THE EXTRATERRITORIAL APPLICATION OF CONSTITUTIONAL LAW: *UNITED STATES V. VERDUGO-URQUIDEZ*

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ABSTRACT

The internationally sensitive case of Rene Martin Verdugo-Urquidez raises serious concerns in a period when federal law enforcement officials conduct a wide range of operations abroad. One important question under U.S. national security law is whether an overseas "law enforcement" operation—such as the 1986 kidnapping and extraordinary rendition by the Drug Enforcement Administration ("DEA")—can be construed as a covert action or be excepted from the statutory finding and congressional notification requirements as a "traditional law enforcement activity." Indeed, one must ask: If the Central Intelligence Agency ("CIA") had conducted the very same operation at an overseas location, such as in Italy for a wanted terrorist, would its non-compliance with the covert action statute have been treated as a non-issue by Congress and its intelligence oversight committees? In 1986, the DEA captured a notorious drug dealer who had been implicated in the February 1985 kidnapping, two-day torture and interrogation of a DEA agent who had been investigating the Guadalajara drug cartel.

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While the DEA managed to secure his illegal arrest and transfer to the United States and subsequent conviction in federal district court, it did so at high cost to the bilateral relations between the United States and Mexico. It also subverted a well-established statute regarding oversight by the U.S. Ambassador in Mexico City under his "Chief of Mission" authority and by the congressional intelligence oversight committees. In fact, the DEA ignored at least two federal statutes, the extradition treaty between the United States and Mexico, and Mexican law with respect to arrest and search warrants. Such action creates significant risk of embarrassment to the U.S. government. This case involves domestic legal issues that have not been previously addressed in case law or secondary literature, and has important implications for policymakers and national security practitioners in terms of securing international legal assistance, the role and authority of the U.S. Ambassador, and congressional oversight involving covert actions. Thus, the application of the covert action statute to law enforcement operations abroad is an important national security topic, particularly given the overseas deployment of federal law enforcement officials and the need to secure international legal cooperation in the fight against international criminal and terrorist organizations.

I. INTRODUCTION: A CAUTIONARY TALE IN FOREIGN LAW ENFORCEMENT OPERATIONS

The extraterritorial application of constitutional law by United States courts carries important implications for the judiciary in deciding cases brought before it, both in terms of the rights of defendants in criminal cases and in terms of international legal cooperation.[1] Thus, whether or not the United States extends protections to non-citizens taken into custody abroad—but tried for U.S. criminal offenses committed also while abroad—raises questions about the fundamental fairness accorded to non-citizens in our courts and the nature of international legal cooperation. This problem has particular force and effect given the increasing tendency on the part of the U.S. government to assert extraterritorial jurisdiction over crimes committed

[1] In Reid v. Covert, 354 U.S. 1 (1957) the U.S. Supreme Court had held that the government could not try an American citizen abroad without constitutional protections, especially the right to trial by jury. This case effectively overturned the Court's earlier long-standing decision that had precluded the extension of constitutional rights to American citizens serving abroad, but left open the issue whether constitutional protections under the Fourth, Fifth and Sixth Amendments applied to a foreign national taken into custody overseas and brought back to the United States to stand trial for violations of U.S. criminal law. *Id.* at 5-6. *See generally* Mary Lynn Nicholas, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L. J. 267 (1990) (examining the line of cases that extended constitutional protections to American citizens abroad and to aliens within U.S. territory).

abroad over the past two decades.[2] The complex issues involving the extraterritorial application of U.S. criminal law are amply illustrated by the internationally sensitive case of Rene Martin Verdugo-Urquidez, a Mexican citizen who was suspected of criminal activities associated with the smuggling of multi-ton quantities of marijuana and cocaine into the United States.[3]

While the U.S. Supreme Court ultimately held that Verdugo-Urquidez lacked the protections of the Fourth Amendment in a split opinion,[4] the case offers a cautionary tale about government accountability and the global reach of the U.S. Constitution.[5] In fact, there is considerable evidence that the DEA may have been acting in cooperation with Mexican officials in violation of both Mexican and U.S. laws.[6] In any case, the DEA agents serving in Mexico apparently failed to comply with certain provisions of U.S. law that mandated coordination with the U.S. Ambassador, bringing about a serious diplomatic affront to the Government of Mexico that damaged the bilateral U.S.-Mexico relationship.[7] This case raises serious concerns in an era in which federal law

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[2] *See*, *e.g.*, Auth. of the Fed. Bureau of Investigation to Override Customary or Other Int'l Law in the Course of Extraterritorial Law Enforcement Activities, Dep't of Justice, 13 Op. O.L.C. 163 (1989), ("Extraterritorial law enforcement activities that are authorized by domestic law are not barred even if they contravene unexecuted treaties or treaty provisions, such as Article 2(4) of the United Nations Charter."). In fact, by 1986 at least nine different U.S. law enforcement agencies had a greatly expanding overseas presence in the fight against drug trafficking, with the primary emphasis in Mexico and Colombia, raising important issues about executive accountability and the need for effective coordination with the Justice and State Departments. U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-87-72BR, DRUG CONTROL: INTERNATIONAL NARCOTICS CONTROL ACTIVITIES OF THE UNITED STATES 2-3 (1987).

[3] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[4] *Id.* at 274-75. Chief Justice William H. Rehnquist authored the majority opinion, in which Justices White, O'Connor, Scalia, and Kennedy joined, while Justice Kennedy filed a concurring opinion and Justice Stevens concurred in the Court's judgment. *Id*. at 261. Justices Brennan, Marshall, and Blackmun dissented in two opinions, with one written by Justice Brennan and one by Justice Blackmun. *Id.* Thus, there were five separate opinions with divergent views on the extraterritorial application of the Bill of Rights to foreign nationals. *Id.*

[5] *Compare* Andrew Kent, *A Textual and Historical Case against a Global Constitution*, 95 GEO. L.J. 463 (2007) (examining the personal and territorial scope of constitutional law; namely, whether the Bill of Rights constrains executive action abroad), *with* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009) (examining why territoriality is an important concept in American constitutional law). Kent explains that globalists contend that "aliens outside the United States should have [constitutional] rights, at least in some circumstances, and that U.S. courts should enforce constitutional limits on extraterritorial action by the U.S. government against non-citizens." Kent, *supra*, at 464.

[6] *Verdugo-Urquidez*, 494 U.S. at 259.

[7] *Id.* at 275.

enforcement officials conduct a wide range of inspections, investigations, and interrogations with increasing frequency beyond the U.S. border.[8] Indeed, one important question under U.S. national security law is whether an overseas operation—such as a DEA sponsored kidnapping and extraordinary rendition in violation of domestic and international law—can be construed as a "traditional law enforcement activity," and thus be excepted from the mandatory reporting and oversight requirements of the covert action statute.[9] This is an issue of domestic law that has not been previously addressed in case law or secondary literature, but has important implications for policymakers and national security practitioners in terms of securing international legal assistance, the role and authority of the U.S. Ambassador as "Chief of Mission," and congressional oversight involving covert actions.[10]

II. WINNING "DIRTY": THE DEA GETS THEIR MAN

The DEA[11] believed Rene Martin Verdugo-Urquidez, along with twenty-

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8 *Id.* at 273.

9 50 U.S.C. § 413 (1982) (current version at 50 U.S.C. § 3093 (2012)).

