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United States v. Davis: Extraterritorial Application of U.S. Drug Laws on the High Seas

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NOTES

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I. Introduction

Over the past twenty years Congress has sought to design, pass, and implement legislation that would effectively reduce the flow of illicit drugs into the United States.[1] A major objective of congressional activity in this area has been a broadening of United States authority to interdict drugs outside American borders.[2] One of the most successful of these legislative efforts is the Maritime Drug Law Enforcement Act (MDLEA).[3] The Act specifically provides for extraterritorial application of United States law on the high seas and grants the Coast Guard authority to board, search, and seize flagged vessels of other nations under certain enumerated circumstances.[4]

The Act and its predecessor[5] have successfully survived constitutional challenge[6] and in fact have been jurisdictionally broadened through recent judicial pronouncements.[7] *United States v. Davis*[8] is a recent example of the movement toward worldwide application of the MDLEA and is likely to indicate how the Act will be applied in the future. This Note will examine the historical underpinnings of the MDLEA, the reasoning of the *Davis* decision, and the validity of the court's holding that the protections of the fourth amendment do not apply to nonresident aliens on the high seas. This Note concludes that while the ultimate result reached in *Davis* was correct, the outmoded reasoning of the court and the manner in which it found

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[1] A. ANDERSON, *In the Wake of the Dauntless the Background and Development of Maritime Interdiction Operations*, in THE LAW OF THE SEA: WHAT LIES AHEAD? 12 (T. Clingan, Jr. ed. 1986) [hereinafter *Interdiction Operations*].

[2] *Id.* at 21.

[3] 46 U.S.C. §§ 1901-1904 (1988).

[4] *Id. See infra* note 54.

[5] 21 U.S.C. § 955c (1970) (Current version at 46 U.S.C. §§ 1901-1904 (1988)).

[6] United States v. Peterson, 812 F.2d 486 (9th Cir. 1987); United States v. Romero-Galue, 757 F.2d 1147 (11th Cir. 1985).

[7] *See Interdiction Operations*, *supra* note 1, at 35. Additionally in United States v. Verdugo-Urquidez, 110 S.Ct. 1056 (1990), the Supreme Court held that the protections of the fourth amendment do not extend to searches and seizures with respect to nonresident aliens in foreign countries. *Id.* at 1066.

[8] 905 F.2d 245 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 753 (1991).

jurisdiction under the MDLEA needlessly left the decision open to constitutional challenge.

II. History of the Maritime Drug Law Enforcement Act

In the mid-seventies, the domestic consumption of marijuana and other controlled substances rose dramatically in the United States.[9] Mexico had long been the primary source of marijuana with the chief supply routes being by land or air directly over the border.[10] American and Mexican efforts to control marijuana importation by tightening security on both sides of the border and by implementing a U.S.-financed spraying operation in the growing fields effectively hindered the ability of smugglers to meet the growing U.S. demand through traditional means.[11]

Smugglers in a number of countries sought to supply the insatiable American drug appetite. Chief among them were the drug lords of Colombia who enjoyed numerous political, climatic, and geographical advantages over their drug producing neighbors.[12] Although marijuana from many nations found its way into the United States, Colombia eventually emerged as the principal supplier for U.S. drug dealers.[13]

As Colombian drug production increased, the already limited airlift capacity of the drug smugglers rapidly became inadequate to transport the vast quantities of marijuana demanded.[14] As a result, it became increasingly necessary for smugglers to rely on sea-going vessels for the transport of bulk marijuana to the United States.[15] Thus, the interdiction of these vessels and their cargo *before* they entered U.S. waters became the focus of congressional anti-drug efforts.[16]

Such interdiction outside of U.S. territorial seas presented a problem since the customary rule of international law is that "[t]he high seas are open to all states, and no state may subject any part of them to its sovereignty."[17] A corollary to this rule is that apart from a few limited exceptions, no nation has jurisdiction over foreign ships on the high seas.[18] The problem Congress faced was to design U.S.

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[9] *Interdiction Operations*, *supra* note 1, at 12.

[10] *Id.*

[11] *Id.*

[12] *Id.* The favorable climate allows the production of two marijuana crops per year. The growing areas are located in "rugged mountains" which are sparsely populated and difficult to reach but which have access to "remote beaches." This isolation combined with the poverty of the region has spawned a "close-knit" smuggling oriented society. *Id.*

[13] *Id.* at 13.

[14] *Id.*

[15] *Id.* at 14.

[16] *Id.* at 20-21; *See also* Marijuana on the High Seas Act, 21 U.S.C. § 955a (1970) (superceded by 46 U.S.C. §§ 1901-1904 (1988)).

[17] R. CHURCHILL & A. LOWE, THE LAW OF THE SEA 145 (1983).

[18] *Id.* at 146. *See infra* note 47.

drug laws that would accomplish the goals of extraterritorial interdiction yet stay within the accepted norms of international conduct.

