

1989

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Recommended Citation

Elizabeth A. Corradino, *The Fourth Amendment Overseas: Is Extraterritorial Protection of Foreign Nationals Going Too Far?*, 57 Fordham L. Rev. 617 (1989).

Available at: <https://ir.lawnet.fordham.edu/flr/vol57/iss4/4>

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THE FOURTH AMENDMENT OVERSEAS: IS EXTRATERRITORIAL PROTECTION OF FOREIGN NATIONALS GOING TOO FAR?

INTRODUCTION

The fourth amendment¹ protects the individual's right to be free from unreasonable searches and seizures.² Originally intended to guard United States citizens against unreasonable intrusion by government officials in this country,³ the amendment was gradually expanded to shelter aliens found within the territorial jurisdiction of the United States.⁴ Courts then determined that United States citizens were entitled to fourth amendment protection by virtue of their citizenship, regardless of their location at the time of the alleged constitutional violation.⁵

Recently, however, courts have considered whether the fourth amendment can be further expanded to protect foreign nationals from actions by United States officials on foreign soil.⁶ The resolution of this issue depends upon whether the primary purpose of the fourth amendment is to safeguard individual rights⁷ or to restrain the activities of the government.⁸ This Note argues that the amendment is designed to preserve the

1. The fourth amendment provides:

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

U.S. Const. amend. IV.

2. See *Alderman v. United States*, 394 U.S. 165, 202 (1968) (Fortas, J., concurring in part, dissenting in part) (fourth amendment prohibits government interference with fundamental individual liberty); *Elkins v. United States*, 364 U.S. 206, 235 (1960) (Frankfurter, J., dissenting) (fourth amendment addresses matters that "vitally relate to individual freedom"); *Weeks v. United States*, 232 U.S. 383, 390-92 (1914) (fourth amendment intended to secure to Americans those safeguards that originated in England to protect against unreasonable searches and seizures).

3. See *Weeks v. United States*, 232 U.S. 383, 390 (1914); *Adams v. New York*, 192 U.S. 585, 598 (1904); J. Hirschel, *Fourth Amendment Rights* 1 (1979).

4. See *infra* note 12 and accompanying text. See generally J. Hirschel, *supra* note 3, at 1 (fourth amendment grants private persons on American soil a guarantee against unreasonable government intrusion).

5. See *infra* note 17 and accompanying text.

6. See, e.g., *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1215 (9th Cir. 1988) (foreign national entitled to fourth amendment protection), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353); *Cardenas v. Smith*, 733 F.2d 909, 915-17 (D.C. Cir. 1984) (Colombian national might have standing to challenge violations of the fourth amendment); *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974) (defendant Italian citizen unlawfully seized in violation of his fourth amendment rights).

7. See *Elkins v. United States*, 364 U.S. 206, 222 (1960); J. Varon, *Searches, Seizures and Immunities addendum* at 11 (2d ed. 1974) (purpose of fourth amendment viewed as measure of prevention for individual against unreasonable government intrusion into privacy of one's person, house, papers or effects).

8. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (fourth amendment is purposeful recognition that law enforcement officers may become too zealous in carrying

individual rights of United States citizens and individuals on United States soil from arbitrary and unreasonable government activity. This intent is thwarted when fourth amendment guarantees are applied to foreign nationals abroad.

Part I discusses the background of the fourth amendment in light of the evolving constitutional climate. Part II analyzes the fourth amendment and examines the amendment's extraterritorial operation in light of cases purporting to extend its guarantees to foreigners abroad. Part III argues that there are viable alternatives to overbroad application that will preserve the rights of nonresidents without unnecessarily broadening the scope of the fourth amendment. This Note concludes that when government action takes place on foreign soil not subject to United States sovereignty, the fourth amendment should not be used to grant protection to aliens claiming no ties to the United States.

I. CONSTITUTIONAL GROWTH AND EXPANSION

The fourth amendment and other protections granted in the Bill of Rights began as assurances that certain rights were to be reserved to the individual.⁹ The framers of the Constitution intended to protect individuals in the United States from unreasonable intrusion by government officials.¹⁰ Consequently, courts initially took a restrictive view of the power of the Constitution to extend beyond United States territory.¹¹ Society's increasing mobility, however, made it necessary to determine whether the Constitution protected aliens in the United States and United States citizens in foreign territories. In response to these changing circumstances, courts have interpreted the Constitution as safeguarding the rights of all individuals within the United States,¹² regardless of citizen-

out their activities); see also Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 Va. J. Int'l L. 741, 742 (1980) (Bill of Rights espoused as the most important limit on the central government's power to act, adopted "to assure that [the government's] authority to claim certain powers would be expressly negated").

9. See A. Kelly, W. Harbison & H. Belz, *The American Constitution—Its Origins and Development* 110 (6th ed. 1983).

10. See J. Creamer, *A Citizen's Guide to Legal Rights* 116 (1st ed. 1971) (framers sought to protect individuals); Saltzburg, *supra* note 8, at 743 (many of the first ten amendments designed to protect individuals suspected of, or charged with, crime); *supra* note 3 and accompanying text.

11. See *In re Ross*, 140 U.S. 453, 464 (1891) ("By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of [its] limits."); see also *Balzac v. People of Porto Rico*, 258 U.S. 298, 312 (1922) (Constitution "contains grants of power and limitations which . . . are not always and everywhere applicable"). See generally Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 487 (1987) ("permanent outsiders . . . seem to have little claim to invoke constitutional 'rights'"); Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U.J. Int'l L. & Pol. 287, 300-01 (1985) ("the Constitution is a compact between citizens and their government that is unenforceable by aliens").

12. See *The Japanese Immigrant Case*, 189 U.S. 86, 101 (1903) (alien who has entered United States and considered part of its population entitled to due process under fifth

ship, and United States citizens wherever they encounter United States government action.¹³

The fourth amendment secures the citizen "in person and property [against] unlawful invasion of the sanctity of [his] home"¹⁴ and is intended to protect the individual from "unreasonable" searches and seizures.¹⁵ When discussing the potential extraterritorial expansion of the fourth amendment, one must examine the amendment in the context of the fundamental purpose of the Bill of Rights—protection of the rights of the individual.¹⁶

amendment); *United States v. Winter*, 509 F.2d 975, 989 n.45 (5th Cir. 1975) (courts have sometimes held that resident aliens are entitled to same rights as American citizens), *cert. denied*, 423 U.S. 825 (1975). *But see* *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) (alien attempting to enter this country brings with him no constitutional rights); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (alien attempting illegal entry is not one of the people protected by the first amendment); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir.) (nonresident aliens "plainly cannot appeal to the protection of the Constitution or laws of the United States"), *cert. denied*, 364 U.S. 835 (1960). *See generally* *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (where aliens are domiciled within the United States, the Court has recognized additional rights and privileges not extended to those on the threshold of initial entry); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (mere lawful presence in this country grants the alien certain rights); *Damrosch*, *supra* note 11, at 553-55 & nn.292-98 (acknowledges authority of Constitution to protect individuals present in United States from government actions).

