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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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WASHINGTON, D.C. 20543

**CAPTION:** UNITED STATES, Petitioner V. RENE MARTIN VERDUGO-URQUILDEZ

**CASE NO:** 88-1353

**PLACE:** WASHINGTON, D.C.

**DATE:** November 7, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

-----x  
UNITED STATES, :  
Petitioner, :  
v. : No. 88-1353  
RENE MARTIN VERDUGO-ORQUIDEZ :  
-----x

Washington, D.C.

Tuesday, November 7, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at  
2:02 a.m.

APPEARANCES:

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C;  
on behalf of the Petitioner.

MICHAEL PANCER, ESQ., San Diego, California; on behalf  
of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

LAWRENCE S. ROBBINS, ESQ.

On behalf of the Petitioner

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MICHAEL PANCER, ESQ.

On behalf of the Respondent

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REBUTTAL ARGUMENT OF

LAWRENCE S. ROBBINS, ESQ.

On behalf of the Petitioner

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P R O C E E D I N G S

(2:02 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1353, United States v. Rene Martin Verdugo-Orquidez.

Mr. Robbins, you may proceed.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

ON BEHALF OF THE PETITIONER

MR. ROBBINS: Mr. Chief Justice, and may it please the Court:

This case involves the overseas search of a foreign national's residence conducted by American agents with the full permission and participation --

QUESTION: Overseas is a little strong for Mexicali, isn't it?

(Laughter.)

MR. ROBBINS: Indeed it is.

QUESTION: -- exaggeration in your first statement, your first sentence, for pete's sake.

MR. ROBBINS: Well, it's extraterritorial. It's outside the United States and perhaps two or three other adjectives, and overseas is not probably one of them.

In any event, the search was conducted, as I say, with the full permission and participation of the host country's officials.



1           In its judgment below, the Court of Appeals for  
2 the Ninth Circuit imposed two sweeping constraints on such  
3 extraterritorial searches. First, the court held that  
4 respondent was entitled to invoke the protections of the  
5 Fourth Amendment to the United States Constitution. And,  
6 second, the court held that under that amendment the  
7 agents were required to secure a search warrant from an  
8 American court before they could conduct the search of  
9 respondent's premises.

10           That broad, potentially far-reaching and in our  
11 view mistaken decision, arises from a not uncommon set of  
12 facts.

13           On January 24th, federal marshals took  
14 respondent, a Mexican national, into custody in the United  
15 States believing that his two houses in Mexico would  
16 contain evidence of narcotics trafficking as well as his  
17 complicity in the assassination of a federal narcotics  
18 agent. DEA agents made arrangements to search his houses.

19           After attempting first, without success, to  
20 reach the second Deputy Attorney General of the State of  
21 Mexico, the agents contacted the Director General of the  
22 Mexican Federal Judicial Police, thereafter spoke with  
23 more local police authorities, and from those persons  
24 secured permission to conduct the searches.

25           Thereafter the agents, together with members of

1 the Mexican police force, proceeded to respondent's  
2 Mexicali and San Felipe residences. Once there, the  
3 police and the agents conducted the searches. At the  
4 direction of the Mexican police commander who  
5 substantially dictated the scope, duration, and the actual  
6 operation of --

7 QUESTION: Mr. Robbins, may I just ask this  
8 question? Did that Mexican official have the authority to  
9 authorize a search like this?

10 MR. ROBBINS: As far as we know, he did, Your  
11 Honor. The record reflects that before giving his final  
12 okay, and before the actual search took place, he  
13 conferred with what the record shows is in Mexico called a  
14 delegado, who is an attorney present at the local MFJP  
15 station house, and who represents the Attorney General of  
16 the Republic of Mexico and supervises that --

17 QUESTION: In other words, in Mexico the  
18 executive branch of the government has full authority to  
19 conduct whatever searches it thinks necessary. It doesn't  
20 have to have any warrant or judicial participation in --

21 MR. ROBBINS: Well --

22 QUESTION: Is that your submission?

23 MR. ROBBINS: No -- well, our submission,  
24 Justice Stevens, of course, --

25 QUESTION: Well, you said with the full

1 authority of the Mexican official -- I take it you're  
2 meaning it was clearly in compliance with Mexican law.

3 MR. ROBBINS: No, as --

4 QUESTION: I mean, would it matter if they asked  
5 the corner policeman, do you mind if we go in and search  
6 this house? Or, would that do -- be any different?

7 MR. ROBBINS: Well, I think it's possible that  
8 if the facts were very different from the ones we have  
9 here, it could be that asking someone who obviously has no  
10 authority or apparent authority would present a different  
11 case.

12 This is not such a case. I can't --

13 QUESTION: I mean, we don't know whether Mexican  
14 law requires anything like a warrant procedure or judicial  
15 participation --

16 MR. ROBBINS: Well --

17 QUESTION: -- in the authority to conduct the  
18 search of a private home.

19 MR. ROBBINS: We do know that Article 16 of the  
20 Mexican constitution purports to require a warrant under  
21 certain circumstances. We've indicated in our reply brief  
22 in response to an argument made by respondents that it is  
23 not at all clear whether under these circumstances a  
24 warrant would, in fact, had been required if this were a  
25 search governed by Mexican constitutional law.



1           We, of course -- it's our submission that Mexican  
2 constitutional law does not control this case and, in any  
3 event, it's our view that for all appearances sake, the  
4 Mexican officials that authorized this search had every  
5 authority that they were conveying to the American agents  
6 who did conduct it.

7           QUESTION: What I'm really asking -- you  
8 emphasized in your presentation that it was done with the  
9 permission of the Mexican authorities.

10          MR. ROBBINS: Correct.

11          QUESTION: And I'm wondering if that is  
12 essential to your position. And, if so, do they have to  
13 be Mexican authorities who had the authority to grant the  
14 permission? That's --

15          MR. ROBBINS: I don't --

16          QUESTION: I just wonder how relevant it is to  
17 the analysis.

18          MR. ROBBINS: Well, I think that the fact that  
19 there was permission --

20          QUESTION: By somebody.

21          MR. ROBBINS: Well, by someone who it was  
22 reasonable to suppose -- reasonable to suppose -- had the  
23 authority that they were conveying is relevant in our view  
24 to whether the search was reasonable, if you assume that  
25 the Fourth Amendment governs that search.

1 QUESTION: Right.

2 MR. ROBBINS: We, of course, make no such  
3 assumption. I state that as a background fact because it  
4 bears on the second half of my argument, which will be  
5 addressed to the assumption arguendo that the Fourth  
6 Amendment does apply.

7 QUESTION: Well, Mr. Robbins, I take it your  
8 fallback position is that it doesn't matter whether  
9 Mexican law was followed in making this search. And you  
10 also make the argument that it doesn't matter whether the  
11 United States constitutional -- you say that the U.S.  
12 Constitution doesn't apply here -- at least the Fourth  
13 Amendment doesn't.

14 MR. ROBBINS: That's correct.

15 QUESTION: Does anything at all limit searches  
16 by U.S. officials beyond our borders of people that we're  
17 going to then prosecute, and, if so, what?

18 MR. ROBBINS: What limits our ability to  
19 exercise law enforcement jurisdiction overseas is in the  
20 typical case, our ability to secure the cooperation of the  
21 host country which is sovereign within its borders.

22 QUESTION: Well, under your argument, I guess,  
23 if our officials could get away with it, they could just  
24 not ask anybody and break into the house in Mexicali and  
25 do what they wanted.