In 1958, the United Nations convened several Conventions on the Law of the Sea to codify the generally accepted principles of international law that had developed as a matter of custom and practice.[19] The United States has ratified the conventions and is bound by their terms.[20] The only basis provided under the 1958 conventions for exercising jurisdiction for the suppression of illicit drug traffic is in the case of a vessel located in the territorial seas of the nation seeking jurisdiction.[21] Even this limited provision is weakened by the requirement that in order for this jurisdiction to exist the crime involved must have actually occurred in the territorial sea of that state.[22]

As for the high seas,[23] the Convention on the High Seas[24] pro-

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[19] United Nations Conference on the Law of the Sea (UNCOLOS-1); Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1610, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 449 U.N.T.S. 311. The 1958 Convention on the High Seas was adopted by the First United Nations Law of the High Seas Conference. The convention codified international sea law as it had grown up over two centuries. The United States was a signatory to the convention. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Vol. 2, Part V, 3-4 (1987) [hereinafter RESTATEMENT (REVISED)].

[20] RESTATEMENT (REVISED), *supra* note 19, at 4. In 1982, after years of preparation, the Third United Nations Conference on the Law of the Sea (UNCLOS III) completed and approved a new United Nations Convention on the Law of the Sea. *Id.* at 4-5. The Convention as completed did not include several proposals made by the Reagan administration in 1981 regarding deep sea-bed mining. *Id.* "The final text of the convention was approved on April 30, 1982, by 130 votes in favor, four against (including the United States) and 17 abstentions." *Id.* at 5. *See* United Nations, The Law of The Sea: United Nations Convention on the Law of the Sea, U.N.Pub. No. E.83.V.5 (1983) (text of 1983 convention).

"However, many provisions of the [new] Convention follow closely provisions in the 1958 conventions to which the United States is a party and which largely restated customary law as of that time." RESTATEMENT (REVISED), *supra* note 19, at 5. In 1983, President Reagan issued a policy statement in which the "United States in effect agreed to accept the substantive provisions of the Convention, other than those dealing with deep sea-bed mining, in relation to all states that do so with respect to the United States." *Id. See* 19 WEEKLY COMP. OF PRES. DOCS. 383 (1983), 83 DEP'T STATE BULL., No. 2075, at 70-71 (1983), 22 I.L.M. 464 (1983) (presidential proclamation of 200-nautical mile exclusive economic zone and LOS policy statement). However, generally the four conventions of 1958 "remain the law of the United States except to the extent they have been superceded." RESTATEMENT (REVISED), *supra* note 19, at 6-7.

[21] Convention on the Territorial Sea and Contiguous Zone, art. 19(1)(d), April 29, 1958, 15 U.S.T. 1611, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

[22] *Id.* at art. 19(5).

[23] "The high seas lie seaward of the territorial sea and thus encompass the contiguous zone." United States v. Williams, 617 F.2d 1063, 1073, n.6 (5th Cir. 1980). In 1988, President Reagan proclaimed that the United States territorial sea was extended to 12 miles from United States shores. *Proclamation by the President of the United States of America on the territorial sea of the United States of America, 27 December 1988*, CURRENT DEVELOPMENTS IN STATE PRACTICE, No.2, at 83 (1989) (United Nations publication).

[24] The actual text of the convention provides:

vides that a warship which encounters a foreign merchant ship on the high seas is only justified in boarding her if such boarding is expressly authorized by an international agreement between the two nations involved.[25] Additionally, a boarding without such agreement is authorized if there are reasonable grounds to suspect that the ship is engaged in piracy;[26] the slave trade;[27] or though flying a foreign flag or no flag, is in reality of the same nationality as the warship.[28]

To investigate such suspicions, the warship may send a boat under the command of an officer to the suspected ship.[29] If suspicion remains after reviewing the ships documents, the officer may make further examination of the ship.[30] If the suspicions turn out to be unfounded and not due to the fault of the suspect ship, then the nation of the warship must compensate the merchant ship for any loss or damage that might have resulted from the boarding.[31]

With these constraints in mind, Congress was faced with the task of finding a jurisdictional basis to reach drug traffickers on the high seas. By statutorily expanding the definition of customs waters[32] to provide that an agreement or arrangement with the flag nation could create constructive customs waters around a foreign vessel on the high seas, Congress found a solution.[33] Once the vessel was deemed

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1. *Except where acts of interference derive from powers conferred by treaty*, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is a reasonable ground for suspecting:
   (a) That the ship is engaged in piracy; or
   (b) That the ship is engaged in the slave trade; or
   (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in sub-paragraphs (a), (b), and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

Convention on the High Seas, art. 22, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1958)(emphasis added).

[25] *Id.*

[26] *Id.* at art. 22, para. 1(a).

[27] *Id.* at art. 22, para. 1(b).

[28] *Id.* at art. 22, para. 1(c).

[29] *Id.* at art. 22, para. 2.

[30] *Id.*

[31] *Id.* at art. 22, para. 3.

[32] By statute, the Coast Guard has authority to enforce U.S. laws within the customs waters of the United States. 19 U.S.C. § 1401(j) (1980). Under current international law, a nation's contiguous zone may extend up to 12 miles from the *territorial sea*. This means that at its maximum, a nations contiguous zone may extend 24 miles from its shores. Economides, *The Contiguous Zone Today and Tomorrow*, in THE NEW LAW OF THE SEA 75 (C. Rozakis and C. Stephanou eds., 1983). Traditionally, a nation's customs waters are encompassed within the contiguous zone. *Id.* at 76-78.

[33] 19 U.S.C. § 1401(j) (1982) (providing that an agreement or arrangement with the flag nation can create constructive U.S. customs waters around a foreign vessel on the high

to be within U.S. customs waters, U.S. drug laws could be enforced regardless of the vessel's distance from American shores.

