnquist referred to the searches of French vessels during the "undeclared war" between France and the United States that occurred seven years after the fourth amendment was ratified. Id. at 1061-62. During that time, Congress authorized President Adams to "instruct commanders of the public armed vessels ... to subdue, seize and take any armed French vessel ... found within the jurisdictional limits of the United States or elsewhere, on the high seas." Id. at 1062 (quoting An Act Further To Protect the Commerce of the United States, ch. 68, § 1, 1 Stat. 578). In addition, Congress authorized the President to commission private ship owners to do the same. Id. Despite some violations of this grant of authority, the majority asserted that a fourth amendment restraint on the government's power to conduct such activities was never questioned. Id. Therefore, the Court concluded that the fourth amendment was not meant to have a global application. Id.

The Court further stated that the Ninth Circuit's position was contrary to its holdings in the Insular Cases—that governmental action is not necessarily subject to each constitutional provision, even in territories where the United States has sovereign power. Id.; see, e.g., Balzac v. Porto Rico, 258 U.S. 298, 302 (1922) (sixth amendment guarantee to jury trial inapplicable in Puerto Rico territory not incorporated into United States); Ocampo v. United States, 234 U.S. 91, 98 (1914) (fifth amendment grand jury guarantee inapplicable in Philippines). The majority reasoned that if these rights were denied to persons in territories governed by the United States, then the argument to extend the fourth amendment to aliens in another country becomes even weaker. Verdugo-Urquidez, 110 S. Ct. at 1062. But see id. at 1074 (Brennan, J., dissenting). Justice Brennan would limit the holding in the Insular Cases, arguing that they focus on criminal prosecutions brought by territorial authorities in territorial courts. Id. (Brennan, J., dissenting). Furthermore, Justice Brennan cited Reid as limiting these cases to their facts. Id. (Brennan, J., dissenting).
tects “the people” of the United States, its guarantees reach a smaller class of persons than do those of the fifth amendment, which, by its terms, applies to any “person.” Therefore, the Chief Justice reasoned, the Court was justified in granting aliens fifth amendment protections while denying them the guarantees of the fourth amendment. Distinguishing the Court’s holdings in Reid and cases dealing with resident aliens, Chief Justice Rehnquist concluded that without some “sufficient connection” to the United States, the fourth amendment would not be applicable to nonresident aliens.

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37 See supra note 1 (text of fourth amendment).

In a concurring opinion, Justice Kennedy stated that the defendant should be denied the protections of the warrant clause of the fourth amendment because the search was conducted outside the United States. Id. at 1067-68 (Kennedy, J., concurring). Justice Stevens, in a separate concurrence, stated that the warrant clause of the fourth amendment is not applicable to noncitizens in foreign lands because American authorities have “no power to authorize such searches.” Id. at 1068 (Stevens, J., concurring). However, he did argue that although Verdugo-Urquidez had been brought to the United States against his will, he was lawfully there and thus was one of the “people” entitled to the protections of the reasonableness standard of the fourth amendment. Id. (Stevens, J., concurring). Justice Stevens was satisfied that the reasonableness standard was met in this case. Id. (Stevens, J., concurring).

38 U.S. CONST. amend. V. The fifth amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; 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; nor shall private property be taken for public use, without just compensation.

Id. (emphasis added).

39 Verdugo-Urquidez, 110 S. Ct. at 1060-61. The Court asserted that the term “the people,” as found in the preamble; article I, section 2, clause 1; and the first, second, fourth, ninth and tenth amendments, refers to members of a national community, or those with a “sufficient connection” to the United States. Id. The purposefulness of the Framers in their use of “the people” is underscored by the terms “person” and “accused” in the fifth and sixth amendments, which control criminal procedure. Id. at 1060. In distinguishing the fourth and fifth amendments, the Court recognized that a criminal defendant’s fifth amendment privilege against self-incrimination is a “fundamental trial right” that cannot be violated until the time of trial. Id. Any violation of the fourth amendment, however, would be fully accomplished at the time of the intrusion and therefore completed well before the time of the trial. Id. (citing United States v. Calandra, 414 U.S. 338, 354 (1974); United States v. Leon, 468 U.S. 897, 906 (1984)).

