

# Foreign Search and Seizure: The Fourth Amendment At Large

*The Administration's recent policy of "Say No to Drugs"<sup>1</sup> has sparked a veritable war on drugs within our country. Outside our borders, on the high seas, and in foreign lands, the war on drugs has been fought to prevent their entry through our borders. This "war" is encroaching on the fourth amendment rights of persons suspected of drug trafficking who are subjected to search and seizure. This Comment examines the fourth amendment protection these people have received, and argues that the courts should uphold the fourth amendment, rather than pay it verbal service.*

## INTRODUCTION

The fourth amendment's<sup>2</sup> applicability outside United States territory has been examined by several authors with respect to the search and seizure of American citizens on the high seas.<sup>3</sup> These articles, however, do not consider the recent Ninth Circuit decision in *United States v. Peterson*,<sup>4</sup> which addressed searches on the high seas. Also, previous treatments have not addressed the issue of searches in foreign countries of either United States citizens or foreign nationals. Similarly, previous treatments have not addressed the extent to which evidence obtained in these searches is admissible in a United States court.

This Comment initially reviews the fourth amendment's applica-

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1. Los Angeles Times, Aug. 10, 1988, Pt. 1 at 1, col. 1; Aug. 7, 1988, Pt. V at 3, col. 3.

2. U.S. CONST. amend. IV. The fourth amendment provides:

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

3. See Note, *High On the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980); Note, *Search and Seizure of Foreign Vessels on the High Seas*, 15 VAND. J. TRANSNAT'L L. 227 (1982).

4. 812 F.2d 486 (9th Cir. 1987).

bility to searches on the high seas as a point of departure for understanding *Peterson*. After a discussion of this case, the Comment next addresses whether the good faith exception to the exclusionary rule of evidence, as stated in *United States v. Leon*,<sup>5</sup> should be extended to foreign searches and seizures. The Comment then examines current application of the fourth amendment in foreign countries, whether the subject of the search is a United States citizen or a foreign national. The issues of joint venture and standing are discussed at this juncture.

In discussing these issues, this Comment considers whether the cases are being decided on the merits, or whether a predetermined disposition to admit the evidence is being justified by manifest considerations. Finally, the Comment highlights implications for the future and concludes that the courts should uphold the fourth amendment in this area.

## THE FOURTH AMENDMENT ON THE HIGH SEAS

### *American Vessels On The High Seas*

The constitutional treatment given the random stopping of vessels on the high seas by government agencies derives its heritage from the practice of random stopping of automobiles, which has been held to violate the fourth amendment absent "articulable and reasonable suspicion" that some violation of the law was engaged in by the motorist.<sup>6</sup> The Ninth Circuit Court of Appeals extended this rationale to vessels on the high seas in *United States v. Piner*,<sup>7</sup> with a divided panel concluding that random stops and safety inspections of American vessels at night, absent reasonable suspicion of noncompliance with safety ordinances, transgress the fourth amendment.<sup>8</sup>

The court's extension of the rationale from land to high seas is useful because it affords individuals upon the high seas the same protections they would receive upon land. It is arguable that even more protection and privacy should be afforded to persons upon the high seas because of the concept that the high sea is *res communis*, belonging to the individuals using it as opposed to any state.<sup>9</sup> Certainly, no less protection should be afforded.

In contrast to other circuits, however, the Fifth Circuit, in *United*

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5. 468 U.S. 897 (1984).

6. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

7. 608 F.2d 358 (9th Cir. 1979); *see also* *United States v. Streifel*, 665 F.2d 414, 423 (2d Cir. 1981) (requiring reasonable suspicion for seizure of a Panamanian vessel on the high seas after obtaining permission of the Panamanian government to board).

8. 608 F.2d at 361.

9. *Trailer Marine Transport Corp. v. Federal Maritime Commission*, 602 F.2d 379, 387 (D.C. Cir. 1979).

*States v. Williams*,<sup>10</sup> declined to extend the rationale from automobile stops to stops of vessels on the high seas. The court, sitting *en banc*, rejected the applicability of "land based" fourth amendment law to seizures upon the high seas, implying that searches and seizures on the high seas are fundamentally different from those on land.<sup>11</sup> The court held that the "reasonable suspicion" standard was unnecessary under the fourth amendment in stopping American vessels in international waters.<sup>12</sup> Instead, *Williams* relies on a statutory approach for its discussion of American vessels,<sup>13</sup> which is less protective of individual liberties.

Whether the search occurs in customs waters or upon the high seas determines which statute applies. "High seas" has been defined to be all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation.<sup>14</sup> The United States Coast Guard obtains its authorization to stop and board American vessels on the high seas from 14 U.S.C. § 89(a).<sup>15</sup> This statute, which the Fifth Circuit has held to be constitutional,<sup>16</sup> gives the Coast Guard full power to stop and board any American flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity.<sup>17</sup>

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10. 617 F.2d 1063 (5th Cir. 1980); *see also* *United States v. Shelnut*, 625 F.2d 59, 61 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1980).

11. *Williams*, 617 F.2d at 1071 n.1., 1081. (A seizure takes place within the meaning of the fourth amendment by merely stopping and boarding a vessel. Indeed, stopping a vessel alone without boarding constitutes a seizure under the fourth amendment, as the governmental action restrains the vessel's freedom to proceed).

12. *Id.* at 1071 n.2, 1081-82.

13. *Id.* *See also infra* notes 14-16 and accompanying text.

14. 21 U.S.C. § 955b(b) (1982); *United States v. Louisiana*, 394 U.S. 11, 22-3 (1969); *United States v. Postal*, 589 F.2d 868 (5th Cir. 1979).

15. 14 U.S.C. § 89(a) (1982) partially provides that:

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of the laws of the United States. For such purposes, commissioned, warrant, and petty officers may at anytime go on board any vessel subject to the jurisdiction, or to the operation of any law of the United States, address inquiries to those on board, examine, inspect and search the vessel and use all necessary force to compel compliance.

16. *United States v. One (1) 43 Foot Sailing Vessel*, 538 F.2d 694 (5th Cir. 1976) (*per curiam*).