While this arm of jurisdiction provided world-wide reach, it was not inconsistent with principals of international law since it was predicated on the consent of the flag nation to the exercise of jurisdiction.[34] This broad new approach to jurisdiction was first codified in 1980 when Congress enacted the Marijuana on the High Seas Act (MHSA)[35].

The MHSA was specifically drafted to correct many of the deficiencies and uncertainties which had plagued law enforcement efforts under prior law.[36] The MHSA declared it unlawful for: (1) any person in the *customs waters* of the United States; (2) anyone who is a United States citizen on a vessel on the high seas, or aboard a vessel of the United States; or (3) any person aboard a vessel subject to the jurisdiction of the United States, to intentionally or knowingly manufacture, distribute, or possess with intent to distribute, illicit drugs.[37]

The most controversial aspect of the MHSA was a provision ex-

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seas without limitation to the U.S. contiguous zone). The actual limiting language of the statute reads: "the waters within such distance of the coast of the [United States] as the said authorities are or may be so enabled or permitted by such treaty or arrangement [with the flag nation]." *Id.*

The United States has a long history of creatively defining customs waters to combat smuggling. *See* Note, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT'L & COMP. L. REV. 487, 494-96 (1988).

[34] *See* Note, *The Judiciary and Public Policy Considerations of the Marijuana on the High Seas Act*, 10 SUFFOLK TRANSNAT'L L.J. 581, 589 n.32 (1986) ("The contractual nature of subsection (c) of the Marijuana Act saves the Act from violating article 6 of the High Seas Convention or other tenets of international law regarding state sovereignty").

[35] Pub. L. No. 96-350, §§ 1-2, 94 Stat. 1159-60 (1980)(codified at 21 U.S.C. §§ 955a-955b (1982); superceded by 46 U.S.C. § 1903 (1988)).

[36] *Interdictions Operations*, *supra* note 1, at 20. The law preceding the MHSA was the Comprehensive Drug Abuse Control Act, 21 U.S.C. §§ 801-966 (1976) [CDAC]. CDAC was designed to consolidate and modernize the myriad laws governing the importation of controlled substances. One feature of the 1970 Act was to repeal all prior federal drug laws including the prior law criminalizing possession aboard United States vessels on the high seas. The drafters of the CDAC inadvertently neglected to include a new provision in the 1970 Act recriminalizing possession of drugs on the high seas. Thus, the new Act resulted in legalization of the possession of controlled substances on United States vessels anywhere beyond customs waters. Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COM. 323, 324 (1982)[hereinafter *Stateless Vessels*].

During the same period, the methods of drug traffickers became more sophisticated. They began to employ what has become known as the mothership technique. This method involves the use of large ships carrying drugs that hovered outside U.S. customs waters. The drugs were loaded on small speed boats (capable of outrunning Coast Guard cutters), which then made the delivery dash for the American shore. Note, *Jurisdiction Over Drug Smuggling on the High Seas*, 44 U. PITT. L. REV. 1095, 1098. Using this method, only a small portion of the shipment was at risk of being seized. In addition, since it was not illegal to possess drugs on vessels hovering outside of U.S. customs waters, even when a speedboat delivery was interdicted, prosecutors were faced with the difficult task of proving a conspiracy to import illicit drugs in order to obtain a conviction. *Stateless Vessels* at 324.

Finally, the CDAC did not apply to stateless vessels (vessels claiming no nationality), and this loophole was often used by drug traffickers to evade jurisdiction. *Id.*

[37] 21 U.S.C. § 955a(a) (1982) (superceded by 46 U.S.C. § 1903 (1988)).

tending the jurisdiction of the United States to include stateless vessels.[38] Several defendants maintained that this provision violated the long standing international law doctrine mandating freedom of the high seas.[39] However, the courts hearing these challenges determined that the provision was in consonance with international law as codified in the 1958 Convention on the High Seas.[40]

In 1986 Congress amended the MHSA to form the current Maritime Drug Law Enforcement Act.[41] Essentially, the new Act mirrors the MHSA[42] with a few notable exceptions. The MDLEA provides an exemption for contract carriers possessing or distributing controlled substances in the lawful course of their duties.[43] It also sets forth federal jurisdiction and penalties for violations of the statute.[44] The statute states that,

> [t]he Congress finds and declares that trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned. Moreover, such trafficking presents a specific

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[38] *See id.* at § 955b(d). Stateless vessels are those vessels flying the flag of no nation; i.e., claiming no nationality. Under general principals of international law, the protections of the law of the sea are derived from a vessel's connection with a sovereign nation. Stateless vessels are thus not protected and are subject to the jurisdiction of all nations. *See generally Stateless Vessels, supra* note 36.

[39] *See* United States v. Smith, 680 F.2d 255, 258 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979).

[40] *See Smith*, 680 F.2d at 258; *Cortes*, 588 F.2d at 110.

[41] 46 U.S.C. § 1903(a) (1988) provides:

> Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels.
>
> (a) Vessels of United States or vessels subject to jurisdiction of United States. It is unlawful for any person on board a vessel of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

Id. at § 1903(a).

[42] *Id.* §§ 1903 (a-c). This section falls under the chapter entitled "Maritime Drug Law Enforcement."

