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Searches and Seizures Abroad in the Federal Courts

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SEARCHES AND SEIZURES ABROAD IN THE FEDERAL COURTS*

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The fourth amendment to the United States Constitution protects against unreasonable governmental invasions of privacy.[1] In recent years federal courts have attempted to define the extraterritorial reach of that right. They have tried to decide when, how, and to whom the amendment applies in the context of a search or seizure of evidence conducted abroad.[2]

The first section of this Article discusses foreign searches and seizures in which American agents participate. Courts agree that when there is sufficient federal participation in a foreign search the fourth amendment is applicable. They have had some difficulty, however, formulating standards for determining how much United States involvement is necessary for attribution of the search to the federal government. It will be argued that the tests formulated by most courts fail to safeguard constitutional rights. In addition,

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1. U.S. CONST. amend. IV provides:

> 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. *E.g.*, United States v. Rose, 570 F.2d 1358 (9th Cir. 1978); United States v. Morrow, 537 F.2d 120 (5th Cir. 1976) (per curiam); United States v. Mundt, 508 F.2d 904 (10th Cir. 1974); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965); United States v. Orman, 417 F. Supp. 1126 (D. Colo. 1976); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); United States v. Jordan, 1 M.J. 334 (C.M.A. 1976).

The problems associated with the seizures of persons, as opposed to evidence, abroad are beyond the scope of this Article. A federal court normally will not surrender jurisdiction over a person in a criminal action despite the irregular measures taken by authorities to procure his presence. *E.g.*, Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). Although this rule has been questioned recently in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), *see* Comment, United States v. Toscanino: *An Assault on the* Ker-Frisbie *Rule*, 12 SAN DIEGO L. REV. 865 (1975); text accompanying notes 222 to 224 *infra*, federal courts in most instances have continued to hold that an "illegal" seizure of a person in a foreign jurisdiction does not compel the release of the accused. *Compare* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) *with* United States v. Lira, 515 F.2d 68 (5th Cir. 1975) *and* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975). *See also* 88 HARV. L. REV. 813 (1975); 15 VA. J. INT'L L. 1016 (1975).

although courts have uniformly held the fourth amendment protects United States citizens abroad from searches and seizures of American government agents, they are divided as to whether aliens abroad are entitled to the same protection. A means of reconciling the various holdings is offered, and, next, a meaningful, practical approach to fulfilling the fourth amendment warrant requirement for foreign searches and seizures conducted with United States participation is suggested.

The second section of this Article discusses the admissibility in federal trials of evidence obtained by foreign officials in searches not meeting fourth amendment standards; the fourth amendment is, of course, not applicable to searches conducted by foreign officers without United States participation. Federal courts have traditionally accepted such evidence handed over by foreign agents on a "silver platter,"[3] but some limitations on this practice seem to be emerging. It is argued that courts should refuse to admit any such evidence if it was procured solely for a prosecution under United States law, if it has been suppressed by a court of the jurisdiction in which the search was conducted, or if it was obtained in a manner that "shocks the conscience."[4]

UNITED STATES PARTICIPATION IN A SEARCH OR SEIZURE ABROAD

In *Reid v. Covert*,[5] the Supreme Court rejected

> the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution . . . . It can only act in accordance with all the limitations imposed by the Constitution. . . . [T]he shield which the Bill of Rights and other parts of the Constitution provide to protect [a defendant's] life and liberty should not be stripped away just because he happens to be in another land.[6]

The fourth amendment right to be free from unreasonable searches and seizures thus extends to United States governmental action

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3. *See* pp. 695-709 *infra*.

4. *See* pp. 720-31 *infra*.

5. 354 U.S. 1 (1957).

6. *Id.* at 5-6 (footnotes omitted). Although only four justices joined in the opinion, the reasoning of *Reid* was reaffirmed by a majority of the Court in Kirsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

abroad.[7] The problem arises in defining what conduct by United States agents is sufficient to bring the fourth amendment into play, that is, what constitutes governmental action abroad. The dividing line between searches and seizures properly attributable to federal action and those considered foreign enterprises is not always clear. United States officers abroad work closely with local law enforcement and intelligence agencies; indeed, more often than not, foreign officers actually conduct the challenged searches or seizures. The fourth amendment is applicable only to the actions of state and federal officers, not to those of private parties and foreign officials,[8] but it would create a major loophole in constitutional protection to hold that so long as foreign officers conduct the search or seizure the fourth amendment is inapplicable. American agents could instigate, direct, or otherwise influence illegal searches conducted by their foreign counterparts, thereby evading the strictures of the fourth amendment and leaving the individuals subject to arbitrary federal intrusions on their privacy. Conduct marked by such "circuitous and indirect methods"[9] ought not be permitted under the Constitution. A rule is therefore necessary to determine when federal involvement in an unreasonable search or seizure conducted by foreign officers requires application of the fourth amendment and concomitant judicial action that might include suppressing evidence, awarding damages, or enjoining future conduct.[10] The cases involving federal participation in searches and seizures conducted by state officers decided before 1949, when the principles of the fourth amendment were first held applicable to the states, furnish a useful analogy for formulating such a rule.

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7. Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950), *cited with approval in* Reid v. Covert, 354 U.S. 1, 9 n.10 (1957). *See* Mendez v. Macy, 292 F. Supp. 802 (S.D.N.Y. 1968); Richardson v. Zuppann, 81 F. Supp. 809 (M.D. Pa.), *aff'd per curiam*, 174 F.2d 829 (3d Cir. 1949); Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948); Saylor v. United States, 374 F.2d 894 (Ct. Cl. 1967); note 2 *supra*. *Reid* referred only to the right of United States *citizens* to be free from such seizures abroad, but fourth amendment protections have been held applicable to aliens in certain situations, *see* pp. 709–12 *infra*.

8. Mapp v. Ohio, 367 U.S. 643 (1961) (guarantee against unreasonable searches and seizures applies to states through due process clause of fourteenth amendment); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (fourth amendment "not intended to be a limitation upon other than governmental agencies").

9. Byars v. United States, 273 U.S. 28, 32 (1927). *See* text accompanying note 19 *infra*.

10. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (exclusion of evidence obtained in an illegal search or seizure); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (award of money damages to the victims of the unconstitutional act); Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) (injunction of similar searches and seizures if fourth amendment violations are

The Byars-Lustig *Test for Federal Participation in State-Conducted Searches or Seizures*

Until 1949, the fourth amendment was understood to apply only to actions of federal officials. The primary sanction for violating the amendment was the exclusion of the illegally seized evidence from federal criminal trials.[11] Because the fourth amendment did not apply to searches and seizures by state officials, federal courts permitted evidence gathered by state authorities and handed over to the federal government on a "silver platter"[12] to be used as evidence. In numerous cases, however, defendants in federal courts argued that the fruits of a state search or seizure should be suppressed because of federal participation.[13] To resolve the cases challenging the applicability of the "silver platter" doctrine, the federal courts evolved criteria to determine whether the degree of federal involvement in the search or seizure warranted the application of the fourth amendment; applying the amendment, of course, would negate the "silver platter" doctrine and necessitate the exclusion of the evidence at trial. Although it did not require imposition of the exclusionary rule in state criminal trials, the Supreme Court held in 1949 that the fourteenth amendment's guarantee of due process required that searches or seizures conducted by state officials also be subject to fourth amendment standards.[14] Having taken this step, the Court felt compelled to abandon the "silver platter" doctrine in 1960.[15] Nevertheless, the criteria evolved by the federal courts prior to the abolition of the "silver platter" doctrine with regard to federal involvement in state searches and seizures does offer some guidance for the application of the fourth amendment to searches and seizures abroad.

In *Byars v. United States,*[16] one of the leading "silver platter" cases, a federal prohibition agent joined state officials in searching defendant's house under authority of a state warrant that failed to meet fourth amendment requirements. During the search, counterfeit

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imminent); *see* Foote, *Tort Remedies for Police Violations of Individual Rights,* 39 MINN. L. REV. 493 (1955); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct,* 78 YALE L.J. 143 (1968).

11. Weeks v. United States, 232 U.S. 383 (1914).

12. This term was coined by Mr. Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 79 (1949).

13. *See* notes 26 to 30 and accompanying text *infra.*

14. Wolf v. Colorado, 338 U.S. 25 (1949). Mapp v. Ohio, 367 U.S. 643 (1961), overruled *Wolf* insofar as *Wolf* had not required imposition of the exclusionary rule to unconstitutionally obtained evidence.

15. Elkins v. United States, 364 U.S. 206 (1960).

16. 273 U.S. 28 (1927).

revenue stamps were discovered and seized by the federal agent. The defendant was convicted under federal law for possessing these stamps with fraudulent intent. Although the Court stated that "*mere* participation in a state search of one who is a federal officer does not render it a federal undertaking,"[17] a different result was required when, as in the case before it, a federal agent acted in his official capacity to pick out evidence for a federal prosecution. By participating in the search even to a limited extent, the federal agent rendered it "in substance and effect . . . a joint operation" of state and federal authorities.[18] Under *Byars,* the search and seizure was to be treated as if the undertaking were conducted exclusively by federal agents. The Court applied fourth amendment standards to the search and seizure, and because the conviction was based on inadmissible evidence, the judgment was reversed. The Court's primary concern was that federal officials not evade the requirements of the fourth amendment. Although the federal government could use evidence improperly seized by state officers operating entirely on their own, "the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods."[19]

A certain ambiguity runs through the *Byars* opinion. On the one hand, the Court implies that the Constitution is violated when federal agents participate in any manner whatsoever; on the other, it suggests that scrutiny of the facts in each case is appropriate to determine whether there has been an attempt to evade fourth amendment strictures. The Court in *Byars* never determined whether the proper test was a strict rule prohibiting federal participation or a functional test based on whether there was an attempt to evade constitutional guarantees.

In *Lustig v. United States,*[20] the Supreme Court clarified the ambiguity in *Byars* by prescribing a strict rule against federal participation. A Secret Service agent investigating possible violations of the counterfeiting statutes was called to defendants' hotel room and, after peeping through the keyhole, concluded that there was no evidence of counterfeiting but that "something was going on."[21] The federal agent informed local police, who conducted a search of the defendants' room on the pretext that the occupants might be counterfeiting racetrack tickets. Discovering evidence of

17. *Id.* at 32 (emphasis in original).
18. *Id.* at 33.
19. *Id.* at 32.
20. 338 U.S. 74 (1949).
21. *Id.* at 76.

currency counterfeiting after all, the local police contacted the federal agent, who returned to the hotel and helped them select the evidence for use in a subsequent federal prosecution. The trial judge admitted the evidence in question because he saw no " 'connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law.' "[22] The Supreme Court rejected this functional test, holding that the evidence should have been excluded. It found that a strict rule should apply because of "the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means."[23] The Court ruled that any participation by a federal agent in an illegal search or seizure "before it had run its course"[24] would be subject to the fourth amendment and to hold otherwise "would be to draw too fine a line in the application of the Fourth Amendment as interpreted in *Byars* . . . ."[25]

Under the *Byars-Lustig* rule, therefore, the fourth amendment applied to a search or seizure ostensibly conducted by state officials if a federal agent instigated the search or seizure,[26] was present during it,[27] helped conduct it,[28] or sifted through evidence prior to its completion.[29] The amendment, and consequently the exclusionary rule, applied "whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before

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22. *Id.* at 77-78 (quoting the trial court).

