

The Demarcation Line of Liberty
The Decimation of the Fourth Amendment at the Border



The Nogales Border Wall – International Street

POL. 699 -- Independent Study

For:

Professor James Todd

By:

George A. Thomson

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Overview:

The right of the people to be secure in their persons, houses, 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. (The Fourth Amendment to the United States Constitution, ratified December, 1791.)

Recent United States Supreme Court decisions that permit searches, random stops and checkpoints at the borders of the United States have eroded the Fourth Amendment almost to the vanishing point. The fear of unrestricted migration and drugs entering the United States have led the Court to uphold legislative initiatives that have nearly gutted the Fourth Amendment at the border. With nothing to check fanatical enforcement, officials at the border are given broad latitude to search. Often at border patrol checkpoints searches are based solely on a person's appearance and the type of car he/she drives.

Revitalization of and respect for Fourth Amendment rights at the border region will require legislative and judicial remedies to safeguard the people's long-standing claim to protection from unreasonable governmental intrusion. The current application of the Fourth Amendment, particularly from checkpoints and roving patrols in the border region, is unreasonable in light of our historical experience with governmental intrusions and the documented ineffectiveness of such operations.

The government rationalizes its diminishment of Fourth Amendment protections at the border by citing national interest. In a free society, respect for fundamental rights should take precedence over enforcement of border restrictions. Our history as a people makes unreasonable the random, mass stops taking place at the border in the present day.

Culture and history intermingle into a distinct border society that blurs the political line. This comes into direct conflict as Congress attempts to control the market for drugs and labor through legislation which the Court upholds and the reality of the intermingling of border culture. Congress is carrying out what is commonly referred to as a "war," against drugs and migration. This war is undeclared and not against any state or political faction, none the less a war in cost of dollars and liberty.

This paper argues that the cost of this war is too costly to our liberties. Ironically, the war on drugs itself has, by enriching many Mexicans who can earn American dollars from their side of the border, prevented even larger numbers of illegal immigrants. In this conflict, the Constitution -- particularly the Fourth Amendment --- becomes another casualty of war.

The first section of this paper looks at “reasonableness” and police power in the light of the fourth Amendment. At what point does police power become “unreasonable.” The Supreme Court’s interpretation of border search questions is presented in the second section. The second section reviews both the application of the Fourth Amendment at the border and whether government officials are required to respect the Bill of Rights when conducting operations in other sovereign nations and acting against another nation’s citizens. The third section reviews the English and American historical foundations for the protections from unreasonable searches and seizures, including the history and development of the Fourth Amendment. The fourth section reviews the case of *United States v. Verdugo-Urquidez* (110 S.Ct 1056 (1990)) as an example of the question. Throughout our history it has been debated whether the Framers intended our constitutional government to be a compact to uphold basic rights, or a contract. If the constitution is a contract, it applies to those who are parties to the contract, the citizens. If it is a compact, it is an agreement to uphold those most fundamental and natural rights of all people, regardless of citizenship. This section will investigate that question. Is the fourth Amendment part of a constitutional social contract or a natural rights compact?

Part five concludes the paper with suggestions for legislative and judicial remedies which would recognize the degree to which the unrealistic and intrusive war against drug-using Americans, and protectionist American labor policies, have diminished the Fourth Amendment --and thus the quality of life for millions of people living along the U.S. – Mexican border.

“*Se calientó el terreno.*” (“The land is heating-up.”) Mexican official commenting of the current situation at the U.S. Mexican border. (AZ Daily Star, 6/14/98)

“... While the machinery of law enforcement and indeed the nature of crime itself have changed dramatically since the Fourth Amendment became part of the Nation’s fundamental law in 1791, what the Framers understood then remains true today – that the task of combating crime and convicting the guilty will in every era seem of such critical and pressing concern that we may be lured by the temptation of expediency into forsaking our commitment to protecting individual liberty and privacy. It was for that very reason that the Framers of the Bill of Rights insisted that law enforcement efforts be permanently and unambiguously restricted in order to preserve individual freedom.” Justice Brennan dissenting in *U.S. v. Leon* (468 U.S. 897, 1984).

Introduction - The Border Region

Most of the 150-year history of the 2,000-mile border between the United States and Mexico has been peaceful and free of social and political conflict. Unlike many borders in the world, the absence of military conflict and militarization has been the norm. Now, a new war threatens this history of peaceful cultural mingling and coexistence. In the "fight" of the “War on Drugs” the Fourth Amendment has become a casualty. The paternalistic tactics used in the so-called “war,” also employed in the control of migration, are futile attempts to control the right to free market choices of millions of people.

The millions of people living along the border with Mexico represent a social and cultural fluidity of the border environment in which a distinct cultural melding has taken place. This cultural melding was the intent of the two governments that created sister-cities along the border. Cities like Nogales, Sonora, Mexico and Nogales, Arizona, USA line the entire (land and river) border. Culture, people and goods traditionally have moved relatively freely over the dividing line. The creation by the governments of the United States and Mexico of fifteen or so “sister-cities” along the border had the explicit intent to create a population that would share the best of both cultures. The expectation was for a fairly free movement of people, culture, language, goods and capital. (Montoya 3).