40 See Verdugo-Urquidez, 110 S. Ct. at 1063. Chief Justice Rehnquist stated that the Reid decision did not stand for the broad holding that all United States citizens abroad were entitled to all constitutional protections. Id. He further stated that the Reid holding stands for the proposition that a citizen of the United States “stationed abroad could invoke the protection of the fifth and sixth amendments.” Id. Based on this logic, the Court concluded that the defendant could not benefit from the Reid decision. Id. The Court also
As the chief dissenter, Justice Brennan wrote that the majority's decision had created an “antilogy” by allowing the government to enforce the Constitution abroad without being subject to its express limitations. Justice Brennan argued that when the government attempts to hold a nonresident alien accountable under United States law, that alien in fact becomes one of the governed, one of “the people” protected by the fourth amendment, even under the majority's “sufficient connection” standard.

refused to allow Verdugo-Urquidez the benefit of its decisions granting constitutional protections to aliens within the United States. Id. at 1064; see supra note 18 (discussing rights granted to resident aliens). In this instance, the Court indicated that its “sufficient connection” standard may be satisfied only if the alien has some “substantial connection” to the United States. See Verdugo-Urquidez, 110 S. Ct. at 1064 (emphasis added). The majority felt that because Verdugo-Urquidez had not voluntarily associated himself with the United States, he could not avail himself of the previous Court decisions involving aliens in this country who had voluntarily associated themselves with the United States. Id. In reaching this conclusion, Chief Justice Rehnquist was careful to limit the Court's holding in I.N.S. v Lopez-Mendoza, 468 U.S. 1032 (1984). Verdugo-Urquidez, 110 S. Ct. at 1064-65. In Lopez-Mendoza, the Court inferred that illegal aliens residing within the United States were entitled to fourth amendment protections. See supra note 20 (discussing the Lopez-Mendoza decision).

Id. at 1068 (Brennan, J., dissenting). In a separate dissent, Justice Blackmun agreed with Justice Stevens' concurring opinion that the warrant clause of the fourth amendment did not apply in this case. Id. at 1078. (Blackmun, J., dissenting). However, Justice Blackmun argued that the search must still be reasonable based on probable cause. Id. (Blackmun, J., dissenting). The issue of reasonableness was not determined in the lower courts, and therefore, he suggested that the case be remanded for further proceedings. Id. (Blackmun, J., dissenting).

Id. at 1069-70 (Brennan, J., dissenting). Recently, the United States government has successfully held foreign nationals criminally liable for violations occurring entirely beyond the territorial limits of the United States. Id. at 1068-69 (Brennan, J., dissenting). Justice Brennan argued that by failing to recognize the fourth amendment rights of these individuals, while holding them to the same standard of conduct, the majority disregarded the basic principles of mutuality. Id. at 1071 (Brennan, J., dissenting); see infra note 44 (discussing mutuality).

Verdugo-Urquidez, 110 S. Ct. at 1070-71 (Brennan, J., dissenting). Justice Brennan noted that the majority recognized the term “the people” as being more inclusive than citizenship of the United States. Id. at 1070 (Brennan, J., dissenting). However, he also recognized that the majority gave little guidance as to what persons are included within “the people,” other than noting that the alien must have some substantial connection to the United States which must be voluntary and coupled with some societal obligation. Id. (Brennan, J., dissenting). Justice Brennan argued that while the majority recognized the term “the people” as a term of art, it failed to find conclusively that the term was intended to be construed more narrowly than the term “person.” Id. at 1072 (Brennan, J., dissenting). According to Justice Brennan, the majority failed to recognize that “the people” is merely a rhetorical counterpart to the term “the government,” thus making the majority's reliance on the wording unfounded. Id. (Brennan, J., dissenting).

Justice Brennan further argued that even if the “sufficient connection” test were applied in this case, it would be satisfied by the government action and not the actions of
tice Brennan argued further that if the United States government expects aliens to obey its laws, then these aliens are entitled to expect the United States to abide by its Constitution. Finally, Justice Brennan stated that the majority had misinterpreted the Constitution by inferring that it was intended to create rights, when in fact it was enacted to prohibit the government from infringing on the natural rights of all people.

It appears that the Verdugo-Urquidez majority failed to confront sufficiently the arguments in favor of granting nonresident aliens the protections of the fourth amendment and its exclusionary rule. In reaching its decision, the Court seemingly viewed the Constitution as a compact between the federal government and its citizens. Such a position ignores the works of scholars who have

Verdugo-Urquidez. Id. at 1070-71 (Brennan, J., dissenting). Justice Brennan asserted that underlying this contention is the fact that the accused was investigated, is being prosecuted, and faces the possibility of spending the rest of his life in a prison within the United States. Id. (Brennan, J., dissenting).