13. *See Reid v. Covert*, 354 U.S. 1, 6 (1957) ("[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights . . . provide[s] . . . should not be stripped away just because he happens to be in another land").

Reid established that the Bill of Rights may be applied to the conduct of federal officials acting upon American citizens abroad. *See 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, 502 (1977); *see also* *United States v. Conroy*, 589 F.2d 1258, 1264 (5th Cir.) (fourth amendment protects all individuals within United States and shelters citizens abroad from unreasonable searches by the United States government), *cert. denied*, 444 U.S. 831 (1979); *Note, The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 Va. L. Rev. 649, 657 (1986) [hereinafter *Note, Unalienable Rights?*] ("all constitutional protections afforded at home should apply with equal vigor for the benefit of citizens abroad").

Another court held that a United States citizen on a foreign ship, *just as on foreign soil*, has rights against an unreasonable search and seizure by United States government authorities. *See United States v. Williams*, 617 F.2d 1063, 1093 (5th Cir. 1980). *But cf. Rosado v. Civiletti*, 621 F.2d 1179, 1189 (2d Cir. 1980) (Bill of Rights does not protect United States citizens "from the acts of a foreign sovereign committed within its territory"), *cert. denied*, 449 U.S. 856 (1980).

14. *Adams v. New York*, 192 U.S. 585, 598 (1904). *See generally* *J. Creamer, supra* note 10, at 116 (fourth amendment protection conferred upon individual as most valued right of civilized men).

15. Fourth amendment requirements apply only to searches and seizures. However, the amendment does not prohibit all searches, nor does it forbid all searches conducted without a warrant. *See, e.g., United States v. Robinson*, 414 U.S. 218, 224 (1973) (warrantless searches permitted if made incident to lawful arrest); *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971) (certain items may be seized without warrant when in plain view of officer lawfully present at scene); *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950) ("mandate of the Fourth Amendment is that the people shall be secure against unreasonable searches").

16. *See supra* notes 7, 9 and accompanying text.

The gradual expansion of constitutional protections has not altered the interpretation of that primary purpose. Extending constitutional rights to United States citizens abroad merely recognizes that constitutional guarantees are a fundamental element of American citizenship.¹⁷ Courts interpreting the Constitution to protect aliens while in the United States¹⁸ reasoned that the alien, once lawfully admitted to the United States, acquired certain rights comparable to those of the citizen.¹⁹ Extending the fourth amendment to protect non-citizens in foreign territories from United States government action would, however, change the amendment's focus.²⁰ Such an extension would require that courts interpret the Bill of Rights as a body of law intended to restrict government action rather than to protect individual rights.²¹ Although the fourth

17. See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957). The landmark decision in *Reid* permitted the courts to exercise jurisdiction abroad on the basis of the accused's United States citizenship. In dismissing the holding of *In re Ross*, 140 U.S. 453, 464 (1891), Justice Black said: "The *Ross* case . . . cannot be understood except in its peculiar setting. . . . [Its] approach that the Constitution has no applicability abroad . . . is obviously erroneous if the United States Government . . . can and does try *citizens* for crimes committed abroad." *Reid*, 354 U.S. at 10, 12 (emphasis added).

18. See *supra* note 12 and accompanying text.

19. Several commentators have also discussed this principle. See, e.g., N. Alexander, *Rights of Aliens Under the Federal Constitution* 88 (1931); see also *id.* at 5; 3 G. Hackworth, *Digest of International Law* 660 (1940); A. Roth, *The Minimum Standard of International Law Applied to Aliens* 25 (1949); Borchard, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 *Am. J. Int'l L. spec. supp.* 233, art. 2, app. 6 (1929); Note, *Unalienable Rights?*, *supra* note 13, at 665. See generally *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353):

[T]he scope of an alien's rights depends . . . on the extent to which he has chosen to shoulder the burdens that citizens must bear. Not until an alien has assumed the complete range of obligations . . . [imposed] on the citizenry may he be . . . entitled to the full panoply of rights guaranteed by our Constitution.

Id. at 1236.

20. See *Verdugo-Urquidez*, 856 F.2d at 1231 (Wallace, J., dissenting); see also Damrosch, *supra* note 11, at 488 n.14 (the term "the people" as used in the fourth amendment may correspond to its use in the Preamble as well as in other constitutional provisions). See generally *United States v. Jacobsen*, 466 U.S. 109, 137 (1984) (Brennan, J., dissenting) (fourth amendment's fundamental principles cannot be discarded when guarantees are applied to modern developments).

21. See *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984). In *Cardenas*, the court addressed the ability of a non-resident alien to seek redress in American courts for wrongs allegedly inflicted on foreign soil by the Attorney General of the United States. See *id.* at 910-11. The court remarked on the apparent tendency of various circuits to recognize situations in which non-resident aliens can invoke constitutional restraints upon the United States government. See *id.* at 916. Nevertheless, the court could not articulate any working definition of those situations or any delineation of the group of non-resident aliens protected by the Constitution. See *id.*

The *Cardenas* court also recognized the inherent danger in painting constitutional protections with too broad a stroke, stating that "[g]iven the difficulties and far-reaching consequences of a doctrine that enhances an alien's standing to put on a constitutional mantle, we are reluctant to apply such a rationale to [this] case." *Id.* at 917; see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (declining to decide question whether constitutional protections applied to noncitizens abroad); *Jean v. Nel-*

amendment does act as a restraint on government action,²² the trend in recent years has been to focus on the amendment as a safeguard of individual rights.²³

Nevertheless, in *United States v. Verdugo-Urquidez*,²⁴ the Court of Appeals for the Ninth Circuit extended fourth amendment protection to a foreign national whose residence in Mexico was searched by United States officials.²⁵ The *Verdugo* court construed the fourth amendment as a restriction on government action,²⁶ failing to consider that the amendment was intended to protect individuals having some affiliation with the United States.²⁷

The Ninth Circuit held that the fourth amendment's constitutional prohibition against unreasonable search and seizure applied to the United State government's unwarranted search of the Mexicali residence of a reputed drug smuggler.²⁸ Evidence obtained in the search was sup-

son, 727 F.2d 957 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985). Appellees in *Jean* argued that fifth amendment analysis should center on the fact of government action without regard to the citizenship of the individual involved. *See id.* at 972. The court dismissed this argument, pointing out that if the Constitution unequivocally limited exercise of governmental power, then

all aliens in all circumstances would presumably be entitled to the full range of constitutional protections. This is clearly not the case. Instead, the courts have made it plain that the degree of constitutional protection accorded an alien in a particular situation is to be determined by such factors as the legal status of the alien and the context of the government action he seeks to challenge.

Id. at 972.

22. *See* Saltzburg, *supra* note 8, at 744 ("design of the fourth amendment . . . suggests the framers' concern about overly ambitious law enforcement").

23. *See* National Treasury Employees Union v. von Raab, 109 S. Ct. 1384, 1390 (1989) (drug testing program invasion of individual's reasonable expectation of privacy); *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412-13 (1989) (fourth amendment protects individual's expectation of privacy against physical intrusion necessary to obtain bodily fluids for drug testing); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1542 (6th Cir. 1988) (fourth amendment protection necessary to preserve individual privacy and dignity infringed by mandatory urinalysis testing); *see also* Simien, *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 Ark. L. Rev. 487, 567 (1988) ("beyond dispute that the fourth amendment protects individual rights").