What is the border? Normally the border is defined by the numerous sister-cities all along the border which share the border line. Those cities contain seven million people. (Borders and Identity <http://educate.si.edu/migrations/bord/cultid.html>). Some call the area a "zone of influence" perhaps sixty

miles wide on either side. With that claim the population base is doubled. While others would take border region of influence farther and include Tucson, Arizona. (Weisman 23)

Regardless of the definition of where the border begins and ends, the peaceful coexistence which has historically defined the border region has been changing; the twelve-foot wall built along many of the cities along the border with Mexico was one recent attempt to impose control over movement on the border. Jack McGarvey, a writer for the *Nogales International* (a border city's newspaper), described the border wall ...

The Nogales Wall looks like indignant eyebrows on the Mexican border hills that rise above downtown Nogales, Arizona. I loathe the Nogales Wall. To me, it is a symbol that differs little from the Berlin Wall. That's because it demeans the good qualities of people who live on either side, just as the Berlin Wall did. (Arizona Daily Star 1/2/99)

The border wall now stretches for miles through most of the border cities.

The case of 23-year-old Victor Cornejo is an example of the border's effect on the people living in the area. Cornejo is one of 1,300 Mexican students who cross the border daily to attend the University of Texas at El Paso. Cornejo's experience is typical for those living on either side of the border.

His drive along the Rio Grande and over the Bridge of the Americas into Texas - normally a 10-minute trip - can take an hour or more, depending on traffic and the U.S. Border Patrol agents. Sometimes Cornejo is waved through the checkpoint after a cursory glance at his documents. On other days, agents with drug-sniffing dogs search his car for contraband. Cornejo has simply learned to allow plenty of time at the border, so as not to be late for class. (AZ Star 12/27/98)

On signs at the checkpoints, the Border Patrol each week announces its score. The sign proudly declares the total number of illegals captured and dollar value of drugs seized. "Fighting the war on drugs and illegal immigration," announces the prominently posted sign. The passengers in every vehicle must come to a stop for a visual once-over by the armed border police. As the passengers of those cars wait to be waved through, they too can keep score by reading the sign. Some see that score change daily on their way to work or home.

The irony is that in both the labor and drug markets, the demand shows no trend of changing. The U.S. Congress, supported by nearly all politicians and the courts, continues the prohibition

against free immigration and the drug trade. In this prohibition lies the heart of the problem. In the attempt to “control the borders” against drugs and immigration, the Fourth Amendment is sacrificed. Ultimately the battle is lost because the border is so porous, the demand so great, and the history of cultural infusion from both sides is so deep.

As author Robert D. Kaplan points out in his article “Mexico and the Southwest -- Travels into America’s Future,” in the July, 1998 issue of *Atlantic Monthly*, the true irony of this historically fluid border is that:

The factors that have kept Mexico at bay - drug profits and the wages of illegal aliens- stem from the very activities that Washington claims it wants to stop. Without the drug trade and illegal migration the United States would face what it has always feared: a real revolution in Mexico and true chaos at the border. To deprive Mexico of its largest sources of income (drug profits and money sent home from the U.S.) would hasten the collapse of its already weak central authority. Indeed, by supporting the Mexican economy, America’s appetite for marijuana and cocaine protects a further flood of immigrants from a contiguous, troubled, and ever more populous country. (52-53)
<http://www.theatlantic.com/issues/98jul/future.htm>

It is possible, Kaplan hints, that these prohibitions are the true strategy of the U.S. government to keep Mexico from collapsing into tyranny. Kaplan writes “Now, as Mexico’s population climbs past 100 million, imagine the level of militarization and domination from Washington that would be required to control a comparable flood of refugees, were Mexico’s central government to devolve into a weak tributary state.” (68)

The people living at or near the border experience the daily threat of personal intrusion from the government. Personal appearance, ancestry and the type of car one drives are the openings used to justify secondary searches and roving patrol stops. Many are accustomed to being stopped, detained and questioned by the Border Patrol on a regular basis. For all people traveling north from the border, the routine of a stop and question at the checkpoint signifies a deeper problem. The lower standard of reasonable suspicion that justifies stops at the border gives the authorities an easier means of intrusion into the citizen’s free movement away from the border.

"Reasonableness" and Police Power

In the study of the Fourth Amendment, the question of “reasonableness” is the key to the constitutionality of search and seizure practices.

Is the imposition of force, in a single city, of many hundreds or thousands of border patrol agents and military so intrusive that it, “shocks the sense” of justice? Are the hundreds of weekly routine stops by roving Border Patrol agents so intrusive as to be unreasonable?

To demonstrate the degree to which the number of police in the region grows, one only need to look at reports in the popular media. The Arizona Daily Star reported on June 12, 1998.

The Tucson sector, which has grown from about 280 agents to more than 900 in five years, will add 240 more by September. More than 3,000 agents have been added to the Border Patrol since 1993, when its ranks numbered about 3,400. Congress has committed to adding 1,000 more each year through the year 2000, said U.S. Border Patrol Chief Gustavo de la Vi-a.

Senator Jon Kyl of Arizona put out a press release recently which took credit for the massive increase in the police presence at the border. It said:

WASHINGTON, D.C. — The U.S. Senate approved measures by Senator Jon Kyl (R-Arizona) to beef up the U.S. Border Patrol and the drug-fighting capabilities of federal and local law enforcement agencies today when it passed the Senate Commerce-Justice-State Appropriations bill with a 99-0 vote. Included in the bill is \$104 million to hire 1,000 new Border Patrol agents to combat illegal immigration, crime and drugs along the border -- satisfying the requirement established by Senator Kyl in the 1996 immigration reform bill that 5,000 new agents be added to the border between 1997 and the year 2001. . (Sen. Jon Kyl Thursday, July 23, 1998).

