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The *Verdugo* Case: The United States and the Comity of Nations

Mark W. Janis *

U.S. v. Verdugo-Urquidez,¹ decided by the U.S. Supreme Court on February 28, 1990, holds that the U.S. Constitution's Fourth Amendment protection against 'unreasonable searches and seizures' does not apply 'to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country.'² Arising in the context of the U.S. war on drugs, the *Verdugo* case has important international implications for the law concerning individual rights and state sovereignty. This brief note discusses the *Verdugo* case and its relationship to international law, paying particular attention to some of the doctrinal and theoretical assumptions of the different members of the U.S. Supreme Court.

In *Verdugo*, Chief Justice Rehnquist delivered the opinion of the Court; he was joined by Justices White, O'Connor, Scalia, and Kennedy. Justice Kennedy also wrote a concurring opinion. Justice Stevens wrote an opinion in which he concurred in the judgment, though not in the opinion, of the Court. The three more liberal judges – Justices Brennan, Marshall, and Blackmun – dissented in two opinions written by Justices Brennan and Blackmun. So, among the five opinions altogether, none commanded a majority of the Court.

Chief Justice Rehnquist's opinion recounted how Rene Martin Verdugo-Urquidez, a citizen and resident of Mexico, had been seized in Mexico in January 1986 and transported to the United States where he was arrested on charges of narcotics-related offences and held pending trial. Thereafter, U.S. Drug Enforcement Agency ('DEA') officials in concert with the Mexican Federal Judicial Police searched Verdugo's properties in Mexicali and San Felipe, Mexico, seizing documents that were ultimately used in the prosecution of Verdugo. Of particular importance was a tally sheet which the U.S. argued as showing quantities of marijuana smuggled by Verdugo from Mexico into the United States. However, since U.S. officials had not obtained a search warrant for Verdugo's Mexican properties, a U.S. district court and a divided Ninth Circuit court agreed with Verdugo's lawyers that the evidence from Mexico should be suppressed, these two courts holding that the search and seizure in Mexico violated the Fourth Amendment of the Constitution:

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¹ *United States v. Verdugo-Urquidez*, 58 USLW 4263, U.S., 108 L.Ed. 2d 222, 110 S.Ct. 1056 (1990) [hereinafter cited as *Verdugo*].

² *Id.* at 4264.

The *Verdugo* Case

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.³

Reversing the lower courts, Chief Justice Rehnquist, in a formal textual reading, concluded that the Fourth Amendment 'by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people";' 'the purpose of the Fourth Amendment [being] to protect the people of the United States against arbitrary action by their own Government.'⁴

With this key argument, a majority of the justices disagreed. Justice Kennedy, though otherwise joining in Chief Justice Rehnquist's opinion, refused to 'place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections.'⁵ Justice Stevens, concurring only in the judgment, wrote that '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.'⁶ Justice Brennan, also writing for Justice Marshall, believed that 'mutuality' between Verdugo and the U.S. put defendant within the class of 'the people:' 'If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.'⁷ And in his dissent, Justice Blackmun, though he distinguished between the relationship of the U.S. government and individuals residing in the U.S. and that involving U.S. and foreign nationals, was 'inclined to agree with Justice Brennan, however, that when a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections.'⁸

This crucial difference on the scope of the Fourth Amendment between the opinion of Chief Justice Rehnquist and the opinions of Justice Kennedy, Stevens, Brennan, Marshall and Blackmun is not only important for U.S. constitutional analysis,⁹ but has importance for an analysis of the relationship between the United States and international law. In large measure, the differing opinions of the U.S. Supreme Court in *Verdugo* illustrate differing perceptions of the role of the United States in world affairs. Let us begin with this passage of Chief Justice Rehnquist:

³ *Id.* at 4264-65, 856 F.2d 1214 (1988). In 1914, the Supreme Court decided that evidence taken by the Federal Government in violation of the Fourth Amendment could not be introduced as evidence in a criminal trial. *Weeks v. United States*, 232 U.S. 383 (1914). In 1961, this rule of suppression was extended to the state governments via the 'due process clause' of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ *Verdugo*, *supra* note 1, at 4265.