24. 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

25. *See id.* at 1218, 1224.

26. *See id.* at 1218 (Constitution limits government's authority when it acts abroad).

27. *See id.* at 1235-36 (Wallace, J., dissenting) (extending fourth amendment to constrain actions of United States agents abroad ignores significance of residency within the United States to question of alien's constitutional rights).

28. *See id.* at 1215. Appellee Rene Martin Verdugo-Urquidez was apprehended by Mexican officials in Mexicali, Mexico and delivered to United States Marshals. *See id.* The DEA, believing that an inspection of Verdugo-Urquidez's Mexican residence would disclose evidence, searched his home with Mexican cooperation and uncovered drug tally sheets, which the government attempted to introduce at trial. *See id.* at 1216-17. Verdugo-Urquidez then moved to suppress this evidence on the grounds that it was obtained by methods which violated norms established by the fourth amendment. *See id.* at 1217.

pressed on these grounds.²⁹

The dissenting opinion by Judge Wallace followed the basic doctrine that the fourth amendment protects only aliens residing in the United States, arguing that the majority's broad interpretation of the Bill of Rights ignored the self-imposed limitations on the geographic reach of the Constitution repeatedly endorsed by the Supreme Court.³⁰ These limitations recognize the Constitution as a blanket of protections shielding the people who invested the government with its power as well as those who are physically present within the United States.³¹

II. ANALYSIS OF THE FOURTH AMENDMENT

A. Practical Application

The fourth amendment is indispensable to preserving the liberties of a democratic society;³² however, the amendment does not require extension to all situations demonstrating the potential for police misconduct.³³ The fear of overzealous law enforcement activity abroad does not support a finding that foreign searches of the dwellings of nonresident aliens are protected by the fourth amendment.³⁴ Thus, in circumstances where a foreign national is the target of an extraterritorial search or seizure, it is appropriate to concentrate on the locus of the alleged misconduct to determine if the fourth amendment applies.³⁵

29. *See id.* at 1230.

30. *See id.* at 1231.

31. *See id.* at 1234.

32. *See Rawlings v. Kentucky*, 448 U.S. 98, 120-21 (1980) (Marshall, J., dissenting).

33. *See United States v. Calandra*, 414 U.S. 338, 350 (1974); *see also Alderman v. United States*, 394 U.S. 165, 174 (1969) (emphasis on exclusionary rule's deterrent value does not mean that "anything which deters illegal searches is . . . commanded by the Fourth Amendment").

34. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1230-31 (9th Cir. 1988) (Wallace, J., dissenting) (arguing that majority's holding that Fourth Amendment applies to foreign search of foreign national's residence fails to recognize Supreme Court's restriction on power of the Constitution to act abroad), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

35. *See infra* notes 36-46 and accompanying text.

However, the "joint venture" cases suggest that the fourth amendment applies to raids by foreign officials on foreign soil *if United States federal agents so substantially participate in the raids as to convert them into joint ventures* between U.S. and foreign officials. The focus is on the involvement of the government actor, rather than upon the citizenship of the individual who is the subject of the search. *See, e.g., Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967); *Birdsell v. United States*, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965); *Shurman v. United States*, 219 F.2d 282 (5th Cir.), *cert. denied*, 349 U.S. 921 (1955); *Sloane v. United States*, 47 F.2d 889 (10th Cir. 1931). *But see Note, The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 Va. J. Int'l L. 515, 528 (1977) (*who* conducted the search is not dispositive in determining whether evidence should be excluded).

1. Locus of Conduct

The Supreme Court has explicitly stated 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.”³⁶ Consequently, in cases where constitutional protection of aliens has been found to exist,³⁷ courts have been careful to indicate that it is the alien’s presence within the courts’ jurisdiction that justifies such a finding.³⁸ Therefore, the site of the violation is a pivotal factor in determining whether an alien is entitled to fourth amendment protection.

Fourth amendment violations occur at the location of the wrongful search or seizure.³⁹ When an individual alleges a fourth amendment violation in foreign territory, the government action occurs on foreign soil.⁴⁰ Although the Constitution protects United States citizens regardless of

36. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *see also* Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 Va. J. Int’l L. 777, 785 (1980) (extending rights to aliens outside United States is contrary to long-established tradition holding the Constitution to be an agreement between a government and its citizens).

It has been suggested that none of the Bill of Rights protections should be extended to non-residents, at least not to those without some permanent affiliation with the United States. *See* Saltzburg, *supra* note 8, at 747 n.29; *see also* *In re Ross*, 140 U.S. 453, 464-65 (1891) (“[t]he framers of the Constitution . . . never could have supposed that all the guarantees in the administration of the law . . . at home were to be transferred [abroad]”). *But see* *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) (“The Constitution of the United States is a law for rulers and people . . . and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”); *Stonehill v. United States*, 405 F.2d 738, 751 (9th Cir. 1968) (Browning, J., dissenting) (“Because our government ‘is entirely a creature of the Constitution,’ it is bound to respect the limitations which the Constitution imposes upon its powers, whether it acts at home or abroad.”), *cert. denied*, 395 U.S. 960 (1969); *United States v. Tiede*, 86 F.R.D. 227, 244 (1979) (“It is a first principle of American life . . . that everything American public officials do is governed by . . . the United States Constitution.”).

37. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (fifth amendment due process protection applied equally to all aliens, whether their presence within territorial jurisdiction of court was unlawful, involuntary, or transitory); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (aliens within United States territory may invoke fifth and sixth amendment protections); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) (alien within territorial jurisdiction of the United States is entitled to fifth amendment protection in criminal proceedings).

38. *See* *supra* note 12 and accompanying text; *see also* N. Alexander, *supra* note 19, at 125 (“[A]fter an alien has been admitted lawfully [to the United States] ‘he becomes entitled . . . to . . . all the guaranties of life, liberty, and property secured by the constitution.’” (citation omitted)).

39. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 906 (1984) (fourth amendment violation fully accomplished at time of unlawful search or seizure); *United States v. Callandra*, 414 U.S. 338, 354 (1974) (same).