[43] *Id.* at § 1903(e). The paragraph reads:

> Exceptions; burden of proof. This section does not apply to a common or contract carrier or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such vessel who possesses or distributes a controlled substance in the lawful course of such person's duties, if the controlled substance is part of the cargo entered in the vessels manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with respect to this exception is upon the person claiming its benefit.

Id.

[44] *Id.* "Any person who violates this subsection will be tried in the United States district court at the point of entry where the person enters the United States, or in the United States District Court of the District of Columbia." *Id.*

threat to the security and societal well-being of the United States.[45]

This language is significant because it provides a basis for universal jurisdiction over suspected drug traffickers similar to that historically recognized over pirates and slave runners.[46] While such jurisdiction has not yet become generally accepted,[47] there are clear indications that the world community may be moving in that direction.[48]

An interesting provision of the MDLEA that deserves mention is found in section 1903(d). This section provides that the right to challenge jurisdiction based on a failure to comply with international law resides solely in the flag state of the vessel concerned.[49] A failure to comply with international law will not divest a court of jurisdiction or otherwise constitute a defense to an action under the MDLEA.[50] Congress added this amendment because, under the MHSA, some defendants had successfully resisted prosecution by "relying heavily on international jurisdictional questions as legal technicalities."[51] While discussion of this provision is beyond the scope of this Note, it has been the subject of criticism on due process grounds.[52]

The MDLEA also expanded the jurisdiction of U.S. law over that

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[45] 46 U.S.C. § 1902.

[46] Piracy and the slave trade have sometimes been described as offenses against the law of nations— international crimes. Under customary international law, the punishment of these crimes has been allowed to any nation that seizes the offender based on the absence of any "international penal tribunal." RESTATEMENT (REVISED), *supra* note 19, § 404, reporter's note 1.

[47] *Id.* § 404. "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism . . . . Drug trafficking, while "universally condemned," has not generally been classified with the above listed offenses so as to provide universal jurisdiction. *Id.* § 522, reporter's note 8.

[48] *See* Comment, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207 (1990).

[49] 46 U.S.C. § 1903(d).

[50] *Id.* This addition appears to be a codification of the *Ker-Frisbie* doctrine. Riesenfeld, *Jurisdiction Over Foreign Flag Vessels and the U.S. Courts: Adrift Without a Compass?*, 10 MICH. J. INT'L L., 241, 250 (1989).

The general gist of the doctrine is that a court that obtains jurisdiction over a defendant as the result of an illegal abduction does not lose that jurisdiction based on due process grounds. *See* Ker v. Illinois, 119 U.S. 436, 440 (1886)(jurisdiction over person resulting from forced abduction from foreign country does not offend due process); Frisbie v. Collins, 342 U.S. 519, 522 (1952)(jurisdiction of state court over person resulting from kidnapping in violation of federal statute is not invalidated by due process requirements).

[51] S. REP. No. 530, 99th Cong., 2d Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5986, 6000. This section of the Maritime Drug Law Enforcement Act reads:

> A claim of failure to comply with international law in enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law will not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

46 U.S.C. § 1903(d).

[52] *See* Note, *Survey of United States Jurisdiction Over High Seas Narcotics Trafficking*, 19 GA. J. INT'L & COMP. L. 119 (1989); Note, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT'L & COMP. L. REV. 487 (1988).

The MDLEA also expanded the jurisdiction of U.S. law over that found in the MHSA.[53] Section 1903(c)(1)(C) defines a vessel subject to U.S. jurisdiction to include not only stateless, American, and foreign vessels within the customs waters of the United States, but also foreign flagged vessels on the high seas when the flag state consents or waives objection to enforcement jurisdiction.[54] This consent or waiver may be transmitted by any reasonable means including by radio or telephone transmission.[55] The addition of this section was significant because it removed the requirement for creating constructive customs waters upon which to predicate jurisdiction. The MDLEA also omitted the MHSA's reference to customs waters as defined in 19 U.S.C. § 1401 (j) which had provided that U.S. customs waters could be deemed to encompass a foreign vessel upon the consent of the flag nation. Thus, under the MDLEA the archaic constructive customs waters approach to jurisdiction should have been dead. In its application of the MDLEA however, the *Davis* court ignored the language of the MDLEA and maintained the old approach. While jurisdiction was alternatively available under section 1903(c)(1)(C), the *Davis* court's error was not completely harmless in light of the Supreme Court's holding in *United States v. Verdugo-Urquidez*,[56] that the protections of the United States Constitution do not apply to foreign nationals outside the United States.[57]

III. Statement of the Case

In June of 1987, the fifty-eight foot sailing vessel, *The Myth of Ecurie* (the *Myth*), was sailing in the Pacific Ocean, having departed

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[53] *See generally* Note, *Maritime Drug Law Enforcement Act: An Analysis*, 11 HASTINGS INT'L & COMP. L. REV. 487 (1988).

[54] 46 U.S.C. § 1903(c)(1)(C). The pertinent portion of the statute reads:

> (1) For purposes of this section, a "vessel subject to the jurisdiction of the United States" includes—
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> (A) a vessel without nationality;
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> (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention on the High Seas;
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> (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;
>
> (D) a vessel located within the customs waters of the United States; and
>
> (E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.
>
> Consent or waiver of objection by a foreign nation to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and may be proved by certification of the Secretary of State or the Secretary's designee.

Id. § 1903(c)(1).

[55] *Id.* § 1903(c)(1)(E).