17. *United States v. Warren*, 578 F.2d 1058, 1064 (5th Cir. 1978) (*en banc*), *rev'd in part, aff'd in part*, 612 F.2d 887 (5th Cir. 1980), *cert. denied*, 446 U.S. 956 (1980); *United States v. Odom*, 526 F.2d 339, 341-42 (5th Cir. 1976).

## *Foreign Vessels On The High Seas*

A different analysis is applied to foreign vessels in international waters. *Williams* concluded that section 89(a) provides the Coast Guard with authority to seize foreign vessels in international waters only if the Coast Guard first has a reasonable suspicion that those aboard are engaged in a conspiracy to smuggle contraband into the United States.<sup>18</sup> The rationale for treating foreign vessels differently is that only when a reasonable suspicion of trafficking exists does the Coast Guard have reasonable grounds for suspecting that the vessel is subject to the operation of American laws. The provisions of section 89(a) are only then invoked.<sup>19</sup> This conclusion is consistent with the international law standard for seizure of foreign vessels in international waters.<sup>20</sup>

Foreign nationals are able to raise fourth amendment challenges in high seas searches by the Coast Guard under the reasoning that "once aliens become subject to liability under United States law, they also have a right to benefit from its protection."<sup>21</sup>

## *Searches In Customs Waters*

United States territorial waters extend three miles from its coastline.<sup>22</sup> "Customs" waters can, however, be extended beyond the normal limit of one hour sailing time, provided an arrangement exists between the United States and the foreign country.<sup>23</sup>

The Customs Service and Coast Guard obtain authority to board vessels and conduct searches in customs waters through 19 U.S.C. § 1581(a).<sup>24</sup> This statute is different from the "reasonable suspicion" standards of *Piner* for American vessels and the application of section 89(a) to foreign vessels. The standard for customs waters

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18. *Williams*, 617 F.2d at 1074. See 19 U.S.C. §§ 1401(j), 1709(c) (1982). This "reasonable suspicion" standard may be illusory in view of the fact that sections 1401(j) and 1709(c) enable customs waters to be extended beyond one hour sailing time if an arrangement or treaty between the United States and foreign country exists. This subjects the foreign vessel search on the high seas to the customs waters search standard that "no suspicion" is necessary.

19. *Williams*, 617 F.2d at 1076.

20. Convention on the High Seas, Article 22, *opened for signature* April 29, 1958.

21. *United States v. Cortes*, 588 F.2d 106, 110 (5th Cir. 1979).

22. *United States v. McRary*, 665 F.2d 674, 677 n.4 (5th Cir. 1982).

23. 19 U.S.C. §§ 1401(j), 1709(c) (1982).

24. 19 U.S.C. § 1581(a) (1982) provides:

Any officer of the customs [defined to include Coast Guard officers by 14 U.S.C. § 89(b) (1976) and 19 U.S.C. §§ 1401(i), 1709(b) (1976)] may at any time go on board any vessel . . . at any place . . . within the customs waters and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

searches is even less stringent regardless of the ship's flagship. In customs waters, whether the vessels are American or foreign, courts have held that no modicum of suspicion is necessary.<sup>25</sup>

*Application of the Fourth Amendment on the High Seas: United States v. Peterson*

The 1987 Ninth Circuit panel decision in *United States v. Peterson*<sup>26</sup> is the most recent consideration of the fourth amendment's applicability on the high seas. In *Peterson*, the Bangkok office of the Drug Enforcement Agency (DEA) received a tip that thirty-two tons of marijuana were to be shipped from Thailand to the West Coast of the United States. The DEA informed Thai authorities that the suspect was present in Bangkok, whereupon the Thai authorities wiretapped the suspect's home telephones and a government post office where a second suspect was believed to be making telephone calls. The ship departed, and after a stop at Manila, the DEA seized the ship in Alaska, finding approximately twelve tons of marijuana on board.<sup>27</sup>

After learning that a second shipment involving the same participants was headed toward the Philippines, the DEA contacted Philippine authorities. The Philippine Narcotics Command placed under surveillance a participant who was living in Manila, and monitored and taped radio transmissions between his apartment and the ship. The DEA helped decipher the intercepted communications. In addition, the Philippine government tapped the suspect's telephone and gave the DEA tapes of the interceptions.<sup>28</sup>

The United States Coast Guard intercepted the ship one hundred miles south of Cabo San Lucas. When the Coast Guard radioed a request for the ship's registration and identification, the vessel responded that it was a Panamanian ship which had departed from the Philippines for Panama.<sup>29</sup>

After the ship refused to consent to the Coast Guard's request for

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25. See, e.g., *United States v. Whitaker*, 592 F.2d 826, 829 (5th Cir. 1979), *cert. denied*, 444 U.S. 950 (1979); *United States v. Freeman*, 579 F.2d 942, 945 (5th Cir. 1978). But see *United States v. Kleinschmidt*, 596 F.2d 133, 135 (5th Cir. 1979) (*per curiam*), *reh'g denied*, 599 F.2d 1054 (5th Cir. 1979), *cert. denied*, 444 U.S. 927 (1979) (holding that the reasonable suspicion standard applies to customs officials' stop of a vessel).

26. 812 F.2d 486 (9th Cir. 1987).

27. *Id.* at 488.

28. *Id.* at 488-89.

29. *Id.* at 489.

boarding, the DEA contacted a Panamanian narcotics official and obtained telephonic approval to search the ship in the name of the Panamanian government. When the ship was informed that the Coast Guard was to board, the ship did not stop and its crew set it on fire. As the Coast Guard attempted to board, the ship rammed into the Coast Guard vessel and the blazing ship started to sink. The crew threw some marijuana overboard; however, the Coast Guard recovered what it could from the deck and the water.<sup>30</sup>

The defendants appealed their convictions for possession of a controlled substance in United States customs waters<sup>31</sup> with intent to distribute, and for conspiracy to destroy goods to prevent seizure.<sup>32</sup> They asserted that the marijuana was inadmissible because it was unlawfully seized, basing their argument on the fact that discovery of the ship resulted from an unlawful wiretap<sup>33</sup> involving participation by United States officials. The defendants further asserted both a lack of a warrant and a lack of statutory authority for the Coast Guard to board, alleging that Panama did not consent.<sup>34</sup>

