International terrorism has become more than something occurring in some faraway place that Americans see on the nightly news. It is now a crime to be dealt with in America itself. American law enforcement faces a difficult and dangerous task in investigating international terrorism. The goal of these investigations is to identify terrorists, deter future terrorist attacks, seize financial assets, and build cases that will lead to the conviction of those involved in terrorist acts. At the same time, investigators must carefully balance actions designed to ensure the security and safety of citizens against individual rights. Criminal investigations involving terrorists must be conducted in accordance with the provisions of the U.S. Constitution.

Local, state, and federal investigators will find themselves working hand in hand on terrorist task forces investigating international terrorists. Cases will be brought in both state and federal courts. Investigators will need to gather evidence, either testimonial or documentary, and assets from within the United States and from foreign sources. This will require cooperation with foreign law enforcement and security agencies. The subjects of these investigations will include both foreign nationals and U.S. citizens living abroad. The citizenship of suspects and the level of participation of American law enforcement in the overseas investigation will determine the legal standards to which American investigators will be held when prosecuting these cases. For these reasons, it is important that investigators understand how the U.S. Constitution limits their actions in foreign lands. This article examines how American law enforcement officials may
seek foreign assistance in their investigations. It also will consider the constitutional restraints upon these investigations.

**Foreign Assistance**

The Fourth Amendment guarantees the privacy of persons, houses, papers, and effects against unreasonable searches and seizures. The U.S. Supreme Court has established the principle that for a search to be reasonable under the Fourth Amendment, it must be authorized by a search warrant or one of the recognized exceptions to this warrant requirement. However, American magistrates do not have the authority to issue search warrants authorizing overseas searches. Fortunately, there are other ways to gather evidence from foreign jurisdictions. One approach is through the use of a mutual legal assistance treaty (MLAT). If an MLAT does not exist between the United States and the foreign nation involved, then one may seek a letter rogatory or possibly a subpoena.

MLATs between the United States and foreign governments establish procedures by which evidence may be obtained from foreign nations. MLATs allow federal prosecutors to request that foreign law enforcement officers gather evidence in their countries for use in U.S. proceedings. The terms of an MLAT may include the actual involvement of U.S. officials in the evidence-gathering process. For example, U.S. officials may be able to be present, or even participate in, the foreign investigations. The main advantage of MLATs is that compliance on the part of the signatories is mandatory. At present, the United States has entered into MLATs with thirty-four nations.

If an MLAT does not exist between the United States and the foreign nation involved, then investigators may consider a letter rogatory. A letter rogatory is simply authority from a federal court to request the assistance of the foreign jurisdiction. The foreign authorities may honor the request by using evidence-gathering tools allowed them by their own laws. Any resulting information or evidence is then forwarded to the requesting American authorities. However, assistance rendered through letters rogatory is discretionary on the part of the foreign nation.

U.S. authorities seeking information from overseas also may consider the use of subpoenas issued to persons or entities located within the United States that have actual or constructive possession of the information located overseas. Some courts, however, may refuse to enforce subpoenas for evidence located abroad on comity grounds because compliance with the subpoena may expose the responding party to criminal liability under the laws of the foreign nation. The factors a court must consider include—

- the vital national interests of each of the states;
- the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person;
- the extent to which the required conduct is to take place in the territory of the other state;
- the nationality of the person; and
- the extent to which enforcement by action of either state can be reasonably expected to achieve compliance with the rule prescribed by that state.
Constitutional Protections Overseas

Constitutional protections are assured to any person within the United States whether they are U.S. citizens or not, including illegal aliens. However, U.S. constitutional guarantees may not extend to persons located overseas. The U.S. Supreme Court has struggled with this issue for years.

The question of whether U.S. constitutional protections extend beyond the shores of the United States was first debated in *Ross v. McIntyre*.8 The Court confronted the issue of whether the Sixth Amendment right to trial by jury applied to a U.S. citizen being tried by an offshore American court. The defendant in this case was charged with committing a murder on an American vessel in Japanese territorial waters. Pursuant to a treaty with Japan, Ross was tried and convicted in an American consular court sitting in Kanagawa, Japan. The consular court consisted of the U.S. consul-general who, with four other persons appointed by him, determined Ross’ guilt. Prior to trial, Ross had made a demand for a trial by jury; his demand was denied.