1 MR. ROBBINS: Well, I think --

2 QUESTION: And your position, I take it, would  
3 be the same. That that evidence could be used?

4 MR. ROBBINS: Well, our position is that the  
5 Fourth Amendment doesn't control the analysis of that  
6 question. And Your Honor's question asks, of course,  
7 about a regime that's not presented in this case, in which  
8 we have no cooperation, in which in fact we are flouting  
9 the sovereign jurisdiction that we're entering and  
10 behaving, I gather, with a form of, sort of random  
11 violence.

12 QUESTION: But that's fair. That's on your own  
13 assumption. That is on your own assumption. That you  
14 didn't really need the permission of the Mexican  
15 authorities.

16 I think your answer to Justice O'Connor's  
17 question has to be yes, that if these people are living in  
18 a regime that lets people break into their houses and do  
19 anything they want, we should benefit from that regime as  
20 well as anybody else. Isn't that your -- isn't that  
21 essentially your position?

22 MR. ROBBINS: Well, I think there comes a point  
23 -- and we've indicated that there is, as it were, a safety  
24 net to this argument provided by the Due Process Clause  
25 which operates in a very different way from the Fourth



1 Amendment. That is to say, in the hypothetical presented  
2 by Justice O'Connor's question, if the agents went in  
3 there and behaved in a fashion that just bespoke utterly  
4 no limitations at all as it were, to choose a --

5 QUESTION: Well, they just entered the house  
6 without any authority from anybody and took the evidence?  
7 Does that shock your conscience?

8 MR. ROBBINS: No, it doesn't. And I think --

9 QUESTION: Why does the Due Process Clause apply  
10 abroad and not the Fourth Amendment?

11 MR. ROBBINS: Because it's not applying abroad,  
12 and that's one of the important differences.

13 QUESTION: It's not?

14 MR. ROBBINS: No. It applies --

15 QUESTION: What shocks the conscience unless  
16 it's the breaking into the house abroad?

17 MR. ROBBINS: I take it that the shock the  
18 conscience cases are talking about what shocks the  
19 conscience of courts that are asked to introduce evidence.  
20 And so that the Due Process Clause attaches to the  
21 introduction of evidence obtained in a way that a judge, a  
22 court, a reviewing court believes to shock the  
23 conscience.

24 The Fourth Amendment doesn't operate that way.  
25 The admission of evidence in an American court is not a

1 separate violation of the Fourth Amendment. The Fourth  
2 Amendment violation occurs, if it occurs at all,  
3 extraterritorially and the separate introduction of that  
4 evidence triggers no constitutional question at all.

5 QUESTION: So, as long as you had such a  
6 break-in for intelligence purposes only and never tried to  
7 prosecute the individual, then at least in that situation  
8 you could -- you could do it with impunity?

9 MR. ROBBINS: Well, impunity may make a greater  
10 claim that we wish to make here. The fact that the Fourth  
11 Amendment doesn't control that question doesn't mean, for  
12 example, that treaties that the United States and foreign  
13 countries have entered into has no bearing. It does not  
14 mean that statutes passed by Congress such as 22 U.S.C.  
15 2291(c) which imposes certain limited restrictions on law  
16 enforcement agents bears not at all.

17 It simply means that the Fourth Amendment by its  
18 nature and in this context, does not supply the  
19 substantive restraints on that activity. And yet that is  
20 indeed our submission.

21 QUESTION: Does the Constitution control what  
22 United States officials do when they're abroad generally?  
23 Or never? Or sometimes?

24 MR. ROBBINS: Well, I think the answer is  
25 sometimes, and the answer is it depends. And, of course,

1 it's the very fact that it depends --

2 QUESTION: When and what does it depend on?

3 MR. ROBBINS: Well, if I might, Justice Kennedy,  
4 I'd like to turn to that directly because the central  
5 failing, we believe, of the court of appeals, is that they  
6 thought it never depends. They thought that the  
7 Constitution, as it were, provides a sort of universal  
8 declaration of rights of man. It applies whenever,  
9 wherever and against whomever government authority acts.

10 And we don't believe that. We believe, as  
11 Justice Harlan suggested in his separate opinion in Reid  
12 against Covert that questions of extraterritoriality are  
13 ones of judgment and not compulsion. And from this  
14 Court's cases, we isolate, Justice Kennedy, three factors  
15 on which the question of judgment ultimately turns.

16 The first of these is, what is the nature of the  
17 right that's being applied? What is the nature of the  
18 constitutional claim that the person seeks the benefit of?  
19 And in this respect it's our view that some constitutional  
20 rights do not attach to all persons by their very nature  
21 and do not apply in all settings by their very nature.

22 And I think the Fourth Amendment in some ways is  
23 a paradigm case of a constitutional provision that makes  
24 next to no sense in most overseas settings.

25 QUESTION: Well, you mean even if the house



1 happens to be owned by a citizen of the United States?

2 MR. ROBBINS: Justice White, we think that is a very  
3 different case and one --

4 QUESTION: Well, the way you put it, it wouldn't  
5 be.

6 MR. ROBBINS: Well, no. I think -- in any  
7 event, what I meant to say is that the Fourth Amendment  
8 presents, in our view, a constitutional provision whose  
9 overseas application ought to be by its very nature  
10 limited. And it may very well be, and we would not  
11 contest the point that it may be limited to citizens or  
12 persons with connections to the United States close to  
13 citizenship.

14 And I base that on a couple of different  
15 features of the Fourth Amendment which give us the sense  
16 that it was not intended, as it were, to be a universal  
17 declaration of rights.

18 We start with the text. The Fourth Amendment to  
19 the Constitution reserves its rights to a class of  
20 persons called "the people." We have tried to indicate in  
21 our brief a variety of reasons why we firmly believe this  
22 is not mere happenstance. It's not mere -- it's not words  
23 that were chosen haphazardly. It was in fact -- the  
24 language was in fact chosen precisely to confine the reach  
25 of the protections conferred.

1           Like the preamble to the Constitution, it  
2 suggests a compact relationship between the claimants, the  
3 ones entitled to the benefits of that right, and --

4           QUESTION: Yes, but, Mr. Robbins, there's a big  
5 difference between the preamble which says, "We, the  
6 people," and "the people" used in the Fourth Amendment  
7 which speaks in the third person, which may suggest that  
8 there third party beneficiaries to the compact that you  
9 described.

10           MR. ROBBINS: Well, I think, for that matter,  
11 Justice Stevens, there were -- there were third party  
12 beneficiaries to the preamble as well. Persons who were  
13 not the ratifiers are clearly entitled to the benefits.  
14 But I think --

15           QUESTION: And so how does the word people tell  
16 us who the third party beneficiaries are?

17           MR. ROBBINS: Well, the word -- it's not just  
18 the word people, it's "the people." And I think this is  
19 not accidental. Let me suggest two reasons why I think  
20 so.

21           First of all, if you go back and take a look at  
22 what the contemporary versions of the -- that were  
23 available for the Fourth Amendment to choose from -- for  
24 example, Your Honor's dissenting opinion in New York  
25 Telephone suggested that the Fourth Amendment derives --

1 that the closest precursor was the Massachusetts Bill of  
2 Rights.

3 Well, the Massachusetts Bill of Rights was  
4 phrased "every subject." When -- when Richard Henry Lee,  
5 for example, tried to append a Bill of Rights to the  
6 Constitution before it was submitted to the ratifying  
7 conventions, he phrased it as "the citizens." When  
8 Patrick Henry, in the ratification convention in Virginia  
9 came up with a version of the Fourth Amendment, he limited  
10 it to "every freeman."