[56] 110 S. Ct. 1056 (1990).

[57] *Id. Verdugo-Urquidez* is discussed in detail *infra*.

from Hong Kong.[58] At a point about thirty-five nautical miles from Point Reyes, California, the United States Coast Guard cutter *Cape Romain* encountered the *Myth*, and Coast Guard personnel requested permission via radio to board.[59] Peter Davis (who is not a U.S. citizen), the captain of the *Myth*, denied the request stating that the Coast Guard had no authority to board his boat because it was of British registry and was sailing on the high seas.[60] Davis then announced his intention to alter his course for the Caribbean.[61]

The Coast Guard had a number of reasons to suspect that the *Myth* was carrying illicit drugs bound for the United States.[62] Accordingly, the Coast Guard requested permission from the United Kingdom to board the ship, apparently pursuant to a 1981 agreement between the two countries regarding the suppression of illegal importation of narcotic drugs into the United States.[63] In its reply by telex, the United Kingdom responded that it had no objection to the boarding, search, and seizure of the vessel by the United States under the terms of the 1981 agreement.[64]

Thus, with the U.K.'s approval, Coast Guard crew members boarded the vessel which by this time had sailed to a location approximately 100 miles west of the California coast.[65] The boarding officer detected an odor of marijuana in the cabin of the *Myth*.[66] Davis and a Coast Guard officer then proceeded to the vessel's lower decks to obtain a shotgun that Davis reported to be aboard.[67] In plain view, the officer saw numerous "bales," and once again smelled marijuana. When asked about the contents of the bales, Davis admit-

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58 *Davis*, 905 F.2d 245, 247 (9th Cir. 1990).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* The *Myth* was included on a list of vessels the Coast Guard's El Paso Intelligence Center suspected of drug smuggling; the *Myth* was also sailing in an area in which sailing vessels were infrequently found, was riding low in the water indicating that it was carrying cargo, and acted suspiciously in attempting to change course upon encountering the Coast Guard. *Id.* at 250.

63 Agreement to Facilitate the Interdiction by the United States of Vessels of the United Kingdom Suspected of Trafficking in Drugs, Nov. 13, 1981, United Kingdom-United States, 33 U.S.T. 4224, T.I.A.S. No. 10,296 [hereinafter 1981 Agreement].

64 905 F.2d 245, 250 (9th Cir. 1990). The actual text of the telex stated:

1. HMG has verified registry of subj vessel and has authorized USG to board, search and seize, if evidence warrents [sic], under U.S. Law. HMG has indicated that the conditions and terms contained in 13 Nov 81 US/UK Agreemnt [sic] will be used in this case.
2. In view of the above, comdt has no objection to taking action against subj vessel under the terms of the US/UK Agreement.
3. Insure Amenbassy [sic] London is info addee on all related msc traffic.

United States v. Biermann, 678 F. Supp. 1437, 1442 n. 2 (N.D. Cal. 1988) (This is *Davis* in the district court).

65 *Davis*, 905 F.2d 245, 247 (9th Cir. 1990).

66 *Id.*

67 *Id.*

ted they were marijuana.[68] The vessel, its 7000 pounds of marijuana, and crew were then placed under arrest and taken to the local California Coast Guard station.[69]

In September of 1987, Davis filed a motion to dismiss the charges against him based on lack of jurisdiction. Additionally, he made a motion to suppress any evidence seized from the *Myth*.[70] The district court denied both motions. In July of 1988, the district court found Davis guilty on stipulated facts.[71] Davis appealed this verdict to the Ninth Circuit Court of Appeals on two grounds: first, that the provisions MDLEA under which he was convicted do not apply to persons on foreign vessels outside the territory of the United States; and second, that the search of the *Myth* violated the fourth amendment.[72]

The Ninth Circuit concluded that Congress had the power to give the MDLEA extraterritorial application so long as the intent to do so was clearly stated in the language of the statute.[73] Additionally, as a matter of constitutional law, the court held that the statute must be applied in a manner that does not offend the due process clause of the fifth amendment.[74] In the case of the MDLEA, Congress explicitly stated that the statute was to be given extraterritorial effect.[75] Thus, the court identified the question of due process as the only statutory question to be addressed.[76]

The court reasoned that due process required there exist a sufficient nexus between the defendant and the United States for a federal criminal statute to be applied extraterritorially.[77] In this case, the court found the nexus to exist in what is called the protective

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 247, 251.

[73] *Id.* at 248.

[74] *Id.* at 248-49. More specifically, there must be sufficient nexus so that application of the statute would not be "arbitrary or fundamentally unfair." *Id.* at 249.

In a footnote to the decision, the court reviewed previous decisions where international law principles of jurisdiction had been discussed simultaneously with Congressional exercise of legislative jurisdiction. *Id.* at 249, n.2. The court noted that while,

> International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process . . . [the] danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?

Id.

[75] 46 U.S.C. app. § 1903(h) (1988). The paragraph reads: "This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States." *Id.*

[76] *Davis*, 905 F.2d 245, 248 (9th Cir. 1990).