Following his conviction, Ross petitioned for a writ of habeas corpus, arguing that the statute establishing the consular courts was unconstitutional. The U.S. Supreme Court rejected this argument, noting that consular courts established by governments to try their citizens in foreign countries for violations of foreign laws dated back to the Middle Ages. The Court stated that because the Constitution has no extraterritorial force, treaties extending American judicial power into foreign countries were controlling. Consequently, the Court concluded that consular courts were constitutionally created under Congress’ treaty-making power. However, this view, that the Constitution had no extraterritorial force, was later repudiated.

In 1957, the Supreme Court decided the case of *Reid v. Covert*.9 In this matter, the wives of two American servicemen were charged with murder. The women were tried and convicted in U.S. military courts sitting in the countries where the murders were alleged to have occurred. This procedure was in accordance with executive agreements in force between the United States and the countries where the crimes occurred. These agreements permitted U.S. military courts to exercise jurisdiction over American servicemen and their dependents who committed crimes overseas in violation of foreign laws.

The women argued that they were entitled to a civilian trial. The Court agreed with the women, but could not agree on a rationale. In his plurality opinion, which was joined by three other justices, Justice Black said that when the government acts abroad by reaching out and punishing an American citizen for his acts outside of the United States, the Bill of Rights and the Constitution should not be stripped away just because the citizen happens to be in another country.10

The *Reid* case established that there are constitutional protections for U.S. citizens while overseas. Unanswered, however, was the question whether constitutional protections extend to aliens located outside the United States, but facing charges in the United States. In *United States v. Verugo-Urquidez*,11 the Supreme Court ruled that the Fourth Amendment does not apply to a U.S.-directed search in Mexico. In this case, U.S. DEA agents, working with Mexican police, searched a home belonging to a Mexican national living in Mexico. The DEA agents did not seek a search warrant from an American court because no American court can authorize an overseas search. Instead, they obtained authorization for the search from the director general of the Mexican Federal Judicial Police. Charges were filed against the defendant in the United States, and the defendant moved to suppress evidence obtained during the search, arguing that the search violated his rights under the Fourth Amendment.

The district court granted the motion and the appellate court affirmed, citing the *Reid* decision, and holding that the Constitution imposes constraints on the federal government when it acts abroad.
The U.S. Supreme Court reversed the appeals court. The Court ruled that the appeals court’s global view of the application of the Constitution was contrary to its decisions in Reid and Ross. The Court stated that in light of those cases, it could not be said that every constitutional provision applies wherever the U.S. government exercises power. The Court held that the subject of the search, a Mexican citizen, had no substantial voluntary attachment to the United States, despite the fact that he was being prosecuted in U.S. courts.

In Verugo-Urquidez, the U.S. Supreme Court limited Fourth Amendment protections to searches and seizures within the United States. The Court refused to endorse the view that every constitutional protection applies wherever the U.S. government exercises its power. That is not to say, however, that constitutional protections never apply in the overseas context. The Reid case makes that clear. What protections apply overseas, and to whom, are questions that slowly are being answered by the courts.

**Fourth Amendment Protection**

Evidence that is seized during foreign investigations often is given to American authorities for use in U.S. investigations. Generally, American legal standards do not apply to the seizure of this evidence where a foreign country is conducting the investigation independently and seizes evidence that later is introduced into an American court.

United States v. Callaway illustrates this point. Canadian police searched two cars they suspected were stolen. They uncovered evidence regarding the theft of cars in America and their subsequent sale in Canada. The searches were not based on probable cause as required by courts in the United States. The evidence from these searches was given to American law enforcement and used to prosecute the defendant in the United States. The defendant moved to have the evidence suppressed on the basis that the searches violated the Fourth Amendment. The U.S. District Court of New Jersey decided not to apply the Fourth Amendment probable cause standard to the searches of the vehicles in question. The court found that the searches occurred in a foreign country; were conducted by foreign law enforcement officials who were not acting in connection, or cooperation, with American law enforcement authorities; and actions of the Canadian officials were not so outrageous as to shock the conscience of the court. Accordingly, the court refused to suppress the evidence.