23. *Id.* at 79.

24. *Id.* at 78.

25. *Id.*

26. It is difficult to determine whether a routine request for information or a response to such a request should be considered "instigation" when it ultimately leads to a search. On the one hand, federal officials might attempt to provoke a search or seizure that they would otherwise be barred from undertaking. On the other, if the amendment were applicable, federal officials trading information with state officials would be responsible for assuring that the state agents obtain a valid warrant. *E.g.*, Shurman v. United States, 219 F.2d 282 (5th Cir. 1955); Crank v. United States, 61 F.2d 981 (8th Cir. 1932); Sloan v. United States, 47 F.2d 889 (10th Cir. 1931); Schroeder v. United States, 7 F.2d 60 (2d Cir. 1925). *See* Note, *The New International "Silver Platter" Doctrine: Admissibility in Federal Courts of Evidence Illegally Obtained by Foreign Officers in a Foreign Country*, 2 N.Y.U. J. INT'L L. & POL. 280, 284-86 (1969) [hereinafter cited as *New "Silver Platter" Doctrine*].

27. *E.g.*, Gilbert v. United States, 163 F.2d 325 (10th Cir. 1947); United States v. Butler, 156 F.2d 897 (10th Cir. 1946); United States v. Irwin, 86 F. Supp. 362 (W.D. Ark. 1949).

28. Byars v. United States, 273 U.S. 28 (1927).

29. Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1927).

the object of the search was completely accomplished, he must be deemed to have participated in it."[30]

Application of the Byars-Lustig *Rule to Foreign Searches and Seizures*

The rule for evaluating federal participation formulated in *Byars* and *Lustig* may be applied to cases involving searches or seizures conducted abroad.[31] The problem raised by the two cases — whether federal involvement in a search or seizure conducted by officials not constrained by the fourth amendment justifies the application of that amendment — is the same whether the search or seizure involved state officials prior to 1960 or involves foreign officials today. The evil to be avoided in both instances is the indirect violation of the fourth amendment. Federal officials were not free from constitutional restraints when cooperating with state officials before 1960, and they should not be free now when cooperating with foreign officials.

Although the federal courts have recognized the applicability of *Byars* and *Lustig* when dealing with foreign searches and seizures,[32] they have countenanced a degree of federal participation far exceeding that permitted under the original *Byars-Lustig* test. In the two leading cases, federal courts have required more than a mere showing of federal participation to trigger the fourth amendment. The Fifth Circuit refused to extend constitutional guarantees despite the fact that American and foreign officials "cooperated in some degree,"[33] and the Ninth Circuit required "substantial participation" by federal agents in a foreign search or seizure before it would apply the fourth amendment.[34] In fact, in only two cases has a non-military federal court applied the fourth amendment and concomitant sanctions when the search was not conducted entirely by federal

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30. Lustig v. United States, 338 U.S. 74, 79 (1949). *See generally* Kamisar, Wolf *and* Lustig *Ten Years Later: Illegal State Evidence in State and Federal Courts,* 43 MINN. L. REV. 1083 (1959).

31. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969); United States v. Jordan, 1 M.J. 334, 337 (C.M.A. 1976). *See* Note, *The Applicability of the Exclusionary Rule in Federal Court to Evidence Seized and Confessions Obtained in Foreign Countries,* 16 COLUM. J. TRANSNAT'L L. 495, 497-502 (1977); *New "Silver Platter" Doctrine, supra* note 26, at 281-91.

32. *See* note 31 *supra.*

33. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965).

34. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969).

agents.[35] Only the Court of Military Appeals has correctly employed the *Byars-Lustig* test in foreign searches and seizures.[36]

In *Birdsell v. United States*,[37] the Fifth Circuit's unanimous opinion did not mention the circumstances surrounding the search in question; however, it was clear that it was conducted by Mexican police with some American involvement. The defendant had been involved in the transportation of stolen automobiles from Texas to Mexico for sale in that country. At his trial for conspiracy to transport stolen automobiles and for the transportation of a particular stolen vehicle, the trial court admitted evidence taken from defendant's person by Mexican police and obtained in their search of two stolen cars. Judge Friendly may not have provided a detailed discussion of the circumstances surrounding this case because he concluded that the fourth amendment did not apply to a search made by foreign officials "even if the persons arrested are Americans and American police officers gave information leading to the arrest and search."[38] Although he conceded that United States officials are bound by the Constitution, Judge Friendly concluded that the fourth amendment was "inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials were present and cooperated in some degree."[39] Evidently, the federal government would have to carry out a foreign search or seizure solely on its own authority for the fourth amendment to apply. The *Birdsell* court failed to consider the applicability of the *Byars-Lustig* rule, which provided that even minimal participation by a federal agent in precipitating or conducting a search would render "the effect . . . the same as though he had engaged in the undertaking as one exclusively his own."[40] To hold that the fourth amendment does not apply so long as foreign officials are the only ones actually conducting an unconstitutional search and seizure enables United States agents to do indirectly what they can not do directly: federal officials could instigate a

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35. Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); United States v. Orman, 417 F. Supp. 1126 (D. Colo. 1976). *Cf.* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (court invoked fourth amendment analysis to conclude that defendant was entitled to government affirmance or denial of whether there had been any unlawful electronic surveillance of him in Uruguay by foreign agent at behest of federal officials).

36. *See* United States v. Jordan, 1 M.J. 334 (C.M.A. 1976); United States v. Price, 17 C.M.A. 566, 569-70, 38 C.M.R. 364, 367-68 (1968).

37. 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

38. *Id.* at 782.

39. *Id.* (footnote omitted).

40. Byars v. United States, 273 U.S. 28, 33 (1927).

foreign search or seizure and directly supervise the conduct of the foreign officials involved for the express purpose of obtaining evidence for a federal prosecution.

In the most elaborate opinion concerning the applicability of the fourth amendment to foreign searches, the Ninth Circuit ruled in *Stonehill v. United States*[41] that fourth amendment protection did not extend to a seizure in the Philippines of two American businessmen's documents.[42] The seizure was made by local investigators at the instigation of a United States Internal Revenue Service (IRS) agent, and the evidence gathered was held admissible in a civil suit by the United States for foreclosure of federal tax liens.[43] Relying on language in *Byars*, the court concluded that "mere participation" in a foreign search or seizure was not enough to invoke fourth amendment safeguards.[44] The court held: "[T]he fourth amendment could apply to raids by foreign officials only if Federal agents *so substantially* participated in the raids so as to convert them into joint ventures between the United States and the foreign officials."[45]

Taken in context, however, the language from *Byars* on which the *Stonehill* court relied meant only that the participation of a federal official must be under color of his office and not "merely" as a private citizen.[46] By requiring "substantial participation" in a "joint venture," the *Stonehill* court adopted a functional approach focusing on whether there was an attempt to evade constitutional requirements. This mode of analysis had been definitively rejected in *Lustig* in favor of a strict rule prohibiting any federal participation in a search not meeting fourth amendment standards.[47] There the Supreme Court held that any participation by federal agents in an illegal search or seizure violated the fourth amendment and that the

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41. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

42. *See* text accompanying notes 50 to 55 *infra*.

43. Under United States v. Janis, 428 U.S. 433, *rehearing denied*, 429 U.S. 874 (1976), the exclusionary rule would not apply in a federal civil case in which the unconstitutional search or seizure was conducted in good faith by state officials. Whether this rule would apply when the search or seizure was conducted by federal authorities and the unconstitutionally obtained evidence then introduced in a civil, rather than criminal, proceeding in a federal court was not decided in Janis. Id. at 456 n.31. *See generally* Note, *Polishing the Tarnished Silver Platter Doctrine: The Effect of* Janis v. United States *on Intersovereign Fourth Amendment Violations*, 12 TULSA L.J. 357, 358 (1976).

44. 405 F.2d at 744.

45. *Id.* at 743 (emphasis added).

46. *See* notes 16 to 19 and accompanying text *supra*.

47. *See* notes 20 to 25 and accompanying text *supra*.

admission of the fruits of such conduct risked countenancing violations of the Constitution by "circuitous and indirect methods."[48]

By using substantial participation as the threshold for applying the fourth amendment, the *Stonehill* majority reached a different result after analyzing the facts of the case than did the dissenting judge who followed the *Byars-Lustig* precedents.[49] In *Stonehill,* the Far Eastern representative of the IRS informed the Philippine authorities of possible federal tax liabilities of two American businessmen residing in the Philippines. In an effort to gather evidence for the deportation of the defendants as undesirable aliens on an unrelated charge, the Philippine officials decided to raid the suspects' business premises. Although the United States agent asked that the impending raids be cancelled or postponed, some of the numerous preparation meetings were subsequently held in the agent's house because he was apparently on intimate terms with the chief of the Philippine National Bureau of Investigation (NBI). The agent did not actively participate in planning the raids except to suggest that a certain place be included on the list of premises to be raided and to review and approve the search warrant. The day after the raids the federal agent and two associates assisted the NBI in determining which of the seized records might be of the greatest significance. They did not, however, make a detailed examination of the records. Two days after the raids some, but not all, of the seized records were made available to United States agents. Based on this evidence, the IRS filed an action for foreclosure of federal tax liens against the two American citizens.

By means of a functional analysis, the *Stonehill* court held that the participation by the IRS representative was not substantial enough to render the raids a joint operation of the United States and Philippine governments. The court noted that the raids were "instigated and planned" by Philippine officials for the sole purpose of gathering evidence for the Philippine deportation proceedings.[50] It was only after the raids were completed that the IRS representative received the evidence. The IRS agent even objected to the raids and, according to the court, was not attempting to circumvent the constitutional rights of the two expatriates through "circuitous and

48. Byars v. United States, 273 U.S. 28, 32 (1927). *See* text accompanying note 19 *supra.*

49. The facts summarized here are necessarily those provided by the majority in *Stonehill.* The facts as discussed in the district court's opinion, United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal. 1968), or as recited in Judge Browning's dissent, 405 F.2d at 752-54, are less favorable to the majority's conclusion.