The actions of the Border Patrol to expand its numbers reveal the extent to which it believes police can solve the immigration and drug problem. The Immigration and Naturalization Service (INS) is also on the increase. As CNN reported on January 25, 1998 :

Thanks to the growing national concern over immigration, the nation now has more immigration officers authorized to carry a gun and make arrests than it has FBI agents.

Led by a 31 percent increase at the Immigration and Naturalization Service, the number of armed federal agents with arrest power rose to 74,500 by mid-1996, the Justice Department reported Sunday.

The INS had 12,403 agents in 1996, compared to 10,389 at the FBI, according to the survey. <http://cnn.com/US/9801/25/briefs.pm/federal.lawmen/index.html>

The INS and the Border Patrol recently announced a “partial victory” in the war on illegal immigration. On October 16, 1997, a CNN report characterized the Border Patrol's “Operation Gatekeeper” thusly:

Mexican illegal immigrants risk their lives to cross the border into the United States, while U.S. Border patrol agents will struggle to the death to keep them out. And while illegal immigrants may yell “freedom” as they cross the border into the United States, for many, that freedom is becoming harder to come by. Operation Gatekeeper, instituted along San Diego's border with Tijuana, Mexico, is one such attempt to close down the border. The 14-mile fence, policed by almost 3,000 border patrol agents and armed with the latest technology, has curbed illegal immigration by more than 40 percent, according to the Immigration and Naturalization Service.

<http://cnn.com/U.S./9710/09/operation.gatekeeper/index.html>¹

(Or hear also a NPR report on operation gatekeeper at: <http://www.npr.org/ramarchives/nc7m1301-12.ram>)

A fourteen-mile fence and 3,000 border patrol agents might stop migration along that fourteen-mile fence, but it does not stop the migration. Immigrants simply began crossing further east. Operation Gatekeeper did demonstrate what it would take to build a fence along the entire 2,000 miles of U.S. – Mexican border even just to slow the tide of people crossing into the United States to work. Thousands of police and/or military agents, and a wall equivalent to the Great Wall of China, massive amounts of left-over cold-war high-tech searching devices (eg. radar). All this would diminish the idea that America is a free country.

The Arizona Daily Star reported on April 13, 1998 about Operation Gatekeeper's affect on the Tucson Border Patrol sector that,

U.S. Border Patrol officials say Operation Gatekeeper - a buildup of agents and resources that began four years ago - is working.

However, the force that has roughly doubled since 1993 has failed to put a dent in the number of people trying to illegally enter the United States from Mexico. Apprehensions are running at a record pace this year, while the number of illegals successfully entering the country hasn't changed, according to federal estimates.

The Border Patrol and INS have wide investigation and enforcement powers. They enforce federal immigration and naturalization laws under 8 U.S.C. §§ 1225, 1357; 8 C.F.R. §§ 100.2(f), 103.1(q), and 287.1 et seq.. Federal law authorizes Border Patrol officers to make warrantless arrests based on probable cause for "any felony cognizable under the laws of the United States," but only "if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest." (8 U.S.C. # 1357(a)(5)(B).)

The law also gives the Border Patrol the power to search...

within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. (8 U.S.C. # 1357(3)).

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. When Border Patrol agents conduct a search on a location other than the border or its functional equivalent, they are governed by ordinary Fourth Amendment restrictions. (United States v. Brennan (5th Cir. 1976) 538 F.2d 711, 716 719.).

The Supreme Court's interpretation of border search questions

For the last 50 years, scholars and judges have debated the relationship between the two "halves" of the Fourth Amendment, the "Warrant clause" and the Reasonableness clause". Those who favor an inclusive model believe the Warrant Clause simply explains the Reasonableness Clause -- so that

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every search, whether or not accompanied by a warrant, must satisfy the requirements of probable cause and specific purpose. (Search and Seizure Findlaw.com <http://caselaw.findlaw.com/data/constitution/amendment04/index.html>)

Proponents of an exclusive model argue that the Reasonableness Clause and the Warrant Clause are independent of one another -- that the probable cause and specific purpose requirements of the amendment apply only to searches by warrants. The U.S. Supreme Court's reliance on this model has led to increasingly intrusive searches based on justifications that have moved farther and farther away from the language and intent of the Fourth Amendment. (ibid.)

The delicate balance of “reasonable – unreasonable” defines the relative strengths of government and individual interests in the United States Supreme Court. By greatly broadening the definition of reasonableness, the courts have usually held that government interests outweigh the privacy and dignity of the individual. Leo Mandell and L. Anita Richardson concluded, in a 1986 Arizona Law Review article, that: “The appropriate balance between conflicting interests and societal interests established by the Fourth Amendment need not be sacrificed to the ‘war on drugs.’” (371) The Supreme Court has almost always ruled that government should have wide latitude in searches at the border region.

