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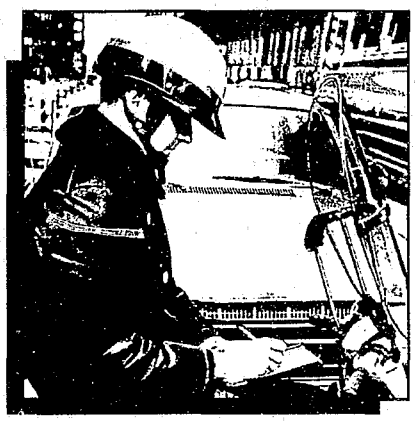

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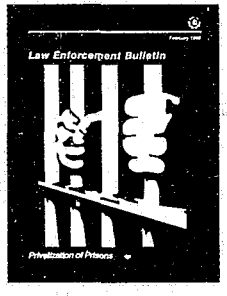

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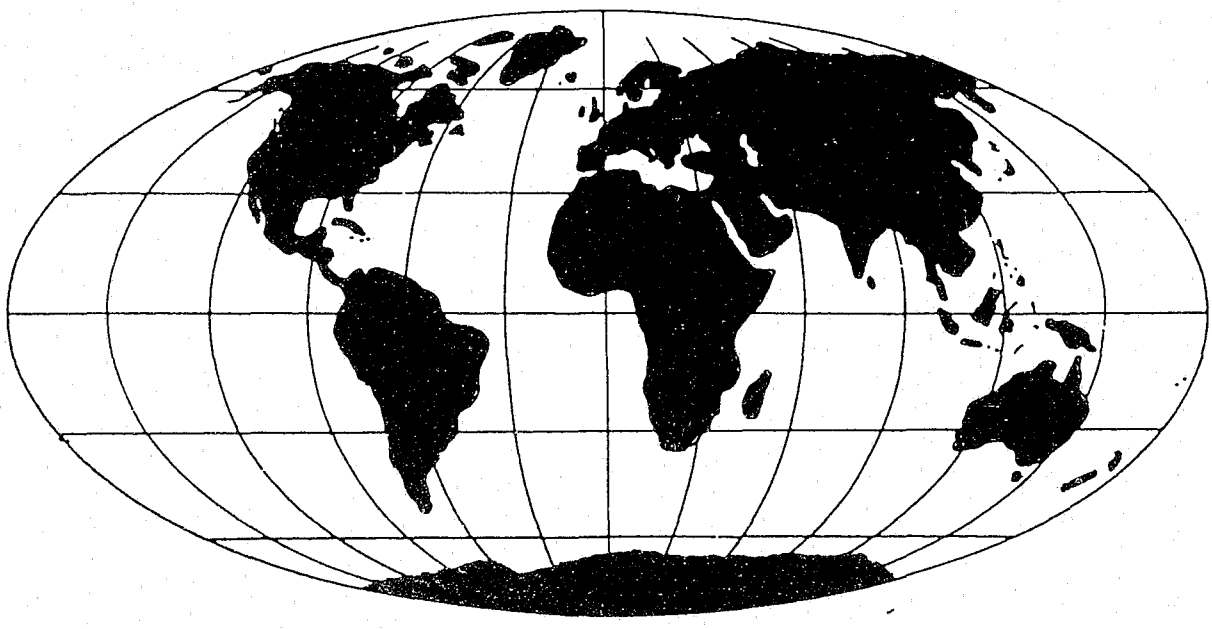
Foreign Searches and the Fourth Amendment



By
AUSTIN A. ANDERSEN, LL.B.

In a recent international, multimillion dollar heroin conspiracy and money laundering prosecution, in which local police officers in Bermuda arrested and searched a fugitive charged in New York for Federal violations, a U.S. District Court observed that since modern day narcotics trafficking is conducted on a global scale, law enforcement agencies will have to enlist the cooperation of their counterparts in other parts of the world. The court went on to note, "This international cooperation does not mandate the conclusion that the assistance rendered by foreign officials thereby makes them agents of the United States and thus subject to our Constitution and jurisprudence."[1]

Because the tide of drugs flowing into the United States cannot be stemmed unilaterally, it is becoming increasingly more obvious that the war against drugs requires teamwork by law enforcement agencies of the world. As various nations share information, coordinate cases of mutual interest, locate each other's fugitives, and participate in transcontinental un-

dercover operations, American courts are being asked to delineate standards governing the admissibility of evidence collected in foreign countries.