11 So, there was a sense, I think, at the time of  
12 the framing of the Fourth Amendment, of confining the  
13 scope of its protections, a point I think --

14 QUESTION: Except they rejected those drafts.

15 MR. ROBBINS: I'm sorry?

16 QUESTION: They rejected those drafts.

17 MR. ROBBINS: Well, it's -- it's -- they didn't  
18 choose any of those. But nor did they choose the Fifth  
19 Amendment's "no person." Nor did they choose the Sixth  
20 Amendment's, the "right of the accused in all criminal  
21 cases." And what's more --

22 QUESTION: And they couldn't have used "every  
23 subject," or they wouldn't have been likely to use "every  
24 subject," would they? In fact, "the people" is probably  
25 the best equivalent in democratic terms of every subject.



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MR. ROBBINS: Well, I think, at a minimum, it conveys the sense that the court of appeals, which viewed the Fourth Amendment as a universal declaration of rights, was considerably off base.

The last point I want to make and then I'll move to the other two factors, Justice Kennedy, that I think inform the analysis is -- it's worth comparing the other provisions in the Bill of Rights that also use the phrase "the people" because they cannot be understood unless you recognize that "the people" was a limiting concept.

The other provisions that use that phrase are the Ninth and Tenth Amendments which make utterly no sense except in terms of this compact that I'm describing; the Second Amendment, which refers to the right to bear arms, which can't plausibly be assumed to be a right of persons overseas to have arms; and finally, a portion of the First Amendment which speaks of the right to peaceably assemble and petition the government.

Again, the notion that one comes back to is the sense of a compact relationship with the government that receives some of the power but in which the people reserve the balance that is not extended.

QUESTION: Well, of course, in order to make this complete, the Third Amendment says no soldier shall

1 in time of peace be quartered in any house. And I assume  
2 that under your semantic analysis it does apply overseas.

3 MR. ROBBINS: Well, I'm not -- I'm not sure that it  
4 does. But, Justice Kennedy, let me hasten to add that I  
5 do not rely on -- I don't know if I would call it  
6 semantics -- but at least purely a textual argument  
7 because I believe that the purpose of the Fourth Amendment  
8 is one that makes it awfully difficult to suppose it was  
9 intended to provide rights in every quarter of the globe.

10 After all, the Fourth Amendment, as this Court  
11 and every other court has said more than once, is designed  
12 to protect expectations of privacy. And that concept, I  
13 suggest, is unusually sensitive to local tradition and  
14 culture. It's difficult for courts to adjudicate.

15 And what's more, it seems to us that  
16 adjudication of what is a reasonable expectation of  
17 privacy in an American court in a contested criminal  
18 litigation or any other kind is perhaps unseemly, perhaps  
19 even improper, raising, I suppose, even act of state  
20 doctrine questions.

21 Now, that's just the first inquiry. What is the  
22 nature of the right? But from this Court's cases, we  
23 think that there are two other factors that again move us  
24 away from this universalist view taken by the court of  
25 appeals.

1           The second is what is the relationship between  
2 the United States and the place in which the  
3 constitutional claim arises? The fact that the search or  
4 seizure takes place in a foreign country, in a separate  
5 sovereignty, makes the case, I think, for overseas  
6 application of a constitutional right a very difficult one  
7 to win on.

8           And that's true for any number of reasons. The  
9 fact that this is a separate sovereignty, Mexico,  
10 indicates that it's their laws and not ours that ought to  
11 presumptively control disputes. Our Constitution, by its  
12 nature, does not seem designed to have widespread overseas  
13 application.

14           The preamble which Justice Stevens adverted to  
15 before uses language that just doesn't sound like it was  
16 written for Mexico, France, The Netherlands, and the rest  
17 of the world.

18           And finally, --

19           QUESTION: Well, that's all true, but all it  
20 takes to accommodate that is to say that unreasonable -- I  
21 mean, the only governing word it has is "unreasonable."  
22 Everything is okay if it's reasonable, right? And all you  
23 have to say is that it's not unreasonable if it complies  
24 with local law, wherever that is.

25           MR. ROBBINS: Well, --



1           QUESTION: And that would mean everything would  
2 be just the way you would like it.

3           MR. ROBBINS: Well, I think if what Your Honor is  
4 saying is that we can build into the reasonableness  
5 investigation the context, the fact that this is an  
6 overseas search, I couldn't agree more. I think that's  
7 yet a separate and entirely independent fallacy of the  
8 court of appeals decision.

9           QUESTION: It also eliminates the argument you  
10 just made that if we acknowledge that the Fourth Amendment  
11 applies abroad, we're letting ourselves into a lot of  
12 silly results. That obviously you have to take foreign  
13 manners and customs into effect. I'm saying you can read  
14 the Fourth Amendment to apply abroad and still take them  
15 into effect.

16           MR. ROBBINS: Well, I think you can. I guess  
17 our view is that that feature of the Fourth Amendment  
18 makes it seem inapplicable overseas. But we freely  
19 concede it also bears on how you would analyze it should  
20 you conclude that it does apply overseas.

21           I mean, it seems to me these defects, the  
22 inapplicability and the inappropriateness of applying the  
23 doctrine, weigh in both at the threshold -- does it apply?  
24 -- and at what Justice O'Connor referred to as our  
25 fallback position -- how does it apply?

1           Finally, the last factor that we think is  
2 relevant is what is the relationship of the claimant to  
3 the United States? This is a familiar inquiry, one raised  
4 in Johnson against Eisentrager, more recently in Landon  
5 against Plasencia and the basic notion is that , "aliens  
6 are accorded a generous and ascending scale of rights as  
7 he increases his identity with our society."

8           This is a point that comes up in a great many of  
9 the immigration cases. And the notion is, again, the  
10 closer the connection to the United States of citizenship  
11 or naturalization or permanent residence, the greater the  
12 claim for the protections of the social compact.

13           Now, viewing these three factors as a whole in  
14 this case I suggest that the solution is not difficult to  
15 find because respondent is at the wrong end of each of the  
16 three spectrums that I've suggested.

17           The Fourth Amendment, first of all, is, we  
18 think, peculiarly out of place in an overseas context and  
19 peculiarly unwarranted for overseas application.

20           Second, this is a completely separate  
21 sovereignty. Mexico is independent of the United States.  
22 It's a wholly extraterritorial search unlike, say,  
23 searches on the high seas or in the Customs waters or in  
24 territories in which the United States exercises  
25 substantial sovereignty.

1           And, finally, this is a claimant with little or  
2 no ongoing connection to the United States, little or no  
3 membership, if any, in the United States community.

4           Those factors, we think, taken as a whole,  
5 confirm our view that the court of appeals' approach and  
6 its result in this case was wrong -- that the Fourth  
7 Amendment simply doesn't apply.

8           Now, let me hasten to add -- I mentioned this --  
9 I adverted to it before, I believe, Justice Stevens, in  
10 answer to one of your questions. The fact that the Fourth  
11 Amendment doesn't provide the controlling restraints on  
12 conduct does not mean that all foreign nationals are out  
13 of luck when there is some kind of activity of American  
14 agents that is thought to be out of bounds.

15           Congress has, and has in fact exercised the  
16 power to impose restraints on agents. I referred before  
17 to 22 U.S.C. 2291(c) which restricts law enforcement  
18 officers in "direct police arrest actions" and also in  
19 interrogations of U.S. persons abroad. As I said before,  
20 also there can be treaties that restrain the exercise of  
21 American power overseas and I suppose as a fallback  
22 position as well the Due Process Clause, which again  
23 regulates the admission of evidence internally -- a  
24 domestic restraint -- may also exercise a protection of  
25 last resort.