Mandell and Richardson trace the conflict between governmental and individual interests to the Framers’ experience with the general warrant, “For the Framers, warrantless searches and seizures and the general warrants symbolized the balance between these competing values (punishment of criminals vs. personal privacy and dignity) if their discretion was unconstrained...The solicitude accorded governmental interests at the expense of individual interests, embodied in warrantless searches and seizures and the general warrant, was categorically repugnant to those drafting the fourth amendment.” (340)

Today’s imbalance between those interests is obvious in nearly every case that defines the Fourth Amendment at the border. In *U.S. v. Ramsey*, 431 U.S. 606 (1977), the Court held that regardless of how intrusive, searches designated as “border” searches are exempt from the probable cause requirements that must still be respected elsewhere. (See also *U.S. v. Montoya*, 473 U.S. at

538. 1985) Although searches at the border require no probable cause, the Court held in *Ramsey* that the searches must be at least reasonable. Since *Ramsey*, the definition of reasonableness has expanded to the point that any two factors cited by an agent are sufficient. Generally, the greater the degree of intrusiveness of the search, the greater the level of suspicion that must be attained by the official (Fine 854)

In *U.S. v. Montoya*, (473 U.S. at 538. 1985) the Supreme Court upheld the twenty-hour detention of a traveler (without any formal charges) as reasonable. In this seven to two decision (Justices Brennan and Marshall dissenting) the court held,

The detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal; here, the facts, and their rational inferences, known to the customs officials clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. Pp. 536-544.

Professor Fine, in her discussion of the *U.S. v. Montoya* case, concludes

Presently, there are almost non-existent requirements for officials conducting a routine search and seizure at the border. ... (In *Montoya*) The result of the Court's decision was to confer no Fourth Amendment rights to travelers at the border. This decision has severely undermined the Fourth Amendment warrant and reasonableness requirements. (The *Montoya* case) represents an overzealous desire for law enforcement which may 'blind us to the peril of our free society' (quoting *Florida v. Royer*, 460 U.S. 491, 513, 1983. Brennan, J. dissenting). (884).

In this case the Supreme Court is clear that the Fourth Amendment does not apply at the border.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975). However, stopping of defendant's car solely because the officers observed the Mexican appearance of the occupants was unjustified. (Id., at 886.) In the unanimous decision the Court held that,

The Fourth Amendment held not to allow a roving patrol of the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. Except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country. Pp. 878-887.

While this *United States v. Brignoni-Ponce* case seems as though it is a victory for equal protection was in fact led to the definition "of "specific and articulable" facts or "polarity factors (discussed following) which border on the absurd.

The Court held that ...

1. The Border Patrol's routine stopping of a vehicle at a permanent checkpoint located on a major highway away from the Mexican border for brief questioning of the vehicle's occupants is consistent with the Fourth Amendment, and the stops and questioning may be made at reasonably located checkpoints in the absence of any individualized suspicion that the particular vehicle contains illegal aliens. Pp. 556-564.

The legal foundation that exempts searches at the border is based in the "Terry Standard." *Terry v. Ohio*, 392 U.S. 1 (1968), first established the reasonable suspicion standard. In *Terry*, the court upheld a warrantless seizure conducted by an officer who had only a reasonable suspicion that the petitioner was armed and dangerous. Using this standard at the border, customs officials are required to have more than a "hunch" and must have specific and articulable facts to support the suspicion that the individual is engaged in criminal activity. (Fine 855).

Terry was extended by *Adams v. Williams*, 407 U.S. 143 (1972), which allows a case-by-case judgement of what is "reasonable grounds to believe" that criminal activity is afoot. Mandell and Richardson said of this case-by-case analysis that: "In each case the courts balanced the values of law enforcement, pressed ever more vigorously, against the values of personal dignity and privacy which the Fourth Amendment had been fashioned to protect." (344)

Once the *Terry* and *Adams* standards were applied at the border, the list of "specific and articulable" facts which might be cited by an agent to justify a detention or search blossomed to ridiculous proportions. Mandel and Richardson listed (each with its companion case) the "polarity factors" which an agent may cite:

"a) traveling alone or traveling with someone; b) having friends or relatives in this country; c) personally purchasing one's airline ticket with cash or not knowing the specifics of an airline ticket purchase; d) dressing inappropriately, poorly, inexpensively, causally, conservatively, or well; e) wearing clothing that is too tight, too loose, or ill fitting; f) carrying inexpensive or poor quality luggage, or carrying good quality luggage g) appearing nervous, calm or passive h) having made no prior

trips or frequent trips to the United States; i) having little or no money, some money or a lot of money.” (350)

The article continues with six more “litmus-factors” which may be cited. The point of the list now is obvious; nearly any combination of factors may uphold reasonable suspicion. As a result of *Adams*, this list of reasonableness is so open it demonstrates what Justice Brennan wrote in his dissent to *U.S. v. Leon*, (that) “the evisceration of the exclusionary rule is now complete.”

Historical application of the Constitution as compact or social contract

The principles of the Fourth Amendment, the autonomy and inviolability of an individual's body and home, date back to Biblical times. Under Roman legal codes, a victim of theft could not instigate a search in a suspect's house without first specifically describing the items sought; and several witnesses were required to be present during the search. (Search and Seizure <http://caselaw.findlaw.com/data/constitution/amendment04/01.html>)

The right of protection from the sovereign's searches and seizures is one of the most fundamental rights developed in our constitutional tradition. This principle existed in English common law, and later it found its way to the U.S. Constitution. Two principles were accepted on both continents at the time of the American Revolution and are embodied in the amendment:

1. General warrants were unacceptable; British and American citizens preferred search warrants used only with probable cause, and precisely stating the person or place to be searched and the items to be seized; and
2. Warrantless searches were not favored except on rare occasions, and then only as part of a lawful arrest. <http://www.abanet.org/media/june96/drugs.html>