[77] *Id.* at 248-49.

principle of international jurisdiction,[78] i.e., "[w]here an attempted transaction is aimed at causing criminal acts within the United States, there is sufficient basis for the United States to exercise its jurisdiction."[79] The court then set forth an extensive list of factors that tended to demonstrate that the *Myth*'s cargo was headed for the United States, providing the necessary jurisdictional basis.[80]

The next step in the court's analysis was to determine whether the MDLEA by its terms applied to Davis' conduct.[81] The court held that section 1903(c)(1)(D) provided jurisdiction over vessels in the "customs waters" of the United States.[82] In the case of a foreign vessel, customs waters include *any* waters where the flag government has by treaty or some other arrangement enabled or permitted the United States to enforce upon such vessels the laws of the United States.[83] A foreign vessel may be deemed to be in the customs waters of the United States practically anywhere in the world subject to the limitations of the agreement or arrangement between the flag nation and the United States.

In *Davis*, the court did not rely upon the standing 1981 agreement between the United States and the United Kingdom to provide the basis for its jurisdiction.[84] Instead, the court premised jurisdic-

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[78] While the court did not specifically use the terminology 'protective principle' in the body of its opinion, this was clearly the doctrinal justification for finding a sufficient nexus. *See infra* note 80 and accompanying text.

[79] United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987). The court in *Peterson* clearly relied upon the international protective principle concept citing the RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 33 for the proposition that "Protective jurisdiction is proper if the activity threatens the security or governmental functions of the United States. Drug trafficking presents the sort of threat to our nation's ability to function that merits application of the protective principle of jurisdiction." *Peterson*, 812 F.2d at 494.

[80] At the time the *Myth* was first detected, it was only 35 miles from the U.S. coast headed on a course for San Francisco. In addition, once the *Myth* was challenged by the Coast Guard, it changed course. The *Myth* had also been identified by intelligence sources as a likely drug smuggler. *Davis*, 905 F.2d 245, 249 (9th Cir. 1990) (*See* United States v. Biermann, 678 F. Supp. 1437 (N.D. Cal. 1988) for additional factual details).

[81] *Davis*, 905 F.2d 245, 249 (9th Cir. 1990).

[82] Two definitions of customs waters are involved in this case. The conventional view is that they are those waters within 24 miles of the coast of the United States. *See supra* note 32. Congress has also provided for the creation of constructive customs waters. *See supra* note 33.

[83] *Davis*, 905 F.2d 245, 249 (9th Cir. 1990)(citing 19 U.S.C. § 1401(j) (1982)). While the court did not spell out its holding in language this broad, the practical effect of an arrangement with a foreign government to board one of its vessels is to extend U.S. customs waters to anywhere the vessel is located regardless of the distance from U.S. shores.

[84] In *Biermann*, the district court denied a motion made by Davis and his co-defendants to dismiss the case against them based on lack of jurisdiction. The district court found that the United States had jurisdiction under subsections (C) and (D) of section 1903(c)(1). 678 F. Supp. at 1441, 1443. Subsection (D) is the "customs waters" basis adopted by the *Davis* court. Subsection (C) is a provision for jurisdiction where the flag nation has consented or waived jurisdiction under United States law. *See supra* note 54. The *Biermann* court held that subsection (C) was satisfied by the 1981 agreement even though the agreement by its terms did not appear to apply to the Pacific Ocean. *Biermann*, 678 F. Supp. at 1442. The court reasoned that the telexed consent allowing search and seizure pursuant to

tion on the telexed consent received in response to the Coast Guard request to board.[85] Judge Wiggins noted that "[a]s long as the foreign government has made clear its indication of consent, the arrangement necessary to create customs waters around a specific vessel may be informal."[86] Accordingly, the court found that the United Kingdom's reply constituted an arrangement pursuant to 19 U.S.C. § 1401(j)[87] and that Davis was therefore in the customs waters of the United States, and hence within its jurisdiction.[88]

Finally, the court disposed of Davis' claims that the search of the *Myth* was conducted in violation of the fourth amendment. Without reaching the constitutional merits of Davis' claim, the court cited the Supreme Court's recent ruling in *United States v. Verdugo-Urquidez* as controlling.[89] In *Verdugo-Urquidez*, the Court had held that the fourth amendment did not apply to searches and seizures of nonresident aliens in foreign countries.[90] The *Davis* court stated that the analysis and language of the *Verdugo-Urquidez* opinion did not create an exception for the searches of nonresident aliens on the high seas.[91] Thus, the protections of the fourth amendment did not apply to Davis.[92] Accordingly, Davis' convictions were affirmed.[93]

IV. Significance of the *Davis* Decision

In *Davis*, for the first time, a Federal Circuit Court held that the protections of the fourth amendment do not apply to nonresident

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the agreement constituted a waiver of objection to a U.S. assertion of jurisdiction. *Id. See also supra* note 65.

[85] Instead of holding that the telexed consent fulfilled the jurisdictional requirement of section 1903(c)(1)(C) by providing consent or waiving objection to jurisdiction, the court takes the multistep approach holding that the telexed consent fulfills the "customs waters" requirements as set forth in 19 U.S.C. § 1401(j) (1982), thus finding jurisdiction under section 1903(c)(1)(D). Why the court opts for the fiction of constructive customs waters is unclear.

[86] *Davis*, 905 F.2d 245, 250 (9th Cir. 1990).

[87] This section further defines customs waters as:

> The term 'customs waters' means, in the case of a foreign vessel subject to a treaty or some other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or to enforce upon such vessel upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement.

U.S.C. § 1401(j)(1982).

The effect of this definition is to allow the creation of constructive customs waters anywhere in the world.