1           But even if the Fourth Amendment generally  
2 applies, we believe that the court of appeals erred in --

3           QUESTION: Mr. Robbins, may I just ask one other  
4 question? Isn't there also an intermediate position that  
5 even if it does not generally apply -- you say this  
6 gentleman had no ongoing relationship with the United  
7 States, but if you're ultimately successful, he will have  
8 an ongoing relationship with the United States --

9           (Laughter.)

10          MR. ROBBINS: Well --

11          QUESTION: -- and he certainly has some  
12 relationship and was physically present in the United  
13 States at the time of the search.

14          MR. ROBBINS: Well, for that matter, Justice  
15 Stevens, if the indictment is correct, he's also had --  
16 he's made periodic trips here for narcotics trafficking;  
17 he's sent shipments of marijuana to the United States. He  
18 may well, for all we know, have cash saved in bank  
19 accounts in the United States.

20          QUESTION: No, but the point I really am making  
21 is that your argument perhaps is less strong in a case in  
22 which the search took place after the owner of the  
23 premises was physically in custody and under indictment in  
24 the United States.

25          MR. ROBBINS: It is undoubtedly the case that

1 had he never been here our argument would be that much  
2 stronger.

3 QUESTION: Yeah.

4 MR. ROBBINS: But his presence as an involuntary  
5 criminal defendant is not the kind of presence that  
6 Johnson against --

7 QUESTION: No, but it's the kind of --

8 MR. ROBBINS: It's not Johnson against  
9 Eisentrager presence.

10 QUESTION: No, but it's the kind of presence  
11 that gives rise to certain constitutional rights, such as  
12 the right to counsel.

13 MR. ROBBINS: No question about it. But those  
14 are domestic rights, rights that apply in the United  
15 States at trial or prior to trial. They are not  
16 restraints on the overseas application of American power.

17

18 QUESTION: Well, the right to object to the  
19 introduction of illegally-seized evidence is a trial  
20 right, I suppose.

21 MR. ROBBINS: But it -- but, again, the Fourth  
22 Amendment is not --

23 QUESTION: I understand your point.

24 MR. ROBBINS: -- separately violated in the  
25 United States. It is, again, an extraterritorial

1 application.

2 Let me quickly address the Warrant Clause issue  
3 because it's our submission that even if the Fourth  
4 Amendment applies, surely the Warrant Clause does not.

5 The court of appeals reasoned that to relieve  
6 the government of the warrant requirement -- quote --  
7 would be to treat foreign searches differently from  
8 domestic searches just because they are foreign.

9 But, of course, foreign searches are different,  
10 and that's just the point. They call for different  
11 treatment under the Fourth Amendment.

12 There are in this setting special needs beyond  
13 the normal need for law enforcement, and a warrant  
14 requirement is therefore inappropriate, and I say that for  
15 two reasons.

16 First, as this Court suggested in its Skinner  
17 decision, a warrant would do little to further the aims of  
18 the Warrant Clause. It would not empower the agents to go  
19 forward. It would give them no authority in Mexico, or,  
20 to use the court of appeals', I think, elegant  
21 characterization, it would be a dead letter in Mexico.

22 It would not provide meaningful protection on  
23 the scope of the search. And this case indicates just why  
24 that's so. Because the actual operation is apt to be in  
25 the control of the host country's officials. And just as

1 the Mexican commander ordered the agents to gather up the  
2 remaining documents and look at them later, so too can it  
3 not be expected that a warrant would have that confining  
4 force.

5           Apart from the fact that a warrant could not  
6 fulfill its traditional missions, in this setting the  
7 burden of obtaining a warrant is likely to frustrate the  
8 governmental purpose behind this search. There is no U.S.  
9 magistrate who is authorized to issue one. We've still  
10 not been told by anybody who the agents were supposed to  
11 go to see in order to get this warrant that they were  
12 supposedly supposed to execute.

13           A warrant would certainly interfere with their  
14 ability to do their job which requires them to obey the  
15 restrictions imposed by the host officials and not follow  
16 the competing agenda set by the United States magistrate.

17           In this case we believe the proper approach is  
18 one of reasonableness, the basic requirement of the Fourth  
19 Amendment. And here the agents' behavior was evidently  
20 reasonable. They sought approval at the highest levels of  
21 the Mexican government available. They secured that  
22 approval. They participated with the Mexicans in the  
23 conduct of the search, and they obeyed the dictates  
24 imposed by the host during the search.

25           We believe, in short, that questions of



1 extraterritoriality are not on/off switches, as the court  
2 of appeals supposed. There is and must be considerable  
3 room for judgment. Is this a territory in which  
4 constitutional protections makes sense? Is this claimant  
5 within the constitutional zone of interest? Do the rights  
6 asserted lend themselves to overseas application and even  
7 if a right applies, must it apply in exactly the same way  
8 as it does domestically?

9 These are complicated questions to be sure, but  
10 the court of appeals never asked them. It believed,  
11 instead, that the Constitution applies everywhere, to  
12 everyone, regardless of circumstance.

13 Had the court of appeals asked the right  
14 questions, it would not have suppressed the tally sheets  
15 in this case. This judgment should be reversed.

16 If I may reserve the balance of my time.

17 QUESTION: Very well, Mr. Robbins.

18 Mr. Pancer, we'll hear now from you.

19 ORAL ARGUMENT OF MICHAEL PANCER

20 ON BEHALF OF THE RESPONDENT

21 MR. PANCER: Mr. Chief Justice, may it please  
22 the Court:

23 The exact question presented to this Court is  
24 whether or not a person who is incarcerated in the United  
25 States, facing charges in the United States, has a Fourth

1 Amendment interest in their residence outside the United  
2 States when a decision to search that residence is made by  
3 a United States agent in the United States and he is  
4 hunting for evidence to be used for the very charges that  
5 the person incarcerated is facing in the United States.

6 That is the specific question and we are mindful  
7 of the rule of this Court enunciated by Justice  
8 Frankfurter in Reid versus Covert that says that this  
9 Court will not formulate a rule of constitutional law  
10 broader than required by the precise facts to which it is  
11 to be applied.

12 QUESTION: Do you think the Ninth Circuit was  
13 mindful of that rule?

14 MR. PANCER: I think that the precise rule that  
15 we could draw from the case -- yes, my answer would be  
16 yes, that the precise rule we could draw from that case is  
17 that since, in this case, there was no exigency to prevent  
18 the officers from getting a warrant, they should have got  
19 a warrant. That's how I understand the rule. I don't  
20 understand it to be as broad as counsel for the  
21 government.

22 QUESTION: Who do you think they should have  
23 gotten that warrant from, in particular?

24 MR. PANCER: I don't think --

25 QUESTION: Puerto Rico?

1 MR. PANCER: I don't think it's a difficult  
2 question. The defendant, Mr. Verdugo, was in custody in  
3 the Southern District of California. The agent, when he  
4 made his decision to search, was present in the Southern  
5 District of California. There was a magistrate present.

6 The Assistant United States Attorney assigned to  
7 prosecute Mr. Verdugo was also in the Southern District of  
8 California. I think --

9 QUESTION: It's the defendant's presence in the  
10 Southern District -- you don't give notice to him of a  
11 motion to file a search warrant.