The purpose of this article is to identify the different circumstances under which evidence can be located in a foreign search and to determine when that evidence will be admissible in American courts. The salient legal issues to be addressed are: 1) Whether the fourth amendment is applicable to a foreign search; and 2) if so, what procedures must police use to meet the reasonableness standard of the fourth amendment.[2]

The resolution of the first issue depends on the degree of involvement or participation by U.S. officials in the foreign search; in general, the greater the involvement, the more likely fourth amendment standards will apply. The extent of involvement by U.S. officials can range from none to exclusive control; the former situation will not implicate the fourth amendment while the latter will. More difficult to categorize are those foreign searches in which there is some degree of involvement by both U.S. and foreign officials. This article discusses specific cases where courts have attempted to define the standards for determining exactly how much involvement by U.S. authorities is needed to trigger the extraterritorial application of the fourth amendment and its reasonableness requirement.

Foreign Searches With No U.S. Involvement

It is clear that evidence independently acquired by foreign police for their own purposes is admissible in U.S. courts despite the fact that such evidence, if seized in the same manner by American police, would be excluded under the fourth amendment.[3] This rule applies even when those from whom the evidence is seized are American citizens.[4] Such evidence is not suppressed for two reasons. First, the Supreme Court decided more than 60 years ago that the framers of the U.S. Constitution did not intend the fourth amendment to apply to private parties, i.e., individuals who are not officials of the U.S. Government.[5] Second, the exclusionary rule is not a constitutional right but is instead a judicially created device intended to deter misconduct by U.S. officials.[6] Because the suppression in American courts of evidence seized by foreign officials would have no deterrent effect on police tactics in the United States, no purpose is served by such punitive exclusion.

American police, however, are often the beneficiaries of such evidence. For example, Canadian authorities recently used a wiretap that did not meet U.S. standards and then provided the contents of that intercept to DEA agents. The U.S. Court of Appeals for the Ninth Circuit held that because the DEA was not involved in the initiation or monitoring of the wiretap, the fourth amendment was not a bar to the use of evidence from the wiretap in an American court.[7]

A rarely applied exception to this rule occurs when a foreign sovereign's actions during the search are so extreme as to shock the judicial conscience, even though no American involvement is present.[8] Because of the small number of cases in which evidence has been suppressed for shocking conduct, it is not clear just how outrageous the conduct must be before a court will exercise its supervisory authority to

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enforce the exclusionary rule. One case illustrating such shocking conduct is *United States* v. *Toscanino*,[9] in which a Federal appellate court held that the fourth amendment was violated when the defendant, an Italian national, was forcibly abducted by Uruguayan agents, tortured, interrogated for 17 days, drugged, and returned to the United States for trial.

Foreign Searches Conducted Exclusively by U.S. Authorities

It is clear that a search controlled exclusively by American authorities—either inside or outside the territorial boundaries of the United States—must be conducted in a manner consistent with the fourth amendment. The U.S. Government, whether it acts at home or abroad, is subject to the limitations placed on its power by the Bill of Rights, at least as far as its relationship with U.S. citizens is concerned.[10] Although the ability of a sovereign state to assert its authority is generally limited to acts occurring within its territorial boundaries, certain situations motivate nations to assert subject matter jurisdiction for their courts to entertain criminal matters which take place in other countries.[11]

In an ever-shrinking world, criminalization of extraterritorial acts by one nation is usually respected by other nations, as long as the statutes conform to generally recognized principles of international law.[12] For example, Congress has extended Federal jurisdiction to vessels at sea, overseas government reservations, and U.S. aircraft.[13] Similarly, Congress has enacted legislation protecting U.S. nationals from terrorist acts in other countries.[14] In addition, courts often construe ordinary statutes designed to protect the government as having extraterritorial effect, as long as the elements of the statute do not specifically exclude such an intent by the legislature.[15]

While Congress has the power to make certain types of extraterritorial activity illegal, the ability of U.S. agents to investigate such violations on foreign soil cannot be granted without contravening customary international law, which accords each of the nations of the world exclusive peace-keeping jurisdiction within its borders.[16]

> ***"The U.S. Government, whether it acts at home or abroad, is subject to the limitations placed on its power by the Bill of Rights...."***

Generally, American law enforcement officers who conduct investigations abroad rely on the foreign country's invitation, treaty, or permission;[17] more often, the investigation is performed by the foreign officials themselves at the request of U.S. authorities. However, in cases where Congress has created extraterritorial investigative jurisdiction and where the host country grants permission to investigate, American authorities must then conduct their inquiry in a manner consistent with the U.S. Constitution.