⁵ *Id.* at 4268.

⁶ *Id.* at 4268-69.

⁷ *Id.* at 4270.

⁸ *Id.* at 4273-74.

⁹ This note no more than touches on the municipal law implications of *Verdugo*. Some of the relevant literature about the Fourth Amendment is reviewed in an analysis of the ultimately reversed opinion of the Ninth Circuit in the case. Note, 'The Extraterritorial Applicability of the Fourth Amendment', 102 *Harvard Law Review* (1989) 1672. The Note, which paid little attention to international law or comity, sought 'to balance the imperatives of effective international law enforcement and the core values underlying the fourth amendment.' *Id.* at 1689, 1693.

For better or worse, we live in a world of nation-states in which our Government must be able to 'function effectively in the company of sovereign nations.' *Perez v. Brownwell*, 356 U.S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.¹⁰

What distinguishes the assumptions of this view of Chief Justice Rehnquist from the assumptions and views of the other four written opinions is the perception of the other four that there is either a need or some form of legal obligation or, at least, that there is some wisdom or good sense for a nation, like the United States, to act in cases like *Verdugo* in accord with other states. Justice Kennedy's concurring opinion acknowledged this notion in an indirect fashion, more or less endorsing Chief Justice Rehnquist but without employing the Chief Justice's power motif:

The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.¹¹

Justice Stevens went further down the road to what one might think of as international comity. He was able to concur in the majority judgment only by basing his decision on the approval of Mexico as related to the limits on U.S. jurisdiction abroad:

I do agree, however, with the Government's submission that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not 'unreasonable' as that term is used in the first clause of the Amendment. I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches.¹²

Similar to Justice Stevens and his rationale but reaching the opposite result on the judgment, Justice Blackmun felt 'that an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country.'¹³ Most cognizant of the values and benefits of international comity was Justice Brennan. As with his analysis of the reach of the Fourth Amendment, he stressed here the principle of mutuality:

Mutuality also serves to indicate the values of law and order. By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Moreover, as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals ev-

¹⁰ *Verdugo*, *supra* note 1, at 4267.

¹¹ *Id.* at 4268.

¹² *Id.* at 4269.

¹³ *Id.* at 4274.

The *Verdugo* Case

erywhere. As Justice Brandeis warned in *Olmstead v. United States*, 277 US 438 (1928):

'If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means ... would bring terrible retribution. Against that pernicious doctrine, this Court would resolutely set its face.' *Id.*, at 485 (dissenting opinion).

This principle is no different when the United States applies its rules of conduct to foreign nationals. If we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness.¹⁴

As Justice Brennan's complaint of constitutional 'lawlessness' was levelled, albeit in dissent, against the executive branch in *Verdugo*, so can there be a complaint of international 'lawblindness' levelled against the opinion of Chief Justice Rehnquist. Although the Chief Justice argued that 'if there were a constitutional violation, it occurred solely in Mexico,'¹⁵ he did so only to assist in his formalistic distinction between the Fourth Amendment and the Fifth and Sixth Amendments respecting the term 'the people.' Unlike Justices Kennedy, Stevens, Brennan and Blackmun, Chief Justice Rehnquist seemed little concerned about the government obtaining Mexican approval for the U.S. search and seizure in Mexican territory. Indeed, in the paragraph quoted above, Chief Justice Rehnquist observed that '[s]ome who violate our laws may live outside our borders under a regime quite different from that which obtains in this country.'¹⁶ What of foreign sovereignty, of international law, or at least of the comity of nations?