50. 405 F.2d at 746.

indirect methods." In essence, the court decided that the evidence turned over to the IRS representative came to him on a "silver platter."[51]

Applying the more rigid *Byars-Lustig* test instead of the majority's "substantial participation" test, Judge Browning in his dissent concluded that there was sufficient United States participation to warrant the application of the fourth amendment and, therefore, the exclusionary rule.[52] He observed that the IRS representative acted under color of his federal office and was asked by Philippine officials to assist them precisely because of the knowledge and expertise he had acquired as a federal agent. Even though the IRS representative did not actually participate in the raid, he did bring the illegal activity to the attention of the Philippine authorities, make his house available for meetings to plan the raid, attend those meetings, and help select the places to be searched and the items to be seized.[53] Thus, according to the dissent, the fourth amendment should have been applied because the acts of American agents "were clearly an integral part of the 'effective appropriation' of the illicitly seized evidence."[54] Moreover, the fact that the IRS representative had originally objected to the search was irrelevant because "[o]fficials of our government are obliged to adhere to the Constitution; it is not enough that they violate its limitations reluctantly."[55]

Although they acknowledge the possibility of applying constitutional rights abroad, the many federal courts that have applied the *Birdsell* and *Stonehill* tests have countenanced some degree of participation by United States officials in a search or seizure conducted by a foreign government without applying the fourth amendment. Even courts that have not specifically relied on these more permissive tests have generally viewed the involvement of federal officials in a foreign search or seizure as not substantial enough to trigger fourth amendment standards. Although *Byars* and *Lustig* have been frequently cited, the strict rule those cases established has seldom been applied correctly in cases dealing with foreign searches or seizures. In *Berlin Democratic Club v. Rumsfeld*,[56] for example, United States Army intelligence agents "suggested" to West German officials that wiretaps be placed on the

51. *Id.*
52. *Id.* at 751-52.
53. *Id.* at 749-50.
54. *Id.* at 751 (footnote omitted).
55. *Id.*
56. 410 F. Supp. 144 (D.D.C. 1976).

telephones of certain American dissidents in Europe.[57] The district court was willing to hold that if the West German officials "rigorously reviewed" the request, "there may not in fact be any search by United States officials, and therefore the fourth amendment would be inapplicable."[58] It is evident, however, that United States officials had prompted the seizure in an effort to learn about criminal activity.[59] In *United States v. Marzano,*[60] the FBI, attempting to locate defendants who were accused of stealing $4.3 million from a Chicago company, contacted the police on Grand Cayman Island. Two agents subsequently flew to the island and were permitted to accompany a local police officer, who allegedly seized evidence in a manner not meeting fourth amendment standards. Applying the *Stonehill* test, the *Marzano* court refused to suppress the evidence because United States agents had not "substantially participated in the conduct."[61] In *United States v. Wolfish,*[62] Israeli police conducted a search of defendant's residence in Jerusalem as part of a joint United States-Israeli investigation of the defendant for mail fraud and later reported the results of that search to a United States Attorney. The *Wolfish* court found that the search itself was not "suggested, requested or directed by any American official"[63] and that "the fact that United States officials 'triggered the interest of the Israeli government is of no import.' "[64] Under the *Byars-Lustig* rule, the very fact that United States agents aroused the interest of their foreign counterparts, who then conducted a search or seizure, could be viewed as tantamount to requesting a search and, therefore, subject to the fourth amendment.[65]

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57. *Id.* at 154.

58. *Id.* at 155.

59. *Id.* at 154–55.

60. 388 F. Supp. 906 (N.D. Ill. 1975), *aff'd,* 537 F.2d 257 (7th Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977).

61. *Id.* at 911.

62. 525 F.2d 457 (2d Cir. 1975), *cert. denied,* 423 U.S. 1059 (1976).

63. *Id.* at 463.

64. *Id.* (quoting the district court's findings).

65. The question whether a specific search or seizure instigated by United States officials falls outside the scope of the fourth amendment is a particularly thorny issue. *See* note 26 *supra.* In dealing with foreign searches and seizures, the federal courts have not given this question the attention it merits. In Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967), federal officials warned Mexican police about the defendant's smuggling activities. Without explanation, the Ninth Circuit upheld the trial court's finding that the Mexican officials were not acting at the instigation of United States officials. In United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), the FBI notified the Royal Canadian Mounted Police that an American living in Toronto had evidence of an impending securities fraud. Canadian

Although the *Birdsell, Stonehill* and *Byars-Lustig* approaches produce different results in a great many cases, in some instances there are no differences. When federal involvement is completely peripheral, there might be no federal participation even under the more rigorous *Byars-Lustig* standard. Thus, when the federal government merely supplied information in response to a routine request from the Canadian government that subsequently led to a search by Canadian officials, there was no federal participation to trigger application of the amendment.[66] Similarly, the fact that the Brazilian government notified the State Department of an imminent search of an American's residence in Brazil would not in itself constitute federal participation under either test.[67]

At the other extreme, where federal participation is particularly flagrant the application of any of these rules might prompt the courts to invoke the amendment. For example, in *Powell v. Zuckert*[68] the District of Columbia Circuit suppressed evidence that was the fruit of an unconstitutional search in Japan. American military investigators requested that a Japanese magistrate issue a warrant pursuant to a United States-Japanese treaty for a search of the off-base residence of the defendant, an American civilian employee of the Air Force. The search warrant issued failed to meet fourth amendment standards because it did not describe with sufficient particularity the things to be seized. During the search, Japanese police and United States military officers went through "literally thousands" of the employee's papers and seized his typewriter, various letters, and some firearms and ammunition.[69] Without any

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officials subsequently conducted a search and seized evidence, but the court held that the United States' involvement was insufficient to invoke the exclusionary rule. The *Morrow* court stated that the "routine transmittal of the name and telephone number of a possibly valuable informant across national borders clearly is permissible under the fourth amendment." *Id.* at 140. To apply the amendment in this case might inhibit "normal lines of communication between the law enforcement agencies of different countries which are beneficial without question and are to be encouraged." *Id.* Although the *Morrow* court's argument is not to be ignored, neither the Fifth nor Ninth Circuit recognized the threat of United States agents supplying information reasonably calculated to precipitate a search or seizure without the fear of fourth amendment sanctions being imposed. *Compare* Sloane v. United States, 47 F.2d 889 (10th Cir. 1931) (federal agents instigate search only when they order or direct it) *with* Gallegos v. United States, 237 F.2d 694 (9th Cir. 1956) (tip from federal agents would be sufficient to find instigation).

66. United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976). *See* note 65 *supra.*

67. United States v. Shea, 436 F.2d 740 (9th Cir. 1970).

68. 366 F.2d 634 (D.C. Cir. 1966). This was a civil action for judicial review of plaintiff's military discharge. *See* text accompanying notes 84 to 87 *infra.*

69. 366 F.2d at 639.

analysis or discussion of precedents, the *Powell* court held that the fourth amendment applied because United States "agents requested the search and actually conducted it."[70] In another case, *United States v. Orman,*[71] the federal district court found substantial participation where United States drug enforcement agents were "full partners" with Turkish police in placing a wiretap on the defendant's telephone in Istanbul.[72] *Orman* is the only case in which a court using the *Stonehill* or *Birdsell* test held that the fourth amendment had been violated in an overseas search or seizure. Although it is true that these rules produce similar results in cases in which federal involvement is either substantial or *de minimis,* the fact remains that the *Byars-Lustig* rule would extend fourth amendment protection to searches abroad with greater frequency than the *Birdsell* or *Stonehill* tests.

The ultimate criterion for selecting one test for federal participation in foreign searches or seizures over another should be which one best vindicates the purpose of the fourth amendment. In the first significant search and seizure case, *Boyd v. United States,*[73] the Supreme Court observed that the amendment was designed to protect against "all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life."[74] When any governmental action jeopardizes this goal, the amendment should be applicable. Even where United States participation in such a search or seizure is relatively minor, the right of an American citizen to be free from unreasonable governmental intrusions can be abridged. In sum, the *Birdsell* and *Stonehill* approach fails to protect fully an individual's constitutional rights. By requiring "cooperation in some degree" or "substantial participation" of United States officials in a foreign search or seizure before constitutional protection may be invoked, the *Birdsell* and *Stonehill* courts seem to be advocating that "federal officers may participate in undertakings violative of Fourth Amendment standards so long as they do not participate too much."[75]

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70. *Id.* at 640.
71. 417 F. Supp. 1126 (D. Colo. 1976).
72. *Id.* at 1131.
73. 116 U.S. 616 (1886).
74. *Id.* at 630, *quoted in* Weeks v. United States, 232 U.S. 383, 391 (1914).
75. Stonehill v. United States, 405 F.2d 738, 748 (9th Cir. 1968) (Browning, J., dissenting), *cert. denied,* 395 U.S. 960 (1969).

Under *Birdsell* and *Stonehill,* the courts must scrutinize the facts of each case to determine whether federal participation was sufficient to warrant application of the fourth amendment. The lack of a clear standard may tend to encourage abuse. United States law enforcement officials are likely to continue their involvement in foreign searches or seizures by means thought to be just short of the threshold of unconstitutionality and thereby test how much participation the courts will tolerate before invoking the fourth amendment. Such uncertainty can easily encourage incursions into the privacy of Americans abroad.

It was this reasoning that led the Court of Military Appeals, in the landmark case of *United States v. Jordan,*[76] to reaffirm the *Byars-Lustig* test for foreign searches and seizures. British authorities suspected Jordan, an American airman, of committing several burglaries. Acting "out of courtesy," they invited two American air police officers to accompany them in a search of Jordan's off-base quarters. The Americans took no part in the actual search, but they unlocked the defendant's locker, looked around his room, and took photographs of incriminating evidence.[77] Prior to *Jordan,* the Court of Military Appeals had enunciated, in *United States v. DeLeo,*[78] a relaxation of the strict *Byars-Lustig* standard that held that the "mere presence" of American officials at the scene of a foreign search did not call for fourth amendment protections.[79] This qualification was considered desirable "for the purpose of assuring that the legitimate interests of the [American] suspect are protected in the conduct of the foreign investigation."[80] The *Jordan* court found the potential sacrifice of fourth amendment protections too high a price to pay for this prophylactic presence. It observed that the *DeLeo* standard might tempt American officials to evade fourth amendment requirements by delegating authority to conduct

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76. 1 M.J. 334 (C.M.A. 1976). The court's opinion discussed in the text was actually its second in the case. *See* note 83 *infra. See also* Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives,* 17 VA. J. INT'L L. 515 (1977) [hereinafter cited as *Fourth Amendment Abroad*]; Comment, *The Fourth Amendment and Foreign Searches: A Standard for the Admission of Evidence,* 34 WASH. & LEE L. REV. 263 (1977).

77. 1 M.J. at 339.

78. 5 C.M.A. 148, 17 C.M.R. 148 (1954).

79. *Id.* at 156, 17 C.M.R. at 156.