"Id. at 1071. (Brennan, J., dissenting). This principle, known as "mutuality," has been recognized since the time of the Framers. Id. (Brennan, J., dissenting). Generally speaking, the denial of this protection would require aliens to follow the laws of the United States while the government would be able to violate the Constitution at will, thus debilitating the document upon which all the nation's laws are based. Id. (Brennan, J., dissenting). According to Justice Brennan, "[m]utuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive government behavior as are United States citizens investigated and prosecuted for the same alleged violations." Id. (Brennan, J., dissenting). Moreover, Justice Brennan recognized that respecting the rights of foreigners would encourage other nations to respect the rights of United States citizens. Id. (Brennan, J., dissenting).

"Id. at 1073 (Brennan, J., dissenting). Justice Brennan wrote:

The focus of the Fourth Amendment is on what the Government can and cannot do, and how it may act, not on against whom these actions may be taken. Bestowing rights and delineating protected groups would have been inconsistent with the drafters' fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern.

Id. (Brennan, J., dissenting).

Justice Brennan proposed that the full rights of the fourth amendment, including its warrant provisions, should be applied even to searches and seizures of nonresident aliens occurring outside the United States. Id. at 1075-76 (Brennan, J., dissenting). Justice Brennan contended that, although the warrant technically would not be valid in a foreign country, mandating one would preserve the reasonableness requirement of the fourth amendment. Id. (Brennan, J., dissenting).

"See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1218-20 (9th Cir. 1988), rev'd, 110 S. Ct. 1056 (1990). Although the majority did not address it directly, the court appears to have sided with advocates of a "compact theory" of the Constitution, as discussed by the circuit court. Id. Under a "compact theory," the Constitution is deemed to be a contract between the people of the United States and the government. Id. at 1218. This theory has found some support in decisions of the Supreme Court. Id. at 1219; see, e.g.,
asserted that the Constitution is a document recognizing the natural rights of all individuals, whether or not they are citizens of the United States.\(^4\) While the Court appeared to acknowledge some of these rights by establishing a “sufficient connection” test that requires a nexus between the defendant and the United States short of citizenship, it failed to articulate the specific factors to be applied under this test.\(^4\) Furthermore, the Court overlooked the potential ramifications of its decision.\(^4\) For example, co-defendants engaging in the same conduct, could be granted different standards of constitutional protection if one were a nonresident alien and the other a United States citizen.\(^5\) Thus, it becomes necessary to de-
fine the term “sufficient connection” in a manner that distinguishes between citizens and noncitizens, yet treats noncitizens as equitably as possible.

III. FACTORS TO BE EXAMINED IN “SUFFICIENT CONNECTION” DETERMINATION

Although the Supreme Court provided little guidance for the application of its “sufficient connection” standard, it is submitted that several factors are clearly relevant to the determination of whether a sufficient nexus exists between a nonresident alien and the United States to justify granting him fourth amendment protections. It appears that before a court will offer an alien fourth amendment protection, there must be some degree of mutual obligation between the alien and the United States government. The Court, seemingly, is awarding the alien a degree of constitutional protection commensurate with the benefit the alien bestows upon the United States.

Application of a three-step analysis is proposed to determine whether an alien has fulfilled his portion of this mutual obligation. Under the first step, a court would examine whether agents of the United States were in fact chargeable with the actions in question. In Stonehill v. United States, the Ninth Circuit recognized the principles of mutuality. See id. (Brennan, J., dissenting). He further argued that when the United States respects the rights of foreign nationals it encourages foreign countries to respect the rights of United States citizens. See id. (Brennan, J., dissenting). Justice Brennan also noted that, as Justice Brandeis warned in Olmstead v. United States:

If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means... would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face.