40. *See* *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1239 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

The introduction of illegally seized evidence does not constitute an independent fourth amendment violation. *See* *Leon*, 468 U.S. at 906; *see also* *United States v. Janis*, 428 U.S. 433, 458-59 n.35 (1976) (fourth amendment violation occurs before evidence is presented to the court).

their location, non-citizens cannot carry constitutional rights outside the United States.⁴¹ Because the ties of citizenship and presence within the jurisdiction do not exist, the Bill of Rights protections afforded the non-citizen in a foreign country are distinct from the protections granted within United States borders.⁴²

Extraterritorial application of the fourth amendment is distinguishable from the application of fifth and sixth amendment protections to non-citizens⁴³ because fifth and sixth amendment violations occur when the defendant is on trial.⁴⁴ Consequently, the locus of these violations is within the territorial jurisdiction of the United States.⁴⁵ Thus, the fact that a nonresident alien is entitled to fifth and sixth amendment rights during a criminal proceeding in the United States does not support extending fourth amendment protection to a search occurring abroad, where the United States is not sovereign.⁴⁶

41. See *Verdugo-Urquidez*, 856 F.2d at 1240 (Wallace, J., dissenting) (American flag does not follow nonresident aliens beyond United States territorial limits); Note, *Unalienable Rights?*, *supra* note 13, at 670 (despite their willingness to recognize some constitutional protections for aliens, courts show great reluctance to grant protections from government conduct when the action complained of occurs abroad); *cf.* *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (government directed to exert power of United States solely on behalf of citizens in jeopardy abroad). *But see In re Aircrash in Bali, Indonesia* on April 22, 1974, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982) (Australian residents have standing to raise constitutional objections to the limitations on liability imposed by the Warsaw Convention); *Porter v. United States*, 496 F.2d 583, 591 (Ct. Cl. 1974) (noting that fifth amendment's just compensation clause applied to takings of property outside the United States), *cert. denied*, 420 U.S. 1004 (1975); *Kukatash Mining Corp. v. SEC*, 309 F.2d 647, 650 (D.C. Cir. 1962) (nonresident alien may have standing if court has jurisdiction of subject res or if the case involves preferred immigration rights); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976) (nonresident alien has constitutional standing in certain circumstances). See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (Constitution powerless in foreign territory unless asserted to protect United States citizens).

42. See *Johnson v. Eisentrager*, 339 U.S. 763, 770-71 (1950) (nonresident aliens do not stand on same footing as American citizens where alleged unconstitutional action of United States officials in foreign countries is concerned); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1234-35 (9th Cir. 1988) (Wallace, J., dissenting) (aliens outside territorial limits of United States stand on different constitutional footing than aliens found either permanently or temporarily within this country's borders), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

43. See *supra* note 37 and accompanying text.

44. See, e.g., *Stephan*, *supra* note 36, at 787 ("[A] violation of due process takes place not when the government initially acts unacceptably against an alien outside the United States, but rather later when the wrongfully seized alien . . . is presented for trial within the United States."); see also *United States v. Yunis*, 859 F.2d 953, 970 (D.C. Cir. 1988) (Mivka, J., concurring) (fifth amendment focuses on trial and prosecution); *Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir.) (fifth amendment violated when infringing statement is received in evidence), *cert. denied*, 389 U.S. 986 (1967).

45. See *Verdugo-Urquidez*, 856 F.2d at 1239 (Wallace, J., dissenting).

46. See *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons . . . are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to . . . all the advantages of citizenship or . . . that all aliens must be placed in a single homogeneous legal classification."); *Verdugo-Urquidez*, 856 F.2d at 1237-38 (Wallace, J., dissenting). *But see Verdugo-Urquidez*, 856 F.2d at 1224 (absurd

2. Exclusionary Rule

The most common remedy for a fourth amendment violation, and the practical means by which an individual's rights are protected, is the exclusion at trial of evidence that was obtained in violation of the amendment.⁴⁷ The exclusionary rule is designed to deter disregard for constitutional prohibitions and to give substance to constitutional rights by barring the government from realizing directly the fruits of its own deliberate lawlessness.⁴⁸ Protection of the individual is still, however, the primary focus of the remedy;⁴⁹ restricting the government is a necessary corollary to effecting the rule's remedial purpose.⁵⁰ This focus is further

that alien has fifth amendment due process protection, is entitled to fair trial under sixth amendment and is to be denied fourth amendment protection against unreasonable search and seizure). See generally *Balzac v. People of Porto Rico*, 258 U.S. 298, 312 (1922) (Constitution in force wherever and whenever *sovereign* power of United States government is exerted).

47. See *United States v. Calandra*, 414 U.S. 338, 347 (1974) (exclusionary rule adopted to effectuate fourth amendment guarantees); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (rule encourages respect for constitutional safeguards against unreasonable invasions of personal liberty); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidence taken in violation of individual's constitutional rights should not be permitted at trial).

The rule is a court-created device designed to deter federal officers from violating the rights of individuals under the fourth amendment. Although the amendment, by its language, does not require the exclusion of evidence, see *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir.), cert. denied, 389 U.S. 986 (1967), the leading cases on the rule adopted the view that "'exclusion is the only practical way of enforcing the [fourth amendment] privilege,'" see Note, *supra* note 35, at 519 & n.22 (quoting *United States v. Pugliese*, 153 F.2d 497, 499 (2d Cir. 1945)).

48. See *Mapp v. Ohio*, 367 U.S. 643, 646 (1961). Today, many believe that it is the exclusionary rule, and not the fourth amendment, that prohibits illegal behavior by law enforcement officials. See MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. Crim. Law & Criminology 608, 618 (1985); see also J. Hirschel, *supra* note 3, at 9 (exclusionary rule regarded as primary means of preserving fourth amendment rights by sanctioning police behavior).

Justice Brennan views the exclusionary rule as "'part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy . . . [giving] to the individual no more than that which the Constitution guarantees him.'" *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting) (citations omitted).

49. See *United States v. Payner*, 447 U.S. 727, 731 (1980) (evidence excluded only if court finds individual's constitutional rights have been violated); J. Varon, *supra* note 7, at 839 (contraband not susceptible to exclusion unless obtained in violation of arrestee's constitutional right); MacDougall, *supra* note 48, at 657 (exclusionary rule as a remedial device should be used to correct the condition repugnant to the Constitution); Stephan, *supra* note 36, at 788 (right to have evidence suppressed does not exist unless the court determines that the United States government acted unacceptably overseas by violating the constitutional rights of the person upon whom it acted).

50. The government could be disciplined by other methods that do not have the preservation of individual rights as their primary purpose. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984) (possibility of declaratory relief against the INS offers an alternative means of challenging agency practices which violate fourth amendment rights); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 399 (1971) (Harlan, J., concurring) (federal courts have power to award money damages for violation of constitutionally protected interests). Another example of such a

demonstrated by standing rules, which permit the exclusionary rule to be invoked only by individuals whose fourth amendment rights have been violated.⁵¹

Nevertheless, in cases in which evidence is secured outside the United States allegedly in violation of fourth amendment principles, courts have tended to focus only upon the suppression issue—whether such evidence should be excluded from United States criminal proceedings—instead of addressing the basic question of whether a constitutional violation *had actually occurred*.⁵² When the government acts abroad on foreign nationals who lack substantial ties with the United States, constitutional constraints are doubtful.⁵³ Therefore, the purpose of the exclusionary rule—to protect the individual from constitutional violations⁵⁴—would not be served if applied in situations where constitutional protection is, at

remedy is found in 42 U.S.C. § 1983 (1982), which provides that every person who, under color of state law, deprives any citizen or other person within United States jurisdiction of rights secured by the Constitution or other law shall be liable to the injured party in an action at law, in equity, or any proper proceeding of redress.