80. *Id.* Distinguishing *DeLeo* in another case, the Court of Military Appeals observed that that rule applied only when "the American agent's presence [was] no more than [an] incidental element." United States v. Price, 17 C.M.A. 566, 569, 38 C.M.R. 364, 367 (1968) (United States agents instigated investigation and search and requested cooperation of foreign authorities who conducted the search).

searches or seizures to foreign officials,[81] and "the unending judicial dilemma of resolving what is and is not sufficient participation to trigger the constitutional guaranty" compelled the *Jordan* court to adopt a rule as strict as that prescribed by *Byars* and *Lustig*.[82] Reversing the defendant's conviction, the court announced its new standard:

> [F]or trials by court-martial commencing after the date of this opinion, whenever American officials are present at the scene of a foreign search or, even though not present, provide any information or assistance, directive or request, which sets in motion, aids, or otherwise furthers the objectives of a foreign search, the search must satisfy the Fourth Amendment as applied in the military community before fruits of the search may be admitted into evidence in a trial by court-martial.[83]

In *Jordan,* the court resolved not to analyze the specific circumstances of each case. The line between "mere presence" and

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81. 1 M.J. at 337-38.

82. *Id.* at 337.

83. *Id.* at 338. The fourth amendment "as applied in the military community" ordinarily requires a finding of probable cause by an authorized person, but a warrant is not required to search property on a military installation or belonging to military personnel. U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 152 (1968).

The opinion discussed in the text modified an earlier Court of Military Appeals decision in the case. *See* United States v. Jordan, 1 M.J. 145 (C.M.A. 1975), *modified,* 1 M.J. 334 (C.M.A. 1976). The initial *Jordan* opinion rejected the "silver platter" doctrine completely. The court held that to be admissible, the fruits of any search or seizure — even one conducted entirely by foreign officials — must have been obtained in a manner consonant with the fourth amendment. *Id.* at 149. Petitioning the court for reconsideration, the Government argued that the original holding "would lead to trial in foreign courts of a substantial number of criminal offenses committed by [United States] servicemen overseas." 1 M.J. 334, 336 (C.M.A. 1976) (footnote omitted). Foreign officials having primary jurisdiction under treaties, *see* North Atlantic Treaty Status of Forces Agreement, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67, would be reluctant to waive it if the incriminating evidence would not be admissible in a United States court-martial. This would "thwart the congressional policy of maximizing American criminal jurisdiction over our service-members who commit offenses while stationed in a foreign country." 1 M.J. at 336 (footnote omitted). Congress evidently believed that servicemen would be more likely to receive a fair trial with due process safeguards in an American court. *See* Williams v. Froehlke, 490 F.2d 998, 1004 (2d Cir. 1974); Gallagher v. United States, 423 F.2d 1371, 1374 (Ct. Cl. 1970), *cert. denied,* 400 U.S. 849 (1970); *Hearings on the Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters, Before the Senate Comm. on Foreign Relations,* 83rd Cong., 1st Sess. (1953). Of course, under both *Jordan* decisions, federal officials may still assist foreign officials in an unconstitutional search or seizure, and the evidence may be introduced in a foreign court. This problem is largely unresolvable because foreign courts are beyond American jurisdiction. Tort liability might deter United States officials from engaging in such activities. *See* note 107 and accompanying text *infra.*

"participation" was too difficult to draw, and the existence of such a distinction jeopardized Americans' right to privacy by condoning some federal participation. In *Powell v. Zuckert,*[84] for example, the government argued that the presence of Air Force investigators as "observers" should not render a search of a civilian employee's home unconstitutional. But, as the *Powell* court noted, the investigators themselves "went through 'literally thousands' of appellant's private papers."[85] Although the mere presence of American officials at a search or seizure of an American's property overseas may be considered a means of protecting his rights against arbitrary action by foreign officials,[86] the officials can too easily become major participants in the search or seizure. This problem is even more pronounced under a *Stonehill*-type test, where some participation by federal officials is permitted and the defendant is left with the difficult task of proving "substantial participation."[87]

A motif running through *Birdsell, Stonehill,* and like cases is that American involvement becomes irrelevant when a foreign government conducts a search or seizure because that foreign nation is exercising its sovereign right in its own territory, and no United States laws or constitutional provisions can interfere. As Judge Friendly stated in *Birdsell,* the Bill of Rights is "inapplicable to an action by a foreign sovereign in its own territory in enforcing its own laws, even though American officials were present and cooperated to some degree."[88] However, it is not the foreign search or seizure that

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84. 366 F.2d 634 (D.C. Cir. 1966). *See* text accompanying notes 68 to 70 *supra.*

85. 366 F.2d at 639.

86. *See* text accompanying notes 78 to 81 *supra.* In both *Powell* and *Jordan,* the United States and foreign officials were attempting to abide by the terms of treaties between their respective countries that required them to "assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure, and in proper cases, handing over of objects connected with an offense." North Atlantic Treaty, Status of Forces Agreement, June 19, 1951, art. VII, para. 6(a), 4 U.S.T. 1792, 1800 T.I.A.S. No. 2846, 199 U.N.T.S. 67, 78; Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, art. XVII, para. 6(a), 11 U.S.T. 1652, 1665, T.I.A.S. No. 4510. Of course, the Constitution overrides any such treaty provisions. Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). Cooperation between United States military authorities abroad and host governments is still desirable, but the Constitution requires United States officials to insure that when cooperating with foreign officials they conduct a search or seizure with probable cause and a valid warrant.

87. Kamisar, *supra* note 30, at 1191.

88. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965).

violates the fourth amendment but — *pace* Judge Friendly — rather the involvement of United States officials. Only when there is no United States participation is Judge Friendly's argument valid. It is the involvement of the United States officials who request or assist in a foreign search or seizure that is the decisive factor rendering it violative of the fourth amendment. *Weeks, Byars,* and *Lustig* recognized this in the federal-state context. Prior to *Wolf* and *Elkins,*[89] treatment of states was analogous to treatment of foreign powers in this area because states were sovereigns in "their own territory in enforcing their own laws."[90] *Weeks* specifically exempted searches and seizures conducted by state authorities from the strictures of the fourth amendment.[91] *Byars* and *Lustig* subjected state searches and seizures to the amendment only because of federal participation.[92]

A reason often advanced for allowing some participation by United States officials in foreign searches or seizures is the need for international cooperation. In a case in which "the minimal participation of American law enforcement officials" in a Canadian search and seizure was held "insufficient to invoke . . . the protections of the fourth amendment," the Fifth Circuit commented on the need for cooperation between United States and foreign law enforcement agencies.[93] As the court pointed out, "[c]riminal conspiracies . . . are sometimes international in scope . . . ."[94] The implication is that the cooperation necessary to combat international crime should not be inhibited by imposing the fourth amendment haphazardly. Arguably, the need for cooperation between state and federal law enforcement officials is even more important than that for international cooperation, and yet the Supreme Court was not reluctant to apply the amendment whenever necessary as demonstrated by *Byars* and *Lustig.* What was required in *Byars* and *Lustig,* and what is required today, is not less cooperation but a sensitivity to constitutional requirements on the part of United States officials. Cooperation with foreign police and constitutional rights are not antithetical. Though foreign officials have no obligation to obey the strictures of the Constitution, federal officials do.

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89. *See* text accompanying notes 14 & 15 *supra.*

90. Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965). *See* text accompanying note 88 *supra.*

91. Weeks v. United States, 232 U.S. 383, 398 (1914).

92. *See* pp. 692–95 *supra.*

93. United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976). *See* note 65 *supra.*

94. 537 F.2d at 140.

Courts do not view the unconstitutionality of a given search or seizure in the abstract. Rather, they view the circumstances surrounding the search or seizure in terms of the specific issue before them. Ordinarily courts apply the *Byars-Lustig, Birdsell, Stonehill,* or *Jordan* precedents in order to determine whether evidence before them is admissible. Courts should exclude evidence unconstitutionally obtained in order to vindicate, or at least not do violence to, the Constitution. The exclusionary rule is based on three separate rationales, and each points to the exclusion of evidence obtained in an unconstitutional search or seizure abroad.

One rationale for the exclusionary rule expounded in *Weeks* and applied to the states in *Mapp v. Ohio*[95] is that it is constitutionally necessary to vindicate fourth amendment principles. As the *Weeks* Court pointed out, if evidence obtained in an unconstitutional search is admissible:

> the protection of the Fourth Amendment declaring [the] right to be secure against such searches and seizures is of no value, and, so far as [the wronged persons] are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[96]

If it is indeed an integral part of the guarantee against unreasonable searches and seizures, then the exclusionary rule automatically applies as soon as the trial court finds a violation of the fourth amendment.[97]

Similarly, under the second rationale for the exclusionary rule, judicial integrity, a finding of unconstitutionality would lead to the suppression of evidence. According to this doctrine, by accepting illegally obtained evidence, the court would in effect be approving the unconstitutional search, and this in turn would undermine judicial integrity. *Weeks* also raises this point: "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no

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95. 367 U.S. 643, 657 (1961) ("[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . .").

96. Weeks v. United States, 232 U.S. 383, 393 (1914).

97. *See* Schrock & Welsh, *Up From* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

sanction in the judgments of the courts which are charged at all times with the support of the Constitution . . . ."[98] If the courts are "to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct . . .,"[99] the fruits of an unconstitutional search or seizure must be suppressed.

In a recent case, the Supreme Court observed that the deterrent effect of the exclusionary rule is its " 'prime purpose' . . . if not the sole one."[100] The rule is intended "to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it."[101] Under this third rationale, a finding of unconstitutionality alone is insufficient to result in the exclusion of evidence. As the Court stated in *United States v. Janis*:[102] "[T]he issue of admissibility of evidence . . . is determined after, and apart from, the violation [of the Constitution]."[103] Thus, whether the exclusion of evidence obtained during an illegal search or seizure will have a deterrent effect on future unconstitutional behavior must be considered. Although the Supreme Court has expressed doubt about the deterrent effect of the rule,[104] so long as it continues to be applied to unconstitutional searches and seizures within the United States, it should also be applied to searches and seizures abroad. If officials in the United States are discouraged from illegally infringing upon a person's privacy by the existence of

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98. 232 U.S. at 392. *Accord,* Elkins v. United States, 364 U.S. 206, 222-23 (1960); McNabb v. United States, 318 U.S. 332, 345 (1943). As Mr. Justice Holmes stated in his dissent in Olmstead v. United States, 277 U.S. 438 (1928):

> For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed.

Id. at 470. The courts exclude evidence "in order to preserve the judicial process from contamination." *Id.* at 484 (Brandeis, J., dissenting).

99. United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting).

100. United States v. Janis, 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)). *See also* Stone v. Powell, 428 U.S. 465, 482-89 (1976); United States v. Peltier, 422 U.S. 531, 536-39 (1975); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

101. Elkins v. United States, 364 U.S. 206, 217 (1960), *quoted in* United States v. Calandra, 414 U.S. 338, 347 (1974).

102. 428 U.S. 433 (1976).

103. *Id.* at 443.

104. *E.g.* United States v. Janis, 428 U.S. 433, 447-54 (1976). The exclusionary rule has been eroded in recent opinions of the Court. *See* Stone v. Powell, 428 U.S. 465 (1976); United States v. Peltier, 422 U.S. 531 (1975); *see also* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 419 (1971) (Burger, C.J., dissenting).

such an exclusionary rule, they will be discouraged from participating in illegal searches outside the country as well.