Foreign Searches by Foreign Authorities with Involvement of U.S. Officials

Since U.S. officials do not normally conduct investigations in foreign countries, most foreign searches which produce evidence of interest to U.S. law enforcement officers are conducted by foreign police. The most important exception to the general rule of admissibility of evidence located by foreign police occurs when there is substantial involvement in the search by U.S. authorities. Two types of involvement, often found together in the same case, are more likely to transform a foreign search into one subject to the protections of the fourth amendment: 1) American officials make foreign police their agents by causing them to conduct searches solely in the interest of the U.S. law enforcement agency;[18] or 2) American officials, through their substantial participation, convert the search into a joint venture.[19]

Providing intelligence concerning criminal activity to a foreign police department does not necessarily convert the foreign police officer who conducts a search based on this information into an agent of the U.S. official. For example, when FBI Agents in New York notified the Royal Canadian Mounted Police (RCMP) that an American citizen living in Toronto had information about stolen securities that would soon be transported from the United States into Canada for sale and distribution, RCMP officers debriefed the informant and conducted a warrant-

less search of the defendant's hotel room. A Federal court refused to suppress evidence received from the RCMP search, which would have been invalid under the fourth amendment. The court held that the transmittal of the name, telephone number, and general information concerning a crime of potential interest to both countries amounts to routine interagency cooperation and does not rise to the level of American involvement necessary to invoke the fourth amendment.[20]

Another Federal court condoned a higher degree of involvement in a case in which FBI Agents notified Mexican police of the identities of two individuals in possession of vehicles stolen in the United States for importation and sale in Mexico, a violation of both U.S. and Mexican statutes.[21] After the Mexican police conducted a warrantless search of the defendant's premises, a second search was conducted in the presence of an FBI Agent. Neither search met fourth amendment requirements. Noting that the Mexican police had a legitimate investigative interest in the defendant's activity, the court held the fourth amendment inapplicable to evidence located in a search by Mexican police, even though the defendants were American citizens, the American police provided the information leading to the search, and an American agent was present at the scene of the search.

These cases imply that a foreign officer who has no independent motivation for a search conducted solely at the behest of a U.S. officer may be considered an agent of that U.S. officer; if so, evidence produced by that search will be tested for admissibility in the U.S. court system under the fourth amendment.[22] Generally, it is unusual for a foreign police officer to have absolutely no interest in the outcome of a search executed in his country, and an independent motive to search can often be found.

> ***"...courts must decide whether the participation by American officials rises to the level necessary to convert the search into a joint venture...."***

In *United States* v. *Molina-Chacon*,[23] the defendant objected to the introduction of evidence seized from his attache case by Bermudian police during an arrest conducted at the request of DEA agents who had a warrant charging him with conspiracy to import heroin into the United States. Avoiding the issue of whether the search of the attache case was constitutional, the court held that the Bermudian police were not mere agents of the United States when they cooperated in the apprehension of a criminal for whom process was outstanding in New York.[24] The court's decision was based on the following factors: 1) Molina-Chacon suffered no mistreatment at the hands of the foreign officers; 2) his rights under the laws of Bermuda were honored; 3) DEA agents, although they possessed an arrest warrant, lacked the power to execute it in a foreign country; 4) at least part of the conspiracy charged occurred on Bermudian soil; and 5) routinely complying with official requests to locate fugitives of other nations is part of the broad responsibility of the police agencies of the world to cooperate with each other.[25]

In most foreign searches with U.S. involvement, there is some common interest in the subject matter of the investigation. In these cases, courts must decide whether the participation by American officials rises to the level necessary to convert the search into a joint venture, thereby invoking the protections of the fourth amendment. One court has described the necessary level as "substantial participation,"[26] based on a case-by-case factual analysis.