10 *See*, *e.g.*, Office of Evaluations and Special Projects, ESP-17-01, A Special Joint Review of Post-Incident Responses by the Department of State and Drug Enforcement Administration to Three Deadly Force Incidents in Honduras (2017), https://oig.justice.gov/reports/2017/o1702.pdf (finding inadequate pre-operational planning by the DEA with respect to three 2012 drug interdiction missions in Honduras; finding that the DEA provided inaccurate information to DOJ leadership, Congress and the public; and finding that the DEA did not cooperate with either the U.S. Ambassador or with the post-incident investigations conducted by the State Department's Bureau of Diplomatic Security and the Honduran government). Moreover, the use of deadly force in inadequately supervised law enforcement activities raises concerns about possible violations of international law, such as under the International Covenant on Civil and Political Rights ("ICCPR") (e.g., violations of the right to life; the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment; and the right to due process and fair trial). International Covenant on Civil and Political Rights art. 6, 999 U.N.T.S. 49 (Dec. 16, 1966), https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en. The ICCPR was ratified by the United States on June 8, 1992, and by Honduras on August 25, 1997. Depository, U.N. HUMAN RTS. OFF. OF THE HIGH COMMISSIONER, http://tbinternet. ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx [http://perma.cc/ZE28-RRSD].

11 The DEA was created by Exec. Order No. 11,727, 38 Fed. Reg. 18,357 (July 6, 1973), *pursuant to* 5 U.S.C. § 5317. EO 11727 provided that the "Attorney General, to the extent permitted by law, is authorized to coordinate all activities of executive branch departments and agencies which are directly related to the enforcement of laws respecting narcotics and dangerous drugs." *Id.* In addition, the DEA has "[r]esponsibility, under the policy guidance of the Secretary of State and U.S. Ambassadors, for all programs associated with drug law enforcement counterparts in foreign countries . . . ." *DEA Mission Statement*, DEA, https://www. dea.gov/about/mission.shtml [http://perma.cc/7C4P-ZS75].

one other Mexican nationals, to be a major drug smuggler and notorious killer who had been part of a vicious campaign against its operations in Mexico.[12] In fact, the DEA believed that he was the West Coast distributor for the Guadalajara cartel, which was responsible for the February 1985 kidnapping, two-day torture and interrogation, and murder of Mexican-born DEA agent Enrique Camarena-Salazar, who had been investigating the cartel, and his pilot Alfredo Zavala-Avelar.[13] The DEA could not let these crimes stand unavenged; it would strike back against its brutal adversary in the war on drugs.[14] But, there were several problems: Mexico did not traditionally extradite its own nationals to the United States, the Guadalajara cartel could well stymy any such effort through its control over corrupt politicians, military officers or police officials,[15] and the cartel would be expected to fight back using more brutal tools.[16] Thus, the DEA would have to find its own way to bring the outlaws to justice, but that had to be in the U.S., where

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[12] Seventh Superseding Indictment at 3, United States v. Rafael Caro-Quintero and 21 others (1991) (No. CR-87-422(G)-ER) (Federal Grand Jury, C.D. Cal. Feb. 1991). The indictment described Verdugo-Urquidez as a high-level lieutenant in the cartel; the indictment also named three officials of the Mexican Federal Judicial Police, the Director of Interpol in Mexico, and two judicial police officers as co-conspirators. *Id.* at 3-4.

[13] *Id*. at 5.

[14] *Id.*

[15] CHRISTOPHER H. PYLE, EXTRADITION, POLITICS, AND HUMAN RIGHTS 281 (2001). The United States has had an extradition treaty with Mexico since May 4, 1978; Article 9, §1, provided that neither party was obligated to deliver up one of its own nationals. Extradition Treaty, Mex.-U.S., art. 9, May 4, 1978, 31 UST 5059.

[16] *See*, *e.g.*, Jay Mathews, *U.S. Obtains Recording of Drug Agent's Torture*, WASH. POST, Feb. 15, 1986, https://www.washingtonpost.com/archive/politics/1986/02/15/us-obtains-recording-of-drug-agents-torture/509cde54-a2f3-4235-bee2-e57ac6deda9c/ [http://perma.cc/57NB-AUHA] (the U.S. government later obtained a tape recording of Camarena-Salazar's torture; it contains a reference to a high official of the Mexican Federal Judicial Police who had allegedly supervised the killing). In a separate case, Dr. Humberto Alvarez Machain was accused of using his medical skills to keep Camarena alive while he was tortured and interrogated by drug traffickers. United States v. Alvarez-Machain, 504 U.S. 655, 655 (1992). Dr. Alvarez was later kidnapped by Mexican bounty hunters and flown to El Paso where he was arrested. *Id.* (holding that the district court had jurisdiction to try a Mexican national who had been forcibly kidnapped and brought to the United States to stand trial). *See also* Linda Greenhouse, *Supreme Court Roundup: High Court Backs Seizing Foreigner for Trial in U.S.*, N.Y. TIMES, June 16, 1992, http://www.nytimes.com/1992/06/16/us/supreme-court-roundup-high-court-backs-seizing-foreigner-for-trial-in-us.html?pagewanted=all [http://perma.cc/RBA7-T3R5]. Eventually, Dr. Alvarez was tried for the 1992 kidnapping, torture and murder of Camarena, but after the presentation of the government's case, the district court judge granted a defense motion for a judgment of acquittal on the grounds of insufficient evidence to support a guilty verdict. Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003). The district court concluded that the case had been based on "suspicion and . . . hunches . . . but no proof." *Id.*

it could at least have a fair fight in court and could be assured of the right result.[17]

On August 3, 1985, the DEA started its own campaign to bring Verdugo-Urquidez to justice.[18] The DEA first filed a sealed complaint against him, charging him with various drug-related offenses, and the U.S. District Court for the Southern District of California responded with an arrest warrant.[19] The DEA then increased its investigative efforts and tried to nab him on one of his frequent "business" trips to the United States.[20] Eventually, the DEA confirmed that he lived in Mexicali, Mexico; therefore, it asked the U.S. Marshals Service for its assistance in apprehending him and bringing him to the United States for trial.[21] In turn, U.S. Marshals contacted Mexican law enforcement officers and asked for their cooperation.[22] Specifically, U.S. Marshals showed the arrest warrant to Mexican officials who agreed to help.[23] On January 24, 1986, six Mexican officers stopped and arrested Verdugo-Urquidez while he was driving in San Felipe, hid him in the back of an unmarked police car, and then whisked him to the border where he was met by waiting U.S. Marshals.[24] The DEA subsequently took custody of him and delivered him to the Metropolitan Correctional Center in San Diego.[25] While an outwardly successful operation, this prisoner snatch and extraordinary rendition[26] had not been authorized by either the Department

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[17] *Alvarez-Machain*, 331 F.3d at 608.

[18] United States v. Verdugo-Urquidez, 856 F.2d 1212, 1215 (9th Cir. 1988). According to the DEA's official history of that period, Operation *Leyenda* (i.e., the Spanish word for "lawman") was then the most comprehensive homicide investigation ever undertaken by the DEA. *1985-1990*, DEA, https://www.dea.gov/about/history/1985-1990.pdf [https://perma.cc/3SUM-HVP8]. The DEA requested assistance from the Mexican Attorney General and sent 25 agents to Guadalajara. *Id.*

[19] *Verdugo-Urquidez*, 856 F.2d at 1216.

[20] *Id.*

[21] *Id.*

[22] *Id.* Apparently, the DEA agents attempted to reach an official from the Mexican Attorney General's Office, but obtained personal—although perhaps not official—approval from the Director General of the Mexican Federal Judicial Police. Ruth Wedgwood, *United States v. Verdugo-Urquidez*, 84 AM. J. OF INT'L L. 747, 748 (1990).

[23] *Verdugo-Urquidez*, 856 F.2d at 1216.

[24] *Id.*

[25] Both the U.S. Marshals Service and the DEA initially denied any involvement in the kidnapping and extraordinary rendition. Jim Schachter, *Suspect in Camarena's Killing Claims He Was Shanghaied into U.S.*, L.A. TIMES, Jan. 30, 1986, http://articles.latimes.com/1986-01-30/local/me-2220_1_dea-agents [http://perma.cc/HYB8-ZCDV].