In theory, an unconstitutional search or seizure abroad could lead not only to the exclusion of evidence but also to injunctive relief or tort liability.[105] When United States participation in a series of unconstitutional searches and seizures is likely to persist, a federal court could enjoin such conduct.[106] This would certainly vindicate fourth amendment principles. In addition, tort liability might be found on the part of those United States officials who participated in an unconstitutional search or seizure overseas.[107] This prospect would also deter such conduct, and a monetary award would compensate the wronged individual. Significantly, a tort action, unlike a motion to suppress evidence, can vindicate constitutional principles even though the fruits of the illegal search or seizure are not offered into evidence during the criminal prosecution of the victim of the governmental action.

The Fourth Amendment Rights of Aliens Abroad

The Supreme Court has recognized that resident aliens have constitutional rights similar to those of United States citizens.[108] Thus, it seems that they should receive the same fourth amendment protection against illegal searches or seizures abroad as citizens. Resident aliens have an expectation and right of privacy against governmental intrusion while in the United States, and these protections would be eviscerated if they vanished during a business or pleasure trip abroad.[109] Even in a foreign country where the guarantee against unlawful searches and seizures is not as strong as it is in the United States, a resident alien, like an American citizen, should be protected against illegal governmental conduct by federal agents.

The extent to which the fourth amendment applies to nonresident aliens abroad is less certain. Only two federal courts have dealt with this question in any detail, and they have reached seemingly

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105. *See* note 10 and accompanying text *supra*.

106. *See* Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968).

107. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

108. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 770 (1950) ("Mere lawful presence in the country creates an implied assurance of safe conduct and gives . . . [the alien] certain rights."); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (protection of due process clause extends to resident aliens).

109. *See* text accompanying notes 7 to 10 *supra*.

divergent conclusions. However, a close examination of the factual situations in *United States v. Toscanino*[110] and *Berlin Democratic Club v. Rumsfeld*[111] reveals that they are reconcilable. The fourth amendment may be applied to exclude from a criminal trial in the United States the fruits of an illegal search or seizure conducted against a nonresident alien abroad. On the other hand, a nonresident alien will not be permitted to sue in United States courts for money damages or injunctive relief for an allegedly illegal search or seizure abroad.

In *Toscanino,* the telephone of an Italian citizen in Uruguay was wiretapped in violation of local law by a local telephone worker acting on behalf of the United States. Evidence was being collected by American agents in connection with an investigation of a conspiracy to import narcotics into the United States. The Second Circuit held that the nonresident alien should be protected against unreasonable searches and seizures conducted by United States authorities.[112] The *Toscanino* court reasoned that the fourth amendment protects "people" rather than simply "areas"[113] or American "citizens."[114] Thus, according to the court's analysis, fourth amendment guarantees extend to both citizens and aliens abroad because there is "[n]o sound basis [for] . . . a different rule with respect to aliens who are the victims of unconstitutional action abroad . . . ."[115]

In *Berlin Democratic Club,* an Austrian citizen joined American plaintiffs in bringing a civil action for monetary, injunctive, and declaratory relief based partly on alleged fourth amendment violations, including the wiretapping of phones in West Germany and West Berlin. Rejecting the Austrian plaintiff's contention that he was entitled to sue for violations of his rights on the basis of

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110. 500 F.2d 267 (2d Cir. 1974).

111. 410 F. Supp. 144 (D.D.C. 1976).

112. The defendant had requested a statement from the prosecution affirming or denying that United States agents had committed an "unlawful act" by wiretapping his telephone. Because the court of appeals found that the type of conduct alleged was unlawful, and even unconstitutional, it found that the trial court had erred in denying a hearing on this matter. 500 F.2d at 279–81. Following *Toscanino,* the court in United States v. Orman, 417 F. Supp. 1126, 1131 (D. Colo. 1976), excluded wiretap evidence gathered by United States agents against a foreign national in Turkey. *See* text accompanying notes 71 & 72 *supra.* A wiretap is a search or seizure within the purview of the fourth amendment. *E.g.,* Katz v. United States, 389 U.S. 347, 353 (1967).

113. 500 F.2d at 279. *See* Katz v. United States, 389 U.S. at 353.

114. 500 F.2d at 280. *See* Au Yi Lau v. United States Immigration & Naturalization Serv., 445 F.2d 217, 223 (D.C. Cir.), *cert. denied,* 404 U.S. 864 (1971).

115. 500 F.2d at 280.

Toscanino,[116] the federal district court dismissed him as a party on the ground that nonresident aliens generally have no standing to sue.[117] The court refused to carve out an exception to this general rule because the United States had no obligation to protect a citizen of another country who was not subject to United States law and who could use the laws of his own country for protection.[118] The court observed: "When the nonresident alien does not make application under a statute to the United States for certain action, or is not subjected to its courts, but is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court."[119] Thus, the *Berlin Democratic Club* court declined to hold that the fourth amendment simply did not apply to nonresident aliens. Rather, the Austrian plaintiff was dismissed solely because he was found to lack standing.[120]

The obvious difference between *Toscanino* and *Berlin Democratic Club* is that in the former the nonresident alien was before the court as a criminal defendant while in the latter he was not. In *Toscanino* there could be no real problem of standing, and indeed, the court in that case implied that while a nonresident alien may not invoke the protections of the fourth amendment generally, he at least may do so "where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien in the United States."[121] In *Berlin Democratic Club*, the court apparently accepted this reasoning:

> [W]hen a non-resident alien is brought from abroad to appear for and be the subject of a domestic criminal prosecution, there are

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116. The *Berlin Democratic Club* court viewed *Toscanino* as holding that "a nonresident alien who is seized abroad in order to secure his presence for a domestic prosecution may challenge the constitutionality of his seizure." 410 F. Supp. 144, 152 (D.D.C. 1976). This proposition has been criticized and restricted. *See* note 2 *supra*. The federal district court's opinion overlooked *Toscanino's* other holding: wiretapping a nonresident abroad without following fourth amendment guidelines could be an "unlawful act." United States v. Toscanino, 500 F.2d 267, 280–81 (2d Cir. 1974). *See* note 112 *supra*.

117. Johnson v. Eisentrager, 339 U.S. 763, 776 (1950); Reyes v. Secretary of H.E.W., 476 F.2d 910, 915 n.8 (D.C. Cir. 1973); Kukatush Mining Corp. v. SEC, 309 F.2d 647, 649–50 (D.C. Cir. 1962).

118. 410 F. Supp. at 152–53.

119. *Id.* at 152.

120. *Id.* at 153. *Cf.* Johnson v. Eisentrager, 339 U.S. 763 (1950), *rev'g* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949) (German nonresident aliens imprisoned in United States Army prison in Germany had no standing to file habeas corpus petitions).

121. 500 F.2d at 280.

> different expectations of treatment than when a non-resident alien is simply affected by United States officials abroad. . . . [In the former case the United States] is the entity attempting to render justice regarding the non-resident alien in a domestic court. . . . [T]he non-resident alien should be entitled to the advantages of the legal process with which he is forced to deal.[122]

In general then, it appears that a violation of fourth amendment standards by government officials abroad can be used by nonresident aliens as a shield in a criminal prosecution but not as a sword in a civil action for affirmative relief.

Warrants For Searches or Seizures Abroad

To meet fourth amendment standards, a search or seizure must be reasonable.[123] This criterion of reasonableness is flexible,[124] but it is ordinarily interpreted to mean that the search must be conducted after obtaining a warrant based upon probable cause.[125] "Probable cause" should mean the same thing when applied to actions of federal officials abroad as it does when applied at home. However, because there are no provisions in the federal rules of procedure governing the issuance of warrants for a search or seizure outside the United States,[126] extraordinary problems can arise when the warrant requirement is applied to foreign searches and seizures. This procedural gap cannot be used to infringe constitutional rights. It is argued below that federal courts possess the inherent power to issue warrants covering such conduct overseas and that warrants issued under foreign law may satisfy the requirements of the fourth amendment.

Ordinarily, before government agents can legally conduct a search or seizure, a warrant based on probable cause and including a specific description of the place to be searched and the things to be seized, must be obtained from an official of the judicial branch.[127] However, under federal law, magistrates are empowered to issue

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122. 410 F. Supp. at 152.

123. Only "unreasonable searches and seizures" are prohibited by the Constitution. U.S. CONST. amend. IV. *E.g.*, Carroll v. United States, 267 U.S. 132, 147 (1925).

124. *E.g.*, Elkins v. United States, 364 U.S. 206, 222 (1960).

125. *E.g.*, Johnson v. United States, 333 U.S. 10, 13-15 (1948).

126. *See* note 128 *infra.*

127. U.S. CONST. amend. IV. *See* Johnson v. United States, 333 U.S. 10, 13-15 (1948).

warrants only within their own districts.[128] The fact that there are no United States magistrates abroad creates special problems in obtaining a warrant for a foreign search or seizure. At least one commentator has suggested that "the inaccessibility of qualified magistrates might render warrantless searches abroad permissible, provided the law enforcement officer had probable cause."[129] Although there ought to be specific exceptions to the warrant requirement for foreign searches and seizures just as there are for domestic ones,[130] any such general rule would seriously jeopardize much of the protection provided by the fourth amendment overseas. The Supreme Court has affirmed the general importance of the warrant requirement in language that clearly applies to *all* searches and seizures:

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[131]

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128. FED. R. CRIM. P. 41(a) provides: "Authority to Issue Warrant: A search warrant authorized by this rule may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property is located, upon request of a federal law enforcement officer or an attorney for the government."

129. 88 HARV. L. REV. 813, 824 (1975).

130. *E.g.*, Terry v. Ohio, 392 U.S. 1, 17 n.15 (1968); Johnson v. United States, 333 U.S. 10, 14-15 (1948). Whether there is an exception to the warrant requirement for searches and seizures conducted in the United States in cases involving foreign intelligence aspects of national security is uncertain. United States v. United States Dist. Ct., 407 U.S. 297 (1972) (question reserved). *Compare* Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 944 (1976) (dictum) (warrant requirement applies even when foreign powers are involved in national security case) *with* United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied,* 419 U.S. 881 (1974) (exception to warrant requirement in espionage case involving national security). *See generally* Note, *Foreign Security Surveillance and the Fourth Amendment,* 87 HARV. L. REV. 976 (1974); Note, United States v. Butenko: *Executive Authority to Conduct Warrantless Wiretaps for Foreign Security Purposes,* 27 HASTINGS L.J. 705 (1976).

In 1978 Congress passed the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978), which requires special judicial orders for domestic electronic surveillance for national security purposes. Legislation was introduced that year dealing with electronic surveillance overseas and all other types of searches and seizures for national security purposes. S. 2525, 95th Cong., 2d Sess., 124 CONG. REC. S 1720 (1978).