The first record in English common law of search and seizure protection was *Semayne's case*, of 1603, which proclaimed the maxim, “Every man's house is his castle.” *Semayne's case* demonstrated the principle at the heart of the Fourth Amendment in protection from the sovereign, but it also recognizes the authority of the state to enter, with notice, to arrest or execute the King's orders. (Findlaw.com <http://www.findworld.com/data/Constitution/amendment04/01.html#3>)

Entick v. Carrington (1762) brought the rights of free press and unreasonable seizure questions together when, in an attempt to silence John Wilkes and his criticism of the King, agents raided various homes of his supporters under a general warrant. (*Howell's State Trials* 1029, 95 Eng. 807, 1762). Entick sued when the King's agents broke into his house looking for papers connecting him with Wilkes. The English court ruled that the search was invalid because it failed to specify the material seized and did not state probable cause.

The most forceful expression of the English tradition of protection from unreasonable searches comes from William Pitt when, in a 1763 speech to Parliament he stated:

The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the win may blow through it – the storm may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.
<http://www.findworld.com/data/Constitution/amendment04/>

It was upon this tradition that the American colonists would base essential legitimacy for the Revolution. In the colonies it was the “Writs of Assistance,” a type of general warrant used in enforcement of import/export laws, that gave the colonists their most bitter experiences with unreasonable searches and seizures. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' (Adams 523)

The debate over rights is one of the central themes in our American constitutional tradition and history. The Founders and the Framers both argued forcefully for a social compact that protected those unalienable rights. Protection from governmental use of unreasonable searches and seizures was at the heart of the Revolution period. With the "general warrants" and "writs of

assistance" and the framing of the Bill of Rights as one of Madison's original proposal on June 8, 1789 of what would consist of the Bill of Rights. (Viet 11)

In July of 1774, Thomas Jefferson wrote in "A Summary of the Rights of British America" that the rights preserved in the English tradition were more than precedent, they were natural. (Kurland 453) For Jefferson, the rights of the people, as a collective, derived from the natural rights of individuals. The Americans had constituted themselves as a people by acting in their own accord. "For themselves they fought, for themselves they conquered, and for themselves alone they have the right to hold." (Kurland 436). This statement of natural rights would become important in later cases asking the question, "To whom does the Constitution apply?" Jefferson would argue that these rights are inherent and natural. Thus, a sovereign must respect the rights inherent to the individual.

Is the right of free movement of people and goods a natural right? Jefferson spoke clearly on the issue of free trade in the Declaration of Rights saying, "That the free exercise of trade with all parts of the world, possessed by the American colonists as a natural right, and which no law of their own had taken away or abridged, was the next object of unjust and encroachment. (Kurland 436).

It was opposition to the British Writs of Assistance that would be at the birth of the Revolution. The arguments employed then in opposition to the writs are relevant today if applied to the search methods used at the border. James Otis, in February of 1761, would call the Writs, "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book. (*Boyd v. U.S.* 616)

The Virginia Declaration of Rights of June, 1776, Article 10, (Kurland 6) stated that general warrants were "grievous and oppressive and ought not be granted." The Declaration of Independence never mentions the Writs of Assistance in its list of grievances, except to complain that: "He has erected a multitude of New Offices, and sent hither swarms of officers to harass our people and eat out their substance." (Kurland 10). In language that would become the Fourth Amendment, the Massachusetts Constitution of 1780 declared in its Article I section XIV that, "Every subject has a right to be free from all unreasonable searches and seizures..."(Kurland 12).

During the debate over the proposed Constitution of 1787, rights were central to the debate. Hamilton, in Federalist # 84 argued against a Bill of Rights in the Constitution. For the Federalists a Bill of Rights was unnecessary as the government did not have the authority or ability to violate rights. In Federalist Number 84 Hamilton said,

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous.” Arguing that a bill of rights was unnecessary he also commented, “The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. (Hamilton 434 <http://www.law.ou.edu/hist/federalist/>)

The Anti-Federalists were vocal in their demands for protection from unreasonable searches and seizures. The Anti-Federalist writings are rich in reference to searches and seizures. Richard Henry Lee wrote to George Mason October 1, 1787 that, “the citizens shall not be exposed to unreasonable searches and seizures of their persons, papers, houses or property (Kurland 448). “Federal Farmer #4” put protection from “hasty and unreasonable search warrants not founded on oath and issued with due caution,” as its first right of “essential rights which we have understood to be the rights of freemen.” (450) Similar statements are found in, “Brutus #2” (452), “Federal Farmer #6” (457), and Federal Farmer #16 (459). The most compelling Anti-Federalist statement of protection from unreasonable searches came in, “A Maryland Farmer #1” which gave the following as its argument in favor of a bill of rights: “Suppose for instance, that an officer of the United States should force the house, the asylum of a citizen by virtue of general warrant, I would ask, are general warrants illegal by the constitution of the United States?” (464) Only speculation can say if the mass border stops and random roving patrols along the United States - Mexican border would give the Anti-Federalists alarm.

Professor David Woll in a *Brooklyn Law Review* article, “Border Searches” questions the soundness of this conclusion, pointing out that, “there is no evidence that Congress ever measured the searches authorized by the customs act against the standards of the Fourth Amendment.” (754 at n. 59). Woll continues to observe that the Fourth Amendment was historically unique from the rest of the Bill of Rights in that it was passed in direct response to the Writs of Assistance in which the

16.