[26] An extraordinary rendition is defined for the purposes of this article as a transfer that occurs outside of the process established by treaty, but without regard for the actual purposes of such transfer, i.e., unlawful detention, interrogation under torture, or trial. This article recognizes that there are some cases when an extraordinary rendition is the only practical

of Justice (DOJ) or the Department of State (DOS).[27]

Terry Bowen, the DEA's resident agent in Calexico, California, then discussed with his colleagues the prospects of searching Verdugo-Urquidez's house in Mexico; Bowen believed that a search would turn up cash proceeds and other evidence from his drug smuggling operations, and it might even uncover information related to the Camarena investigation.[28] After receiving approval from Walter White, the Assistant Special Agent in charge of DEA operations in Mexico, on January 25, 1988, a team of four agents drove to Mexicali where they met with local police officials who helped them search Verdugo-Urquidez's home there, as well as his home in San Felipe.[29] This search revealed incriminating documents, including a tally sheet,[30] which the government believed to indicate the quantities of marijuana that had been smuggled by the defendant into the United States.[31] Moreover, neither the U.S. DOJ nor the U.S. Attorney's Office were involved in this search process;[32] in fact, the DEA apparently obtained permission for the search directly from Mexican officials.[33] In short, the DEA "got their man," as well as evidence that would be later offered into evidence at trial, but without having to comply with risky extradition proceedings or the dubious need for a search warrant from a U.S. magistrate that would have been invalid in

means of bringing someone to justice, namely in cases where the accused has taken refuge in a sympathetic or non-extradition country.

[27] PYLE, *supra* note 15, at 283.

[28] *Verdugo-Urquidez*, 856 F.2d at 1216-17.

[29] *Id.*

[30] Apparently, the tally sheet was the only item taken during the search of the defendants' homes that was later offered into evidence by the government. Reply Memorandum for the United States at 4, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353), 1989 U.S. S. Ct. Briefs LEXIS 927, at *4.

[31] *Verdugo-Urquidez*, 856 F.2d at 1217.

[32] Wedgwood, *supra* note 22, at 754 n.32. Wedgwood also argues that a prompt search was likely necessary as a means of preventing the defendant's associates from destroying evidence once they learned of his arrest and rendition to U.S. authorities. *Id.* In that sense, one could plausibly claim that the secretive removal (kidnapping) of the accused was also necessary to avoid a bloody confrontation between the police and cartel members. *Id.* In fact, a U.S. Attorney has broad discretionary authority within his district with regard to investigating and prosecuting criminal cases, but "federal investigators operate under the hierarchical supervision of their bureau or agency and consequently are not ordinarily subject to direct supervision by the United States Attorney." *U.S. Attorney's Manual, Title 9-2.010: Investigations*, OFF. OF THE U.S. ATTORNEYS, https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals [http://perma.cc/7J6L-T5AR]. Thus, while the DEA may not have required prior approval from the U.S. Attorney in terms of conducting its investigation of the case, prior coordination could have helped mitigate against some of the litigation risks involved in this case. Wedgewood, *supra* note 22, at 754.

[33] *Alvarez-Machain*, 331 F.3d at 608.

Mexico.[34]

At trial, the U.S. government proffered documents into evidence that had been found in Verdugo-Urquidez's home; the defendant moved to suppress the evidence, claiming that the government's failure to obtain a search warrant had violated his Fourth Amendment rights.[35] The district court agreed, holding that a foreign national was entitled to seek the suppression of evidence seized during a search by American officers in a foreign jurisdiction on constitutional grounds.[36] The court then suppressed the evidence because the DEA had failed to obtain a search warrant and because, even if the warrant had not been required, the after-midnight search had been itself unreasonable.[37] The government appealed this unpublished order, but the Court of Appeals, in a divided three-judge panel, held that a foreign national could challenge the search of his foreign home under the Fourth Amendment, that the search had been a "joint venture" by American and Mexican officials, and that the DEA agents had been required to obtain a warrant prior to searching his Mexican residence.[38]

The majority opinion, authored by Judge David R. Thompson, initially held that the U.S. Constitution limits the government's authority when acting abroad and that a non-resident alien could challenge the reasonableness of the government's actions under the Fourth Amendment.[39] The court reasoned that prior cases had extended constitutional protections to resident aliens, as well as certain rights to non-resident aliens, but acknowledged that none of these prior cases had considered the extension of Fourth Amendment rights to a non-resident alien.[40] The court concluded that "it seems absurd to grant the protection of the Fourth Amendment to one whose presence in the country is voluntary although illegal, and yet deny it to Verdugo-Urquidez, whose presence in the United States, although legal, is plainly involuntary."[41] The

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[34] *Id.* at 750.

[35] *Verdugo-Urquidez*, 856 F.2d at 1217.

[36] *Id*.

[37] *Id*.

[38] *Id.* Verdugo-Urquidez was found guilty in the kidnapping and slaying of Camarena after a two-month trial. Kim Murphy, *Mexican Drug Figure Found Guilty in Death of U.S. Agent*, L.A. TIMES, Sept. 27, 1988, http://articles.latimes.com/1988-09-27/news/mn-2733_1_mexican-drug [http://perma.cc/84DJ-TW3F]. Still, both the defendant and his San Diego-based criminal defense attorney, Michael Pancer, maintained his innocence. Edward J. Boyer, *Drug Trafficker Gets Life Plus 240 Years in U.S. Agent's Killing*, L.A. TIMES, Oct. 27, 1988, http://articles.latimes.com/1988-10-27/news/mn-472_1_drug-trafficker [http://perma.cc/C78R-ZM93].

[39] *Verdugo-Urquidez*, 856 F.2d at 1224.

[40] *Id*.

[41] *Id*. The majority did not, however, analyze the nature of the defendant's arrest and transfer to U.S. custody outside the established treaty process, apparently because the defendant did not raise that issue, but the dissenting judge did discuss—and distinguish—a

court held that the "search" had been conducted by the federal government, applying its own "joint venture" doctrine.[42] Here, the court found that the post-midnight search of the defendant's Mexicali and San Felipe residences "was an American one from start to finish,"[43] with the Mexican officers standing perimeter watch while American agents went through the houses and took away what evidence they wanted without leaving behind any kind of receipt for or inventory of things taken.[44] Indeed, the defendant argued that the search also violated Mexican law, but the court dismissed that argument as irrelevant in the present case.[45] Finally, the court held that the DEA agents had been required to obtain a search warrant.[46] And, since the agents had not done so, the court concluded that the search had been unlawful and the evidence had been properly suppressed.[47]

In his dissenting opinion, Judge Alfred Wallace reasoned that the Fourth Amendment did not apply to a search of the Mexican residence of a Mexican national.[48] He explained that "the majority fails to mention, much less attempt to explain, the Supreme Court's seemingly unequivocal pronouncement that '[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens.'"[49] He explained that the Fourth Amendment protects only the people of the United States, pointing out that the Supreme Court had "never held that the Bill of Rights protects foreign nationals residing abroad from actions taken abroad by our officials."[50] He said that the majority painted

possible basis for excluding evidence in an extraordinary rendition case under a Fifth Amendment analysis. *Id.* at 1242 (Wallace, J., dissenting) (citing United States v. Toscanino, 500 F.2d 267, 286 (2d Cir. 1974)). The *Toscanino* case is, however, distinguishable from *Verdugo-Urquidez* in that Toscanino, an Italian citizen, alleged that Americans had kidnapped him in Paraguay, had used illegal surveillance, and had tortured and interrogated him in Brazil for 17 days prior to his transfer to the United States for trial. *See also* RAUSTIALA, *supra* note 5, at 165.

42 *Verdugo-Urquidez*, 856 F.2d at 1224 (citing Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969)). In *Stonehill*, a case involving a search of the business premises of an American citizen by the Philippine police but in the presence of special agents of the Federal Bureau of Investigation, the Court of Appeals held that "the Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials." *Stonehill*, 405 F.2d at 743.