As the court in Callaway pointed out, there are two circumstances where U.S. courts may exclude evidence gathered by foreign governments: 1) where there is joint action by both the U.S. and foreign governments, and 2) where solo actions by the foreign government shock the conscience of the U.S. court.

**Joint Ventures**

Joint investigations between U.S. and foreign law enforcement can create constitutional considerations for American law enforcement operating overseas. The actions of foreign officials against U.S. citizens abroad may be held to American legal standards and subject to the exclusionary rule—they were not independent actions but, rather, “joint ventures.” If an American official substantially participates in the activities of the foreign agency against American citizens or American concerns overseas, these activities could be deemed “joint ventures” and subject to U.S. constitutional scrutiny. Whether or not such a joint venture exists depends upon the facts of each case.

In United States v. Behety, an American vessel was searched by Guatemalan authorities. American authorities alerted them to the possibility that cocaine was aboard. In Guatemala, probable cause to believe that evidence or contraband are aboard a vessel is not required for Guatemalan officials to conduct a search of a vessel. American authorities did not actually participate in the search of the vessel, but were present and videotaped the
search. The court held that substantial participation by American authorities is required before the Fourth Amendment reasonableness standard is used to judge the search. The court found that providing information concerning possible criminal misconduct and videotaping the Guatemalan search did not constitute substantial participation.

United States v. Barona,15 illustrates that the Fourth Amendment reasonableness standard is applied in cases where there is substantial participation by American authorities. This case involved an international drug conspiracy “joint venture” investigation involving American, Danish, and Italian authorities. Danish police intercepted phone calls of the main suspects at the request of the DEA. Transcripts of the intercepted calls were introduced at the defendants’ trial in the United States. Following their conviction, the defendants appealed, claiming an unconstitutional search and seizure on the part of the DEA in conjunction with foreign investigators. The U.S. Circuit Court of Appeals for the Ninth Circuit rejected the defense contention on the grounds that the interception was lawful under the Fourth Amendment if it was reasonable. According to the court, reasonableness in this context means that the foreign authorities either followed their own law, or the U.S. agents acted in the good faith belief that the interceptions complied with foreign law. In this case, foreign law was adhered to. The court pointed out that the Fourth Amendment applies only to the people of the United States. However, even when American citizens are not the subject of the overseas investigation, violations of foreign law by foreign investigators could result in a judicial finding that the actions of the foreign government shock the conscience of the court and may result in the exclusion of the evidence.

**Shocks the Conscience of the Court**

As noted in several of these cases, not all evidence gathered by foreign investigators in foreign lands will be admitted into American courts, even if the evidence is collected with no U.S. involvement. Evidence obtained in a shocking manner, such as through torture or physical abuse, may be excluded as evidence in an American court as a due process violation.16 However, mere violations of foreign law by foreign governments do not necessarily cause an American court to exclude evidence.

In United States v. Peterson,17 evidence was collected from a wiretap conducted in the Philippines by Filipino officials. When the evidence was introduced by the U.S. government at the defendant’s trial, he challenged it on the grounds that the wiretap had not been properly authorized under Filipino law. American authorities were unaware of its illegality and had been assured that proper authority was sought. The U.S. Court of Appeals for the Ninth Circuit noted that Philippine law governed the reasonableness of the search, but American law governed its admissibility into U.S. courts. The court held that the seized evidence was admissible under the good faith exception to the exclusionary rule, because American investigators relied in good faith upon the assurances of the Filipino authorities. In addition, the court ruled that the actions of the Filipino authorities were not sufficiently outrageous to shock the conscience of the court.

**Fifth Amendment Protection Overseas**

The Fifth Amendment voluntariness standard and the rights to silence and counsel announced in the Miranda18 case clearly apply to custodial interrogations of U.S. citizens abroad by U.S. investigators.19 However, confusion exists regarding whether Fifth Amendment rights apply to overseas interrogations of nonresident aliens by American interrogators. Two U.S. district courts faced this issue and reached opposite conclusions.