Id. at 1071 (Brennan, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

61 See id. at 1070-71 (Brennan, J., dissenting). Justice Brennan contended that holding the noncitizen to the same standards as a citizen, while offering the noncitizen fewer protections violates this mutuality principle. Id. However, the majority appeared to require an obligation to the United States on the part of an alien that is similar in some respects to that of a citizen before the alien will receive constitutional protections as sacred as those of the fourth amendment. Id. at 1063-64. The Court recognized that the exact constitutional protections a defendant will receive depends greatly upon what process his circumstances dictate. Id. Therefore, the alien apparently must have some connection to the United States before the United States has a reciprocal obligation to the alien. Id. at 1063 (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

62 See E.C. Fisher, SEARCH AND SEIZURE 79 (1970). “Constitutional provisions prohibiting unreasonable searches and seizures are intended to protect the people against action by
nized that because the fourth amendment and its exclusionary rule were designed to regulate the conduct of federal officers, it did not apply to the acts of foreign officials. The court noted, however, that the fourth amendment would apply to foreign raids against United States citizens "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."  

Once the first step has been addressed, the court would then shift its focus to the degree of sanctions the defendant might face if convicted. The level of constitutional protection the alien receives should increase proportionately with the degree to which his personal liberties are at stake. For example, an alien whose alleged conduct would subject him to a fine or penalty would receive fewer constitutional protections than an alien facing possible imprisonment. This type of analysis would be analogous to the practice of allowing certain criminal penalties, such as petty offenses, to be tried without a jury.  

Should the disputed search and seizure be committed by the United States government in an instance where the nonresident defendant faces substantial sanctions, the court should consider still another factor prior to cloaking the defendant with fourth amendment protections. The final prong of this three-step test provides the alien with an ascending degree of constitutional protection in accordance with the beneficial contributions he has bestowed upon the United States. The court would determine whether the alien’s connections to the United States are sufficiently substantial to establish what, in effect, would be a contract between the alien and the United States under which he would receive a degree of fourth amendment protection in proportion to his level of involvement with the United States. While some protections, such as those provided by the fifth and sixth amendments, would be given to an alien who merely has participated in the justice system of the United States, fourth amendment pro-

Constitution gives defendants the right to trial by jury in “all criminal prosecutions.” Id. at 148; see U.S. Const. amend. VI. Petty offenses, however, may be tried without a jury. Frank, 395 U.S. at 148. Thus, in instances where the potential sanctions are less severe, a jury trial is not guaranteed. See Baldwin v. New York, 399 U.S. 66, 69 (1970). Based on this logic, the Supreme Court has stated that there are “no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial and prosecuting petty crimes without extending a right to jury trial.” Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

Cf. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950). In Eisentrager, the Supreme Court recognized that “[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.” Id. The Court has recognized that in reviewing rights afforded to aliens by immigration legislation, judicial inquiry is limited. See Fiallo v. Bell, 430 U.S. 787, 792 (1977). In Fiallo, the Court recognized that Congress has its greatest power when legislating to exclude aliens from the country. Id. The Supreme Court, however, in Landon v. Plasencia, stated that “once an alien gains admission to [the United States] and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.” Landon, 459 U.S. at 32-33.

See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1237 (9th Cir. 1988) (Wallace, J., dissenting), rev’d, 110 S. Ct. 1056 (1990). Dissenting in the lower court opinion, Judge Wallace stated that the alien defendant’s obligation to adhere to the United States drug laws did not impose a burden sufficient to entitle him to receive the full constitutional protections given resident aliens. Id. (Wallace, J., dissenting). In making this determination, Judge Wallace stressed that the defendant had neither undertaken to support the United States government nor placed himself in a position where he might be called upon to serve for the national defense. Id. (Wallace, J., dissenting). This type of reasoning would appear to support the interpretation of the Constitution as a compact under which the individual receives a number of liberties reciprocal to the liberties he gives up to the government. See supra note 46 (discussing “compact theory” of Constitution).

See Verdugo-Urquidez, 856 F.2d at 1237 (Wallace, J., dissenting). Judge Wallace declared that although he would not offer the defendant the protections of the fourth amend-
To determine whether nonresident aliens are entitled to fourth amendment protections under the third prong of the test, four criteria must be applied. First, does the alien currently maintain a place of residence within the United States? Second, does the alien own property within the United States? Third, does the alien generate legal income upon which he pays federal and state income tax? Fourth, has the alien ever resided within the United States, and if so, how long has he been absent from the country and does he intend to return?
Application of the proposed test can best be illustrated by a series of hypotheticals involving a nonresident alien who, as the result of an illegal search of his foreign residence, seeks the protections of the fourth amendment.