43 *Verdugo-Urquidez*, 856 F.2d at 1225.

44 *Id.*

45 *Id.* at 1229.

46 *Id.* at 1217.

47 *Id.*

48 *Id.* at 1230 (Wallace, J., dissenting).

49 *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

50 *Id.* at 1234 (Wallace, J., dissenting).

with a broad brush, making sweeping conclusions that pretermitted "the crucial caveat that the extraterritorial effect of the Constitution has never been extended by the Supreme Court to persons other than American citizens."[51] Judge Wallace did, however, acknowledge that the defendant was entitled to a fair trial that included constitutional protections under the Fifth and Sixth Amendments; he explained that the crucial difference between this case and the cases relied upon by the majority involved the question of where the government's actions took place.[52] In other words, any constitutional violation of the Fourth Amendment could have only occurred on foreign soil, while any violation of the Fifth or Sixth Amendments could only occur at trial and on American soil.[53] Thus, he concluded that there was no inconsistency between finding that aliens might have rights under the Fifth and Sixth Amendments, but not the Fourth.[54]

The U.S. Supreme Court granted the government's petition for certiorari, heard the case, and ultimately reversed the Court of Appeals in a 5-1-3 opinion which held that the Fourth Amendment did not apply to a search and seizure of property by U.S. government agents owned by a non-resident alien in a foreign country.[55] In effect, the Court adopted much of the reasoning in Judge Wallace's dissenting opinion. Writing for the Court, Chief Justice Rehnquist used a textual analysis to reason that the drafting history of the Fourth Amendment shows that it was intended to protect the "people" of the United States, but without restraining the actions of the government against non-resident aliens who lacked "substantial connections" to this country.[56] He reasoned that if a constitutional violation had occurred in this case, that it had occurred in Mexico, noting that the Fourth Amendment operated differently in this respect from the Fifth and Sixth Amendments.[57] Moreover, he noted that the rule proffered by the Court of Appeals for the Ninth Circuit "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[58] Chief Justice Rehnquist also noted that the government has frequently employed force abroad over

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[51] *Id.*

[52] *Id.* at 1239.

[53] *Id.*

[54] *Id.* at 1240.

[55] *Verdugo-Urquidez*, 494 U.S. at 274-75. In the Supreme Court, Verdugo-Urquidez was represented by Michael Pancer, a well-known San Diego-based criminal defense attorney and the government's case was argued by Assistant to the Solicitor General Lawrence S. Robbins. *Id.* at 261. Pancer has been called a "legal magician" and has been twice voted as the "San Diego Trial Lawyer of the Year" by the San Diego Criminal Defense Bar Association. MICHAEL PANCER, http://www.michaelpancer.com/ [http://perma.cc/QS9W-R8UB].

[56] *See Verdugo-Urquidez*, 494 U.S. at 264-71.

[57] *Id.* at 264.

[58] *Id.* at 273.

the course of U.S. history, and that a rule limiting foreign searches and seizures would disrupt the ability of the executive branch to respond to foreign situations affecting U.S. national interests and might well bring about claims for damages against the government by foreign nationals.[59]

Justice Kennedy refused to put any weight on the relevance of the words "of the people" in the Fourth Amendment, but otherwise concurred in the judgment.[60] In fact, Justice Kennedy adopted a flexible and pragmatic approach, referring to the earlier decisions in *Reid* and the *Insular Cases* to argue that the applicable constitutional protections depended upon context.[61] In a sense, this approach foreshadowed the similar pragmatic approach that Justice Kennedy, joined by Justice Stevens, would apply when construing whether the right to the writ of habeas corpus extended to foreign nationals held at Guantanamo Bay, Cuba.[62]

Justice Stevens concurred in the judgment, arguing that the Fourth Amendment and the prohibition against unreasonable searches and seizures does apply in such cases,[63] but found that the search and seizure in this case was reasonable because it had been effected with the permission and assistance of the Mexican government and because no U.S. court had jurisdiction to issue a warrant.[64] On the first point, Justice Stevens may have been mistaken; there is ample evidence that Vergudo-Urquidez had been kidnapped and taken to the U.S.-Mexico border by Mexican police officers who lacked official approval for the transfer.[65] Moreover, during the

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59 *See also* Mark W. Janis, *The Verdugo Case: The United States and the Comity of Nations*, 2 EUR. J. INT'L L. 118, 120 (1990) (observing that the opinion of Chief Justice Rehnquist differed from the other four opinions on the issue of whether there is either a form of legal obligation or some sense for a nation such as the United States to act in accord with other states in cases like *Verdugo*).

60 Justice Kennedy's opinion diverged so completely from the majority opinion that at least one commentator believes that he was actually speaking for a plurality of four (including White, O'Connor and Scalia). Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 972 n.378 (1991).

61 *Verdugo-Urquidez*, 494 U.S. at 277 (Kennedy, J., concurring) (citing *Reid*, 354 U.S. 1 and the "so-called" *Insular Cases* (Downes v. Bidwell, 184 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922)).

62 Boumediene v. Bush, 553 U.S. 723, 725 (2008) (holding that the Suspension Clause has full effect at Guantanamo Bay, rejecting the government's claim that the Clause affords the petitioners—all foreign nationals who were captured abroad—no rights based upon the lack of U.S. sovereignty over the base).

63 *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J. concurring in judgment).

64 *Id.*

65 Brief in Opposition to Petition for Writ of Certiorari at 10-11, United States v. Verdugo-Urquidez*,* 494 U.S. 259 (1990) (No. 88-1353), 1989 U.S. S. Ct. Briefs LEXIS 922, at *10-11 [hereinafter Brief in Opposition].

suppression hearing in the district court, the defendant was not permitted to develop evidence on the issue of whether the Mexican officials assisting in the search and seizure had been acting under color of law.[66] In fact, it would have been unlikely that the Mexican government would have approved an official search of his residences subsequent to a kidnapping.[67] Thus, while the United States claimed that "the DEA agents conformed to all of the requirements imposed by their foreign host, and conducted themselves in an entirely professional manner,"[68] that claim may not have been entirely accurate.[69] On the second point, Justice Stevens was undoubtedly correct. Under the Federal Rules of Criminal Procedure, Rule 41, federal magistrates are limited in their authority to issue a "warrant to search for and seize a person or property located in the district . . . ."[70] Indeed, given Justice Stevens' later dissenting opinion in the *Alvarez-Machain* case,[71] it is possible that a fuller development of the record would have caused him to change his vote in *Verdugo-Urquidez*.

There were two dissenting opinions. Justice Brennan dissented, reasoning

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[66] *Id*. at *12. The defendant proffered evidence during the suppression hearing that the DEA had been working in concert with corrupt Mexican officials, at least one of whom was a fugitive with an outstanding warrant in the Southern District of California. *Id.* at *13.

[67] Constitución Política de los Estados Unidos Mexicanos [CP] [Constitution], art. 16, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 25-06-2017 (Mex.), provides that: "[n]o person shall be disturbed [*molestado*] in their family home, papers or possessions, except by virtue of a written order of the competent authority, that substantiates and motivates the legal cause of the procedure." In a later paragraph, Article 16 states that "[n]o order for arrest may be issued [*librarse*] except by the judicial authority and only with the prior denunciation or complaint of an act that the law specifies as a crime, sanctions with a penalty deprivative of liberty and information exists which establishes that such an act has been committed and that the probability exists that the accused committed or participated in its commission." *Id.* While Mexican police officials were present during the search of Verdugo-Urquidez' residences, there is no evidence that either search was effected pursuant to a valid warrant. Brief in Opposition, *supra* note 65, at *50. Indeed, there is no evidence that the DEA agents even had probable cause for the issuance of a warrant—under either U.S. or Mexican law. *Id.* at *24.