In United States v. Raven,20 the defendant, a Dutch citizen, was charged with drug offenses in the United States. He was in custody in Belgium when American officials sought permission from Belgium...
authorities by a letter rogatory to interview him. American investigators were instructed that Belgium law does not permit a defendant’s lawyer to be present. Raven was interrogated by American investigators without his lawyer and made statements the government wished to introduce at his trial. The defendant moved to have the statements suppressed because he was denied counsel during the interrogation in violation of both the Fifth and Sixth Amendments to the Constitution.

In denying the motion to suppress, the U.S. District Court for the District of Massachusetts held that foreign nationals simply are not protected by the U.S. Constitution during custodial interrogations that take place overseas. The court cited the Supreme Court case of Johnson v. Eisentrager for the proposition that the Fifth Amendment does not protect aliens outside of the United States. The court went on to say that because the Supreme Court has rejected the extraterritorial application of the Fourth and Fifth Amendments, it also would likely reject the extraterritorial application of the Sixth Amendment right to counsel, even though the Court had not yet answered the question directly.

However, in United States v. Bin Laden, the U.S. District Court for the Southern District of New York reached the opposite conclusion. In this case, two alien defendants suspected of involvement in the bombings of U.S. embassies were subjected to repeated custodial interrogations by American and foreign officials after their arrests in Kenya and in South Africa. Both defendants were given modified advice of rights forms, informing them that they had the right to remain silent and that anything they said could be used against them in a court of law. They also were told that had they been questioned in the United States, they would have had the right to have an attorney present during questioning, but because they were not in the United States, the interrogators could not ensure that a lawyer would be appointed before questioning. Both defendants waived their rights as presented and made statements. Prior to trial in the United States, both defendants moved to have their statements suppressed, arguing that their Fifth Amendment rights were violated during the overseas interrogations.

The court ruled that the Fifth Amendment privilege against self-incrimination did protect these alien defendants, even though the interrogations occurred overseas. The court went on to hold that U.S. courts should use the Miranda warning and waiver framework to judge whether the government may introduce an alien’s custodial statement, even when the statement results from overseas interrogation by U.S. investigators. The court reasoned that a Fifth Amendment violation occurs only when the U.S. government introduces the statement against the defendant at trial. Therefore, the location of the interrogation is irrelevant. In addition, the court opined that the only way to ensure a defendant’s (alien or citizen) privilege against self-incrimination is protected—wherever they might be arrested—is to require American interrogators to comply with the Miranda warning and waiver regimen.

The court recognized that the content of the warnings provided to defendants interrogated abroad will vary. Warning overseas defendants of the right to silence and that any statements made may be used in a court of law is no problem. However, informing overseas defendants of their right to counsel during custodial interrogation poses particular difficulties. Because the defendants are in foreign custody, they may not be permitted access to counsel under local law. The court resolved this difficulty by saying that American interrogators should do or say nothing that would foreclose any right to counsel, either retained or appointed, that the defendants may have under foreign law, and the warning should conform as much as possible to the local circumstances under the laws of the foreign country.

A related issue is whether or not Miranda protections extend to overseas custodial interviews of individuals by foreign officials. In United States v. Welch, Welch was arrested by Bahamian officials in Bahama for attempting to deposit
a stolen U.S. Treasury bill in a Bahamian bank. He was taken to the local police station to be interrogated. Prior to the interrogation, he was warned of certain rights under Bahamian law. The warning did not include all of the rights mandated in the Miranda case. Welch waived his rights and made statements to the Bahamian interrogators. The U.S. government later attempted to use those statements against Welch in his trial for offenses regarding the stolen Treasury bill. Welch moved to suppress the statements, arguing that they were taken by Bahamian officials in violation of Miranda.