In treating these issues, the court acknowledged that neither the Ninth Circuit nor the Supreme Court had been particularly clear about the extent to which the fourth amendment applies on the high seas.<sup>35</sup> However, following other Ninth Circuit decisions,<sup>36</sup> the court assumed that the fourth amendment applied.<sup>37</sup> Normally, the fourth amendment does not apply to searches by foreign authorities in their own countries, even if the subjects of the search are American.<sup>38</sup> *Peterson's* major premise is, however, that if participation by United States agents in the investigation is substantial, then the action may be considered a "joint venture" between United States and foreign officials. The joint venture then becomes subject to the reasonableness of the fourth amendment. The minor premise of *Peterson* holds that reasonableness under the fourth amendment is to be determined

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30. *Id.*

31. *Id.* at 493. The Ninth Circuit refers to the high seas search (occurring one-hundred miles south of Cabo San Lucas) as taking place in customs waters. Given the joint venture nature of this search, this characterization may be appropriate. *See supra* note 18.

32. 18 U.S.C. § 2 (1982); 21 U.S.C. § 955a(c) (1982); 18 U.S.C. §§ 371, 2232 (1982).

33. *Peterson*, 812 F.2d at 489. The government did not, but should have argued that the independent criminal acts of setting the *Pacific Star* on fire and jettisoning the cargo were so attenuated from the wiretap that the chain of the taint was broken.

34. *Id.*

35. *Id.*

36. *See, e.g.,* United States v. Troise, 796 F.2d 310 (9th Cir. 1986); United States v. Cilley, 785 F.2d 651 (9th Cir. 1985); United States v. Watson, 678 F.2d 765 (9th Cir. 1982), *cert. denied*, 459 U.S. 1038 (1982).

37. *Peterson*, 812 F.2d at 489.

38. United States v. Rose, 570 F.2d 1358, 1361 (9th Cir. 1978) (citing *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir. 1965)).

by consulting and examining the law of the foreign country.<sup>39</sup> This second premise can be criticized because the court fails to provide any support or explanation for such an unprecedented action.

The Ninth Circuit found that the district court erred in concluding that no joint venture existed: the DEA had assumed a substantial role because the DEA believed that the marijuana was destined for the United States.<sup>40</sup> After concluding that a joint venture existed, the appellate court examined the foreign law to determine the import of the Philippine wiretap. The Philippine Constitution and the Republic Act 4200 provide that wiretaps without written judicial authorization are inadmissible for any purpose in any proceeding, unless required by an order for public safety.<sup>41</sup> Although the district court had found no violation of Philippine law, the Ninth Circuit maintained that, because of the Philippine courts' long history of construing their constitution in favor of individual liberties,<sup>42</sup> the search did not comply with Philippine law, and therefore, was not reasonable under the fourth amendment.<sup>43</sup>

#### FOREIGN SEARCHES AND THE EXTENSION OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

Instead of excluding the evidence on this basis, the court in *Peterson* next considered if the evidence could be admitted by applying the good faith exception to the exclusionary rule established in *United States v. Leon*.<sup>44</sup> The exclusionary rule was designed to deter federal officers from violating the fourth amendment and to encourage legal conduct.<sup>45</sup> The premise of the good faith exception is that the exclusionary rule does not deter the conduct of law enforcement officers acting on the reasonable belief that their conduct was legal.<sup>46</sup> Hence, if officers rely in good faith on a facially valid warrant, although the evidence was unlawfully seized, the evidence is

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39. *Peterson*, 812 F.2d at 490.

40. *Id.*

41. PHIL. CONST. art. IV, § 4; Republic Act 4200, Phil. Permanent and General Stat., Trinidad, Ed. (Quezon City 1978).

42. *Peterson*, 812 F.2d at 491 (citing *Marcelo v. De Guzman*, 114 Phil. Sup. Ct. Rpts. Ann. 657 (1982)); see also *Marcelo*, 114 Phil. Sup. Ct. Rpts. Ann. at 664 (Aquino, J., concurring) (holding that evidence seized pursuant to an insufficiently particular warrant must be excluded).

43. *Peterson*, 812 F.2d at 491.

44. 468 U.S. 897 (1984).

45. *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968).

46. *Leon*, 468 U.S. at 918-19.

not excluded.<sup>47</sup>

The court in *Peterson* liberally applied the good faith exception to protect United States officials from what was feared to be a "strict liability standard."<sup>48</sup> Although finding the search to be illegal under Philippine law and unreasonable under the fourth amendment, the court held that the good faith exception to the exclusionary rule applied to foreign searches, and admitted the evidence.<sup>49</sup> *Leon*, however, spoke of reliance on *facially valid* warrants,<sup>50</sup> absent in *Peterson*: United States officials relied only on foreign law enforcement officers' representations that compliance with their own law had been met; no written authorization was obtained.<sup>51</sup>

The extension of the good faith exception to foreign searches may pose potential problems in the future due to a lack of restraint on foreign officials' conduct. When reliance upon the representations of foreign officers, who are not available to testify later, is feasible, U.S. officers may be induced to take procedural shortcuts. Getting a foreign official to do what one could not do directly is the type of conduct the exclusionary rule seeks to deter. Thus, the *Peterson* extension of the good faith exception, from *facially valid* warrants given by a neutral magistrate to foreign searches based on the representations of foreign officers, is a broad leap.

Although a seizure and search may be authorized by statute, *United States v. Ramsey*<sup>52</sup> requires the court to make a second inquiry: Did the same search violate the Constitution?<sup>53</sup> Similar to the dual inquiry in personal jurisdiction issues,<sup>54</sup> this approach helps protect individual liberties, because although authorized by statute, the search must still comply with constitutional requirements.

Consistent with the *Ramsey* two-prong inquiry, the court in *Peterson*, after asserting that statutory authority existed for the search, addressed whether that search violated the fourth amendment. The court assumed that the fourth amendment applied, while stating that the point was far from settled, but found probable cause to search and seize the vessel, resulting in no constitutional invalidity.<sup>55</sup>

Thus, a predetermined disposition justified by manifest considerations emerges from the court's decision in *Peterson*: a wiretap search in violation of the fourth amendment and the law of a foreign coun-

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47. *Peterson*, 812 F.2d at 492.