[68] Reply Brief for the United States, United States v. Verdugo-Urquidez*,* 494 U.S. 259 (1990) (No. 88-1353), 1989 U.S. S. Ct. Briefs LEXIS 925, at *18.

[69] Reportedly, the Mexican government was so incensed over the abductions that it suspended DEA operations in the country, lodged criminal charges against the DEA agents who had been responsible for the abduction, and even demanded a renegotiation of the existing extradition treaty to ban such activities. Subsequently, Presidents George H. W. Bush and Bill Clinton had to promise the Mexican government that they would not authorize any abductions during their presidencies. PYLE, *supra* note 15, at 296.

[70] FED. R. CRIM. P. 41.

[71] *Alvarez-Machain*, 504 U.S. at 671 (Stevens, J., dissenting) (contending that Mexico's demand for the defendant's return must be honored based upon the apparent violation of the 1978 extradition treaty).

that the Court's decision created an antilogy, holding that the Constitution authorizes the government to enforce U.S. criminal laws abroad, but that "when Government agents exercise this authority, the Fourth Amendment does not travel with them."[72] He criticized the "substantial connections" test used by the majority, contending that the connection was supplied in this case not by the defendant but by the government that was prosecuting him in its courts.[73] He believed that the Court had regarded the basic concept of "mutuality" between the defendant and the United States. He contended that 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."[74] In a like manner, Justice Blackman reasoned that when a foreign national is to be held accountable for violations of U.S. criminal laws, that person has effectively become one of the governed and should have Fourth Amendment protections.[75]

Subsequently, the Court of Appeals considered the issue involving the forcible abduction of a Mexican national from that country without the consent of his government.[76] The Court of Appeals reviewed two letters of formal complaint from the Mexican Embassy to the State Department, as well as the applicability of the *Ker-Frisbie* doctrine,[77] the purposes underlying extradition treaties,[78] and the provisions of the existing bilateral extradition treaty.[79] Ultimately, the court held that the United States would have breached a treaty obligation if it had authorized or sponsored the taking without the consent of the Mexican government, that the defendant in such

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[72] *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting).

[73] There was evidence, however, that Verdugo-Urquidez did become a lawful permanent resident (green card holder) in 1970 and that the card may have still been valid at the time of his kidnapping, indicating that he did have a "substantial connection" to the United States, coming here as more than a casual tourist—albeit likely focused on his illicit business ventures. RAUSTIALA, *supra* note 5, at 172. Generally, a person remains a green card holder unless he applies for and completes the naturalization process, or loses or abandons that status. *Maintaining Permanent Residence*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Sept. 21, 2016), https://www.uscis.gov/green-card/after-green-card-granted/maintaining-permanent-residence [http://perma.cc/2Y47-QU2Y]. Thus, whether one had abandoned his status would be an important issue of fact for a trial court.

[74] *Verdugo-Urquidez*, 494 U.S. at 284 (Brennan, J., dissenting).

[75] *Id*. at 297.

[76] United States v. Verdugo-Urquidez, 939 F.2d 1341, 1342 (9th Cir. 1991).

[77] *Id.* at 1345 (citing Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952)). Generally, this doctrine holds that criminal defendants who are forcibly abducted from a foreign jurisdiction may be prosecuted in U.S. courts without regard to whether their presence in court has been obtained other than through the use of applicable extradition treaties. *Id.* at 1345.

[78] *Id*. at 1349.

[79] *Id*. at 1354.

case would have standing to raise an objection to the court's personal jurisdiction over him, and that the district court was obligated to hold a further evidentiary hearing on the issues—effectively overruling the 1988 conviction and 240 year prison sentence.[80]

The government then petitioned the Supreme Court for a writ of certiorari; in a one paragraph opinion, the Court granted the petition and vacated this recent decision of the Court of Appeals, remanding the case for reconsideration in light of the Court's 1992 holding in *Alvarez-Machain* that the kidnapping of the defendant from Mexico did not prohibit his trial in the United States for violations of this country's criminal laws, thus reaffirming the *Ker-Frisbie* doctrine.[81] This brought about an effective end to the case with the defendant left to serve out his sentence.

This case had a long and difficult history involving uncommon issues in domestic and international law. The defendant was arrested in Mexico and transferred to the United States outside the established extradition process; indeed, there is conflicting evidence about the level of complicity on the part of Mexican officials and whether the case involved a kidnapping under Mexican law. Subsequently, there was an "unreasonable search"—that is, one that had occurred after midnight and on a weekend—of the defendant's homes in Mexicali and San Felipe. And, while Mexican police officers facilitated that search and seizure, it was apparently an American venture.[82] The evidence suggests that neither the DOJ nor the DOS (and presumably neither the President nor the U.S. Ambassador in Mexico City) were involved in the decision-making process for either action, undoubtedly because it was not expected that Mexico would agree to the first-ever extradition of one of its own nationals—even if that extradition process was untainted by corrupt judges or police officials. The evidence also suggests that the DEA used sympathetic Mexican officials to coordinate its actions, going outside traditional law enforcement processes.[83] In that respect, the DEA conducted multiple operations that were officially unacknowledged—at least at that time—to the appropriate Mexican officials.

Here, the DEA "got their man" for the Camarena[84] slaying, but not without

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[80] *Appeals Court Returns Case in Agent's Slaying*, N.Y. TIMES, July 23, 1991, http://www.nytimes.com/1991/07/23/us/appeals-court-returns-case-in-agent-s-slaying.html [http://perma.cc/3P3B-NNW9].

[81] United States v. Verdugo-Urquidez, 505 U.S. 1201, 1201 (1992).

[82] The decision of the U.S. Supreme Court in this case also undermines the "joint venture doctrine" used in the 9th Circuit. *See Verdugo-Urquidez*, 856 F.2d at 1224 n.12.

[83] *See* Greenhouse, *supra* note 16 (citing Mexican protests to the violation of its sovereignty in the *Alvarez-Machain* case).

[84] Camarena received numerous awards, such as two Sustained Superior Performance Awards and a Special Achievement Award during his eleven-year DEA career; he also received several posthumous honors, to include the Administrator's Award of Honor, the

excessive costs in terms of time, expense, and serious damage to the bilateral relationship between the United States and Mexico, as well as endangering the pending North American Free Trade Agreement and undermining overall DEA operations in Mexico.[85] The *Verdugo-Urquidez* case involved over six years of litigation, to include at least four appellate decisions.[86] The U.S. government was forced to relocate six Mexican police officers, as well as their families, to the United States to avoid retribution from the Guadalajara cartel and its supporters.[87] In the companion case involving Dr. Alvarez-Machain, a Guadalajara physician who was accused of assisting with the torture, the U.S. government achieved a hollow legal victory in the U.S. Supreme Court, but suffered an embarrassing failure when a district court judge granted a defense motion for judgment of acquittal on the grounds of insufficient evidence to support a guilty verdict.[88] Moreover, as a result of the Court's 6-3 decision—also authored by Chief Justice Rehnquist—in the *Alvarez-Machain* case, Mexico stripped DEA agents of their authority to operate in that country.[89] Finally, both Mexico and Canada have since taken steps to criminalize cross-border law enforcement activities, such as the kidnapping of a person, through the 1990 U.N. Convention Against Illicit Traffic in Narcotic Drugs.[90] In short, the DEA eviscerated its own ability to

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highest award granted by DEA and the naming of Camarena Clubs to honor sacrifices made by him and others in the war on drugs. Eventually, "Red Ribbon Weeks" gained momentum across the country with a national campaign that featured President Ronald Reagan and First Lady Nancy Reagan as honorary chairpersons. *Kiki and the History of Red Ribbon Week*, DEA (Sept. 21, 2016), https://www.dea.gov/redribbon/RedRibbon_history.shtml [http://perma.cc/3UN7-BN4U].