**Hypothetical A: Insufficient Connection for Fourth Amendment Protections**

Mr. X, the defendant, is a European citizen and a known terrorist. Mr. X is accused of the torture-murder of an American tourist which he allegedly committed to draw attention to his group's opposition to United States foreign policy. He has been arrested and is being detained in a federal prison in New York. Following his arrest, United States officials, acting on their own and without a warrant, broke into his European residence and discovered the alleged murder weapon as well as the victim's bloodstained clothing. Federal prosecutors now seek to use this evidence at trial.

Mr. X claims the search was improper due to the absence of a warrant and seeks to have the evidence suppressed. Other than his presence in New York as a result of his detention, Mr. X has few ties to the United States at this time. A small number of Mr. X's relatives immigrated to the United States several decades ago and still reside here. In addition, Mr. X resided within the United States for a good part of his childhood and attended college here; however, he has not been within the United States for the past fifteen years.

**Analysis:**

*Step 1:* The search was conducted solely by United States officials and, therefore, the "joint venture" standard articulated in *Stonehill* need not be applied.\(^6^\)

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Plasencia, 459 U.S. 21, 28 (1982); supra note 56 (discussing differences between deportation and exclusionary hearings). In determining whether an alien residing within the United States was making an "entry" upon his return, the alien's intent is crucial. See *Fleuti*, 374 U.S. at 462. A mere casual, brief excursion by a resident alien will not result in his return being deemed an "entry." *Id.* Where, however "the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence... would properly be regarded as meaningful." *Id.*

\(^6^\) See *Stonehill*, 405 F.2d at 743. "Neither the Fourth Amendment of the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers
Step 2: The defendant is charged with murder in the second degree, a serious offense for which he could be imprisoned for up to twenty-five years or life. Because the defendant faces a substantial sanction, the court would move to step three of the analysis.

Step 3: While the defendant has no present contacts with the United States, he resided in this country for a significant period of time and currently is detained here. In *Verdugo-Urquidez*, however, the Court made it clear that involuntary detention within the United States would not, by itself, be a “sufficient connection” to the United States. While the fact that Mr. X previously resided in the United States lends some support to his quest for fourth amendment protections, this particular defendant would not have a sufficient connection to the United States. Mr. X has resided within the United States but, even prior to his arrest, showed no indication of wishing to return, nor does he maintain allegiance to this country. Furthermore, he does not contribute to the national treasury by paying taxes, nor does he maintain a residence or own any property within the United States. Therefore, in effect, Mr. X has not “contracted” with the United States for the protections of the fourth amendment, although he will be entitled to receive other constitutional protections at trial.

*Hypothetical B: Clearly a “Sufficient Connection” for Fourth Amendment Protections*

Mr. Y, a former United States agent, is being prosecuted for selling military secrets to a foreign government. Prior to his arrest, Mr. Y renounced his American citizenship and defected to that country. Shortly thereafter, he secretly returned to the United States to recover $1 million in United States currency he had from violating the Fourth Amendment, is applicable to acts of foreign officials.” *Id.* (citing Brulay v. United States, 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967)); see *supra* notes 52-55 and accompanying text (discussing joint ventures and step one of test).

67 See *Verdugo-Urquidez*, 110 S. Ct. at 1064. The Court acknowledged the argument of Justice Stevens, who concurred in the opinion, that the fourth amendment should apply to an alien who is lawfully in the country, although being held against his will. *Id.* However, the Court held that this lawful but involuntary presence would not constitute the necessary “substantial connection” to the United States. *Id.* To hold otherwise, the majority concluded, would be to allow the application of the fourth amendment to turn upon the fortuitous circumstances surrounding the defendant. *Id.*

68 See *id.* at 1066. Presumably, the defendant’s voluntary attachment to the United States would be considered under the court’s “sufficient connection” test. *See id.*

69 See *supra* notes 38-39 and accompanying text (discussing other constitutional protections granted more freely than fourth amendment protections).
stored in a safe deposit box. During his clandestine return to the United States, Mr. Y was arrested and detained in Virginia. Subsequently, United States officials searched his foreign residence without a warrant and seized copies of the classified documents he purportedly had sold. Mr. Y, whose estranged family still resides in the United States, has substantial holdings in the United States, including two homes and a substantial amount of property upon which he had paid the required taxes up until his departure from the United States. Mr. Y claims he is innocent and seeks the protections of the fourth amendment.