12 MR. PANCER: No, but if you want to go to a  
13 magistrate -- and that's how I understood the question --  
14 what magistrate would you logically go to or which judge  
15 -- I would think that since the agent, the defendant, and  
16 the prosecuting authority were all in the Southern  
17 District of California, it would certainly make sense to  
18 go there. Now, there could be --

19 QUESTION: Well, it's as good as any.

20 MR. PANCER: Well, also, I think --

21 QUESTION: You don't think the Mexican  
22 authorities would be a little bit annoyed with an American  
23 official issuing a document that authorizes an American  
24 law enforcement officer to search their territory? You  
25 don't think that Mexico might be annoyed at that?

1           MR. PANCER: I think they would be very annoyed  
2 if that document was presented to them by the agents as  
3 something that said this gives us the right vis-a-vis the  
4 Government of the Republic of Mexico to take action in  
5 Mexico. They'd have every right to be outraged.

6           No. All we're saying that the warrant does is  
7 create a relationship between the evidence and the court  
8 in the United States. It can't authorize the agents to  
9 search if the Mexican authorities don't want them to or  
10 don't give them permission. But it can say that this  
11 search is legal according to the laws of the United  
12 States. And that's all we're saying that the warrant  
13 accomplishes. Clearly, it can't force the Mexicans to let  
14 the agents search.

15           QUESTION: Well, that's an unusual warrant then,  
16 isn't it? Because, I mean, a normal warrant is something  
17 that is presented to the person in control of the premises  
18 which shows the legal authority. And the person, if he  
19 resists the execution of that warrant, is subject to  
20 punishment.

21           So you're talking about a very -- I mean, you  
22 could call it a warrant if you like. But it's -- it's a  
23 strange form of warrant, isn't it?

24           MR. PANCER: In that sense it is different, but  
25 requiring a warrant fulfills the same purposes --



1 QUESTION: No, it --

2 MR. PANCER: -- as having a warrant in the United  
3 States. Clearly because --

4 QUESTION: It may be but it's not a warrant as  
5 we have generally known warrants, what you're talking  
6 about.

7 MR. PANCER: It certainly has the difference  
8 that the Justice has mentioned.

9 QUESTION: In fact, Counsel, it would be rather  
10 odd, wouldn't it, for this Court to require the issuance  
11 of a warrant that's not permitted by the rules?

12 MR. PANCER: No, I think it is permitted  
13 pursuant to Rule 41. Rule --

14 QUESTION: Is the -- well let's look at that.  
15 Doesn't the property have to be located in the district  
16 where the magistrate or the state court sits?

17 MR. PANCER: That would be true if we just  
18 looked at Rule 41(a). But that rule -- I think in the New  
19 York Telephone case -- has been held to have a broader  
20 application and the court has been deemed to have inherent  
21 powers to issue orders that will accomplish a rational aim  
22 of the court.

23 For example, there was no specific provision, as  
24 I understand the New York Telephone Company case, that  
25 permitted the court to issue a warrant for a pen register

1 and to require the phone company to help out and lend  
2 equipment so that a pen register could be affixed to pay  
3 telephones. But, yet, Rule 41 was read not to limit what  
4 the courts may do but to spell out some of the kinds of  
5 warrants that a magistrate could issue or a district court  
6 could issue, but not to limit it, and that the court  
7 certainly would have inherent power to issue such an  
8 order.

9           The same I think was true in the Torres case,  
10 which was cited by the district court in this case, in  
11 which the law enforcement wished to have an order for  
12 indoor surveillance and there was just no specific  
13 provision but it was held to be encompassed by Rule 41 and  
14 by the inherent power of the court to issue orders to  
15 accomplish irrational aims.

16           QUESTION: Do you have cases that say they have  
17 authority to issue it beyond their jurisdiction? That in  
18 that particular respect they can exceed what the rule  
19 says?

20           MR. PANCER: There is no case that says that  
21 they can or cannot. But the reading of the language, I  
22 think, in the New York Telephone Company case and the  
23 reading of the language in Torres seems -- they didn't  
24 seem to be concerned with a problem of territorial in this  
25 because it didn't come up in those instances. But the

1 language of the case seems to say that it wouldn't matter  
2 that the territorial limitation mentioned in Rule 41(a)  
3 wouldn't prevent the court, due to its inherent power, to  
4 issue an order outside of the territory.

5 QUESTION: No, but, you know, if you want to --  
6 if you are trying a person in the Southern District of  
7 California and you want to search his house in Tucson,  
8 you don't get a warrant from -- who do you get the warrant  
9 from?

10 MR. PANCER: It would be the magistrate in  
11 Tucson or the court in Tucson?

12 QUESTION: Why?

13 MR. PANCER: I think because Rule 41(a) talks  
14 about specifically --

15 QUESTION: Well, it is territorial then, isn't  
16 it?

17 MR. PANCER: Pardon me?

18 QUESTION: It is territorial.

19 MR. PANCER: Rule 41(a) is. I only mentioned  
20 the other case to say that I don't think it restricts the  
21 court -- Rule 41(a) restricts the court in issuing orders  
22 or else --

23 QUESTION: Well, it restricts it in the sense  
24 that a warrant issued in Southern California wouldn't  
25 authorize a search in Tucson.

1 MR. PANCER: That's correct, but I don't think  
2 it would restrict a court from issuing a warrant to search  
3 or a finding of probable cause to search a residence in  
4 Mexicali in Mexico. And there is nothing in the rule that  
5 says that it would, and I think the holding of New York  
6 Telephone indicates that the court would have that power.

7 But I think I should hasten to add, if this  
8 Court finds that the warrant requirement applies, the fact  
9 that the United States Congress has not set up a system  
10 whereby a warrant could be obtained, is certainly not a  
11 defense for the government in obtaining a warrant. If a  
12 warrant is required, then the government must get a  
13 warrant or they must not search. I am suggesting there is  
14 a way they could have done that.

15 QUESTION: Is a warrant in this record?

16 MR. PANCER: There is no warrant.

17 QUESTION: I mean, what -- whatever papers that  
18 the United States officers used, are they -- copies of  
19 them in this record?

20 MR. PANCER: Justice Marshall, there were no  
21 papers. They used no papers. Agent Bowen, the agent who  
22 decided to search, sat in his office and said, I'm --

23 QUESTION: What are we talking about a warrant  
24 for?

25 MR. PANCER: Whether or not they should be



1 required to get a warrant, and we're saying that they  
2 should have been required to obtain a warrant. But there  
3 was no warrant in this case.

4 QUESTION: They should have been required to  
5 obtain a warrant?

6 MR. PANCER: Yes.

7 QUESTION: And what would the warrant say?

8 MR. PANCER: That the -- it would specifically  
9 identify the places to be searched, list specifically the  
10 items that could be seized, and specifically set --

11 QUESTION: Would that have any relation to the  
12 laws of Mexico?

13 MR. PANCER: Well, in fact it would, because the  
14 Article 16 of the Constitution of the Republic of Mexico  
15 is very similar to our own warrant requirement and  
16 specifically requires that a search warrant be obtained.

17 I disagree with counsel when they say that this  
18 search was authorized in Mexico. It was not because no  
19 warrant was obtained, and we submitted an affidavit that  
20 is part of the record in this case --

21 QUESTION: Well, I thought he said that they  
22 checked with some assistant attorney general or somebody.

23 MR. PANCER: Well, they checked with another law  
24 enforcement official and they said we'd like to search and  
25 this fellow police officer said, sure, we'll help you out.

1 That's basically what happened. But nobody told them that  
2 this was legal. It's just another police officer that  
3 says, sure, we'll help you out and we'll do the search.