51. See *Alderman v. United States*, 394 U.S. 165, 171-72 (1969) (“suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search . . . not by those who are [merely] aggrieved . . . by the introduction of damaging evidence”). The *Alderman* Court further noted that “federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized.” *Id.* at 172 n.5 (quoting *Goldstein v. United States*, 316 U.S. 114, 121 (1942)); see also *United States v. Payner*, 447 U.S. 727, 731 (1980) (individual has fourth amendment standing to invoke exclusionary rule only when challenged conduct invades “his legitimate expectation of privacy [and not] that of a third party”); *Rakas v. Illinois*, 439 U.S. 128, 133-40 (1978) (no authority to exclude evidence under fourth amendment absent finding that individual’s own constitutional rights were violated by unlawful government activity); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (standing to invoke exclusionary rule restricted “to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search”). The *Payner* Court also remarked that “Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices.” *Payner*, 447 U.S. at 735. See generally *Simien*, *supra* note 23, at 574 (to satisfy standing requirements, fourth amendment claimant must demonstrate actual harm directly related to unlawful search and seizure).

52. See, e.g., *United States v. Mundt*, 508 F.2d 904, 906 (10th Cir. 1974) (only question considered by court was whether participation by American officials was so extensive as to require that statements be excluded), *cert. denied*, 421 U.S. 949 (1975); see also *Saltzburg*, *supra* note 8, at 762-64.

53. See *Stephan*, *supra* note 36, at 780.

54. See *United States v. Calandra*, 414 U.S. 338, 347 (1974) (rule adopted to effectuate individual’s fourth amendment right to be free from unreasonable searches and seizures); *Alderman v. United States*, 394 U.S. 165, 174-76 (1969) (exclusionary rule may be invoked only by those whose fourth amendment rights are infringed). *But see* *United States v. Janis*, 428 U.S. 433, 446 (1976) (primary, though not sole purpose of the rule, is to deter unlawful police conduct). See generally *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1246 (9th Cir. 1988) (Wallace, J., dissenting) (no authority to justify exclusion of evidence absent a constitutional violation), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

most, dubious.⁵⁵

B. Purported "Extraterritorial" Application

The fourth amendment is generally construed narrowly to protect only those who can claim ties of residency or citizenship to the United States.⁵⁶ There are situations, however, in which it appears that the amendment is broadly applied. For example, *United States v. Toscanino*⁵⁷ held that a nonresident foreign national could invoke the fourth amendment to protest the seizure of evidence by United States agents abroad when egregious methods that "shock the conscience" were employed in bringing the defendant to trial.⁵⁸ Although at first blush it appears that *Toscanino* allows nonresident aliens to invoke fourth amendment protection for extraterritorial activities, the *Toscanino* holding, in practice, is very limited.⁵⁹ The court itself stated that it was the government's use of outrageous methods in bringing *Toscanino* within the court's jurisdiction that demanded a remedy.⁶⁰ Therefore, courts take extreme care not to expand the doctrine any further and very few cases fit the *Toscanino* exception.⁶¹ As one court noted, "[w]hile *Tos-*

55. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful . . . conduct which has deprived the defendant of some [constitutional] right.").

It is indispensable to the alien's suppression argument that he be entitled to fourth amendment protection because the "[e]xclusion of evidence cannot be used against every exercise of discretion. . . . [It is] [t]he nature of the violation [which] determines . . . the remedy." *MacDougall*, *supra* note 48, at 657; see also *United States v. Leon*, 468 U.S. 897, 919 (1984) (exclusionary rule "should not be applied, to deter objectively reasonable law enforcement activity"); *Alderman v. United States*, 394 U.S. 165, 175 (1969) (rule does not "provide that illegally seized evidence is inadmissible against anyone for any purpose"); *United States v. Hensel*, 699 F.2d 18, 29 (1st Cir.) (exclusionary rule "not fashioned to vindicate a broad, general right to be free of agency action not 'authorized' by law, but rather to protect certain specific, constitutionally protected rights of individuals"), *cert. denied*, 461 U.S. 958 (1983).

56. See *supra* notes 2-4 and accompanying text; see also *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir.) (aliens in this country are protected by the fourth amendment), *cert. denied*, 404 U.S. 864 (1971).

57. 500 F.2d 267 (2d Cir. 1974).

58. Defendant was illegally apprehended abroad, abducted by government agents and tortured for several weeks before being transported to the United States. See *id.* at 269-71. The court, reviewing the heinous methods used to bring *Toscanino* to trial, see *id.* at 269-70, found that the court's exercise of power over his person represented the fruits of the government's exploitation of its deliberate misconduct. See *id.* at 275. "Having unlawfully seized the defendant in violation of the Fourth Amendment . . . the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante.*" *Id.*

59. See, e.g., *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1244 (9th Cir. 1988) (Wallace, J., dissenting) ("*Toscanino* presented a unique fact situation."), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

60. See *Toscanino*, 500 F.2d at 275-76.

61. Reluctance to extend *Toscanino* beyond its carefully drawn boundaries was demonstrated by the Second Circuit's subsequent decision in *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). The *Lujan* court held that absent the allegation of egregious government conduct, forcible abduction of a

canino definitely signals a trend toward liberalizing the general rule [that nonresident aliens do not have standing to challenge unconstitutional action abroad], the court's caveat makes clear that it is *simply another exception* to that [general rule]."⁶²

Other cases, involving Coast Guard actions and immigration and deportation proceedings, apply various regulations and constitutional provisions to facilitate law enforcement activities in these special areas⁶³ and represent exceptions to the restrictive view of the fourth amendment. For example, although the fourth amendment requires "probable cause"⁶⁴ before a search can be effected, "reasonable suspicion" is enough to permit Coast Guard searches on the high seas.⁶⁵ In addition,

person from a foreign country to bring him to the United States would not violate due process. *See id.* at 66; *see also* *United States v. Lira*, 515 F.2d 68, 70 (2d Cir.) (*Toscanino* does not apply if alleged mistreatment is not at hands of United States agents), *cert. denied*, 423 U.S. 847 (1975).

62. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976) (emphasis added).

63. For example, 14 U.S.C. § 89(a) (1982) was intended to give the Coast Guard the broadest authority available under the law. *See United States v. Warren*, 578 F.2d 1058, 1068 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980); *see also United States v. Cadena*, 585 F.2d 1252, 1257-59 (5th Cir. 1978) (statute not limited on its face to domestic vessels; jurisdiction over the offense conferred authority under the statute to search and seize foreign vessels). The text of § 89(a) reads in pertinent part:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes . . . officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel . . .

14 U.S.C. § 89(a) (1982).

In *United States v. Cortes*, 588 F.2d 106, (5th Cir. 1979), the court discussed the applicability of the fourth amendment to sea searches conducted beyond United States territorial jurisdiction. The *Cortes* court analyzed the legality of a Coast Guard search on the high seas in light of fourth amendment principles, concluding that, because of the vessel's inherent mobility and the possibility that it would weigh anchor and flee, the boarding was not unreasonable for fourth amendment purposes. *See id.* at 110-11; *see also United States v. Demanett*, 629 F.2d 862, 866 (3d Cir. 1980) (applying fourth amendment to both Americans and Colombians in sea search whether vessel was in United States territorial waters or on high seas), *cert. denied*, 450 U.S. 910 (1981); *United States v. Cadena*, 585 F.2d 1252, 1262 (5th Cir. 1978) (extending fourth amendment applicability beyond domestic vessels and United States citizens). *But see United States v. Williams*, 617 F.2d 1063, 1091 (5th Cir. 1980) (noting absence of Supreme Court precedent that fourth amendment restricts government action as to foreign vessel on high seas); Saltzburg, *supra* note 8, at 746 (many sea-search decisions do not consider fourth and fifth amendment limitations). *See generally United States v. Freeman*, 579 F.2d 942, 947 (5th Cir. 1978) (boardings pursuant to provisions of 19 U.S.C. § 1581(a) are "statutorily authorized and constitutionally permissible").

64. *See supra* note 1.

65. *See United States v. Green*, 671 F.2d 46, 53 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *United States v. Williams*, 617 F.2d 1063, 1087 (5th Cir. 1980); *United States v. Warren*, 578 F.2d 1058, 1064-65 (5th Cir. 1978) (en banc), *cert. denied*, 446 U.S. 956 (1980). It is the circumstances and exigencies of the maritime setting and its extensive federal regulation that affords individuals on vessels a lesser expectation of privacy.

in order to combat the increasing drug problem, the reasonableness of searches beyond the contiguous zone⁶⁶ may now be judged under a more lenient standard than other searches.⁶⁷

Searches on the high seas call sovereignty issues into question.⁶⁸ The Constitution is in force "wherever and whenever the *sovereign* power of [the United States] government is exerted."⁶⁹ Thus, according to established principles of sovereignty,⁷⁰ the fourth amendment may restrict high seas searches of vessels, including those manned by foreign nationals.⁷¹ The foreign sovereign, however, has exclusive jurisdiction over the residence of a foreign national on foreign soil.⁷² Consequently, cases that extend constitutional protection under maritime regulations cannot be used to support extension of the fourth amendment to searches within another sovereign's territorial jurisdiction.⁷³

Immigration and deportation cases, while also standing on special footing,⁷⁴ recognize the inherent distinction between resident and nonresident aliens and the protections due each group.⁷⁵ Courts have acknowl-

66. The contiguous zone is the area of water stretching three to twelve miles from the coast. See Saltzburg, *supra* note 8, at 748.

67. See *United States v. Hensel*, 699 F.2d 18, 29 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983); see also Restatement (Third) of Foreign Relations Law § 522(2)(a) & comment c (1986) ("Ships other than those specified in Subsection (1) are not subject to interference on the high seas, but a . . . law enforcement ship of any state may board such a ship . . . if there is reason to suspect that the ship a) is engaged in piracy, slave trade . . .").

68. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1242 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

69. *Balzac v. People of Porto Rico*, 258 U.S. 298, 312 (1922) (emphasis added).

70. See *Verdugo-Urquidez*, 856 F.2d at 1242 (Wallace, J., dissenting) ("Each nation is accorded a limited right of sovereignty under maritime law over any vessel whose passage may affect . . . national interests.").

71. See *id.* at 1242 (Wallace, J., dissenting); see also *United States v. Peterson*, 812 F.2d 486, 489, 494 (9th Cir. 1987) (discussing extraterritorial applicability of fourth amendment in context of search upon the high seas). *But see United States v. Williams*, 617 F.2d 1063, 1091-92 (5th Cir. 1980) (en banc) (Roney, J., concurring) (noting fourth amendment does little to control activities of law enforcement officers acting on the seas).

72. See *Verdugo-Urquidez*, 856 F.2d at 1242 (Wallace, J., dissenting).

73. See *Williams*, 617 F.2d at 1084 (substantial differences between vessels and structures on land preclude assumptions that cases defining what is "reasonable on land automatically control . . . what is reasonable on the high seas"); *cf. United States v. Freeman*, 579 F.2d 942, 946 (5th Cir. 1978) (recognizes "substantial distinction between a landlocked vehicle and a nautical vessel for Fourth Amendment purposes").

74. See *Landon v. Plasencia*, 459 U.S. 21 (1982). *Landon* stands for the principle that an alien seeking initial admission to the United States can claim no constitutional rights regarding his application, since the power to admit or exclude belongs exclusively to the sovereign. See *id.* at 32; see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (overseas alien has no constitutional right to negotiate the terms of his entry into this country).

75. See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (where aliens are within United States, "the Court has recognized additional rights and privileges not extended to those . . . who are merely 'on the threshold of initial entry'") (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)); see also *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953) (fifth amendment protection does not extend to excludable aliens); *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)

edged that, although resident aliens are entitled to due process protection, the protection of aliens who have not been admitted into this country is quite different.⁷⁶ Certain courts, anticipating indiscriminate constitutional expansion, have warned that “[a] great extension of the constitutional rights of aliens might defeat [congressional policy] and . . . imperil national security.”⁷⁷

C. *Extraterritorial Application as a Distortion of Constitutional Principles*

The scope of an alien's constitutional rights is inextricably linked to the extent to which he has chosen to assume obligations within the United States.⁷⁸ “Because the Government's obligation of protection [of the individual] is correlative with the duty of loyal support inherent in the [individual's] allegiance,”⁷⁹ an alien cannot claim that he is entitled to the spectrum of constitutional rights available to citizens or resident

(“The Bill of Rights is a futile authority for [an] alien seeking admission . . . to these shores.”).

76. In *Leng May Ma v. Barber*, 357 U.S. 185 (1958), petitioner, a native of China, arrived in the United States claiming citizenship on the ground that her father was a United States citizen. *See id.* at 186. Failing to establish this claim, she was ordered excluded and applied for a stay of deportation under section 243(h) of the Immigration and Nationality Act. The Act currently reads: “The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country” 8 U.S.C. § 1253(h) (1982).

The Court rejected petitioner's contention that because she was “within the United States” by virtue of her physical presence as a parolee, she was entitled to section 243(h) protection. *See Leng May*, 357 U.S. at 188. The *Leng May* Court emphasized that “our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, . . . and those who are within the United States after an entry, irrespective of its legality.” *Id.* at 187.

In *Bridges v. Wixon*, 326 U.S. 135 (1945), petitioner was an Australian native who entered the United States in 1920. *See id.* at 137. In 1938, deportation proceedings were instituted against him on the ground that he was affiliated with the Communist Party. *See id.* His petition for a writ of habeas corpus was denied, *see id.* at 140, and the Supreme Court granted certiorari. *See id.* Finding that petitioner's detention was unlawful on its face, *see id.* at 156, the Court found it unnecessary to adjudicate the larger constitutional questions advanced in the detention challenge. *See id.* at 156-57. Nonetheless, Justice Murphy, in his concurrence, remarked that “[t]he power to exclude and deport aliens is one springing out of the inherent sovereignty of the United States. . . . Since an alien obviously brings with him no constitutional rights, Congress may exclude him . . . for whatever reason it sees fit.” *Id.* at 161 (citations omitted). *See generally de Vattel*, *The Law of Nations* (1758) (“Every nation has the right to refuse to admit a foreigner into the country. . . .”) (quoted in *Jean v. Nelson*, 727 F.2d 957, 963-64 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985)).