A classic U.S. statement of international comity now almost a century old is that in *Hilton v. Guyot*:

'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹⁷

Hilton involved the recognition and enforcement of a French commercial judgement in the United States, a recognition refused because of a failure of reciprocity in French law. However, the case persuasively enunciated the values espoused by nations and their courts when they are sensitive to, and respect, the sovereignty of foreign states and foreign judicial systems. It is just this international sensitivity that seems so glaringly missing from the Chief Justice's opinion.

The closest in *Verdugo* that Chief Justice Rehnquist comes to acknowledging the values of international cooperation is the last sentence of that same quoted paragraph:

If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.¹⁸

¹⁴ *Id.* at 4270.

¹⁵ *Id.* at 4265.

¹⁶ *Id.* at 4267.

¹⁷ 159 U.S. 113, 163-164 (1895).

¹⁸ *Verdugo*, *supra* note 1, at 4267.

The word 'treaty' is indeed a fair recognition of the place of international agreements in U.S. constitutional law,¹⁹ but what of 'diplomatic understanding'? It is doubtful that the Chief Justice's term is meant to convey the notion of customary international law. Rather, 'diplomatic understanding' seems to mean some sort of unwritten agreement between states. Indeed, perhaps telephone contacts between U.S. and Mexican officials about the search of Verdugo's properties²⁰ might be 'diplomatic understandings,' but we cannot know for sure. In any event, 'restrictions' imposed by 'diplomatic understanding, treaty, or legislation' seem to be mentioned just as a finishing aside without factual or juridical explication. The 'restrictions' are not held out as justifications for the search *à la* Kennedy, Stevens or Blackmun. Nor are they elements of mutuality in the fashion of Brennan.

The underlying assumption about international law and comity in Chief Justice Rehnquist's opinion appears to be the sterile positivism of an international case like *Lotus*.²¹ What seem to be given presumptive priority are the positive acts of states, here the search and seizure by the United States in Mexico. Whatever is not prohibited by international law apparently is to be permitted. If there are limits in international law, it is only a law of positive state content, e.g., a treaty or a diplomatic agreement. Such a view is, I submit, narrow, regressive and short-sighted. As Justice Brennan put it, if I may turn his phrase from the executive branch to the Court: 'If we seek respect for law and order, we must observe these principles ourselves.'²²

What sadly emerges from Chief Justice Rehnquist's opinion in *Verdugo* is an unnecessary call to, and legal justification based upon, American national self-interest. Justices Kennedy and Stevens were able to reach the same pragmatic result as Chief Justice Rehnquist, i.e., allowing the evidence taken in Mexico to be introduced in the criminal trial, and still keep an eye on international cooperation. They plainly recognized the authority of Mexico over its own territory. Indeed Justice Kennedy and Stevens justified the U.S. warrantless search and seizure in large measure because of the active involvement of the Mexican government, thus encouraging the U.S. government to seek such cooperation in the future. Justice Blackmun reached a like conclusion about U.S.-Mexican cooperation but felt the search had still not been proven reasonable on Fourth Amendment grounds. Justice Brennan, who will be sorely missed on the Supreme Court, imposed the greatest international restraint on the U.S. government. By stressing 'the principles of mutuality and fundamental fairness,' Justice Brennan most effectively contributed to the development of international law and order. Most of all of the opinions, the opinion of Justice Brennan put the *Verdugo* case and the Fourth Amendment in the context not only of U.S. constitutional law, but in the larger and equally important context of the law of nations.

19 Article VI(2) of the U.S. Constitution provides that the 'Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.' The key Supreme Court ruling in this regard is, of course, Chief Justice Marshall's decision in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). The U.S. jurisprudence is reviewed and analyzed in M.W. Janis, *An Introduction to International Law* 72-80 (1988).

20 *Verdugo*, *supra* note 1, at 4264.

21 *France v. Turkey*, 1927 PCIJ Reports, Series A. No. 10.

22 *Verdugo*, *supra* note 1, at 4270.