4 According to the Constitution of Mexico, the  
5 search was not legal and the agents were guilty of the  
6 crime of excess, according to the laws of Mexico.

7 QUESTION: Then I assume the agents are guilty  
8 of violating your client's rights.

9 MR. PANCER: That's correct.

10 QUESTION: And subject --

11 QUESTION: Did you ever seek --

12 QUESTION: -- to suit.

13 QUESTION: Did he ever bring any suit against  
14 them in Mexico?

15 QUESTION: That was my question.

16 MR. PANCER: No civil suit was ever filed in  
17 Mexico that I know about.

18 QUESTION: Or any place?

19 MR. PANCER: No -- no -- I know of no civil  
20 suit.

21 QUESTION: So he did not seek to vindicate the  
22 rights you say were denied under Mexican law?

23 MR. PANCER: He did not seek to sue U.S. agents.  
24 Of course, he was incar --

25 QUESTION: Did he seek to sue the Mexican agents

1 whom you say violated his rights?

2 MR. PANCER: I don't believe that he did. He  
3 has an attorney in Mexico. But I don't believe that he  
4 did. Of course, he was here incarcerated in the United  
5 States well before the search. But I don't believe that  
6 he did.

7 QUESTION: Suppose we think the warrant  
8 requirement does not extend to searches beyond our  
9 borders, would we then have to -- if the Fourth Amendment  
10 applies -- look to a reasonableness test?

11 MR. PANCER: Well --

12 QUESTION: And how would you measure that? It  
13 wouldn't necessarily be measured by the law of a foreign  
14 country.

15 MR. PANCER: No. No, it -- well, in the  
16 Peterson case that was -- the Ninth Circuit case -- that  
17 was one of the things looked at to determine whether or  
18 not the search complied with the Fourth Amendment.

19 But if we're looking -- and I'm clearly urging  
20 this Court to say that a warrant must be obtained when the  
21 sanctity of a home is being violated, that there has never  
22 been a broad rule from this Court saying that homes can be  
23 entered without a warrant.

24 QUESTION: Well, we understand your argument.  
25 Now, how about getting to my question.

1 MR. PANCER: Yes. Well, this search we are  
2 saying for many reasons was not a reasonable search if we  
3 are not going to apply the warrant requirement. It was  
4 not reasonable, we are saying, because of law enforcement  
5 official Agent Bowen made that decision on his own,  
6 without contacting anybody from the Department of Justice,  
7 without contacting the Assistant United States Attorney  
8 who was assigned to prosecute Mr. Verdugo in the Southern  
9 District.

10 He even said that he didn't contact his own  
11 supervisor, but had he contacted his supervisor and his  
12 supervisor said no, he still might have conducted the  
13 search.

14 He never contacted any --

15 QUESTION: I don't understand that. There's a  
16 -- do you have to consult with a certain number of people  
17 before the search can be reasonable? What difference does  
18 it make whether he contacted the supervisor or not? I  
19 don't understand that.

20 MR. PANCER: Well, it was considered by the  
21 district court in that had he contacted some official, he  
22 might have realized, one, that there was a warrant  
23 requirement in Mexico that he could have complied with; he  
24 might have learned that as far as the Department of  
25 Justice is concerned maybe a warrant or an order of



1 probable cause should be obtained here. And it doesn't  
2 seem that we just want a law enforcement official to be  
3 able on his own to put together a raiding party and go  
4 into Mexico, ask for help and search. But that --

5 QUESTION: The traditional rule -- an objective  
6 test -- you know, if you're right objectively, I thought  
7 it didn't make any difference how many people you  
8 consulted. And if you're wrong objectively, consulting a  
9 number of people beforehand shouldn't validate the thing.

10 MR. PANCER: Well, we are saying that he was  
11 wrong objectively in that he didn't comply at least with  
12 the warrant requirements --

13 QUESTION: But the failure to consult adds  
14 nothing to the objective.

15 MR. PANCER: We urge that had he consulted, he  
16 might have learned that there was a warrant requirement in  
17 Mexico. So in that sense we think it's on point.

18 He never contacted --

19 QUESTION: -- to know if his supervisors were  
20 smarter than he was. Maybe, you know, he may have been  
21 smarter than his supervisors, in which case the consulting  
22 would be counterproductive. We just don't have any such  
23 rule.

24 MR. PANCER: Okay. He never contacted any  
25 judicial officer in the Republic of Mexico, only other law

1 enforcement officials. These are all reasons why we think  
2 that the search was unreasonable.

3 He enlisted the aid of a corrupt Mexican Federal  
4 Judicial Police officer to go on this raiding party that  
5 --

6 QUESTION: How do you know that?

7 MR. PANCER: We presented evidence at the  
8 district court from two other agents who were also there  
9 that this agent was corrupt, this MFJP commandante. We  
10 attempted to present more evidence --

11 QUESTION: Is that what the district court  
12 found?

13 MR. PANCER: No, it's what the agents testified  
14 to. The district court would not let us pursue that any  
15 further, saying that this went to an issue of good faith  
16 and good faith was not an issue in the case.

17 On this raiding party that went to search in  
18 Mexico was a fugitive.

19 QUESTION: Why -- what do you mean good faith  
20 isn't an issue in the case?

21 MR. PANCER: I say the district court found that  
22 good faith was not an issue so we weren't --

23 QUESTION: You mean there was good faith?

24 MR. PANCER: No. The court found that, one,  
25 there was not good faith, but that good faith was not

1 relevant because we don't have the situation as we do in  
2 Leon where the agents were relying on a neutral and  
3 detached magistrate. We have a far different situation.  
4 So the court found, one, that good faith was not relevant  
5 but if it were --

6 QUESTION: Do you think Leon is limited to those  
7 situations where you have a warrant that was issued by a  
8 magistrate?

9 MR. PANCER: No. Clearly it is not, but the  
10 court found that the reasoning in Leon would not apply  
11 when the officers, as they were in this case, relied on  
12 the word of this Mexican commandante. He felt that they  
13 did not have a good faith -- the court found --

14 QUESTION: You mean they found that -- they  
15 thought that -- the court thought that the agents knew  
16 this man was corrupt?

17 MR. PANCER: Two of the agents testified that  
18 they knew that he was corrupt. We were getting into when  
19 they learned of his corruption when the court cut off that  
20 inquiry because the government objected to it.

21 QUESTION: Did they know he didn't have any  
22 authority to do what he was doing?

23 MR. PANCER: No, just that he was corrupt.

24 QUESTION: What does the term corrupt mean when  
25 you use it?

1 MR. PANCER: A person who was willing to take,  
2 in this context, bribes to do illegal activities is the  
3 way it was presented.

4 QUESTION: Well, supposing a policeman serves a  
5 warrant -- can the defendant defend against the search and  
6 claim it's illegal on the grounds that the policeman had  
7 taken a bribe in an unrelated situation?

8 MR. PANCER: No, no, this -- no, we are only --  
9 this was only discussed in the district court in the  
10 context of a good faith argument by the agent.

11 QUESTION: Well, was it suggested that the  
12 American agents who participated in this particular search  
13 in Mexico had themselves tried to bribe this agent?

14 MR. PANCER: It was suggested that prior to the  
15 search that U.S. law enforcement officials who were  
16 involved in this search were involved with getting police  
17 officers in Mexico to engage in the illegal action of  
18 kidnapping Mr. Verdugo and sending him back to the United  
19 States from which --

20 QUESTION: Well, that's a lot different than  
21 being very directly tied into this particular search.

22 MR. PANCER: It relates to the kinds of  
23 activities in which the U.S. law enforcement agents were  
24 engaged and when did those activities in connection with  
25 the search, i.e., the apprehension of Mr. Verdugo, was to



1 get the law enforcement there to commit an act illegal in  
2 Mexico for which charges were issued in Mexico. Those  
3 officials then came to the United States -- those Mexican  
4 police officials, where they're being protected. That's  
5 part of the record of the district court.