48. *Id.*

49. *Id.*

50. *Leon*, 468 U.S. at 920-22.

51. *Peterson*, 812 F.2d at 492.

52. 431 U.S. 606 (1977).

53. *Id.* at 615.

54. *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 435 (2d Cir. 1971).

55. *Peterson*, 812 F.2d at 494.



try should be excluded from evidence once the court determines that a joint venture exists. However, this evidence is now admissible by extending the good faith exception of the exclusionary rule to foreign searches.

#### UNITED STATES CITIZENS ASSERTING THE FOURTH AMENDMENT IN FOREIGN COUNTRY SEARCHES

The fourth amendment has been held to have extraterritorial application to a federal agent's conduct abroad against United States citizens.<sup>56</sup> When the search and seizure is no longer on American soil or in United States customs waters, but takes place in a foreign country, justification is necessary to admit evidence into a United States court when no overt act or crime was committed within United States territory. *United States v. Bowman*<sup>57</sup> provides the justification: the government has the right to defend itself against crimes perpetrated by its own citizens wherever the crimes may be committed. If the locus of the act was limited to the site where the individual would be subject to territorial jurisdiction, United States citizens would be immunized in foreign countries.<sup>58</sup>

#### *The Concept of Joint Venture Applied To Foreign Searches*

Parallel to *Peterson* and its joint venture requirement upon the high seas, fourth amendment protections are afforded to American citizens only when a joint venture is found to be present between the United States and a foreign government.<sup>59</sup> The problem with the joint venture concept is that it is particularly susceptible to result-oriented factual determinations — determinations which run counter to the spirit of the fourth amendment. The court need only find that no joint venture exists between the two governments; the fourth

56. *Best v. United States*, 184 F.2d 131, 138 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951).

57. 260 U.S. 94 (1922).

58. "But the same rule of interpretation should not be applied to criminal statutes which are . . . not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens . . . . [T]o limit [the] locus [of an offense] to . . . territorial jurisdiction would . . . greatly . . . curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense." *Bowman*, 260 U.S. at 98.

59. *Stonehill*, 405 F.2d at 743.

amendment then becomes inapplicable and the evidence becomes admissible. For example, in *Brulay v. United States*,<sup>60</sup> the court found no joint venture when United States customs agents alerted Mexican federal police to the activities of an American citizen in Mexico, although their advisement clearly facilitated his arrest. Even though the Mexican police had no warrant, 297 pounds of amphetamine tablets found in his car and 1,908 pounds found in a Tijuana house were seized and admitted into evidence in a United States federal court.<sup>61</sup> Fourth amendment interpretations, such as in *Brulay*, protect individuals less when this type of involvement is considered insufficient to constitute a joint venture. Indeed, the exclusionary rule's goal of deterring conduct in violation of the fourth amendment is frustrated when courts sanction United States agents' conduct. This provides the necessary inducement for foreign officers to act illegally.

A concern should exist about an additional method by which the fourth amendment may be unduly circumvented in foreign searches. The opportunity now exists for courts to apply *Peterson's* generous holding and extend the good faith exception of the exclusionary rule to foreign searches, thereby decreasing needed constitutional protections.

### *Stonehill v. United States*

The Ninth Circuit developed the joint venture doctrine in *Stonehill v. United States*.<sup>62</sup> In *Stonehill*, the defendants, American citizens living in the Philippines, had business records seized and admitted into a civil action brought by the United States, which sought foreclosure of federal tax liens against the taxpayers. On appeal, the taxpayers asserted that the district court erred in denying their motion to suppress because the seizure by foreign officials violated their fourth amendment rights and because the conduct of the United States agents constituted "participation" in the illegal searches and seizures.<sup>63</sup>

The Ninth Circuit found that the fourth amendment did not apply because all activities of the United States agents apparently took place before the raids began, or after their termination.<sup>64</sup> Before the raids, United States agents took part in selecting the places to be

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60. 383 F.2d 345 (9th Cir. 1967); see also *United States v. Benedict*, 647 F.2d 928, 931 (9th Cir. 1981). No joint venture was found between Thai police and the DEA in investigating the activities of an American citizen residing in Bangkok. Although DEA agents accompanied the Thai police during the search (which was held to violate the United States Constitution), their role was said to be passive. As a result of the search, 150 grams of heroin were admitted into evidence.

61. *Brulay*, 383 F.2d at 348.

62. 405 F.2d 738 (9th Cir. 1968).

63. *Id.* at 740.

64. *Id.* at 746.

searched and the items to be seized. United States agents examined records, differentiated significant from insignificant material for seizure, and consulted and advised the foreign government in the searches.<sup>65</sup> However, because the United States agents copied the documents with the Philippine government's permission after the raids were completed, no joint venture was found.<sup>66</sup>

The Philippine Supreme Court, relying on a section of the Philippine Constitution identical to the fourth amendment, held that the raids were illegal searches and seizures; if these same raids had been conducted by United States agents, they would have been improper under the United States Constitution.<sup>67</sup>

However, the Ninth Circuit in *Stonehill*, developing its rationale from *Brulay*, found that the exclusionary rule should not apply to the acts of foreign officials. The court, in fleshing out the concept of joint venture, provided its rationale for holding the exclusionary rule inapplicable to the acts of foreign officials:

1) All relevant evidence is admissible unless there is an exclusionary rule;

2) The fourth amendment does not by itself provide for exclusion of unlawfully obtained evidence;

3) In order to compel United States officers to abide by the fourth amendment, the Supreme Court created the exclusionary rule;

4) There is nothing our courts can do to require foreign officers to abide by our Constitution.<sup>68</sup>

Thus, the fourth amendment applies to raids by foreign officials only if federal agents so substantially participate in the raids that a joint venture is formed between the United States and foreign officials.<sup>69</sup> Hence, the exclusionary rule will only apply with the participation of United States officials.

The United States-foreign nation joint venture analysis derives from a similar joint venture analysis between federal and state officials prior to the decisions in *Mapp v. Ohio*<sup>70</sup> and *Elkins v. United States*,<sup>71</sup> which incorporated the fourth amendment into the four-

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65. *Id.* at 751.

66. *Id.* at 743, 746.