77. N. Alexander, *supra* note 19, at 37.

78. *See United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission [to the United States] and begins to develop the ties that [accompany residency], his constitutional status changes accordingly.”); *Radich v. Hutchins*, 95 U.S. 210, 211 (1877) (“As a foreigner domiciled in the country, . . . [the alien] owed allegiance to the government of the country so long as he resided within its limits”).

79. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

aliens without assuming even a temporary duty of allegiance to the United States.⁸⁰ Courts have taken care to ensure that the fundamentals of this doctrine are preserved by requiring the alien's presence within the jurisdiction before granting constitutional protection.⁸¹

Extending the fourth amendment to non-resident aliens, however, distorts this principle. This is especially true in light of prior judicial interpretations of the Constitution holding that "some measure of allegiance to the United States, as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking [the] Bill of Rights as a check on the extraterritorial actions of United States officials."⁸² Thus, an alien who has no stronger ties to the United States than the fact that he is being tried here⁸³ should not be allowed to claim fourth amendment protection with respect to actions that occurred outside the United States.⁸⁴

III. VIABLE ALTERNATIVES TO EXTRATERRITORIAL APPLICATION OF THE FOURTH AMENDMENT

Legislation and certain interpretations of constitutional protections enunciated in the last decade provide viable means of coping with undisciplined law enforcement activities as an alternative to sweeping fourth amendment expansion.⁸⁵ For example, overzealous activities on the part of drug agents led to congressional enactment of a statute barring American agents from being present at the scene of searches and seizures in foreign countries.⁸⁶

The "shock the conscience" exception developed by the Second Circuit in *Toscanino*⁸⁷ is also available to redress situations where outrageous, reprehensible conduct is employed in apprehending citizens, resident aliens and foreign nationals alike.⁸⁸ This standard helps to eradicate the

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

81. By voluntarily establishing residence within the United States, aliens assume a duty of temporary allegiance to the United States during the period of their residency. See *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872). As a consequence of this allegiance, aliens are entitled to many of the same rights as citizens. See *Eisenstrager*, 339 U.S. at 769-71.

82. *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988) (Wallace, J., dissenting), cert. granted, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

83. See *id.* at 1237 (Wallace, J., dissenting) (being held in custody in United States does not establish residency necessary for fourth amendment guarantees); cf. *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (detention of alien in custody pending admissibility determination in immigration proceeding does not legally constitute entry and has no effect on status under law), *aff'd on other grounds*, 472 U.S. 846 (1985).

84. See *supra* note 41 and accompanying text.

85. See *United States v. Cotten*, 471 F.2d 744, 748 n.11 (9th Cir.), cert. denied, 411 U.S. 936 (1973).

86. See International Narcotics Control Act, 22 U.S.C. § 2291(c)(1) (1982).

87. *United States v. Toscanino*, 500 F.2d 267, 269-71 (2d Cir. 1974).

88. In addition, in *United States v. Russell*, 411 U.S. 423 (1973), the Court remarked that, while certain law enforcement practices may not violate the Constitution, they may

fear that the United States government will engage in conduct unfettered by the Bill of Rights.

The principles of international law are also available to constrain egregious extraterritorial actions by United States government agents.⁸⁹ International law does not demand that aliens be accorded treatment equal to that of nationals, only that the alien be treated in conformity with the basic standards of human decency.⁹⁰ In an extraterritorial search of the residence of a foreign subject conducted by United States officials, it is the responsibility of the foreign government to ensure that the rights of the individual are protected.⁹¹

Furthermore, two sovereign nations may use their treaty making power to provide protections identical to those under the fourth amendment to non-resident aliens in their respective countries. For example, some treaties in effect between the United States and foreign governments contain provisions that closely parallel constitutional prohibitions against unreasonable searches and seizures.⁹² This treaty making power

be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32.

89. *See* A. Roth, *supra* note 19, at 95 ("The propriety of governmental acts should be put to the test of international standards. The treatment of an alien, in order to constitute an international delinquency should amount to . . . wilful neglect of duty . . . so far short of international standards that every reasonable . . . man would readily recognize its insufficiency.") (quoting *U.S.A. (L.F. Neer) v. United Mexican States*, Op. of Comm. 71 (1927) (A.D., 1925-26, case No. 154)).

90. *See id.* at 96 (test of propriety of authorities' actions regarding aliens is "whether aliens are treated in accordance with the ordinary standards of civilization"). Therefore, a different treatment of nationals and aliens, without more, does not give rise to a violation of international law. *See id.* at 83.

91. *See id.* at 87 (in absence of central authority to enforce standard of duty upon State of residence, international law grants home State the right to demand compensation for injuries suffered by its subjects in foreign territory); *see also* *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1248 (9th Cir. 1988) (Wallace, J., dissenting) (safeguarding interests of foreign citizens is a responsibility that must fall on their own governments), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353).

This same principle was espoused by the Private Property Committee appointed by the Executive Council of the International Law Association in 1925. The Committee, referring to the limits placed upon the rights exerted by one State upon the subjects of another, stated in part that "[t]he latter remain under the protection of their own sovereign who is entitled to demand that a certain standard of conduct shall be observed towards them by a State in whose territory they find themselves." A. Roth, *supra* note 19, at 109 (quoting International Law Association, Vienna Conference, Report of the Protection of Private Property Committee 9 (1926)); *see also* *United States v. Williams*, 617 F.2d 1063, 1089-90 (5th Cir. 1980) (Panama's consent forecloses defendant's argument of violation of international law); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 68 (2d Cir. 1975) (abduction from foreign country violates international law when offended state objects to conduct), *cert. denied*, 421 U.S. 1001 (1975).

92. *See, e.g.,* Damrosch, *supra* note 11, at 504.

For example, the treaty between the United States and Pakistan contains a clause on security and protection of persons and property similar to the Fourth Amendment. *See* Treaty of Friendship and Commerce Between the United States of America and Pakistan, Nov. 12, 1959, art. VI, 12 U.S.T. 110, 113, T.I.A.S. No. 4683 at 4.

The United States-Italian Treaty of Friendship, Commerce and Navigation contains a

has provided a means of bestowing additional rights upon aliens.⁹³

In addition, Congress has the power to enact a statute or agency regulation governing the actions of United States officials which could encompass existing fourth amendment probable cause standards, act as a limitation on extraterritorial police activity, and outline a standard of behavior against which all questionable activity could be judged.⁹⁴ Such an enactment would discourage arbitrary searches and seizures conducted on foreign soil and bypass the constitutional issue altogether while simultaneously providing protection for those who may be subject to such searches.⁹⁵

Directing the conduct of United States agents by statute or regulation

provision granting protection against unreasonable search and seizure to the citizens of each contracting nation by stating that

dwellings . . . and all premises . . . located in the territories of the other High Contracting Party, shall not be subject to unlawful entry or molestation. There shall not be made . . . any search of . . . such dwellings . . . except under conditions and in conformity with procedures no less favorable than the conditions and procedures prescribed for nationals . . . under the applicable laws and regulations within the territories thereof.