The following examples of involvement by U.S. officials reflect the range of activity that courts have held *did not convert* searches into joint ventures:

- Presence of an American agent to observe a search not under his control;[27]
- Providing information predicating the foreign investigation and limited assistance at the search scene when there is a substantial foreign interest in the case; [28]

- A request for international cooperation by police agencies contacted by the United States for assistance in the arrest of a fugitive.[29]

However, a joint venture was found in a recent case in which DEA agents notified authorities in Thailand of a marijuana smuggling ring in that country, participated in monitoring a wiretap installed by the Thai police on the defendant's telephone, and reviewed all information received from the wiretap.[30]

The above cases show that courts will conduct factual analyses of foreign searches to determine if involvement by U.S. officials is so marginal as not to implicate the fourth amendment or so substantial that the action must be characterized as an exercise of American authority subject to the limitations of the U.S. Constitution. For American law enforcement officers, however, the determination of exactly how much involvement will transform a foreign search into a joint venture is not easily predictable.

Application of the Fourth Amendment to a Jointly Conducted Search

Once the decision has been made that a search is a joint venture between the U.S. and foreign authorities, evidence resulting from the search must be measured against the fourth amendment in order to determine its admissibility in an American court. The Supreme Court has ruled that all warrantless searches are unreasonable per se unless a recognized exception to the warrant requirement exists.[31] Warrantless joint venture searches which fall within such exceptions (such as consent, incident to arrest, or emergency) will, therefore, produce admissible evidence as long as the legal requirements for the exception are met. The emergency exception, in particular, seems appropriate to the U.S. official in a foreign land where time, language, and distance create formidable barriers to the issuance of a warrant by a magistrate in the United States. Courts generally excuse the need for a search warrant where probable cause exists and clearly articulated exigent circumstances make consultation with a judicial officer impractical.[32] In fact, Congress has facilitated the need for practical extraterritorial action when time is of the essence by authorizing certain warrantless intrusions without probable cause, such as the ability of the U.S. Coast Guard to search ships sailing under the American flag on the high seas[33] and U.S. Customs officers to board any vessel entering waters under Customs jurisdiction.[34]

> ***"...courts will conduct factual analyses of foreign searches to determine if involvement by U.S. officials is so marginal as not to implicate the fourth amendment...."***

In the event that an American officer participates in a joint search that does not fall within a recognized exception to the warrant requirement, there is still a chance that evidence located may be salvaged through an exception to the exclusionary rule. In *United States* v. *Peterson*,[35] Philippine authorities, at the request of DEA agents, conducted a wiretap which the court considered a joint venture. When information from the wiretap was used as a basis for a search, the court reasoned that the law of the foreign country must be consulted as a factor to determine whether the wiretap was reasonably conducted. In this case, although the wiretap and resulting search were invalid under Philippine law, the Ninth Circuit Court of Appeals found that a reasonable reliance on the foreign law enforcement officers' representations that there had been compliance within their own law triggered the good faith exception to the exclusionary rule.[36]

Courts differ on how they resolve the reasonableness issue in joint searches for which there is no apparent exception to the warrant requirement or the exclusionary rule. One solution is to adopt the foreign constitutional norm when it is a reasonable substitute for U.S. procedure.[37] This approach eliminates the practical difficulty of attempting to superimpose American regulations on the cooperating foreign host.

Recently, however, in *United States* v. *Verdugo-Urquidez*,[38] the Ninth Circuit Court of Appeals, in a case hinging on the question of whether the fourth amendment applies to joint searches of nonresident

aliens in foreign countries, held that the fourth amendment is the proper standard for U.S. governmental searches of citizens or aliens, at home or abroad. Verdugo-Urquidez, a Mexican national suspected of the torture-murder of an undercover DEA agent, became a fugitive after being charged by the DEA with numerous drug violations in the United States.

Based on the outstanding American warrant, Verdugo-Urquidez was arrested in Mexico by the Mexican Federal Judicial Police (MFJP) and remanded to U.S. Marshals at the California border. The next day, the Director of the MFJP, at the request of DEA agents, authorized a warrantless search of Verdugo's two residences in Mexico. During the searches, conducted by MFJP officers and DEA agents, one of the DEA agents found and seized documents allegedly reflecting the volume of marijuana smuggled into the United States by Verdugo's organization. Because the searches—which were unrelated to any contemplated Mexican prosecution—were initiated and participated in by DEA agents (who took custody of the evidence), both the U.S. District Court and the Ninth Circuit Court of Appeals found the participation of the DEA agents so substantial as to convert the searches into joint ventures.