The U.S. Court of Appeals for the Second Circuit ruled that the requirements of the Miranda case were inapplicable to overseas custodial interrogations conducted solely by foreign officials. The court stated that the Miranda warning and waiver requirement was developed to deter American investigators from using coercive techniques during custodial interrogations. When the interrogators are foreign officials, Miranda does not have its intended deterrent effect. The only test regarding the admissibility of statements taken solely by foreign officials overseas is whether the statement is voluntary under the totality of the circumstances. Here the statement was voluntary and, therefore, admissible.

Conclusion

With increasing frequency, American investigators are called upon to conduct investigations overseas in conjunction with foreign investigators. Consequently, American courts are faced with the difficult task of deciding what constitutional protections extend to these overseas investigations. While the law is still developing, some conclusions can be drawn.

American investigators acting abroad must be aware of which constitutional rights have extraterritorial effect. The application of these rights depends upon several factors: whether the investigations are conducted by foreign investigators alone, foreign and American investigators acting jointly, or American investigators acting alone. It also depends upon whether the target of the investigative action is an American citizen or a foreign national.

Some conclusions are clear. American investigators acting overseas always should comply with foreign laws. To the extent possible, American investigators abroad should conduct their investigations as if they were operating in the United States. American investigators operating abroad should consult with their prosecuting attorneys whenever a question of the applicability of a constitutional right arises.

When working jointly with foreign officials overseas, investigators should be mindful that their activities will be subject to constitutional limitations when the subject is an American or an American interest. Substantial participation in searches or interrogation on the part of American investigators will invoke constitutional protections on the part of the subject. Investigators should ensure that these protections are adhered to under these circumstances.

Robert Ingersoll said, “Give to every human being every right that you claim yourself.” If investigators follow that simple rule, they will have few legal obstacles interfering with their efforts overseas in identifying terrorists, intercepting their operations, seizing their assets, and securing criminal convictions.

Endnotes

1 U.S. Const. amend. IV.
2 Filippo v. West Virginia, 120 S. Ct. 7 (1999).
3 United States v. Verugo-Urquidez, 494 U.S. 259 (1990), at 274 (noting that warrants issued by U.S. magistrates are ineffective outside the United States).
4 U.S. State Department Website, http://travel.state.gov/mlat.html. Currently, there are 19 MLAT’s in force with Argentina, Bahamas, Canada, Hungary, Italy, Jamaica, Korea, Mexico, Morocco, Netherlands, Panama, Philippines, Spain, Switzerland, Thailand, Turkey, United Kingdom (Cayman Islands), United Kingdom, and Uruguay. There are 15 MLAT’s that have been signed but are not yet in force with Antigua and Barbuda, Australia, Austria, Barbados, Belgium, Columbia, Dominica, Grenada, Hong Kong, St. Lucia, Luxembourg, Nigeria, Organization of American States, Poland, and Trinidad.
5 Title 28, U.S.C. Sec. 1781.
Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

6 This was the case in United States v. First National Bank of Chicago, 699 F.2d 341 (7th Cir., 1983) where compliance with a subpoena issued to a Greek bank would have exposed the bank and its employees to criminal liability under Greek bank-secrecy laws. The court in this case refused to enforce the subpoena.

However, in United States v. Nova Scotia, 740 F.2d 817 (11th Cir., 1984), the court ignored foreign bank secrecy and “blocking” statutes that made compliance to the U.S. subpoena an illegal act and enforced the subpoena.

7 Id. at 827, citing Restatement (Second) of Foreign Relations Law of the United States (1965).

8 140 U.S. 453 (1891).

9 354 U.S. 1 (1957).

10 Id. at 6.


12 446 F.2d 753 (3rd Cir., 1971).

13 See Stonehill v. United States, 405 F.2d 738 (9th Cir., 1968)

14 32 F.3d 503 (11th Cir., 1994).

15 56 F.3d 1087 (9th Cir., 1995).

16 See United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

17 812 F.2d 486 (9th Cir., 1987).


19 See Reid v. Covert, 354 U.S. 1 (1957)

(The Court extended Fifth and Sixth Amendment protections to U.S. citizens overseas).


21 339 U.S. 763 (1950)


23 455 F.2d 211 (2nd Cir., 1972).

24 See Bram v. United States, 168 U.S. 532 (1887).


Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.