[85] Knight-Ridder/Tribune, *U.S. Tries to Calm Mexico Over Court's Kidnap Ruling*, CHI. TRIB., June 17, 1992, http://articles.chicagotribune.com/1992-06-17/news/9202230639_1_rene-martin-verdugo-urquidez-dr-humberto-alvarez-machain-mexico-city [http://perma.cc/FSE4-ZV34]. *See also* Lawrence Iliff, *Mexico, United States to Review Extradition Treaty*, UPI (June 16, 1992), http://www.upi.com/Archives/1992/06/16/Mexico-United-States-to-review-extradition-treaty/ 7451708667200/ [http://perma.cc/4PPA-BHKK].

[86] *Verdugo-Urquidez*, 939 F.2d at 1341-42.

[87] The Court of Appeals noted that the six Mexican police officers had been subjected to death threats and were consequently permitted to move to the United States. Of note, a Mexican prosecutor also filed a formal accusation against the six officers, charging them with kidnapping. *Verdugo-Urquidez*, 856 F.2d at 1216 n.1. *See also* H.G. Reza, *U.S. Role in Kidnaping of Drug Trafficker Is Denied*, L.A. TIMES (Feb. 11, 1986), http://articles.latimes.com/1986-02-11/local/me-22931_1_mexican-drug-trafficker [http://perma.cc/4CJE-3YTD].

[88] *Verdugo-Urquidez*, 494 U.S. at 259.

[89] Iliff, *supra* note 85.

[90] U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95. Mexico ratified this treaty on April 11, 1990 and the United States ratified it on February 20, 1990. *Id.*

conduct counter-drug operations in Mexico—a pyrrhic victory. According to Professor Ruth Wedgwood, "[i]f the United States wishes to retain credibility as a treaty signatory, Atty. Gen. William Barr must instruct the Drug Enforcement Administration and other U.S. law enforcement agencies to cease and desist from cross-border kidnapings [sic] in narcotics cases."[91]

III. DEA CASE HANDLING: U.S. LAW

The U.S. Congress has passed two important statutes that constrain executive branch activities abroad; both statutes are applicable to unacknowledged law enforcement operations, particularly ones that pose significant risks to U.S. foreign policy interests. The first statute, the Foreign Service Act of 1980, is designed to ensure the effective direction and control of all executive branch activities in a foreign country.[92] While U.S. government employees, particularly persons representing the State Department, Defense Department and the CIA, serving overseas undoubtedly recognize and respect the U.S. Ambassador's authority as a general practice, that authority has sometimes been ignored—likely causing considerable embarrassment and risk to U.S. interests. Here, the evidence supports the conclusion that the DEA agents operating in Mexico violated that statute in the *Verdugo-Urquidez* case.[93]

The second statute, the 1980 Covert Action Statute, was designed to ensure that intelligence operations in foreign countries remain a limited, but focused tool of U.S. foreign policy.[94] This statute imposed both procedural and substantive requirements on the President, especially with regard to oversight by the congressional intelligence committees.[95] While the DEA operations in Mexico may not have violated the 1980 statute, similar law enforcement operations would raise troublesome questions under its 1991 revision. Indeed, gun-running operations into Mexico by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) during the period of 2006 to 2011 suggests that there is a continuing lack of executive control within the DOJ with respect to law enforcement operations abroad.[96] In any case, the DEA's

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[91] Ruth Wedgwood, *Kidnappings*, L.A. TIMES, July 13, 1992, http://articles.latimes.com/1992-07-13/local/me-3664_1_kidnapings-canada-mexico [http://perma.cc/DS8L-EFNR].

[92] Foreign Service Act of 1980, Pub. L. 96-465, § 101, 94 Stat. 2071 (1980) (codified as amended at 22 U.S.C. § 3902 (1982)).

[93] *Verdugo-Urquidez*, 494 U.S. at 259.

[94] MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 1 (2013) [hereinafter ERWIN, LEGISLATIVE BACKGROUND].

[95] 50 U.S.C. § 413 (1980).

[96] Richard A. Serrano, *Emails show top Justice Department officials knew of ATF gun program*, L.A. Times, Oct. 3, 2011, http://articles.latimes.com/2011/oct/03/nation/la-na-atf-

failure to comply with its legal obligations under the Foreign Service Act of 1980 in the *Verdugo-Urquidez* case indicates that there is an important need for greater clarity in the roles and responsibilities of executive branch officials with respect to the conduct of "traditional law enforcement activities" abroad.

The Foreign Service Act of 1980 outlines the Chief of Mission authority of a U.S. Ambassador who serves as the President's representative to a foreign nation.[97] In general, as Chief of Mission, the U.S. Ambassador has the:

> (1) . . . full responsibility for the direction, coordination, and supervision of all Government executive branch employees in that country (except for employees under the command of a United States area military commander); and
>
> (2) shall keep fully and currently informed with respect to all activities and operations of the Government in that country, and shall insure that all Government executive branch employees in that country (except for employees under the command of a United States area military commander) comply fully with all applicable directives of the chief of mission.[98]

As the President's representative to that country, the Ambassador typically understands the intricacies of the U.S.'s relationship with that country, including local sensitivities on various issues.[99] As Chief of Mission, the Ambassador has an important responsibility involving executive oversight; the conduct of uncoordinated executive activities in the country raises a substantial risk to U.S. diplomatic relations with the host nation.[100] In any case, the clause stating that the Chief of Mission "shall [be kept] fully and currently informed"[101] does not specify what level of detail is necessary to keep the Chief of Mission "fully and currently informed," meaning that agents may not provide specific or operational information, perhaps because there is some level of detail that an Ambassador does not need to know. This leaves room for misunderstandings and even deliberate efforts to sideline an Ambassador.

guns-20111004 [http://perma.cc/L8DV-FLSB].

[97] Foreign Service Act of 1980 § 102(3) defines a Chief of Mission as: "[t]he principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) to be temporarily in charge of such a mission or office[.]"

[98] 22 U.S.C. § 3927(a) (1982).

[99] *Id.* § 3927(b).

[100] *Id.* § 3927(a).

[101] *Id.* § 3927(b).

The DEA agents in Mexico clearly came under the authority of the U.S. Ambassador. It is apparent that neither he nor the U.S. State Department were kept "fully and currently" informed about on-going operations involving either the kidnapping or the search and seizure of evidence at Verdugo-Urquidez' residences,[102] even though the Ambassador clearly knew that there was a major, on-going investigative effort into the kidnapping and murder of Camarena-Salazar and his pilot.[103] The Foreign Service Act of 1980 exists to ensure that the U.S. government conducts coordinated and effective operations in a foreign country; this helps promote strong bilateral relationships and avoid unnecessary embarrassments for U.S. officials.[104] Indeed, the DEA agents involved in this case probably knew that the U.S. Ambassador—who could have readily anticipated the reactions of the Mexican government and public to the U.S. actions—would not have agreed to either kidnapping had he been informed or consulted in advance.[105] However, the U.S. Ambassador could have either suggested a more constructive approach or could have been better prepared for the eventual political fallout.

Under the 1980 Covert Action Statute, the Director of Central Intelligence, as well as "the heads of all departments, agencies, and other entities of the United States involved in intelligence activities,"[106] were obligated to keep key congressional leaders "fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States . . . ."[107] Critically, this statute did not define terms like covert actions or make exceptions for certain types of low profile clandestine collection, counter-terrorism, or law enforcement activities. Here, at least during this period, the DEA probably did not consider its actions as anything other than a non-traditional means to accomplish a traditional law enforcement end—namely, bringing a suspect to justice for a fair trial in a competent court. Still, the DEA activities in Mexico have been complicated; the DEA has been involved in clandestine intelligence collection, as well as law enforcement, activities in Mexico against drug traffickers which can be traced back to the 1930's.[108] In fact, the DEA's Office of National Security Intelligence, but not the DEA itself, did not become a member of the U.S. intelligence community

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[102] Brief in Opposition, *supra* note 65, at *8.