Treaty of Friendship, Commerce and Navigation, United States-Italy, Feb. 2, 1948, art. VI, 63 Stat. 2255, 2264, 79 U.N.T.S. 171, 180 (1948).

In applying the terms of the treaty, the court in *United States v. Romano*, 706 F.2d 370 (2d Cir. 1983) found that appellants were entitled to all the rights granted to American citizens in similar circumstances. That is, within a search and seizure context, fourth amendment provisions apply. *See id.* at 376-77.

93. *See* N. Alexander, *supra* note 19, at 23-24. Congressional authority, expressly limited by the enumerated powers doctrine, does not include extraterritorial jurisdiction over individual aliens. The treaty making power, however, is not subject to such restrictions. Therefore, the federal government may use this power to grant aliens rights relating to a subject over which Congress is given no control by the Constitution. *See id.* at 24. The Supreme Court in *Geofroy v. Riggs*, 133 U.S. 258 (1890), made the following pronouncement:

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument [I]t is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Id. at 267. *But see* *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 155 (D.D.C. 1976) (no agreement with foreign nation can confer power on any branch of government which is free from constitutional restraints).

Other constitutional provisions which permit the exercise of extraterritorial powers do not grant Congress the power to regulate the activity of individuals on foreign soil. The commerce clause gives Congress the power to regulate commerce with foreign nations. U.S. Const. art. I, § 8, cl. 3. The necessary and proper clause presupposes the existence of an underlying right by giving Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art I, § 8, cl. 18.

94. *See* *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (aliens outside United States borders are accorded only that degree of protection provided by executive or administrative decisions). Thus, any violation would be statutory, and constitutional adjudication would be avoided.

95. *Cf.* *Richardson, Why the Fourth Amendment Doesn't Stand Still*, 26 *Judges' J.* 48, 48 (1987) (to preserve fourth amendment interests, balance must be struck, giving privacy a broad, flexible scope while simultaneously permitting intrusions by certain individuals *under carefully outlined circumstances*).

would also eliminate the need for compliance with the warrant requirement mandated by the fourth amendment. Because a warrant issued by a United States judge carries no weight on foreign soil,⁹⁶ such a requirement would be an unnecessary hindrance to effective, expedient law enforcement.⁹⁷ Furthermore, requiring United States officials to obtain a warrant before conducting a search in a country whose warrant procedure does not resemble the procedure followed in the United States would be nonsensical⁹⁸ because United States agents often conduct searches abroad *only* at the will of foreign officials, who decide not only the search's scope and reasonableness but determine if it will occur at all.⁹⁹

Maintaining that the fourth amendment, and therefore its exclusionary rule, does not apply to the product of searches of foreign nationals on foreign soil does not suggest that a federal court can never exclude from a criminal proceeding evidence obtained against an alien by United States officers. *Toscanino* recognized that aliens have the fifth amendment right to challenge the admission of evidence procured through the use of egregious means.¹⁰⁰ A rule intended to exclude evidence obtained in viola-

96. See, e.g., *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1229-30 (9th Cir. 1988) ("[A] warrant issued by an American magistrate would be a dead letter in Mexico. . . . [I]t would be an affront to a foreign country's sovereignty if the DEA presented an American warrant. . . ."), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353); see also Saltzburg, *supra* note 8, at 762 (because no American magistrate can issue search warrant having legal effect in Peru, absence of warrant not crucial).

97. "[T]he cost of judicially imposed constraints on the foreign behavior of [the United States] government is unacceptably high." Stephan, *supra* note 36, at 784. When the United States government acts overseas to protect United States interests, as in the apprehension of a terrorist or a drug smuggler, judicial barriers would impede, if not inhibit, these efforts. See *id.*

98. See Saltzburg, *supra* note 8, at 767.

99. See *Verdugo-Urquidez*, 856 F.2d at 1249 (Wallace, J., dissenting); see also Stephan, *supra* note 36, at 795 (United States government abroad is subordinate sovereign subject to authority of host country). See generally *United States v. Jordan*, 1 M.J. 334, 339 (1976) (Cook, J., dissenting) ("a 'foreign government, like a private person, is . . . not subject' to the prohibitions of the United States Constitution" (citation omitted)).

100. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1245 (9th Cir. 1988) (Wallace, J., dissenting), *cert. granted*, 57 U.S.L.W. 3687 (U.S. Apr. 18, 1989) (No. 88-1353); *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974). The majority in *Verdugo* had no occasion to query whether such a due process "shock the conscience" test should be adopted in the case before it, inasmuch as the conduct of the agents searching appellee's residence was "simply not comparable to the official acts of torture, brutality, or other outrageous invasions of a defendant's bodily security that were present in those cases where police conduct was found to 'shock the conscience.'" *Id.*; see also *United States v. Mount*, 757 F.2d 1315, 1323 n.6 (D.C. Cir. 1985) (Bork, J., concurring) (declining to exclude evidence seized abroad on "shock the conscience" grounds).

Toscanino, on its facts, did not require a fourth amendment determination, although one was rendered. See *Verdugo-Urquidez*, 856 F.2d at 1243-44 (Wallace, J., dissenting) (*Toscanino* majority concluded that fourth amendment protects nonresident aliens, although case could have been decided on due process grounds); see also *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 68 (2d Cir.) (Anderson, J., concurring) (same), *cert. denied*, 421 U.S. 1001 (1975). See generally *Jean v. Nelson*, 727 F.2d 957, 987 (11th Cir. 1984) (Kravitch, C.J., concurring in part, dissenting in part) ("It is a basic proposition

tion of principles of international law and basic human rights should not rest solely upon whether an individual is first entitled to the full panoply of rights available under the fourth amendment.¹⁰¹ "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'"¹⁰²

CONCLUSION

The fourth amendment, designed to safeguard an individual's right to be secure in his person and property, cannot be invoked to shelter foreign citizens on foreign soil from questionable United States government conduct. An alien's ability to claim benefits under the fourth amendment in a search conducted in a foreign nation should depend, not on the participation of United States law enforcement agents, but rather upon both the citizenship of the individual asserting a violation of constitutional rights and the place where the conduct occurred. The fourth amendment, as part of the constitutional compact between a government and its people, is not applicable to other peoples of the world, who neither gave it authority nor consented to its rule. Other, more appropriate means may be employed to achieve the same end—preserving the basic human right to be free from unreasonable and arbitrary official conduct.

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that 'prior to reaching any constitutional questions, federal courts must consider non-constitutional grounds for decision.'"), *aff'd on other grounds*, 472 U.S. 846 (1985).

101. See Saltzburg, *supra* note 8, at 775 ("Because those norms which are part of international law are incorporated in domestic law, courts may want to exclude evidence obtained abroad . . . in violation of such norms in order to demonstrate that no civilized nation should countenance violations of fundamental human rights." (footnote omitted)).

102. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