British used the general warrant to search homes and buildings for contraband. (754). He concludes that, "...it is doubtful that the historical context of the fourth amendment's enactment supports warrantless and intrusive customs searches conducted today." (754). Justice Brennan summed it up in *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983), saying of the Act of July 31, 1798 and the Fourth Amendment: "I cannot agree that every statute enacted by the First Congress must be presumed to be constitutional" *Id.*, at 600, n.7, (Brennan J. dissenting).

The record of the debate of the First Congress on the Fourth Amendment holds few suggestions by representatives for change. The only debate concerned stylistic and grammatical changes to the Amendment (Veit 181, 187-88). The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses (Reasonableness and Warrant clauses). Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." (1 Annals of Congress 434-35 (June 8, 1789)). As reported from committee omission corrected on the floor, the word "secured" was changed to "secure" and the phrase "against unreasonable searches and seizures" was reinstated. (*Id.*, at 754 (August 17, 1789)) the section was almost identical to the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision. (Veit 182). The limited debate, revolving around stylistic changes, leads to the conclusion that the experience of the colonists with the Writs of Assistance imbedded the extreme importance to this protection from governmental intrusion.

Constitutions -- Social Contract or Natural Rights Compact?

As mentioned earlier, there is no probable cause required in border searches. Constitutional protections, although natural and fundamental, may also be territorial. Within the boundaries of the United States those rights have meaning, outside the boundaries they do not. The case of the *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990), provides a bright-line example of the nullification of the Fourth Amendment at the border resulting mostly from the war against drug-using Americans. Before the *Verdugo-Urquidez* case it was unclear if constitutional protections applied to non-resident aliens. The Court decided that the Fourth Amendment does not protect non-resident aliens located in a different country from searches and seizures by United States officials (*ibid.* at 1057)

After the 1985 killing of DEA agent Enrique Camarena Salazar in Mexico, the DEA obtained an arrest warrant for Verdugo-Urquidez after suspecting his involvement in the agent's death and because he was a known major drug smuggler. The DEA requested help from the U.S. Marshall Service, which contacted the Mexican Federal Judicial Police (MFJP). On January 24, 1986, the MFJP arrested Verdugo-Urquidez and brought him to the United States - Mexican border. At the border, waiting U.S. officials arrested Verdugo-Urquidez then transported him to the U.S. Border Patrol station at Calexico, California.

After Verdugo's arrest, DEA agents attempted to arrange searches of his residences in Mexico without obtaining a warrant from United States officials. DEA agents requested the MFJP to grant permission to search Verdugo-Urquidez's homes in Mexicali and San Felipe, Baja Norte. Permission to search was granted by the Mexican.

In the Ninth Circuit District Court, Verdugo moved to suppress the evidence resulting from the search of his Mexican homes. The court granted the motion because the DEA had failed to obtain a warrant. The Ninth Circuit Court of Appeals upheld the ruling. The court of appeals, citing *Reid v. Covert*, 354 U.S. 1 (1957), stated that "the Constitution imposes substantive constraints on the federal government, even when it operates abroad (*U.S. v. Verdugo-Urquidez*, 856 F.2d. at 1218. *See also* Strong at 1165). The appellate court's opinion cited previous Supreme Court recognition of

some rights retained by citizens abroad, by resident aliens and even by immigrants in the United States illegally. The court wrote: "...it would be absurd to grant the protection of the Fourth Amendment to one whose presence in the country is voluntary and illegal, and yet deny it to Verdugo-Urquidez whose presence in the United States, although legal, is plainly involuntary." (Strong 1165).

In her article, "The selective Application of the Fourth Amendment: United States V. Verdugo-Urquidez" Janet E. Mitchell gives the history of the case before it reached the Supreme Court of the United States

Verdugo-Urquidez challenged the admissibility of the evidence seized in the search, arguing that, without a warrant, any evidence found in either of his residences should be suppressed. The United States District Court for the Southern District of California held that the Fourth Amendment controlled in a search conducted as a "joint venture" (United States v. Verdugo-Urquidez, 856 F.2d 1214, 1215 (9th Cir. 1988), *rev'd* 110 S. Ct. 1056 (1990) by United States and Mexican agents. Accordingly, the court concluded that the exclusionary rule barred the admission of the seized drugs. (*Id.* at 1230). The Court of Appeals for the Ninth Circuit affirmed, reasoning that the Constitution extended to an official extraterritorial government action and guaranteed protections to individuals directly "governed" by the United States. (*Id.*)² (Mitchell 13)

The Court of Appeals first noted that Verdugo-Urquidez was a target of a United States investigation. Second, they pointed out that Verdugo-Urquidez was in custody in the United States at the time of the search and that he was subject to full adversarial proceedings. The appellate court determined, therefore, that Verdugo-Urquidez was effectively under the domain of the United States government, one of the "governed," and entitled to constitutional protection. ((United States v. Verdugo-Urquidez, 856 F.2d 1214. 1988). The case was appealed to the United States Supreme Court in 1989.

The plurality opinion in *Verdugo-Urquidez* written by Chief Justice William Rehnquist, joined by Justices White, O'Connor and Scalia, reversed the decision of the Ninth Circuit Court of Appeals. The decision focused on three factors: first, the location of the constitutional violation, secondly, the historical significance of the words "the people" used in the Fourth Amendment and thirdly, the plurality-established requirement that a defendant must have a voluntary, sufficient connection with the United States to enjoy Fourth Amendment protections. (Nicholas at 283.)