67. *Id.* at 743.

68. *Id.*

69. *Id.* See generally *Lustig v. United States*, 338 U.S. 74 (1948); *Byars v. United States*, 273 U.S. 28 (1926); *Symons v. United States*, 178 F.2d 615 (9th Cir. 1949); *Sloane v. United States*, 47 F.2d 889 (10th Cir. 1931).

70. 367 U.S. 643 (1961).

71. 364 U.S. 206 (1960).

teenth amendment.<sup>72</sup>

Prior to this incorporation, courts employed the “silver platter” doctrine in their federal-state analysis. Under this doctrine, if state officials did the seizing and handed the evidence over to federal officials on a “silver platter,” evidence obtained in violation of the fourth amendment would be admissible unless the purpose of the search was to obtain evidence for a federal offense, or if federal officers participated in the search.<sup>73</sup> “Substantial participation” was the key for finding that a joint venture existed, and this carried over into the United States-foreign nation analysis.<sup>74</sup>

Borrowing from the federal-state counterpart of *Byars v. United States*,<sup>75</sup> the court in *Stonehill* held that mere participation by a federal agent is insufficient to constitute a joint venture; instead, the effect must be as though the agent engaged in the undertaking as one exclusively the agent’s own.<sup>76</sup> Whether the search is framed as a joint venture is determined by comparing what the federal agent did with the totality of the acts comprising the search and seizure.<sup>77</sup>

### The Byars-Lustig Rule

*Lustig v. United States*<sup>78</sup> affirmed the *Byars* principle upon which *Stonehill* relied, but found a joint venture between federal and state agents when a Secret Service Agent reported suspicions of the defendant’s counterfeiting to local police. The court stated, “[S]o long as [the officer] was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.”<sup>79</sup> *Lustig* went on to hold that to differentiate between participation from the beginning and joining a search before it had run its course would be drawing too fine a line in applying the *Byars* doctrine.<sup>80</sup>

The significance of the *Lustig* holding is its demonstration of how courts can massage the joint venture concept to achieve a predetermined disposition. Although, as the court stated in *Stonehill*, a “thorough examination of the facts of each case” is required by *Byars* to determine the question of substantial participation,<sup>81</sup> if the court wants a particular outcome, the joint venture concept can be framed in such a way that the desired outcome is ensured. Similar

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72. *Mapp*, 367 U.S. at 657; *Elkins*, 363 U.S. at 215.

73. *Gambino v. United States*, 275 U.S. 310 (1927); *Lustig*, 338 U.S. at 79.

74. *Stonehill*, 405 F.2d at 743.

75. 273 U.S. 28 (1926).

76. *Stonehill*, 405 F.2d at 744 (citing *Byars*, 273 U.S. at 32-33).

77. *Stonehill*, 405 F.2d at 744.

78. 338 U.S. 74 (1949).

79. *Id.* at 79.

80. *Id.*

81. *Stonehill*, 405 F.2d at 745; see *Byars*, 273 U.S. at 32.

sets of facts may or may not give rise to the conclusion that a joint venture existed. For example, in *Birdsell v. United States*,<sup>82</sup> an American was arrested in Mexico by Mexican officials. The *Birdsell* facts are similar to those of *Lustig*: an American police officer gave information leading to the arrest and search, and assisted Mexican authorities by acting as an interpreter.<sup>83</sup> The court found no joint venture here,<sup>84</sup> where the *Lustig* court would have found one. A footnote in *Birdsell* stated that if federal officials induced foreign police to engage in conduct which shocked the conscience, then a federal court *might* refuse to allow the prosecution to enjoy the fruits of that action.<sup>85</sup> However, the *Lustig* court did not require the federal official's conduct to shock the conscience, but only that the agent's participation occurred before the search was completed.

A federal agent must not be permitted to do indirectly that which he cannot do directly: circumvent the fourth amendment.<sup>86</sup> Furthermore, the *Lustig* criterion holds that as long as the officer was involved before the search was completed he was a participant.<sup>87</sup> Therefore, the base qualifications for a joint venture should be very broad. Accordingly, courts should be slow to come to the conclusion that a joint venture doesn't exist, leaving that conclusion only for the narrowest of circumstances where the United States had no involvement of any kind before, during, or immediately after the search. If any assistance to the foreign government was given, then in the interest of protecting an invaluable constitutional right, a joint venture should be found.

The dissent in *Stonehill* develops these themes. In his persuasive dissent, Judge Browning emphasized that the evidence obtained by the searches and seizures flagrantly violated a Philippine constitutional provision, identical to our fourth amendment, which required that a warrant contain language describing with particularity the items to be seized.<sup>88</sup> The Supreme Court of the Philippines had stated that, "[t]o uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights

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82. 346 F.2d 775 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965).

83. *Id.* at 782.

84. *Id.*

85. *Id.* n.10 (emphasis added).

86. *Sloane*, 47 F.2d at 890.

87. *See supra* note 79 and accompanying text.

88. *Stonehill*, 405 F.2d at 747 (Browning, J., dissenting); Phil. Const. art. III §

guaranteed in our Constitution.”<sup>89</sup>

The dissent points out that the majority misapplied the “silver platter” doctrine.<sup>90</sup> According to the majority, evidence obtained in violation of the fourth amendment would be admissible unless federal participation in the search was so substantial that it constituted a “joint venture” between the governments.<sup>91</sup> The dissent aptly observes that the majority’s holding is that federal officials may participate in searches and seizures that violate the fourth amendment as long as they don’t participate “too much.”<sup>92</sup>

The majority relied on *Byars*, which states that the fourth amendment applies when the search was a joint operation.<sup>93</sup> According to the dissent, however, this language refers to the facts in *Byars* only, rather than setting forth a general rule for all fourth amendment cases.<sup>94</sup> Actually, the sole issue in *Lustig* was the interpretation and application of *Byars*.<sup>95</sup> As the *Lustig* court states:

The crux of [the *Byars*] doctrine is that a search is . . . by a federal official if he had a hand in it . . . . The decisive factor . . . is the actuality of a share by a federal officer in the total enterprise of securing and selecting evidence by other than sanctioned means.<sup>96</sup>

Hence, *Lustig*’s liberal construction lends itself to increased findings of joint ventures. *Lustig* made no reference to the concept of joint operation,<sup>97</sup> but emphasized the percentage role the agent played. Justice Frankfurter explained later that under the “silver platter” doctrine, the “question has always been whether the offending search or seizure was conducted in any part by federal officers or in the interest of the Federal Government. . . .”<sup>98</sup> This supports the contention that a joint venture can be found without the agent having a literal hand in the search. If the federal government has an interest in the search, then the fourth amendment should become applicable through the finding of a joint venture.