[88] *Davis*, 905 F.2d at 250. It is the use of this outdated constructive customs waters approach which is the main criticism of this Note.

[89] 110 S.Ct. 1056 (1990).

[90] *Id.* at 1061.

[91] 905 F.2d at 251.

[92] *Id.*

[93] *Id.*

aliens on the high seas.[94] This holding was contrary to the historical assumption that the amendment applied wherever United States agents sought to apply United States law to foreign nationals.[95] Nonetheless, in light of the Supreme Court's ruling in *Verdugo-Urquidez*,[96] the inapplicability of the fourth amendment to nonresident aliens on the high seas appears to follow logically. However, the "customs waters" reasoning used by the court to find jurisdiction in *Davis* may provide a distinction that would support fourth amendment application.[97]

Instead of relying on the provision of the MDLEA that allows United States jurisdiction over a foreign flag vessel based simply on an arrangement with or the consent of[98] the flag nation, the court fell back on the old pre-MDLEA concept of constructive customs waters jurisdiction.[99] Thus, instead of taking the one step road to juris-

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[94] The previous assumption was that the protections of the fourth amendment did apply on the high seas. *See* United States v. Peterson, 812 F.2d 486, 489 (previously assuming without deciding that the fourth amendment protections apply on the high seas).

[95] In his dissent in *Verdugo-Urquidez*, Justice Brennan quoted Bill of Rights architect James Madison for the proposition that:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are no more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand a temporary obedience, they are entitled, in return, to their protection and advantage.

United States v. Verdugo-Urquidez, 110 S.Ct. 1056, 1071 (1990) (Brennan, J., dissenting)(citing *Madison's Report on the Virginia Resolutions (1800), reprinted in* 4 ELLIOT'S DEBATES 556 (2d ed. 1836).

[96] The *Davis* court started with the concept that the high seas are outside of U.S. territory. 903 F.2d at 251. Since the Supreme Court had ruled that the fourth amendment does not apply to searches and seizures of nonresident aliens outside U.S. territory (*see* United States v. Verdugo-Urquidez, 110 S.Ct. 1056 (1990)), the *Myth*, being located on the high seas, was not subject to fourth amendment protection. *Id.*

[97] The gist of the distinction this Note makes is that 'constructive' customs waters *may* be sufficiently analogous to territory of the U.S. to distinguish such waters from the high seas, the contiguous zone, or traditional customs waters.

[98] 46 U.S.C. § 1903(c)(1)(C). *See also supra* note 54.

[99] The predecessor statute to the MDLEA was the Marijuana on the High Seas Act (MHSA), 21 U.S.C. § 955(a) (1980). Under the MHSA, a "vessel subject to the jurisdiction of the United States" included U.S. flag vessels, foreign vessels in U.S. territorial waters, stateless vessels, and most significantly for our purposes, vessels in the customs waters of the United States. *Id.* Notably missing is the clause found in section 1903(c)(1)(C) of the MDLEA, providing jurisdiction over foreign vessels based on an arrangement with or consent of the flag nation.

The functional reach of the two statutes is the same because the MHSA definition of customs waters was based on 19 U.S.C. § 1401(j) (1982), which provided that customs waters could be created by an arrangement with or consent of the flag nation. Thus, under both statutes, consent or an arrangement could provide jurisdiction. However, the MDLEA does so without relying on the fiction that the waters around the subject vessel are customs waters.

The MDLEA's retention of jurisdiction within the traditional U.S. customs waters is still important when a vessel of another nation is suspected of trafficking drugs within the contiguous waters of the United States but the flag nation will not consent to allowing jurisdiction. *See* Note, *Survey of United States Jurisdiction Over High Seas Narcotics Trafficking*, 19 GA. J. INT'L & COMP. L. 119, 136-39 (1989).

diction under section 1903(c)(1)(C) which allows informal consent of the flag nation to provide jurisdiction, the court took a multi-step approach under section 1903(c)(1)(D).

The court found that an "arrangement" existed between the United Kingdom and the United States.[100] This arrangement was sufficient to meet the requirements of 19 U.S.C. § 1401(j) which allows the creation of constructive United States customs waters around the vessel.[101] Under 14 U.S.C. § 89(a), "[t]he 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."[102] Since the customs waters of the United States are within United States jurisdiction, the *Myth* was subject to search and seizure.[103]

The problem with the court's approach is that the constructive placement of the *Myth* inside United States customs waters arguably places it within the protective sphere of the fourth amendment even after *Verdugo-Urquidez*. Whether *Verdugo-Urquidez*, which only addressed fourth amendment application in foreign countries, can be logically extended to waters where the United States is claiming (albeit constructively) customs enforcement rights is unclear.

The Court expressly stated in *Verdugo-Urquidez* that it was not ruling on whether the fourth amendment applied to nonresident aliens subjected to search in the United States, but instead whether the fourth amendment applied to nonresident aliens subjected to search in foreign countries.[104] The Court distinguished the situation of illegal aliens by reasoning that they are in the United States voluntarily and presumably have accepted some societal obligations, while the respondent who was in the United States against his will had accepted none.[105]

The *Davis* court extrapolated from *Verdugo-Urquidez* that the protections of the fourth amendment do not extend to searches of nonresident aliens on the high seas, and thus Davis had no standing to raise a fourth amendment challenge.[106] While the court's equating

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[100] *Davis*, 905 F.2d at 250 (telex of consent to board vessel pursuant to 1981 agreement constitutes an arrangement).