Analysis:

Step 1: Here, the warrantless search was conducted solely by United States officials and, therefore, there is no need to examine the “joint venture” standard articulated in Stonehill.70

Step 2: Because Mr. Y has been accused of selling military secrets to a foreign government, his actions would constitute treason.71 Clearly, the court would find this violation to be a serious offense72 and therefore should proceed to step three.

Step 3: Mr. Y satisfies the criteria of the third prong of the proposed test. He owns two residences and other property in the United States. Furthermore, the defendant has paid his taxes in accordance with the laws of the United States. The only real issue arises in reference to Mr. Y’s absence from this country and his intent to return. Although it appears that Mr. Y does not intend to return to the United States on a permanent basis, he has resided here all his life and has never been absent from the country for a substantial period of time. As a result, Mr. Y should satisfy this third step of the test; he therefore should receive fourth amendment protections.

70 See supra notes 52-55 (discussing joint venture standard).
71 See Cramer v. United States, 325 U.S. 1, 29 (1945). The crime of treason consists of two elements, both of which must be present in order to sustain a conviction: (1) adherence to the enemy, and (2) rendering the enemy aid and comfort. Id.
72 See Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870). “No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof.” Id.
Hypothetical C: A Possible "Sufficient Connection" for Fourth Amendment Protections

Mr. Z, a resident of a Middle Eastern nation, is being tried for a terrorist attack on a United States airliner which resulted in the deaths of over two hundred United States citizens. The defendant was apprehended by officials in his own country and properly extradited to the United States to stand trial. While he was in the country, United States agents, cooperating with the police from the defendant's home country, conducted a search of Mr. Z's foreign residence. The warrantless search uncovered a schedule of terrorist bombings, including the one for which the defendant currently is being tried.

Mr. Z maintains several residences, none of which is located within the United States. He did, however, attend college and graduate school in California where he obtained a degree in chemistry and achieved notoriety as an explosives expert. The defendant subsequently founded a company in Oklahoma which produced explosives. Mr. Z's company employs over three hundred United States citizens and supplies explosives to many United States corporations, as well as the United States government. He visits the United States regularly to check on business matters, but never has manifested any intent to reside here permanently.

Analysis:

Step 1: This search was conducted by United States officials in connection with a foreign government, therefore requiring application of the Stonehill standard. The court must ask whether "Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials." Because the present circumstances are similar to those in the Verdugo-Urquidez case, it appears that the Stonehill standard would be satisfied.

Step 2: The murder of more than two hundred United States citizens clearly is a serious offense. Therefore, this step of the test would be satisfied and the court would then proceed to the third step.

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78 See supra note 55 and accompanying text (reciting Stonehill joint venture standard).
74 See Verdugo-Urquidez, 110 S. Ct. at 1059 (1990). In Verdugo-Urquidez, DEA agents asked for and received the cooperation of the Mexican officials. Id. The Court recognized this as a "concert" of action. Id.
Step 3: Although Mr. Z does not own or maintain a residence in the United States, he does own and operate a business here. This business generates a substantial amount of income within the United States on which Mr. Z pays taxes. Furthermore, by employing a large number of United States citizens, Mr. Z's operations patently are benefitting the United States. Although Mr. Z had resided within the United States some time ago, any time lapse loses importance due to his substantial business activity within the United States. Although the court might find differently if the defendant merely were a majority stockholder in a large United States corporation, under these facts, Mr. Z's business involvement in this country alone probably would satisfy this step of the test and result in the granting of fourth amendment protections.

Conclusion

In Verdugo-Urquidez, the United States Supreme Court refused to extend unconditionally the protections of the fourth amendment and its exclusionary rule to nonresident aliens. This decision is significant, in that it apparently reverses the trend toward granting constitutional protections to noncitizens and applying the Constitution beyond the territorial borders of the United States. The overall impact of Verdugo-Urquidez will depend upon the methodology employed by the courts in their application of the "sufficient connection" standard. This Note has offered guidelines that clearly define and establish a process for making this determination, concentrating primarily on the benefits the alien offers the United States and the benefits he derives from this country. Although the Supreme Court ultimately must determine the parameters of its "sufficient connection" test, the specific criteria suggested in this Note provide a reasonable basis toward this end.

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