It has been suggested that the reluctant and stingy administration of the *Byars-Lustig* rule by some lower courts imposed upon the victims of searches and seizures impossible evidentiary burdens (burdens which would be even more formidable in a foreign search), and

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89. *Stonehill v. Diokno*, 20 Phil. Sup. Ct. Rpts. Ann. 383, 392 (1967).

90. *Stonehill*, 405 F.2d at 748 (Browning, J., dissenting).

91. *Id.*

92. *Id.*

93. *Stonehill*, 405 F.2d at 744 (citing with approval *Byars*, 273 U.S. at 33).

94. *Stonehill*, 405 F.2d at 748 (Browning, J., dissenting).

95. *Id.*

96. *Lustig*, 338 U.S. at 78-79 (emphasis added).

97. *Stonehill*, 405 F.2d at 749. (Browning J., dissenting).

98. *Elkins v. United States*, 364 U.S. 206, 236 (1960) (Frankfurter, J., dissenting) (emphasis added); see also *Euziere v. United States*, 266 F.2d 88, 90 (10th Cir. 1959) stating, “The test in all cases is ‘did the federal authorities participate in any way in the search?’”

tempted federal and state officials to collude.<sup>99</sup> The ultimate result of this concern was reflected in *Elkins v. United States*, which held that evidence unconstitutionally seized by state officers must be excluded from federal prosecutions even if federal officials did not participate in any way in the search and seizure.<sup>100</sup> Because the United States-foreign nation joint venture concept has followed the direction of its federal-state counterpart thus far, with policy considerations being equally applicable, courts should apply the same rule to foreign searches and exclude all evidence unconstitutionally seized by foreign officers, even if United States federal agents did not participate in the least. At the very least, evidence should be excluded where the foreign official's conduct "shocks the conscience."

The dissent in *Stonehill* emphasizes that because the fourth amendment applies only to United States officers, the focus should be on their actions.<sup>101</sup> The majority's own summary of the facts shows definite United States involvement. In stating that American agents were involved in events preceding and following the *initial physical intrusion upon the searched premises*, the majority uses a highly restrictive characterization of the term "raid."<sup>102</sup> An officer's actions can be more easily viewed as participatory if the search is seen as a functional process, (rather than merely related to a physical process) which is incomplete until appropriation of the seized objects is made for introduction into a court of law.<sup>103</sup> In viewing the officer's participation in a search in terms of its functional whole, activities taking place before or after the raids can be seen as "substantial participation," necessitating the invocation of the fourth amendment.<sup>104</sup>

#### FOREIGN NATIONALS ASSERTING THE FOURTH AMENDMENT IN FOREIGN COUNTRY SEARCHES

Recently, courts have been faced with cases in which foreign nationals have attempted to assert the fourth amendment and other constitutional rights. The foreign nationals claim that those rights were violated in a foreign country through the efforts of a joint venture between the United States and a foreign government, with the

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99. *Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1165-96 (1959).

100. *Elkins*, 364 U.S. 206.

101. *Stonehill*, 405 F.2d at 749 (Browning, J. dissenting).

102. *Stonehill*, 405 F.2d at 751.

103. *Id.*

104. *Id.*

seized evidence ultimately being used in a United States proceeding.

The Constitution's protection of foreign nationals from the conduct of United States officers abroad has never been delineated. An initial consideration with regard to the extent of protection afforded is the degree to which the interest asserted by the foreign national is congruous with the intended scope of the constitutional provision.<sup>105</sup>

The issue first arose in 1974 in *United States v. Toscanino*,<sup>106</sup> in which the Second Circuit Court of Appeals held that the fourth amendment limits that conduct of United States officers abroad which affects foreign nationals. Toscanino, an Italian citizen, appealed his conviction of conspiracy to import narcotics.<sup>107</sup> A hearing was granted after the defendant asserted that he was kidnapped from Uruguay by a member of the Uruguayan police who was acting *ultra vires*, in that he was accepting payment from the United States government.<sup>108</sup> Toscanino alleged that he was later tortured in Brazil and drugged before being put on a plane to the United States.<sup>109</sup>

Aside from claimed violations of treaties to which the United States was a party,<sup>110</sup> Toscanino alleged that there had never been a formal or informal request by the United States government to extradite him from Uruguay and that the Uruguayan government had no prior knowledge of his kidnapping.<sup>111</sup> He further alleged that the prosecutor, a United States Attorney for the Eastern District of New York, was aware of Toscanino's interrogation and that a member of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, was present and participated in some of the interrogations.<sup>112</sup> In response to these allegations, the government prosecutor did not affirm or deny them, instead claiming that they were immaterial to the district court's power to proceed.<sup>113</sup>

An illegal arrest constitutes a seizure of the person, violating his

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105. See *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978). Here, United States' participation was seen as substantial, requiring a finding of joint venture between United States and Mexican authorities. Statements made by an American under interrogation and arrest in Mexico were subject to suppression for failure of Mexican authorities to administer *Miranda* warnings. Because *Miranda* safeguards "should not be circumvented merely because the interrogation was conducted by foreign officials in a foreign count[r]y. . .", it follows that in similar situations, the fourth amendment should not be refrained from being upheld because the search takes place in a foreign country by foreign officials.

106. 500 F.2d 267 (2d Cir. 1974).

107. *Id.* at 280.

108. *Id.* at 269.

109. *Id.* at 270.

110. These treaties included the O.A.S. Charter, art. 17; U.N. CHARTER art. 2, para. 4.

111. *Toscanino*, 500 F.2d at 270.