6 QUESTION: What does it prove?

7 MR. PANCER: It proves that it is one thing to  
8 say that officers could rely in good faith on a neutral  
9 and detached magistrate, but it is far another thing to  
10 say that they have some good faith reliance on a person  
11 they know to be corrupt.

12 In addition, as I say, on this raiding party  
13 that went to search was a fugitive from justice in the  
14 United States. And he was a fugitive from a companion  
15 case to the case in which the defendant in this case was  
16 charged.

17 QUESTION: Of course, that wasn't the basis for  
18 the Ninth Circuit's holding.

19 MR. PANCER: No. I am trying to list all of the  
20 things that came out that we think made this search  
21 unreasonable, responding to Justice O'Connor's question.

22 One of the houses searched in Mexico was the  
23 wrong house. It wasn't the home of Mr. Verdugo. Our  
24 agents went inside the residence of a family named Tofoya.  
25 In that home, Mrs. Tofoya was intimidated by Mexican

1 officials when she first said she did not know who Mr.  
2 Verdugo was and that he didn't live here.

3 And after a search of that residence, which was  
4 the wrong residence, and some intimidation, they found --  
5 Mr. Tofoya was able to lead the agents to where Mr.  
6 Verdugo's residence in San Felipe was. The --

7 QUESTION: Do you think your rule would apply to  
8 an arrest or a detention in Mexico of an alien by United  
9 States police which would be illegal in the United States  
10 -- would they have to have probable cause in United States  
11 terms to detain him?

12 MR. PANCER: We would have no remedy if that  
13 were to happen.

14 QUESTION: Well --

15 MR. PANCER: I think that's clear.

16 QUESTION: -- let's assume they detain him, not  
17 only detain him but they bring him to the United States.  
18 In the meanwhile, they get some admissions from him.

19 MR. PANCER: Well, I think we'd have some remedy  
20 as to the admissions. As to him being in the United  
21 States --

22 QUESTION: As to the admissions obtained from  
23 him in Mexico?

24 MR. PANCER: Yes, I think that there -- and I  
25 don't have the case before me, but there are cases that

1 say the Fifth Amendment would apply to the questioning of  
2 a person, whether it took place in this country or not.  
3 But there would be no remedy as to his being here in the  
4 United States.

5 QUESTION: Do you think the Fourth Amendment  
6 applied to American forces in Mexico during the Mexican  
7 War?

8 MR. PANCER: I think that there have been cases  
9 that distinguished times of war enemy alienage from a  
10 situation in which we --

11 QUESTION: To say that the Fourth Amendment  
12 didn't apply in those situations?

13 MR. PANCER: I would not --

14 QUESTION: Well, but I thought you were talking  
15 about cases?

16 MR. PANCER: No, I'm sorry -- I would not say  
17 that. But I believe that the Johnson case, which was  
18 cited by counsel, turns on the issue of enemy alienage.  
19 And that we're not disputing that -- those cases.

20 QUESTION: So you don't agree with the Ninth  
21 Circuit that the Constitution or the Bill of Rights  
22 applies equally everywhere in the world that the United  
23 States is acting?

24 MR. PANCER: Well, I -- as a general  
25 proposition, I would agree with that -- however, I will

1 recognize there are cases that are to the contrary and I'm  
2 thankful that we need a much more limited rule to prevail  
3 in this case.

4 QUESTION: Well, but when you say it's a Fourth  
5 Amendment it doesn't -- you know, it can no longer be  
6 controlled by Congress. It's an absolute. Suppose the  
7 drug problem is so severe that with the full authorization  
8 of Congress the executive sends a battalion of troops to a  
9 foreign country that has been absolutely uncooperative in  
10 our efforts to prevent the exportation of drugs to this  
11 country? It's not a war. Just sends a battalion and the  
12 object is to search and destroy any heroin production  
13 facilities. And they have authority to go and search and  
14 destroy.

15 MR. PANCER: Well, to the extent they would try  
16 to come back with evidence from that raid and use it in  
17 the United States, I think Reid versus Covert in addition  
18 --

19 QUESTION: Oh, no, but wait. They shouldn't be  
20 doing it at all. I mean, I'm advising the President --  
21 I'm counsel to the President. He says, you know, Congress  
22 has passed this statute, I think we should do it. But if  
23 you tell me it's a violation of the Fourth Amendment, I  
24 don't care whether I'm introducing evidence or not. I  
25 certainly shouldn't do it if it violates the Fourth



1 Amendment.

2 MR. PANCER: Well, I think it does violate the  
3 Fourth Amendment.

4 QUESTION: Right. So it can't be done then?

5 MR. PANCER: I would say it certainly viola --

6 QUESTION: Absolutely. There's no way, right?

7 MR. PANCER: I would agree.

8 QUESTION: But with a treaty -- they make a  
9 treaty with Mexico and they agree that searches can be  
10 made of properties in Mexico pursuant to procedures that  
11 wouldn't even come close to complying with the Fourth  
12 Amendment. Do you think that treaty is valid?

13 MR. PANCER: No, I don't think the treaty would  
14 be valid if it contradicts the Fourth Amendment. But,  
15 again, I don't need to go that far to prevail here. There  
16 is -- there is no such treaty. In fact, there is the  
17 Mexican Constitution, which is akin to our own in terms of  
18 what it requires from searching officers.

19 This -- for the first time during --

20 QUESTION: I take it that if foreign police  
21 officials ask American DEA agents to cooperate with them  
22 in a search, under your view the American agent has to get  
23 a warrant before he does that?

24 MR. PANCER: A search in this country?

25 QUESTION: No. A search in a foreign country.

1 MR. PANCER: If he intends to use the evidence  
2 in the United States -- we're talking about a situation --

3 QUESTION: Well, suppose they don't know.  
4 Again, would you advise that officer that he's acting  
5 illegally if he cooperated with foreign police in search  
6 of a foreign residence without -- and he has no warrant?

7 MR. PANCER: Not necessarily because I think the  
8 Fourth Amendment, by case law, and by its terms applies  
9 when officers -- most specifically when officers are  
10 seeking to get evidence to introduce in the United States  
11 against a defendant in the United States. Many cases have  
12 mentioned that that is the specific protection that --

13 QUESTION: So the violation is the introduction  
14 of the evidence?

15 MR. PANCER: No, the violation -- well, the  
16 remedy for the violation is to prevent --

17 QUESTION: I'm asking whether there is a  
18 violation. If you are a law enforcement official who is  
19 conscientious about his constitutional obligations, you  
20 would not assist foreign police unless you had a warrant  
21 from a United States court?

22 MR. PANCER: Or unless I did not intend to  
23 obtain evidence to bring back to the United States, I  
24 think that I would have to say --

25 QUESTION: So, in your view, the Fourth

1 Amendment is limited to those instances where there is a  
2 search and the evidence is brought to a United States  
3 court -- there is no violation?

4 MR. PANCER: In a foreign --

5 QUESTION: There is --

6 QUESTION: Well, what if a plaintiff --

7 MR. PANCER: In a foreign country --

8 QUESTION: What if a plaintiff brings a suit

9 under 1983 -- the same hypothesis as Justice Kennedy's.