[101] *Id.* at 249-50. This definition of customs waters while specifically referenced in the MHSA was *not retained* in the MDLEA. Nevertheless, the court adopts it anyway.

[102] 14 U.S.C. § 89(a) (1988).

[103] *Davis*, 905 F.2d at 250.

[104] In *Verdugo-Urquidez*, 110 S.Ct. 1056 (1990), the Court specifically declined to rule on the validity of a fourth amendment claim that might be brought by illegal aliens who are subject to search and seizure *inside* the United States. *Id.* at 1065.

[105] *Id.* The Court also noted that in INS v. Lopez-Mendoza it had assumed that the fourth amendment did apply to illegal aliens in the United States. *Id.* at 1064 (citing INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)).

[106] *Davis*, 905 F.2d at 251.

of searches in foreign countries to those on the *high seas* may be reasonable, it is not dispositive of the search in *Davis* which by the court's own analysis occurred in "constructive" U.S. *customs waters*.[107]

In *United States v. Villamonte-Marquez*, the Supreme Court assumed that the fourth amendment applied "in the United States or within the customs waters."[108] The customs waters in *Villamonte-Marquez* consisted of a shipping channel connecting the Gulf of Mexico with Lake Charles, Louisiana which was a customs point of entry.[109] While the customs waters in *Villamonte-Marquez* are distinguishable in their proximity to the United States from those constructively created in *Davis*, it is by no means clear that they do not enjoy the same fourth amendment protections.[110] The court could have avoided any reasonable question of fourth amendment applicability by finding jurisdiction under section 1903(c)(1)(C) of the MDLEA.[111]

Section 1903(c)(1)(C) provides jurisdiction under exactly the same conditions of flag nation consent[112] as the constructive customs waters approach actually used by the court. Therefore, logically section 1903(c)(1)(D) (providing for customs waters jurisdiction) should be reserved for vessels actually in the traditional customs waters of the U.S., and not used to obtain jurisdiction over a foreign flag vessel on the high seas based on flag nation consent. In such a case, jurisdiction should be found exclusively under the consent provisions of section 1903(c)(1)(C). This position is strengthened by the fact that the MDLEA does not retain the reference to the definition of constructive customs waters found in the MHSA.[113]

The advantage to using section 1903(c)(1)(C) is that it avoids the attendant baggage that may accompany a finding that a vessel is within U.S. customs waters. In fact, the addition of the section upon the creation of the MDLEA makes little sense if Congress had intended for the outdated jurisdiction by "customs waters" approach to be used when the flag government had met the consent requirement under section 1903(c)(1)(C). While the Supreme Court may

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[107] *Id.* at 250.

[108] 462 U.S. 579, 585 (1983).

[109] *Id.* at 582.

[110] Some courts have held that conventional customs waters are the functional equivalents of national borders. *See* United States v. Stanley, 545 F.2d 661 (9th Cir. 1976), *cert. denied*, 436 U.S. 917 (1977); United States v. Hidalgo-Gato, 703 F.2d 1267 (11th Cir. 1983). While this is significant as to border search warrant requirements, it is not dispositive of the question as to whether the fourth amendment applies to 'constructive' customs waters far from U.S. shores.

[111] Jurisdiction would have been obtained over the defendant on the high seas without any pretense of creating customs waters around his vessel located 100 miles off the U.S. coast.

[112] Countries that have provided consent for drug interdiction actions include the United Kingdom, the Bahamas, Colombia, Haiti, Panama, France, Spain, Jamaica, Denmark, Venezuela, Honduras, and Canada. *See Interdiction Operations*, *supra* note 1, at 36.

[113] The reference to the definition of customs waters under the MHSA is found at 21 U.S.C. § 955b(a). No such reference is found in the MDLEA.

clarify on a future occasion the applicability of the fourth amendment to nonresident aliens on vessels in the constructive customs waters of the United States, there is little sense in using a legal fiction subject to a fourth amendment attack when a clear statutory alternative is available.

V. Conclusion

United States v. Davis is an ideal case for illustrating the application of the MDLEA. In the MDLEA Congress has fashioned a statutory scheme for obtaining extraterritorial jurisdiction over drug smugglers while remaining within the acceptable bounds of international law. *Davis* is also the first case applying the MDLEA since the Supreme Court's ruling in *Verdugo-Urquidez*. The court in *Davis* correctly read *Verdugo-Urquidez* to stand for the proposition that searches of nonresident aliens on the high seas are unprotected by the requirements of the fourth amendment.

Had the court found jurisdiction under the simple consent provisions of section 1903(c)(1)(C), then Davis would have been located only on the high seas and in light of *Verdugo-Urquidez*, not entitled to fourth amendment protection. However, the court erroneously based jurisdiction on the old MHSA constructive customs waters definition; a definition omitted under the current MDLEA. Thus the question arises, does the fourth amendment apply to United States customs waters. As noted, there is some authority suggesting it does.

By misapplying of the jurisdictional provisions of the MDLEA, the *Davis* court needlessly left the search and seizure of the *Myth* open to fourth amendment challenge. Congress has eliminated the need for the fiction of constructive customs waters jurisdiction. In light of *Verdugo-Urquidez*, the federal circuit should recognize and make use of the change.

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