112. *Id.*

113. *Id.*



or her fourth amendment rights.<sup>114</sup> The government asserted in *Toscanino* that fourth amendment protections afforded to American citizens did not extend to foreign nationals.<sup>115</sup> The court, however, emphasized that the fourth amendment protects "people" rather than "areas"<sup>116</sup> or "citizens"<sup>117</sup> and stated that "[t]he Constitution of the United States is in force . . . whenever and wherever the sovereign power of that government is exerted."<sup>118</sup> Because a foreign national may assert the fourth amendment against searches occurring in the United States,<sup>119</sup> the court found "no sound basis . . . [for] a different rule with respect to aliens who are the victims of unconstitutional action[s] abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."<sup>120</sup> The concurrence by Judge Anderson suggested that the Bill of Rights need not be extended to foreign nationals;<sup>121</sup> instead, he proposed that the same result could be achieved by deciding the case on due process grounds alone.<sup>122</sup>

Since *Toscanino*, the issue has recurred only a handful of times. However, the results of these cases disclose that the modern judicial trend can be characterized as permitting foreign nationals, who are victims of unconstitutional governmental conduct abroad, to assert constitutional protections when the United States government tries to use the product of their illegal conduct in a criminal prosecution.<sup>123</sup>

#### FOREIGN NATIONALS ASSERTING STANDING IN AMERICAN COURTS

Within the issue of whether the fourth amendment applies to the foreign search of a foreign national conducted as a joint venture between two governments is the issue of standing. This issue was first

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114. *Henry v. United States*, 361 U.S. 98, 100-01 (1959); *Giordenello v. United States*, 357 U.S. 480, 485-88 (1958); see Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).

115. *Toscanino*, 500 F.2d at 280.

116. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

117. *Toscanino*, 500 F.2d at 280.

118. *Id.* (citing *Balzac v. Puerto Rico*, 258 U.S. 298, 312-13 (1921)).

119. *Toscanino*, 500 F.2d at 280 (citing *Au Yi Lau v. United States Immigration and Naturalization Serv.* 335 F.2d 217, 223 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971)).

120. *Toscanino*, 500 F.2d at 280.

121. *Id.* at 281. (Anderson, J., concurring).

122. *Id.*

123. See *Jean v. Nelson*, 727 F.2d 957, 973 (11th Cir. 1984), *aff'd on other grounds*, 472 U.S. 846 (1985).

addressed in *Cardenas v. Smith*.<sup>124</sup> A Colombian citizen filed suit against the Attorney General when her Swiss bank account was seized under a treaty between the American and Swiss governments which provided for mutual assistance in gaining information and evidence needed for criminal proceedings.<sup>125</sup> Cardenas was not under investigation or indictment, but charges were pending against her brother for allegedly violating United States narcotics laws.<sup>126</sup>

The district court granted the government's motion for summary judgment, stating that it had "no basis for attempting to apply constitutional standards on behalf of a nonresident alien with respect to a *res* which is not subject to the court's control."<sup>127</sup> However, in addressing the issue of whether a nonresident alien has standing to assert a constitutional claim, the Court of Appeals for the District of Columbia (D.C. Circuit) pointed out that Cardenas' status as a foreign national did not alter the fact that she suffered from an injury in fact, sufficient to invoke standing under Article III, and that it is the injury, not the party, that determines standing.<sup>128</sup> Whether she is Colombian or American, she has a personal stake that would be affected by the outcome of the controversy.<sup>129</sup> Further, the injury is no less of an injury just because it occurred abroad.<sup>130</sup>

Although the trend of the earlier cases was to hold otherwise,<sup>131</sup> "the decisions over the years disclose a definite trend to relax the rigidities of earlier cases."<sup>132</sup> For example, the Ninth Circuit recently held that Australian residents have standing to raise objections under the United States Constitution to limitations on liability imposed by the Warsaw Convention.<sup>133</sup> One court has said that, even abroad, conduct of American officials must be measured by the Constitution.<sup>134</sup> Additionally, the D.C. Circuit assumed without deciding that an alien could constitutionally challenge American actions in the United States that led to his arrest in Germany by German officials, stating, "the extent to which the Constitution's protections

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124. 733 F.2d 909 (D.C. Cir. 1984).

125. *Id.* at 911; Treaty Between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters (1973).

126. *Cardenas*, 733 F.2d at 911.

127. *Id.* at 912. See *Cardenas v. Smith*, 555 F. Supp. 539 (D.D.C. 1982).

128. *Id.* at 913.

129. *Id.*; see also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983).

130. *Cardenas*, 733 F.2d at 913; see, e.g., *Toscanino*, 500 F.2d at 267; *Reid v. Covert*, 354 U.S. 1, 6 (1956).

131. See *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

132. *Kukatush Mining Corp. v. Securities and Exchange Commission*, 309 F.2d 647, 650 (D.C. Cir. 1962).

133. *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308 n.6 (9th Cir. 1982).

134. *United States v. Tiede*, 86 F.R.D. 227 (Ct. for Berlin 1979).

shield . . . aliens from actions which occur in other countries is not clear . . . Much may depend on the status of the individual complaining and the action complained of."<sup>135</sup>

### United States v. Verdugo

A recent opinion develops the reasoning of these recent cases and continues the judicial trend toward extension of fourth amendment protections to foreign nationals. *United States v. Verdugo*<sup>136</sup> involved the search of two residences of Verdugo-Urquidez, a Mexican national and suspect in the kidnap and murder of DEA agent Enrique Camarena Salazar. *Verdugo* was a case of first impression in the Ninth Circuit, which had never dealt with the issue of foreign searches of foreign nationals.<sup>137</sup>

After Verdugo's arrest<sup>138</sup> on narcotics offenses, both DEA agents and Mexican Federal Judicial Police (MFJP) conducted a thorough search of his two homes in Mexico.<sup>139</sup> The DEA agent who made the decision to conduct the searches had participated in "hundreds" of previous searches in Mexico, and although none of the evidence had been admitted into a United States court, this was his objective in the instant case.<sup>140</sup> Although obtaining authorization from the MFJP, the agent did not contact the United States Attorney or Department of Justice for authorization or for a determination of the legality of the proposed searches.<sup>141</sup> Although all the seized weapons were kept by the MFJP, all other materials were turned over to the DEA, which brought them into the United States without either preparing an inventory or leaving a receipt for items that had been seized.<sup>142</sup>

The District Court found that a joint venture between the United States and Mexican government existed because the sole purpose of the search was to aid the pending prosecution in the United States

135. *Sami v. United States*, 617 F.2d 755, 769, 773 n.34 (D.C. Cir. 1979).