[103] *Id*. at *45.

[104] *See generally* The Foreign Service Act of 1980.

[105] *Id*. § 101(2).

[106] 50 U.S.C. § 413 (1980).

[107] *Id.*

[108] María Celia Toro, *The Internationalization of Police: The DEA in Mexico*, J. OF AM. HIST. (Sept. 19, 2016), http://archive.oah.org/special-issues/mexico/mtoro.html [http://perma.cc/38W2-U8H6].

until 2006.[109] Thus, the kidnapping of Verdugo-Urquidez probably did not constitute "an intelligence activity," but rather a secretive law enforcement activity—albeit one with major foreign policy implications and risks.

By 1991, however, there had been a changing dynamic in the U.S. Congress, largely as a result of a range of high profile covert and counter-terrorism operations that had been conducted under President Ronald Reagan; this led Congress to pass new and tougher statutory restrictions on such operations.[110] In fact, the 1991 Intelligence Authorization Act "embodied the effort to reinforce legislative oversight of covert operations and to circumscribe future short-circuiting of the finding process."[111] The 1991 Covert Action Statute established requirements for a written finding by the President with a memorandum of notification to the intelligence oversight committees.[112] The President was obligated to make a written finding that the action was "necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States . . . ."[113] Each finding had to specify each "department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action."[114] Moreover, the President was obligated to keep the "congressional intelligence committees fully and currently informed of all covert actions,"[115] and could limit reporting to the

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[109] OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., DEA'S USE OF INTELLIGENCE ANALYSTS, AUDIT REPORT 08-23 (2008). Currently, the DEA has an assigned intelligence mission that is limited to the collection, analysis, and dissemination of information, as well as the exchange of analysis and information with foreign partners and international organizations. Exec. Order No. 12,333, 3 C.F.R. § 1.7(i), 46 Fed. Reg. 59,941 (Dec. 4, 1981).

[110] MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS (2013) [hereinafter ERWIN, CONGRESSIONAL OVERSIGHT].

[111] J. RANSOM CLARK, AMERICAN COVERT OPERATIONS: A GUIDE TO THE ISSUES 155 (2015). *See also* ERWIN, LEGISLATIVE BACKGROUND, *supra* note 94, at 1-2 (summarizing congressional efforts during the period 1974-91).

[112] The covert action statute has been since updated to reflect the role and responsibilities of the Director of National Intelligence; the statute has also been recodified at 50 U.S.C. § 3093 (2012). *See generally* Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429.

[113] 50 U.S.C. § 3093(a) (1976).

[114] *Id.* § 3093(a)(3). According to John Rizzo, the former Acting General Counsel at the CIA, he "could not recall a single instance in his many years of dealing with this issue in which an agency other than the CIA sought and received the required written finding to conduct a covert action—even the U.S. military." Standing Committee on Law and National Security, *Event Summary: The bin Laden Operation – The Legal Framework,* AM. BAR ASS'N (May 26, 2011),
https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/50-7_nat_sec_bin_laden_operation.authcheckdam.pdf [http://perma.cc/L8Y7-E3XH].

[115] 50 U.S.C. § 3093(b).

"Gang of Eight" in the case of sensitive operations.[116] A covert action had to be distinguished from a traditional military or law enforcement activity.[117] Notably, the statute set out specific congressional reporting requirements for a covert action and indicated that there was no explicit requirement for control by the CIA over such an action.[118]

The 1991 statute defined "covert action" as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly . . . ."[119] Finally, the statute excluded from its ambit certain intelligence collection, as well traditional military, diplomatic and law enforcement, activities.[120] This statutory definition and a set of exceptions has created significant space for low profile operations to escape congressional oversight, including coordination with either the CIA or U.S. Ambassadors serving overseas, risking violations of international law with considerable risk to U.S. foreign policy interests.[121]

The distinction between a covert action and a "traditional law enforcement activity" can be analyzed in terms of the need for an unacknowledged role by the United States, the nature and complexity of the operation, and the risk to U.S. foreign policy interests—all of which leads to the need for reporting to congressional oversight committees and coordination with U.S. Ambassadors serving abroad.[122] Traditional law enforcement activities have typically been conducted as bilateral collaborative activities, such as under a

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[116] *Id.* § 3093(c)(2). The "Gang of Eight" includes the leaders of each of the two parties from both the Senate and House of Representatives, and the chairs and ranking minority Members of both the Senate and House Committees for Intelligence. ERWIN, LEGISLATIVE BACKGROUND, *supra* note 94, at 1-2.

[117] 50 U.S.C. § 3093(e).

[118] *Id.* § 3093(a)(3), which provides only that: "[a]ny employee, contractor, or contract agent of a department, agency, or entity of the United States Government other than the Central Intelligence Agency directed to participate in any way in a covert action shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency, or entity, to govern such participation."

[119] *Id.* § 3093(e).

[120] *Id.*

[121] *Id.* § 3093(e).

[122] Unlike the term "traditional military activity," there are no discussions in either the legislative history of the covert action statute or subsequent academic literature about the meaning of the term "traditional law enforcement activity." However, the legislative history is helpful in that it indicates that "[a]ctivities that are not under the direction and control of a military commander should not be considered as 'traditional military activities.'" *See* Questions for the Record Caroline D. Krass, U.S. SENATE (citing H.R. REP. NO. 102-166, at 30 (1991)), https://www.intelligence.senate.gov/sites/default/files/hearings/krasspost.pdf [https://perma.cc/R6ZT-JHHW].

mutual legal assistance agreement or extradition treaty.[123] Like a traditional military activity, one would expect that law enforcement activities would be conducted through established liaison relationships, following the prescribed legal processes and procedures in the sending and receiving countries.

The DEA actions in the *Verdugo-Urquidez* case would likely have come within the ambit of the 1991 Covert Action Statute, if not its 1980 predecessor. On one hand, the DEA conducted activities that were intended to influence political and economic conditions abroad, i.e., undermining the Guadalajara cartel and side-stepping Mexican processes, and under conditions in which the role of the U.S. government was not apparent (at least to responsible Mexican officials or even to the American public).[124] Indeed, it is hard to argue that six Mexican police officers who actually supported the kidnapping did not know that the operation was illegal under Mexican law, in part because four Mexican police officials were apparently paid a bribe of $32,000.[125] On the other hand, the DEA would likely argue that the primary purpose of the secretive activity was to support the public prosecution of the accused, but with only a later public acknowledgment of the U.S. role. Indeed, in analogous counter-terrorism cases, the Department of Defense has recently argued that certain foreign operations were not "covert actions," but were instead clandestine activities—missions designed to collect information or to prepare for later missions to disrupt, capture or kill terrorists.[126] However, such a clandestine claim by the DEA would be undermined by both the lack of interagency coordination and approval by senior executive branch officials before the kidnapping and home searches took place, as well as by the initial denial of involvement by both the DEA and the U.S. Marshals Service after the accused had arrived in San Diego.

Nonetheless, it is difficult to describe a kidnapping as a "traditional law enforcement activity."[127] Traditional law enforcement activities should

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[123] Reportedly, "the DEA maintains five principal objectives for working with foreign counterpart agencies: (1) participate in bilateral investigations, (2) cultivate and maintain quality liaison relations, (3) promote and contribute to foreign institution building, (4) support intelligence gathering and sharing efforts, and (5) provide training opportunities." OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., AUDIT REP. 07-19, THE DRUG ENFORCEMENT ADMINISTRATION'S INTERNATIONAL OPERATIONS iii (2007) [hereinafter OFF. OF THE INSPECTOR GEN. AUDIT REP.].

[124] *See* Schachter, *supra* note 25 (describing the denials of involvement by the U.S. Marshals Service and the DEA).