Since the searches were of questionable validity under Mexican law, the government argued that the good faith exception to the exclusionary rule should apply to the evidence because it was reasonable for the U.S. officials to rely on representations of the Mexican police that the searches were legal. The court disagreed, stating that the fourth amendment, and not Mexican law, governs the procedures for joint searches in foreign countries. Most significant, however, was the finding that in the absence of any exception to the warrant requirement, the fourth amendment required the DEA agents to obtain a U.S. search warrant in order to search the residence of a foreign national. The Supreme Court has agreed to review this lower court decision during its 1989-1990 term.

> ***"Evidence located in foreign countries by foreign police acting independently is not subject to fourth amendment standards...."***

Conclusion

Evidence located in foreign countries by foreign police acting independently is not subject to fourth amendment standards and is admissible in American courts, unless there is conduct during the search so outrageous and bizarre as to shock the judicial conscience. Evidence located by U.S. officials acting independently in a search abroad is subject to fourth amendment scrutiny. Often, however, there is involvement by both American and foreign police in searches outside the United States. In these cases, the following factors are among those considered in determining the degree of involvement by U.S. officials: 1) How the search or investigation was initiated; 2) whether the search related to any contemplated investigation or a violation of the laws of the foreign country; 3) whether U.S. authorities merely observe, participate in a passive or supportive role, or control the execution of the search; 4) which agency seized the evidence; and 5) which agency maintained custody of the evidence. Because courts may differ in the weight they give to the above factors in the context of varying factual situations, it is difficult to anticipate the precise degree of involvement which will convert a foreign search into a joint venture. If it becomes apparent that an American official will be involved in a foreign search that might be considered a joint venture, that official should then consider seeking legal advice to be certain that any action will be deemed reasonable by fourth amendment standards. LEB

Footnotes

[1] *United States* v. *Molina-Chacon*, 627 F.Supp. 1253, 1260 (E.D.N.Y. 1986).

[2] U.S. Const. amend. IV reads: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[3] *See, e.g., United States* v. *Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985); *United States* v. *Rose*, 570 F.2d 1358, 1361-2 (9th Cir. 1978); *Government of Canal Zone* v. *Sierra*, 594 F.2d

60 (5th Cir. 1979). See also Saltzburg, "The Reach of the Bill of Rights Beyond the Terra Firma of the United States," 20 Va. Journal of Int. Law 741 (1980).

[4] *See, e.g., Birdsell* v. *United States*, 346 F.2d 775, 782 (5th Cir. 1965), *cert. denied*, 382 U.S. 963 (1965).

[5] *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). See Andersen, "The Admissibility of Evidence Located in Searches by Private Persons," *FBI Law Enforcement Bulletin*, April 1989, pp. 25-29.

[6] The exclusionary rule should be used only in those situations where this remedial objective will be achieved. *See United States* v. *Janis*, 428 U.S. 433, 446-7 (1976).

[7] *United States* v. *LaChapelle*, 869 F.2d 488 (9th Cir. 1989); *see also, United States* v. *Delaplane*, 778 F.2d 570 (10th Cir. 1985).

[8] *Supra* note 4.

[9] 500 F.2d 267 (2d Cir. 1974). *Toscanino* is a seizure rather than a search case; it nevertheless illustrates an example of appalling behavior by foreign officials which shocked the judicial conscience in a fourth amendment case. In *Rochin* v. *California*, 342 U.S. 165 (1952), the Supreme Court found that U.S. officials committed shocking and outrageous conduct when they forced an emetic solution into the defendant's mouth to recover two morphine tablets which had been swallowed. *See also, U.S. ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65 (2d Cir. 1974), another abduction case, in which the court, noting the absence of torture or brutality, held that a defendant forcibly brought from a foreign country into a domestic court's jurisdiction was without a judicial remedy absent "conduct of the most outrageous and reprehensible kind...." The authority to try defendants who have been abducted for the purpose of bringing them within a court's jurisdiction is based on two U.S. Supreme Court cases—*Ker* v. *Illinois*, 119 U.S. 436 (1886) and *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

[10] *See Reid* v. *Covert*, 354 U.S. 1, 5-6 (1957), in which Justice Black writes for the majority: "When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." See also, note, "The Extraterritorial Application of the Constitution - Unalienable Rights?" 72 Va. L. Rev. 649 (1986); and Ragosta, "Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action," 17 N.Y.U.J. Intern. L. & P. 287 (1985).