131. Johnson v. United States, 333 U.S. 10, 14 (1948) (footnote omitted).

The failure of Congress to provide for the issuance of warrants for foreign searches and seizures cannot justify the violation of vital constitutional rights that clearly apply abroad. As the District of Columbia Circuit stated in an analogous situation: "Congress could not effectuate by omission that which it could not accomplish by affirmative action."[132]

By and large courts have indicated that the warrant requirement does apply to federal searches and seizures abroad.[133] In *Best v. United States*,[134] for example, the court suggested that when United States agents conduct a search or seizure abroad without a warrant it is unreasonable and violates the fourth amendment. To illustrate this point, the court referred to a hypothetical situation in which FBI agents, acting without a warrant, break into the residence of an American citizen residing in Germany, "ransack the place," and find and seize evidence of a federal crime. The *Best* court concluded that the fruits of such a hypothetical search and seizure should be excluded:

> even though no judicial officer had been authorized to issue a warrant for a search in occupied Germany. Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant. If the search is one which would otherwise be unreasonable, and hence in violation of the Fourth Amendment, without the sanction of a search warrant, then in such a case, for lack of a warrant, no search could lawfully be made.[135]

Despite the lack of authorization for the issuance of warrants abroad,[136] federal courts must have inherent constitutional power to grant warrants for foreign searches and seizures.[137] If the Constitu-

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132. Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). *See* note 120 *supra.*

133. This discussion applies to searches abroad conducted by federal officials or conducted by foreign officials with the involvement of their United States counterparts. Agencies likely to be participating in such searches include the military police, military intelligence, CIA, FBI, and the Drug Enforcement Agency. It is irrelevant whether the searches are legal under the laws of the jurisdiction in which they are conducted. See pp. 724-27 *infra.*

134. 184 F.2d 131 (1st Cir. 1950).

135. *Id.* at 138.

136. *See* note 128 *supra.*

137. *See* United States v. Toscanino, 500 F.2d 267, 280 (2d Cir. 1974); Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950). *But cf.* Johnson v. Eisentrager, 339 U.S. 763 (1950) (federal court has no power to grant writs of habeas corpus to nonresident enemy aliens captured and imprisoned abroad).

tion requires warrants overseas, then it is implied that some federal magistrate must have the power to issue them.[138] In another context, the Supreme Court has spoken of "an inherent power . . . to issue search warrants under circumstances conforming to the Fourth Amendment."[139] Federal officials must not be allowed to participate in a search or seizure overseas without adhering to constitutional guarantees. In *Berlin Democratic Club,*[140] the only case in which a federal court has discussed whether United States officials had the power to issue such warrants, the district court concluded that its "authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas."[141] A procedure to issue warrants for foreign searches or seizures should be created by the judiciary unless Congress acts first.[142] The *Berlin Democratic Club* court suggested a sensible means for obtaining such warrants without undue delay: "[W]arrants could be approved telephonically, 'based on sworn oral testimony communicated by telephone or other appropriate means, with procedures for recording, transcribing and certifying the statement.' "[143]

It seems that the warrant required by the fourth amendment for a search or seizure abroad may also be constitutionally issued by a foreign magistrate rather than one from the United States. When the *Berlin Democratic Club* court addressed this alternative, it held on constitutional grounds that a wiretap allegedly conducted with

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138. *See* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 160 (D.D.C. 1976).

139. United States v. New York Tel. Co., 434 U.S. 159, 168 n.14 (1977). Rule 57(b) of the Federal Rules of Criminal Procedure lends some support to this proposition. It provides that where no rule is applicable, "the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." FED. R. CRIM. P. 57(b); *see* United States v. New York Tel. Co., 434 U.S. 159, 170 (1977).

140. 410 F. Supp. 144 (D.C. Cir. 1976).

141. *Id.* at 160.

142. Such a procedure should specify which federal courts are empowered to issue warrants for searches and seizures abroad. These warrants would ordinarily be issued by a court in the district where at least part of the crime was committed; in addition, a court in the district where the defendant resides or where a complaint has been filed might issue warrants. A situation might arise in which evidence is sought relating to acts committed abroad by an American citizen permanently residing abroad. In such instances, and perhaps also in other cases to the extent a court's power to issue warrants is related to its control over American officials, the district in which an official normally operates or the District of Columbia may be appropriate places. The court in Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976), in which all the acts involved probably took place in Germany, apparently contemplated the warrant would be issued by the federal court in the District of Columbia. *See id.* at 160.

143. *Id.* n.10 (quoting United States v. Robinson, 533 F.2d 578, 585 (D.C. Cir. 1976)).

American participation required prior authorization from a United States magistrate regardless of the provisions of German law. Although it cited no precedential support, the court concluded that "the Constitution guarantees that warrants shall issue from United States, not foreign, officials."[144]

The holding in *Berlin Democratic Club* seems misguided. If there exists an independent judiciary and if the warrants employed meet the general requirements regarding probable cause and specificity, the fourth amendment's guarantee of freedom from unreasonable searches and seizures would likely be vindicated by a magistrate in a foreign country. It is significant that although the fourth amendment did not reach action by state officials before 1949,[145] in certain instances state magistrates could, by statute, issue warrants for searches and seizures carried out by federal and state officials to uncover evidence of federal crimes.[146] Generally, state warrants were acceptable if they met the requirements of the fourth amendment. In *Byars*,[147] the fact that the search involving federal agents was based on a state warrant was not the reason why it was found unconstitutional. The Court was apparently willing to accept the warrant if it met fourth amendment standards, but because it was based on inadequate information, the warrant was rejected.[148] Warrants issued by foreign officials today are analogous to those issued by state officials prior to 1949; thus, foreign warrants that meet fourth amendment standards would appear to be constitutionally valid. Willingness to accept a foreign warrant was expressed in *Powell*.[149] The Court of Appeals for the District of Columbia Circuit held that a Japanese warrant was invalid because it lacked specificity — it provided in part that officers could seize " 'everything in relation to this case.' "[150] By criticizing the particulars of the warrant rather than rejecting it outright, the court strongly implied that it would have accepted a Japanese warrant if it had properly delimited the objects to be seized. Similarly, in *Stonehill*[151] the court

144. *Id.* at 160.

145. *See* text accompanying notes 11 to 14 *supra*.

146. *E.g.*, National Prohibition Act, ch. 85, tit. I, § 2, 41 Stat. 306 (1919) (repealed 1935); *id.* tit. II, § 2, 41 Stat. 308 (1919) (repealed 1935).

147. *See* text accompanying notes 16 to 19 *supra*.

148. Byars v. United States, 273 U.S. 28, 29 (1927).

149. *See* text accompanying notes 68 to 70 *supra*.

150. Powell v. Zuckert, 366 F.2d 634, 639 (D.C. Cir. 1966) (quoting Japanese warrant).

151. *See* pp. 697-99 *supra*.

acknowledged that the Philippine warrant, if "properly prepared, might have satisfied Constitutional requirements."[152]

A statute permitting foreign judges to issue warrants meeting fourth amendment requirements would help resolve doubts in this area. When there is United States participation in a foreign search or seizure primarily conducted by foreign police, the need for two warrants would be eliminated if the foreign warrant is constitutionally adequate. In the meantime, a warrant obtained in those countries that issue them might be considered sufficient protection under the fourth amendment's warrant clause so long as it meets United States constitutional standards. Foreign warrants must be scrutinized as they were in *Powell* and *Stonehill* to ensure that they do meet these standards.[153]

FOREIGN SEARCHES OR SEIZURES WITHOUT UNITED STATES PARTICIPATION

The Basis of the "Silver Platter" Rule

Under current case law, foreign officials who conduct an illegal search or seizure without federal participation stand in the same position as private parties,[154] and the federal courts will accept such illegally obtained evidence under the "silver platter" doctrine.[155] For example, in a case in which foreign officials conducted a search and turned over the evidence to a federal prosecutor, the Ninth Circuit wrote: "The Fourth Amendment is directed at the Federal Government and its agencies. Fourth Amendment rights are protected from state encroachments by the Fourteenth Amendment which reaches the states and their agencies . . . . Neither the Fourth nor the

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152. Stonehill v. United States, 405 F.2d 738, 746 (9th Cir. 1968).

153. With regard to one limited aspect of foreign searches or seizures, Congress has considered taking action. In 1978, a bill was introduced requiring court orders for searches and seizures overseas conducted for foreign intelligence purposes. *See* note 130 *supra*. The bill applies to indirect searches and seizures as well as direct ones.

154. In Burdeau v. McDowell, 256 U.S. 465 (1921), the Supreme Court held that the fourth amendment applies to actions of federal officials and not to private parties. *Id.* at 475. In *Wolf* and *Mapp*, state officials were included within its ambit through the fourteenth amendment's due process clause. *See* text accompanying notes 14 & 15 *supra*. Thus, the fourth amendment does not reach the actions of those not acting on behalf of the federal or a state government. Extending this argument, the courts have concluded that foreign law enforcement officials stand in the same position as private parties. United States v. Janis, 428 U.S. 433, 455–56 n.31 (1976) (dictum) (citing Burdeau v. McDowell, 256 U.S. 465 (1921)); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

155. *See* text accompanying note 12 *supra*.

Fourteenth Amendments [sic] are [sic] directed at Mexican officials . . . ."[156] It could be argued that the court would violate the constitutional rights of a defendant if it admitted into evidence the fruits of a foreign search or seizure that did not meet fourth amendment criteria.[157] No federal court has accepted this reasoning, but neither has any refuted its underlying theory.

In *Burdeau v. McDowell,*[158] the Supreme Court reasoned that the fourth amendment applied only to unreasonable searches or seizures conducted by government officials; therefore, it could "see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken [papers], should prevent them from being held for use in prosecuting an offense . . . ."[159] Despite the *Burdeau* Court's pronouncement, constitutional reasons can be offered for excluding evidence obtained in violation of the fourth amendment. Even if the amendment does not extend to the actual search or seizure, it could, in theory, prevent the introduction of the evidence seized in an American court. In its initial opinion in the *Jordan* case, later modified,[160] the Court of Military Appeals, although it acknowledged that the fourth amendment could not reach actions by foreign officials, required that searches or seizures meet fourth amendment standards if their fruits were to be admissible in a federal court. In this opinion, the court stated that because "American judicial power" was being exercised against the defendant "it is by American constitutional standards that he should be judged."[161]

Under this view, the Constitution is violated by the mere introduction of evidence obtained in a search or seizure by foreign officials that does not meet fourth amendment criteria. The act of a federal court in admitting the evidence would be an exercise of governmental power to which the fourth amendment could be applied. Thus, all evidence obtained in "unreasonable" searches or seizures by private parties or foreign officials would be excluded. In somewhat analogous circumstances, federal courts have refused to give judicial sanction to the acts of private parties or foreign

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156. Brulay v. United States, 383 F.2d 345, 348 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967). *See* Note, *Searches South of the Border: Admission of Evidence Seized by Foreign Officials,* 53 CORNELL L. REV. 886 (1968) [hereinafter cited as *Searches South of the Border*].

157. *See, e.g., Fourth Amendment Abroad, supra* note 76, at 522–23.