[125] Kim Murphy, *9 Indicted in Murder of Drug Agent in Mexico: Narcotics Lord and Former Police Officials Named in Torture-Killing of DEA's Camarena*, L.A. TIMES, Jan. 7, 1988, http://articles.latimes.com/1988-01-07/news/mn-33774_1_caro-quintero/2 [http://perma.cc/DW3M-M9AC].

[126] ERWIN, LEGISLATIVE BACKGROUND, *supra* note 94, at summary.

[127] One wonders if the CIA had affected a high profile secretive kidnapping of foreign national, under circumstances that caused unwanted international problems, whether it would

generally comply with established legal processes and procedures during the investigation of a case, the arrest and transfer of the suspect, and his eventual prosecution. In short, law enforcement officers traditionally do not bribe others to kidnap persons off the street and then search the person's home without a warrant. In any case, the Covert Action Statute was passed to ensure appropriate executive and legislative oversight, both to avoid unnecessary embarrassment to the government and to ensure the suitability of such operations.[128] One wonders whether the President or the congressional oversight committees would have agreed to this operation if they had known that at least one case (*Alvarez-Machain*) was based upon weak evidence, that 29 persons would have to be relocated to the United States, that prolonged litigation would ensue (including at least three cases before the U.S. Supreme Court), or that there would be serious damage to U.S.-Mexican bilateral relations.

In a more recent and analogous case, ATF agents conducted a series of gun-running operations from 2006-2011, in which licensed firearms dealers in Phoenix, Arizona were allowed to sell weapons to illegal straw buyers, hoping to track the guns to Mexican drug cartel leaders and arrest them.[129] Reportedly, the U.S. government lost track of over 2,000 weapons; some were found at 170 crime scenes in Mexico and two were recovered at the scene of the December 2010 slaying of a U.S. Border Patrol agent.[130] According to credible press reporting, weapons from this gun-running operation have even been traced to the November 2015 terrorist attacks in Paris.[131] In any case, there is evidence that senior leaders from the DOJ were informed that weapons were "walked" into Mexico in Operation *Wide Receiver*, but not in Operation *Fast and Furious*—raising serious questions about executive oversight and accountability.[132]

Like the kidnapping and search activities involving Verdugo-Urquidez, it is difficult to contend that the ATF "gun running" operations were a

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have been accepted by Congress as exempted from the covert action statute as "intelligence collection" or a law enforcement activity. Clearly, the classification of an action as a "traditional law enforcement activity" should not turn merely on which U.S. government agency mounted the operation.

[128] *See* ERWIN, LEGISLATIVE BACKGROUND, *supra* note 94, at 1.

[129] *See generally* Serrano, *supra* note 96; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 1 (2012).

[130] Richard A. Serrano, *Gun Store Owner had Misgivings about ATF Sting*, L.A. TIMES, Sept. 11, 2011, http://articles.latimes.com/2011/sep/11/nation/la-na-atf-guns-20110912 [http://perma.cc/8T4D-ZWK8].

[131] *Law Enforcement Sources: Gun Used in Paris Terrorist Attacks Came from Phoenix*, JUDICIAL WATCH (June 29, 2016), http://www.judicialwatch.org/blog/2016/06/law-enforcement-sources-gun-used-paris-terrorist-attacks-came-phoenix/ [http://perma.cc/858H-WG3Z].

[132] OFF. OF THE INSPECTOR GEN. AUDIT REP., *supra* note 123, at 419-71.

traditional law enforcement activity exempted from the covert action statute. Here, the arming of one foreign armed group, under circumstances involving the unacknowledged participation of the United States, was clearly intended "to influence political and economic conditions abroad,"[133] even if it had also been intended to facilitate law enforcement operations in the United States. Such operations carry significant foreign policy implications and risks for the United States; one could clearly anticipate that the increased para-military capability on the part of one drug cartel might generate a significant increase in criminal activity, as well as cartel-on-cartel violence, over an extensive area in Mexico.[134] Indeed, the DOJ Inspector General later found that the operation had been conducted without sufficient controls and lacked adequate attention to public safety, made inappropriate use of federal firearms licensees to advance an investigation, and lacked meaningful oversight by ATF headquarters.[135] In any case, while there are discrepancies in the record about what Attorney General Eric Holder knew about the two operations and when he knew it, the record suggests that the President never made a statutory finding and that the congressional oversight committees were not kept "currently and fully informed," as required by the covert action statute.[136]

In summary, the DEA operations in Mexico conducted against Verdugo-Urquidez were conducted in likely violation of an international (extradition) treaty with the Mexican government, various Mexican laws, and at least one important U.S. statute intended to ensure appropriate oversight by senior officials in the executive branch and by members of the congressional oversight committees. The use of bribed foreign officials to affect the kidnapping of an accused suspect, as well as the search of his foreign homes, cannot be fairly construed as a traditional law enforcement activity. Such high risk foreign intelligence operations, whether or not technically defined as "covert actions," should have ample oversight by agency officials, the U.S. Ambassador (in his Chief of Mission capacity), senior officials of the executive branch, and members of the congressional oversight committees. In other words, if the DEA had effected appropriate coordination with the U.S. Ambassador and within the executive branch, that coordination would have ensured that all relevant national interests had been considered while minimizing the risk to the overall bilateral relationship between the United States and Mexico.

Finally, it would be helpful if executive branch officials had a good,

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[133] 50 U.S.C. § 3093(e) (1976).

[134] Letter from Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to Judicial Watch (Apr. 19, 2016) (on file with author) (indicating that as of March 23, 2016, that weapons had been recovered from 94 locations in 13 Mexican states).

[135] OFF. OF THE INSPECTOR GEN. AUDIT REP., *supra* note 123, at 419-28.

[136] *Id.* at 426.

working definition for "traditional law enforcement activities;" namely, that such activities comply with established legal processes and procedures during the investigation of a case, the arrest and transfer of the suspect, and the suspect's eventual prosecution. In cases involving foreign partners, traditional law enforcement activities should involve routine compliance with international treaty obligations, the use of existing liaison relationships, and a respect for foreign legal processes and procedures.

IV. CONCLUSION

The DEA maintains a substantial foreign presence, in large part to facilitate the cooperation and support of foreign governments in its war on drugs. According to one writer, "[b]y the early 1990s . . . over three hundred DEA agents were posted in 70 foreign countries. Overall, more than 2000 American law enforcement agents were operating overseas by the end of the 1990s."[137] This raises important questions for the DOJ, as well as its subordinate organizations (the DEA, the U.S. Marshals Service, and the ATF) in terms of affecting international legal cooperation and assistance. Unauthorized law enforcement activities can jeopardize American interests in many ways: it can undermine the efforts of the U.S. Ambassador in managing the overall bilateral relationship with the host government, it can undermine the safety of American citizens and their families serving overseas, it can inhibit cooperation from skeptical foreign law enforcement officers and judges, it can jeopardize the integrity of the evidence or the availability of witnesses to support a prosecution, it can embarrass the United States (e.g., the failed prosecution of Dr. Alvarez-Machain), and it can threaten diplomatic and political relationships (e.g., North American Free Trade Agreement). Indeed, an angry foreign government could order all American law enforcement officers out of its country.

In cases where agencies such as the DEA or the ATF conduct operations abroad, it is imperative that officials comply with all obligations under U.S. law, including appropriate oversight by the U.S. Ambassador and the congressional oversight committees, and demonstrate respect for the rights of foreign nationals. While some legal obligations under extradition treaties or certain parts of the Bill of Rights might not apply in certain circumstances, unauthorized law enforcement activities can undermine foreign support to the U.S. efforts to combat drug traffickers, terrorists and other felons, respect for the law, and the integrity of American legal processes.

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[137] RAUSTIALA, *supra* note 5, at 158.