In reversing the lower court, the Supreme Court ruled that Fourth Amendment did not apply to a search and seizure by United States Agents of property owned by a non-resident alien and located in a foreign country. The Court noted that while other parts of the Constitution referred to the “accused” or “persons,” the Fourth Amendment refers to “the people.” Professor Strong points out in his article on *United States v. Verdugo-Urquidez*, “Application of the Fourth Amendment Beyond America’s Borders,” that:

The Court included in its discussion other parts of the Constitution which referred to ‘the people,’ such as amendments, one, two, nine and ten. *Id.* at 1059-60. Thus it would appear that non-resident aliens have no right to rely on these provisions any more than they can now rely on the fourth amendment. (1166)

For the Court, that difference of nouns between “the people” and the “accused” was essential. The Fourth Amendment means that “the people” was “A class of persons who are part of the national community or have otherwise developed sufficient connection with this country to be considered part of the community.” (Strong at 1167). This distinction defines the border as the demarcation line of constitutional history and philosophy.

Justice Rehnquist did include a limited natural-rights approach to the *Verdugo* plurality opinion. In recognition of the fundamental rights approach, Rehnquist stated that some of the Fifth Amendment protections were “fundamental” in nature and thus would apply to any defendant. (*Verdugo-Urquidez* at 1060). For Rehnquist, constitutional provisions which are written in a more specific manner than for “people,” such as those that refer to the “persons” or the “accused” could be fundamental in nature and thus within the natural rights theory. (Strong at 1175).

The most powerful statements of the *Verdugo* case as a violation of the Fourth Amendment came from the dissent of Justice Brennan, joined by Justice Marshall. In his view the Fourth Amendment should be applied “in its entirety” to non-resident aliens (*Verdugo* at 1075-77). He did not go so far as to propose that constitutional rights be accorded to person everywhere, he did support the idea that *Verdugo-Urquidez* have some connection to the United States; Brennan would find that connection in any person who had the power of the government applied on them, legal or illegal, citizen or not. (*Id.* at 1072) Brennan acknowledged the existence the rights inherent in each person (*Id.* at 1073) He concluded that the Bill of Rights, rather than establishing

new rights applicable only to citizens, prohibited the US government from infringing on these pre-existing rights and liberties (Id. 1073).

Justice Brennan filed a dissenting opinion, in which Justice Marshall joined. Justice Blackmun, filed a separate dissenting opinion. In his dissent Justice Brennan said,

In my opinion aliens who are lawfully present in the United States are among those "people" who are entitled to the protection of the Bill of Rights, including the Fourth Amendment. Respondent is surely such a person even though he was brought and held here against his will. I therefore cannot join the Court's sweeping opinion...Today the Court holds that although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws. I respectfully dissent. (*Verdugo-Urquidez* 110 S.Ct. 1066, 1990 at 279)

The conduct of the government toward Verdugo ignored the principle of fundamental fairness. Noting that fundamental fairness is an underlying ideal of the Constitution, Brennan said that the Bill of Rights "compels a conclusion that the Fourth Amendment protects those subject to U.S. criminal laws." (Id., at 1070). The contradiction is obvious; the police were able to ignore fundamental rights and the rule of law at will when arresting and searching Verdugo-Urquidez out of the territory of the United States. Allowing these actions diminishes the fundamental maxim of our government, that the rule of law applies to all actions of the government. Brennan noted that, "if we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness." (Id., 1071). Brennan concludes that the Warrant Clause must be applied to both domestic and foreign searches to assure determination by a neutral, detached magistrate. (Id., 1076).

In response to the "sufficient connection test" of the plurality, Brennan points out the unfairness of capturing Verdugo-Urquidez then bringing him into the United States against his will, saying "the sufficient connection is supplied not by Verdugo-Urquidez, but by the government." (Id., at 1070). Since Verdugo was treated as a member of our national community and forced to comply with our laws, Verdugo becomes one of "the people" protected by the Fourth Amendment. For Brennan the sufficient connection test and the natural rights theory were not mutually exclusive.

The *Verdugo-Urquidez* case clearly demonstrates how radically the high court is willing to subvert rights long-established since the inception of Bill of Rights at least, in order to gain even

slight advantage in this war against the millions of peaceful and responsible users of mind-altering drugs.

The relevance of that point is that if individual rights are antecedent to the constitution, they should apply regardless of the physical location of the sovereignty. The question of who are "the accused" and who are "the people" becomes a central issue in the *Verdugo-Urquidez* case. There are two competing theories at play in *Verdugo-Urquidez*. Whichever is applied determines the extent of constitutional protection.

Two theories about the fundamental coverage of the Constitution apply. The first theory portrays the Constitution as a social contract, an agreement between the citizens and the government. To enjoy the protections of government, one must be a party to the contract. The second theory portrays the Constitution as a compact between the government and all people. Along this line of thought, rights came before government arose, so that government then bears the responsibility to recognize the existence of fundamental rights. Whichever approach the Court accepts defines the degree to which the Fourth Amendment becomes a restriction on the power of government agents at the border.