136. *United States v. Verdugo-Urquidez*, No. 86-0107-JLI-Crim, slip op. at 3 (S.D. Cal. Feb. 17, 1987).

137. *Verdugo*, slip op. at 10. Previous cases in the circuit involved searches of U.S. citizens.

138. United States agents admitted to paying six Mexicans to abduct Verdugo. He was blindfolded and stuffed into the back of a car and pushed through a hole in the border fence where United States Marshals were waiting to arrest him. *Los Angeles Times*, Sept. 21, 1987 at 1, col. 4.

139. *Verdugo*, slip op. at 2-4.

140. *Id.*

141. *Id.*

142. *Id.* at 8.

and because Mexico had no similar interest or pending prosecution.<sup>143</sup> Reasoning that it was unlikely that the fourth amendment was not intended to protect a foreign national facing criminal charges in United States custody, the court held that the fourth amendment applied to the searches irrespective of citizenship.<sup>144</sup>

The searches were conducted without a Mexican or United States warrant and the government demonstrated no exigent circumstances for circumventing this requirement.<sup>145</sup> The district court has the constitutional power, notwithstanding Federal Rule of Criminal Procedure 41(a), to issue overseas warrants. This power does not infringe upon the sovereignty of the foreign nation if the joint venture search is authorized by foreign officials prior to the warrant's execution.<sup>146</sup> Because the DEA agents failed to obtain a warrant, the court held the search to be unconstitutional. The court explained that there was no meaningful way to distinguish between the fourth amendment's overseas application to a United States citizen and to a foreign national in custody.<sup>147</sup> Despite the government's request, the court declined to extend the good faith exception to the exclusionary rule to foreign searches, as the Ninth Circuit later did in *Peterson*.<sup>148</sup> Even if the exception was extended, the *Verdugo* court held that the DEA agent's belief in the legality of the searches was unreasonable under the *Leon* standard.<sup>149</sup>

Finally, the searches were held to be unreasonable even if the lack of a warrant was excusable. The government demonstrated no exigent circumstances to justify the searches taking place at night.<sup>150</sup> Compounded by the lack of inventory, receipts, and lack of a written or verbal description of the items to be seized, the search was declared by the district court to be an unconstitutional general search, justifying suppression of the evidence.<sup>151</sup>

The United States appealed the District Court's ruling and a panel of the Ninth Circuit affirmed the District Court's holding that the fourth amendment protected Verdugo, a foreign national, stating that the evidence was properly suppressed.<sup>152</sup> The Ninth Circuit

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143. *Id.* at 10.

144. *Id.* at 12.

145. *Id.*

146. *Id.* at 15-16. FED. R. CRIM. P. 41(a), provides that, "A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property or person subject to seizure is located, upon request of a federal law enforcement officer or an attorney for the government."

147. *Verdugo*, slip op. at 18.

148. *Id.*

149. *Id.* at 19.

150. *Id.* (citing *United States v. Searp*, 586 F.2d 1117, 1122 (6th Cir. 1978); *United States v. Stefanson*, 648 F.2d 1231, 1236 (9th Cir. 1981)).

151. *Verdugo*, slip op. at 20.

152. *United States v. Verdugo-Urquidez*, 88 Los Angeles Daily J. D. Apt. Rep.

based its reasoning on the principle that the Constitution limits governmental authority to act abroad.<sup>153</sup> The court rejected the dissent's "compact theory" in the context of the Constitution's extraterritorial application, whereby Verdugo would not be entitled to fourth amendment protections as a foreign national who was not a party to the compact between the federal government and "The People" of the United States.<sup>154</sup> Instead, the court adopted a "natural rights" approach<sup>155</sup> and observed that because the fourth amendment protects an alien whose presence in the United States is voluntary but illegal, denying protection to Verdugo whose presence in the United States is legal but involuntary could not be justified.<sup>156</sup>

*Verdugo* demonstrates the better rule for foreign and even high seas searches. The case is significant for two reasons: it asserts the fourth amendment's applicability to foreign nationals and protects the foreign national. In the same spirit as *Lustig* and the *Stonehill* dissent, these views are viable because they help distill the clouded fourth amendment issues and set a clear example for judges and attorneys to follow in the future. These cases take the fourth amendment beyond the verbal patronage that it has received from other courts, and actually provide fourth amendment safeguards.

#### CONCLUSION

The fourth amendment's applicability to American and foreign citizens on the high seas and in foreign countries is in a state of evolution, making it ripe for Supreme Court adjudication. A concern should exist for what appears to be the courts' paradoxical tendency to extend the fourth amendment's applicability while at the same time neglecting to protect the individual with its safeguards. The most readily ascertainable means, but the means least consistent with protecting constitutional liberties, is to extend the good faith exception to foreign searches or find that no joint venture exists, as the courts in *Peterson* and *Stonehill* respectively held.

However, our government is entirely a creature of the Constitution, bound to respect the limitations that the Constitution imposes on its powers, whether it acts at home or abroad.<sup>157</sup> *Lustig*, the

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11122 (Aug. 31, 1988). Due to the timing of this decision's issuance and this case note's publication, full analysis of the case must be postponed.

153. *Id.* at 11124.

154. *Id.*

155. *Id.* at 11125.

156. *Id.* at 11126-27.

157. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

*Stonehill* dissent, and *Verdugo*, which support a more strict constitutional interpretation, provide the most desirable benchmark for other courts to follow in upholding fourth amendment protections: deny the admissibility of evidence when fourth amendment requirements have not been met during foreign searches and seizures. The case law appears to be slowly following this trend, at least in respect to more courts recognizing the rights of aliens to invoke constitutional protection. Ideally, the trend will catch on with respect to our own citizens, as their nexus to the Constitution is closer. In this manner, predictability and stability in the application of our Constitution may be reestablished. Likely to flow from this is a positive perception of our government and an increased respect for its laws which may promote adjustments in people's conduct to conform to consistent judicial standards.

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