158. 256 U.S. 465 (1921). *See* note 154 *supra.*

159. 256 U.S. at 476.

160. 1 M.J. 145 (C.M.A. 1975), *modified,* 1 M.J. 334 (C.M.A. 1976). *See* text accompanying notes 76 to 83 and note 83 *supra.*

161. 1 M.J. at 149.

officials, for fear of violating the Constitution. In *Shelley v. Kraemer*,[162] the Supreme Court refused to permit the judicial enforcement of a racially restrictive covenant, even though the terms of the private covenant were not proscribed directly by the Constitution. The Court observed that "judicial action . . . bears the clear and unmistakable imprimatur of the State."[163] In *Bram v. United States*,[164] the Court refused to allow into evidence a confession made to a foreign official. While the Constitution could not reach the actions of the official, the Court held that permitting use of such a confession in federal court would violate the fifth amendment. By extension, a court might refuse to admit evidence obtained in an unreasonable search or seizure conducted by foreign officials even though they are not subject to the fourth amendment.

Although the approach of the Court of Military Appeals in its first *Jordan* opinion does have a superficial appeal, its weaknesses become apparent upon close inspection. In *Shelley* the black petitioners would have been denied equal protection only when a court actually attempted to enforce the restrictive covenant, and in *Bram* the defendant would have been compelled to be a witness against himself in violation of the fifth amendment only when a court admitted his statement. By contrast, introduction of the fruits of an illegal search and seizure works no further violation of the fourth amendment. The amendment is intended to guard against "'all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life.'"[165] Thus, once the invasion of privacy has occurred, the violation of the Constitution is complete.[166] As one commentator stated: "It is neither the possession of property nor the use of evidence, but the sanctity of homes, that is the concern of the Constitutional guaranty."[167]

Even if not unconstitutionally obtained, evidence may be excluded for policy reasons.[168] In *Olmstead v. United States*,[169] two

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162. 334 U.S. 1 (1948).

163. *Id.* at 20. *See Searches South of the Border, supra* note 156, at 894-95; *New "Silver Platter" Doctrine, supra* note 26, at 305-06.

164. 168 U.S. 532 (1897).

165. Weeks v. United States, 232 U.S. 383, 391 (1914) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

166. United States v. Janis, 428 U.S. 433, 443 (1976). *See* United States v. Calandra, 414 U.S. 338, 347-48 (1974); Linkletter v. Walker, 381 U.S. 618, 637 (1965); Brulay v. United States, 383 F.2d 345, 349 n.5 (9th Cir. 1967).

167. Plumb, *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 375 (1939).

168. *See* notes 232 to 234 and accompanying text *infra*.

169. 277 U.S. 438 (1927). Insofar as *Olmstead* held that a wiretap was not a fourth amendment search or seizure, it was overruled by Katz v. United States, 389 U.S. 347 (1967).

of the dissenting justices argued that governmental and judicial integrity would be impaired if evidence illegally but not unconstitutionally obtained were admitted in court.[170] But there the illegal acts had been perpetrated by federal officers. If foreign officials, over whom neither the executive nor the judicial branch has any control, conduct the search or seizure, there can be no fear that the government assumed "moral responsibility"[171] for the search or seizure. Judicial integrity cannot be undermined by accepting from an English official evidence obtained without a judicial warrant[172] or from a German official who searched a home on "suspicion" rather than "probable cause."[173] To exclude evidence in the hope of deterring activities that contravene constitutional norms makes little sense where foreign officials act alone and for their own purposes. As the Ninth Circuit noted: "[N]o prophylactic purpose is served by applying an exclusionary rule [in foreign searches] since what we do will not alter the search policies of the sovereign Nation of Mexico."[174]

Generally then, a search or seizure conducted without United States participation works no violation of the fourth amendment, and its fruits will be admitted in federal court. However, as will be seen in the following two sections, this rule has two major exceptions.

Foreign Searches and Seizures Conducted on Behalf of the United States

When there is no United States participation in a foreign search or seizure, the exclusionary rule ordinarily does not apply.[175]

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170. *Id.* at 470 (Holmes, J., dissenting), 483 (Brandeis, J., dissenting).

171. *Id.* at 483.

172. In England, senior police officers may authorize searches in some instances. *See, e.g.*, The Theft Act of 1968, c. 60, § 26(2). *See also* J. DEVLIN, POLICE PROCEDURE, ADMINISTRATION AND ORGANIZATION 340–41 (1966); Farrar, *Aspects of Police Search and Seizure Without Warrant in England and the United States*, 29 U. MIAMI L. REV. 491, 502 n.46, 518 n.121 (1975). In addition, the Home Secretary, a cabinet member, may authorize wiretaps. *See* COMMITTEE OF PRIVY COUNCILLORS APPOINTED TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS, FIRST REPORT, CMND. NO. 283 (1957).

173. *See* GER. C. CRIM. P. § 102; THE GERMAN CODE OF CRIMINAL PROCEDURE § 102 & n.1 (H. Niebler trans. 1965).

174. Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967). *Cf.* People v. Kelley, 66 Cal. 2d 232, 250, 424 P.2d 947, 961, 57 Cal. Rptr. 363, 377 (1967) (in bank) (dictum) ("Where officials have secured evidence under procedures valid in their jurisdiction no deterrent purpose would be served by excluding the evidence when offered in another jurisdiction.").

175. United States v. Janis, 428 U.S. 433, 455 n.31 (1976) (citing Burdeau v. McDowell, 256 U.S. 465 (1921)); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969)).

Nevertheless, the holding in *Gambino v. United States,*[176] a case decided before fourth amendment norms were extended to the actions of state officials,[177] suggests that the rule ought to apply when foreign officials conduct a search or seizure solely on behalf of the United States. In *Gambino,* New York state troopers seized liquor possessed in violation of the National Prohibition Act after conducting a warrantless search of the defendants' automobile. The seized evidence was turned over to a federal official for use in a federal prosecution against defendants. Because possession of intoxicating beverages was a federal, but not a state, offense, it was apparent that the seizure "was made solely for the purpose of aiding the United States in the enforcement of its laws."[178] There was no direct participation by federal officials; the state troopers had acted independently and thus were not agents of the United States.[179] The *Gambino* Court, however, held that the evidence should be excluded.

At first glance, it appears that the Court's reasoning was founded on the belief that the mere introduction of evidence obtained in violation of the fourth amendment was constitutionally impermissible. The Court noted "[T]he admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the Fourth and Fifth Amendments."[180] By contrast, the Court in *Weeks* and *Burdeau* held that the amendment and concomitant exclusionary rule applied only to those searches or seizures in which there was federal participation. Under the "silver platter" rule espoused in those cases, federal courts would accept evidence obtained without federal participation[181] notwithstanding the unreasonableness of the search or seizure involved. As one commentator has observed: "Cupidity, jealousy, and treachery among private citizens are still fruitful and welcome sources of information."[182]

The *Gambino* Court distinguished *Weeks* and *Burdeau* from the facts presented in the case before it by noting that in those cases

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176. 275 U.S. 310 (1927).

177. *See* notes 11 to 15 and accompanying text *supra.*

178. 275 U.S. at 317.

179. *Id.* at 314-15.

180. *Id.* at 316.

181. *See* text accompanying note 12 *supra.*

182. Comment, *The* Benanti *Case: State Wiretap Evidence and the Federal Exclusionary Rule,* 57 COLUM. L. REV. 1159, 1167 (1957) (footnote omitted). Of course, at the time *Gambino* was decided, state officials were treated as "private citizens" for fourth amendment purposes. *See* Olmstead v. United States, 277 U.S. 438 (1928); Byars v. United States, 273 U.S. 28 (1927); Weeks v. United States, 232 U.S. 383 (1914).

"the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws."[183] The Court noted: "[T]he rights guaranteed by the Fourth and Fifth Amendments may be invaded as effectively by such cooperation, as by the state officers' acting under direction of the federal officials."[184] Although the state police were not specifically authorized by the federal government to conduct the search, the subsequent federal prosecution was "in effect a ratification of the arrest, search and seizure made by the troopers on behalf of the United States."[185]

What underlies *Gambino* is a fear of tacit collusion between law enforcement agencies not bound by the Constitution and those that are.[186] As the Supreme Court observed in *Mapp v. Ohio*:[187] "Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."[188] Although the amendment would not be applied to officious action by a private party, the existence of long-standing cooperation between law enforcement agencies tends to justify its application.[189] Applying the fourth amendment and the exclusionary rule to searches and seizures conducted on behalf of the federal government might prompt persons seeking federal conviction to forgo the use of methods that violate constitutional norms.[190]

Despite the apparent applicability of the *Gambino* rationale to foreign searches and seizures, courts have been reluctant to apply it in that context. For example, in *United States v. Wolfish*,[191] Israeli police searched the defendant's residence for evidence of the commission of a federal crime, and the items seized were admitted in federal court on the ground that United States authorities had not "suggested, requested, or directed" the search.[192] Several other cases in which evidence seized by foreign officials at the suggestion of

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183. 275 U.S. at 317.

184. *Id.* at 316.

185. *Id.* at 317.

186. Note, *Private Assumption of the Police Function Under the Fourth Amendment*, 51 B.U.L. REV. 464, 473 (1971).

187. 367 U.S. 643 (1961).

188. *Id.* at 658.

189. United States v. Gumerlock, 590 F.2d 794, 800 n.19 (9th Cir. 1979).

190. United States v. Benanti, 244 F.2d 389, 393 (2d Cir.) (construing *Gambino*), *rev'd on other grounds*, 355 U.S. 96 (1957).

191. 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). *See* text accompanying notes 62 to 64 *supra*.

192. *Id.* at 463.

United States officers has been held admissible could have been decided on the basis of *Gambino* because the foreign officials were acting solely on behalf of the United States.[193]

The dissenting opinion in *Stonehill* stands alone in mentioning the applicability of *Gambino* to a foreign search or seizure.[194] Judge Browning suggested in his dissent that a key reason for the Philippine raid was to gather evidence of tax fraud under United States law, as well as for the Philippine deportation hearing.[195] Because *Gambino* involved state officials gathering evidence only for a federal violation,[196] it was not applicable to the facts in *Stonehill.* Judge Browning argued, however, that the question to be asked in applying the exclusionary rule was " 'whether the offending search was conducted *in any part* . . . in the interest of the Federal Government; or whether it was conducted . . . *exclusively* for state purposes.' "[197]

There are persuasive arguments against extending the *Gambino* doctrine as far as Judge Browning advocated in cases involving foreign searches and seizures. That is not to say there is no danger of tacit collusion between United States and foreign officials, but foreign officials are far less likely to act as enforcers of American law than state officials were. It would be unusual for a foreign government to instruct its police to enforce federal law as had the Governor of New York.[198] Nor do the rationales that lie behind

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193. *E.g.,* United States v. Marzano, 537 F.2d 257 (7th Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). (Grand Cayman Island police gathering evidence at request of United States agents). *See* text accompanying note 65 *supra.* Under one interpretation of the *Byars-Lustig* rule such evidence would be excluded because the search or seizure was instigated by federal officials. *See* notes 26 & 65 *supra.*

194. Stonehill v. United States, 405 F.2d 738, 753 n.29 (9th Cir. 1968) (Browning, J., dissenting), *cert. denied,* 395 U.S. 960 (1969). *See* text accompanying notes 41 to 55 *supra.* The *Gambino* precedent has been overlooked in several cases in which it was clearly relevant. Brulay v. United States, 383 F.2d 345 (9th Cir. 1967) (Mexican police seized amphetamines illegal in United States but not in Mexico); Johnson v. United States, 207 F.2d 314, 321 (5th Cir. 1953) (Cuban police apparently acting "to assist the Miami police in recovering . . . jewelry and bringing about appellant's capture on the State [of Florida] charge."). *See New "Silver Platter" Doctrine, supra* note 26, at 295.