[11] *See, e.g., United States* v. *Bowman*, 67 L.Ed. 2d 145, 151 (1922) in which the Court finds authority to criminalize certain extraterritorial acts "because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated."

[12] The source of recognition under international law for criminal statutes that affect the world community has traditionally been the following five principles of jurisdiction: 1) Location of the offense; 2) nationality of the victim; 3) nationality of the offender; 4) protection of governmental functions; and 5) universally repugnant crimes, such as piracy. For discussion, see Empson, "The Application of Criminal Law to Acts Committed Outside the Jurisdiction," 6 American Criminal Law Quarterly 32 (1967); and Petersen, "The Extraterritorial Effect of Federal Criminal Statutes: Offenses Directed at Members of Congress," 6 Hastings International and Comparative Law Review 773 (1983).

> ***Evidence located by U.S. officials acting independently in a search abroad is subject to fourth amendment scrutiny.***

[13] 18 U.S.C. §7 (Special maritime and territorial jurisdiction of the United States).

[14] 18 U.S.C. §2331 (Terrorist acts abroad against U.S. nationals).

[15] *See, e.g., United States* v. *Layton*, 509 F.Supp. 212, 220 (N.D. Cal. 1981), in which the defendant was charged with the homicide of Congressman Leo J. Ryan in Guyana on 11/18/78. The court denied Layton's motion for dismissal for lack of subject matter jurisdiction, stating that the Federal statute (18 U.S.C. 351) protecting U.S. officials has extraterritorial reach "at least when the attack is by a U.S. citizen and when the Congressman is acting in his or her official capacity."

[16] *See, e.g.*, 1 Restatement (Third) of the Foreign Relations Law of the United States §206.

[17] *See Lujan, supra* note 9, at 66-8 for a discussion of the ability of police officers to engage in official conduct in another country without the permission or in defiance of representatives of that country.

[18] *See, e.g., United States* v. *Rosenthal*, 793 F.2d 1214, 1230-31 (11th Cir. 1986), *cert. denied*, 107 S.Ct. 1377 (1987).

[19] *See, e.g., United States* v. *Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985); *United States* v. *Hawkins*, 661 F.2d 436, 455-6 (5th Cir. 1981); *United States* v. *Marzano*, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

[20] *United States* v. *Morrow*, 537 F.2d 120 (5th Cir. 1976).

[21] *Supra* note 4.

[22] *See United State* v. *Hensel*, 699 F.2d 18 (1st Cir. 1983), in which the appellate court upheld a lower court finding that the exclusionary rule applied in a case where an American DEA agent urged Canadian authorities to seize and search a ship entering Canadian waters because the foreign officers acted as agents for their American counterparts.

[23] *Supra* note 1.

[24] *Id.* at 1260.

[25] *Id.* at 1259-60.

[26] *Supra* note 18, at 1231.

[27] *Id.* at 1223-26.

[28] *Id.*

[29] *Supra* note 1.

[30] *United States* v. *Peterson*, 812 F.2d 486 (9th Cir. 1987).

[31] *Katz* v. *United States*, 389 U.S. 347 (1967).

[32] *See, e.g., Mincey* v. *Arizona*, 437 U.S. 385 (1978).

[33] 4 U.S.C. §89(a).

[34] 19 U.S.C. §1581(a).

[35] *Supra* note 30.

[36] For discussion of good faith exception, *see United States* v. *Leon*, 468 U.S. 897 (1989), and Fiatal, "Judicial Preference for the Search Warrant: The Good Faith Warrant Exception to the Exclusionary Rule," *FBI Law Enforcement Bulletin*, July 1986, pp. 21-29.

[37] *See, e.g., Jordan*, 24 C.M.A. 156, 51 C.M.R. 375 (1976); Peterson, *supra* note 30.

[38] 856 F.2d 1214 (9th Cir. 1988), *cert. granted*, 109 S.Ct. 1741 (1989).

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.