In *Verdugo-Urquidez*, a plurality of the Court applied the social contract approach to determine whether Verdugo should have been afforded any Fourth Amendment rights. The social contract or compact theory envisions the United States Constitution as an agreement or compact between the people and the government created by the Constitution. Strong calls this agreement a "reciprocal relationship where, in exchange for a person becoming part of and obliging oneself to the national community, certain protections for the a person are guaranteed by the federal government." (Strong at 1169, *citing Verdugo-Urquidez*). Strong points out that: "It stands to reason that since non-resident aliens have no obligations in our society, they are not parties to the constitutional compact and thus are not entitled to its provisions." (1170)

The Court found the compact theory "the most prevalent" in the *Verdugo* decision. Citing our historical traditions, the Court would use the social compact theory to deny Verdugo-Urquidez of Fourth Amendment protections because he was not part of the people in the "contract." From

this comes a view of “the people” as those individuals who have some investment in the American economic and political structure. In *Verdugo-Urquidez* the Supreme Court called this investment the “sufficient connection test.” The Court found significance in the textual reference to “the people” in the Fourth Amendment, “The right of the people to be secure” As opposed to “persons” in the Fifth, “No person shall be held to answer...” and the Sixth Amendment which refers to “...the accused shall enjoy...”. For the Court, the distinction between the amendments is more than an attempt by the Framers to avoid redundancy but to extend protections of the Fourth Amendment only to citizens residing in the United States, not as a general natural right to all, citizen or non-citizen. (*Verdugo-Urquidez* at 1060). To the majority of the Court, Verdugo-Urquidez was not one of “the people” of the United States, he did not have a “sufficient connection” and could be denied this fundamental right. The actions of the government agents were not applicable in Mexico and the search and seizure effected against him was allowed to stand.

Verdugo-Urquidez could not claim protection from the Fourth Amendment because his presence in the United States was involuntary. The Court was clear that if protections were extended to Verdugo, aliens who had no previous connection with the United States would have a cause of action for alleged violations occurring in foreign countries. The Court held furthermore, that if Fourth Amendment protections were extended to those without a substantial connection to the United States, American agents conducting activities beyond United States borders would be severely limited.

The other theory of constitutional formation is the “natural” or “fundamental” rights theory. Under this approach, the Constitution was intended to be a codification of those rights that are natural, unalienable and fundamental. Justice Brennan wrote in his dissent in *Verdugo* that “the Framers of the Bill of Rights did not purport to ‘create’ rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed pre-existing.” (*Id.*, at 1073). These rights are possessed by all, and would be possessed in a state of nature, whether a person was part of the body politic or not.

The natural-rights theory traces back to the pre-revolutionary era writings of Locke, and the listings of fundamental rights as essential components of nearly every compact or constitution written in the pre-revolutionary, revolutionary and constitutional periods. In fact, our whole history as a people could be described as a discussion of the proper definition of rights. The general purpose of government as stated in the Declaration of Independence is to secure unalienable rights. If rights are unalienable, then they are natural, fundamental and can not be taken by government in its authority from any person, for any reason. The excursions of the government across the border, to carry-out a search and seizure of a person accused in the United States is a blatant example of the kinds of abuses that are invited when the government is not limited by a bill of rights.

Who "the people" are, to whom the Constitution applies has long been a subject of debate in American constitutional studies.

Conclusions -- Legislative Remedies and Judicial Remedies

This paper argued that the price paid for "a drug free America" and unionized protective labor laws are a lessened Fourth Amendment and that such a price is too high to pay. At the border, the liberties of the Fourth Amendment cease to exist. The protections of the Fourth, for instance, searches based on probable cause, are not a requirement at the border. The city police officer across the street from the border could only search upon arrest, plain view or consent. The border patrol office at the same place needs none of this to conduct a search.

The reality for those persons living along the border is a virtual police state. At checkpoints and by roving patrols in the border region, the people who live legally in the border region must endure a significantly lower level of protection from governmental intrusion. For the border resident who may cross the border frequently, and for those who leave or enter the country, the Fourth Amendment really is a "parchment barrier." With no probable cause required to justify detention and interrogation of travelers, every person found in the region is subject to the "polarity and litmus tests" that can justify a search of anyone. From any determination of these factors, the official can derive a suspicion to conduct a secondary search.

Journalist Severino Profeta Reyes captured the experience of many border residents when traveling through a checkpoint. In a 1995 article he wrote,

“The fences have holes and where there are none, fingers will tear and nails will scratch and backs will bleed from the metal thorns. On the freeway, the cars and the signs they (the illegals) can not read will treat them like a wildlife crossing. If you can imagine that sign, your spirit will break as mine has now as I approach this checkpoint, the border patrol behind the red and white sign, his hand outstretched to my sudden stop. Behind his sunglasses, he searches me over and I would like to say to him, “I have no war with you.” Then without a word, he waves me through. And my life goes on, crossing this ritual crossing of minds, where I almost do not stop because the road is clear and I feel American.” <http://www-rohan.sdsu.edu/course/pub-art/579/sreyes/fall95/crosamer.html>

The reality of the border is its ubiquitous nature, a reality that the lineage of Supreme Court rulings on the border and legislative politics fails to recognize. It seems as though the Court is willing to throw out even what little remains of the Fourth Amendment in a last futile effort to win this war. The Court’s current approach fails to recognize the reality of the situation and the impossibility for government to win its war. When the government itself is unreasonable, it cannot well determine what is and is not a reasonable search.

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 - B. General exception of border searches from the fourth amendment.
 - C. The “Terry” Standard at the border
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 - B. To who do the rights in the Constitution apply?
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 - D. Social Contract approach to constitutional protections
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