10 No evidence was introduced to him but he's been the victim  
11 of a seizure of property that he says violates the Fourth  
12 Amendment because, as you say, the Fourth Amendment  
13 applies in that situation.

14 How does the court rule?

15 MR. PANCER: I would think that if there has  
16 been a violation of the defendant's rights, then he would  
17 have the right to sue.

18 I hope I have properly answered Justice  
19 Kennedy's question. I think that the joint venture  
20 doctrine determines when there is sufficient involvement  
21 of U.S. officials to call the Fourth Amendment into play.  
22 And if it is a joint venture which is ordinarily the  
23 situation when U.S. agents are seeking evidence to bring  
24 back to the United States, then there is a violation if  
25 the search is unreasonable or if no warrant is obtained.

1 QUESTION: Well, of course, you don't need to be  
2 seizing evidence to violate the Fourth Amendment by  
3 entering a house.

4 MR. PANCER: No.

5 QUESTION: You enter a house illegally and  
6 you're there wrongfully and you tip over a television and  
7 break it and you get sued.

8 MR. PANCER: If I said to the contrary, then I  
9 misspoke myself. Clearly, there is a violation when the  
10 illegal search takes place or when the joint venture takes  
11 place without a warrant or without probable cause.

12 QUESTION: So the way we have the case now is  
13 that there can be no cooperation with foreign police  
14 officials by American police officials unless they have a  
15 warrant. That's your position?

16 MR. PANCER: No joint venture. That would be  
17 correct. Absent exigency. Now, if our agents are up in  
18 the mountains of Columbia and there's no telephone handy  
19 and they have to make a decision to search very quickly,  
20 then clearly it would be reasonable for them not to get a  
21 warrant. And that may be true in many situations.

22 QUESTION: What court do they seek a warrant  
23 from?

24 MR. PANCER: I think that they could call --

25 QUESTION: Having no prisoner back in any



1 particular jurisdiction, who should they call?

2 MR. PANCER: Well, as I say, in that situation  
3 if they could call, then I would think that they would  
4 call a magistrate in the jurisdiction in which they intend  
5 to bring the evidence, the reason for the joint venture,  
6 or in Washington, D.C. or contact some judge. I don't  
7 think it's key where. If they're required to get a  
8 warrant, they can get the -- they must --

9 QUESTION: It's called Warrant Central.

10 (Laughter.)

11 MR. PANCER: I think that the government would  
12 concede that Mr. Verdugo, here in the United States at the  
13 time this search took place, had the benefit of every  
14 other one of the Bill of Rights. He had the First  
15 Amendment protection, he had the Fifth Amendment  
16 protection, the Sixth Amendment.

17 But, Mr. Verdugo, they would say to him, you  
18 don't have the benefit of the Fourth Amendment. And yet,  
19 though the burden is on them to justify warrantless  
20 searches, they have presented no reason, no exigency to  
21 this Court as to why they should be permitted to go into  
22 a residence without a warrant.

23 QUESTION: Mr. Pancer, in your brief there is  
24 some argument to the effect that this evidence was taken  
25 after the respondent was in the United States and it was

1 taken from a briefcase, something to that effect. Were  
2 those arguments raised below?

3 MR. PANCER: No, they were not.

4 QUESTION: Okay.

5 MR. PANCER: And we would submit those  
6 arguments. When counsel argued previously, for the first  
7 time we were able to determine that the government held  
8 that if this were a U.S. citizen in custody, then the  
9 Fourth Amendment would apply and possibly the government  
10 would have to get a warrant.

11 But many cases have held that this kind of  
12 discrimination between aliens and U.S. citizens is  
13 inherently suspect and clearly in this case there would be  
14 no reason under the government's reasoning for a different  
15 rule as to aliens versus U.S. citizens whose property is  
16 being searched outside of the country.

17 In addition, there is no rational reason why the  
18 Fifth Amendment or the Due Process Clause would apply as  
19 opposed to the Fourth Amendment in these situations, and  
20 the government has presented no theory.

21 Mr. Verdugo's connection to this country was  
22 that he was forced to be here. He was arrested and forced  
23 to be in this country. He has been tried and convicted  
24 in another case and is serving 240 years. He will be here  
25 for a long time.

1           He has as strong a connection to this country  
2           and did at the time of the search as any United States  
3           citizen had, and we think that given no offer by the  
4           government as to why the warrant requirement shouldn't  
5           apply, where is the exigency that allows agents to just go  
6           into a person's home, that this Court should find a  
7           warrant was required.

8           If there are no further questions, thank you.

9           QUESTION: Thank you, Mr. Pancer.

10           Mr. Robbins, do you have rebuttal? You have  
11           three minutes remaining.

12                   REBUTTAL ARGUMENT OF LAWRENCE S. ROBBINS

13                           ON BEHALF OF THE PETITIONER

14           MR. ROBBINS: Very briefly. Thank you, Mr.  
15           Chief Justice.

16                   On the assumption for now that the Fourth  
17           Amendment does apply, let me just say a couple of words  
18           about reasonableness. The first thing I want to say about  
19           that is that it does not turn on whether the agents have  
20           complied with Article 16 of the Mexican Constitution.

21                   I have tried myself to read Article 16 of the  
22           Mexican Constitution several times. I've quoted it at  
23           pages 11 and 12 of our Reply Brief in footnote 10 and our  
24           office has not been able to get a definitive sense of  
25           whether it applies here. It is very different from the

1 Warrant Clause of the United States Constitution.

2 It does not, for example, require probable  
3 cause. It has, for example, an exception for searches for  
4 sanitary -- to enforce the sanitary and police  
5 regulations, which under Mexican law, as we understand it,  
6 includes the narcotics laws.

7 The fact is, it's a different constitutional  
8 provision and what that really tells you is not so much  
9 does it apply or doesn't it apply. But it's simply not  
10 plausible to suppose that agents executing law enforcement  
11 activities overseas should be conversant with the niceties  
12 of constitutional law of 150 different countries.

13 What counts is whether their activities, as the  
14 Chief Justice suggested in one of his questions, are  
15 objectively reasonable. And under any test, the  
16 activities of these agents was. They sought out approval  
17 at the highest levels of the government. They secured  
18 approval.

19 Let me just quickly say that these allegations  
20 of corruption are based on, for the most part, questions  
21 that didn't elicit the answers that counsel -- defense  
22 counsel had hoped at the suppression hearing, and in any  
23 event are not the subject of any finding in the lower  
24 courts.

25 They secured the authorization. They secured



1 the cooperation and the participation, and they followed  
2 the dictates that were imposed.

3 QUESTION: And didn't one of the officers secure  
4 an automobile?

5 MR. ROBBINS: I'm sorry?

6 QUESTION: And didn't one of the officers secure  
7 an automobile?

8 MR. ROBBINS: Well, not one of the American  
9 officers.

10 QUESTION: I mean one of the Mexican officers.

11 MR. ROBBINS: Well, but what that points out,  
12 among other things, is the -- I think the zaniness of  
13 seeking a search warrant. I mean, the purpose of the  
14 search warrant is supposed to confine the scope of the  
15 search.

16 You cannot in the host country tell the host  
17 country's officials how to behave. You're there at their  
18 sufferance. And it's precisely that kind of example that  
19 tells you how far off base the court of appeals was.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
21 Robbins.

22 The case is submitted.

23 (Whereupon, at 3:01 p.m., the case in the  
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-1353 - UNITED STATES, Petitioner V. RENE MARTIN VERDUGO-URQUIDEZ

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Leona M. May  
(REPORTER)