195. 405 F.2d at 752.

196. 275 U.S. 310, 317 (1927). *See* Parker v. United States, 183 F.2d 268, 270 (9th Cir. 1950); Gilbert v. United States, 163 F.2d 325, 327 (10th Cir. 1947); United States v. Butler, 156 F.2d 897, 898 (10th Cir. 1946); Scotti v. United States, 102 F. Supp. 747, 750–51 (S.D. Tex. 1950), *aff'd,* 193 F.2d 644 (5th Cir. 1952). *But see* Sutherland v. United States, 92 F.2d 305, 307–08 (4th Cir. 1937) (interpreting *Gambino* to encompass cases of "general cooperation" between state and federal officials which may lead to fourth amendment violations).

197. 405 F.2d at 753 n.29 (quoting Elkins v. United States, 364 U.S. 206, 236 (1960) (Frankfurter, J., dissenting)) (emphasis added by Browning, J.).

198. 275 U.S. 310, 315 (1927).

Gambino apply when foreign officials, without federal participation, are acting at least in part to enforce their own laws. Because they were not acting solely on behalf of the United States, acceptance of evidence obtained would not constitute a ratification of their acts. A deterrence rationale also carries little weight. If evidence of a local and an American offense obtained by foreign officers is admissible in a local prosecution,[199] inadmissibility under fourth amendment standards at an American trial would hardly be likely to affect the conduct of the search by foreign officials. As noted, however, there might be some deterrent effect if the foreign officers were acting not to enforce local law but only to assist in the enforcement of United States law. In any case, to expect a foreign official to be familiar with, and comply with,[200] fourth amendment standards seems ingenuous.

Foreign Searches and Seizures Illegal Under Local Law

In *United States v. Jordan,*[201] the Court of Military Appeals held that in order "to use evidence obtained either directly or indirectly from a search conducted solely by foreign authorities," the government must prove that "the search by foreign officials was lawful, applying the law of their sovereign . . . ."[202] but other courts have rejected this position.[203] The mere fact of illegality under foreign law should not cause the fruits of a foreign search or seizure to be automatically excluded. If under the law of a foreign nation the fruits of an illegal search or seizure would not be excluded,[204] there

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199. For example, German police, without federal participation, might conduct a search based on less than probable cause and obtain evidence of both the German crime of heroin possession and the American crime of drug smuggling. Under German law a search conducted on the basis of mere suspicion is legal. *See* note 173 and accompanying text *supra.* The officials have conducted a search legal in Germany to enforce their local laws, and the knowledge that the evidence would be suppressed by a United States court would not deter their making the search without probable cause.

200. It is difficult to see how foreign officials would comply with the warrant requirement at all. As the law stands now, they might go through the cumbersome process of contacting a United States official who would, in turn, apply for the warrant.

201. 1 M.J. 334 (C.M.A. 1976). *See* pp. 703–05.

202. 1 M.J. at 338. *Cf.* People v. Kelley, 66 Cal. 2d 232, 250, 424 P.2d 947, 961, 57 Cal. Rptr. 363, 377 (1967) (in bank) (dictum) ("Where officials have secured evidence under procedures valid in their jurisdiction no deterrent purpose would be served by excluding the evidence when offered in another jurisdiction.")

203. *E.g.,* United States v. Morrow, 537 F.2d 120, 139–41 (5th Cir. 1976); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969).

204. Mr. Chief Justice Burger has noted that the exclusionary rule is "unique" to American jurisprudence. *See* Bivens v. Six Unknown Named Agents of the Fed.

would be little sense in the United States' vindicating the law of a foreign nation in a manner the foreign nation itself considered unsatisfactory. American courts would find themselves in the position of being "more Catholic than the Pope." Exclusion of evidence for breaches of foreign law by foreign agents would certainly not deter invasions of privacy and would inhibit the fact-finding process.

Applying the *Jordan* rule would create tremendous difficulties because American courts would have to determine whether a search or seizure abroad violated foreign law. Because the federal court would only be concerned about the admissibility of evidence under foreign law and not the legality of the act itself, the "act of state" doctrine would not preclude a federal court from independently evaluating the legality of the foreign search or seizure.[205] However, at least one of the rationales underlying the "act of state" doctrine is applicable to foreign searches and seizures: pronouncing a foreign search or seizure illegal might prove embarrassing to the executive branch if the foreign nation took offense.[206] Moreover, a federal

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Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J. dissenting). In its *Stonehill* case, the Philippine Supreme Court excluded the evidence. *See* p. 727 *infra*. *See* Stonehill v. Diokno, 20 Phil. Sup. Ct. 383 (1967). English and Scottish courts have discretion to exclude illegally obtained evidence. *See, e.g.*, Kurumu v. The Queen [1955]A.C. 197, 204 (dictum); Crook v. Duncun (1899), 1 Fraser (J) 56; Laurie v. Muir [1950] Just. Cas. 19; McGovern [1950] Just. Cas. 33. For a general discussion of how various countries deal with illegally seized evidence, see Symposium, *The Exclusionary Rule Regarding Illegally Seized Evidence*, 52 J. CRIM. L.C. & P.S. 245, 272-75 (1961).

205. The federal "act of state" doctrine requires that "'the courts of one country will not sit in judgement on the acts of the government of another done within its own territory.'" Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)). However, the effect of a foreign act of state may be limited when it involves interests localized outside of that country's territory. According to the *Restatement (Second) of Foreign Relations Law of the United States:*

> (1) The [act of state doctrine] does not prevent examination of the validity of an act of a foreign state with respect to a thing located, or an interest localized, outside of its territory if the act has not been fully executed in accordance with applicable law.
>
> (2) A court in the United States will give effect to an act of a foreign state of the type described in Subsection (1) only if to do so would be consistent with the policy and law of the United States.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43 (1965). *Cf., e.g.*, Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972) (expropriation of Cuban corporation by Cuban government does not affect rights of former owners with regard to assignment of United States trademark); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) (Iraqi confiscatory ordinance did not affect property in United States held by administrators of deceased Iraqi king because foreign act of state was inconsistent with policy and law of United States).

206. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-33 (1964).

court's lack of expertise in such matters suggests that it should decline to decide whether a foreign search was legal under local law. Finally, the court would have difficulties in obtaining adequate evidence, including testimony, concerning the legality of the foreign search and seizure.

Once a foreign court has resolved to suppress evidence seized by foreign authorities acting to enforce their own laws and without United States participation, however, it ought to be excluded by American courts. A federal court should not thwart a foreign jurisdiction's decision to exclude evidence, given the United States' own reliance on such a remedy to deter unlawful governmental conduct.[207] The United States court should accept its foreign counterpart's finding of illegality regardless of whether the foreign standards differ from those of the fourth amendment. If they reviewed such cases, federal courts would still be involved in matters of foreign law in which they are not expert and would run the risk that a contrary finding would cause considerable friction. Clearly, the notion of comity is at work here;[208] in return for suppressing evidence excluded in a foreign court, federal courts would hope that foreign courts applying an exclusionary rule would not accept evidence that had been suppressed in the United States. Without comity, fourth amendment sanctions could be circumvented, and the deterrence of illegal action by United States agents would be undermined.[209]

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207. *See New "Silver Platter" Doctrine, supra* note 26, at 302.

208. The principle of comity "is universally admitted among all civilized nations, and has grown out of mutual convenience which they experience from it." Banks v. Greenleaf, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959). *See* Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 (1797); Robinson v. Bland, 96 Eng. Rep. 129, 131 (K.B. 1760); Yntema, *The Comity Doctrine,* 65 MICH. L. REV. 1 (1966).

209. In Elkins v. United States, 364 U.S. 206 (1960), rather than discarding the "silver platter" rule altogether as applied to evidence seized by state officials, Mr. Justice Frankfurter in dissent suggested that the rule should be altered only for states with exclusionary rules of their own. Although *Elkins* totally abolished the "silver platter" rule for state searches and seizures, Mr. Justice Frankfurter's remarks shed some light on the analogous use in federal courts of evidence obtained in foreign searches and seizures in countries that maintain their own exclusionary rules:

> [A]lthough I find no good reason not to admit in federal courts evidence gathered by state officials in States which would admit the evidence, I would not admit such evidence in cases . . . where state courts, enforcing their exclusionary rules, have found their officers guilty of infractions of the rules properly regulating their conduct and have suppressed the evidence. . . . [I]t seems to me unseemly for a federal court not to respect the determination of a state court that its own officials were guilty of wrongdoing and not to support the State's policy to prevent those officials from making use through federal prosecution of the fruits of their wrongdoing.

Id. at 249–50.

United States courts embracing the "silver platter" rule with regard to searches or seizures by foreign authorities have not yet made a similar exception for cases in which a foreign court has excluded evidence. In *Stonehill*,[210] for example, Philippine police raids intended to gather evidence for the deportation of two United States citizens flagrantly violated a constitutional provision, borrowed directly from the United States' fourth amendment.[211] The Supreme Court of the Philippines excluded the evidence, observing: "To uphold the validity of the warrants in question would be to wipe out completely one of the most fundamental rights guaranteed by our Constitution."[212] Nevertheless, the Ninth Circuit upheld the admission of the evidence in the federal tax case brought against the two American citizens.[213] This holding undercuts the Philippines' policy of excluding such evidence. Arguably, Philippine police would be less reluctant to violate their own country's constitution if the illegally seized evidence may be used elsewhere to convict the victims of their illegal conduct. If the situation were reversed, United States judges would be justifiably upset to see evidence excluded by them used to convict wronged individuals in a foreign country. A loophole in constitutional protection would be created through which excluded evidence could be given to a foreign jurisdiction for use at trial.

Foreign Searches or Seizures That "Shock the Conscience"

Mr. Justice Holmes once said: "It is desirable that criminals should be detected, and to that end that all available evidence should be used."[214] The constitutional considerations attendant on an unreasonable search or seizure by a government official may outweigh this concern,[215] but no such considerations exist in a search or seizure by a foreign official. To take this policy to its logical extreme, however, would put courts in a difficult moral position. What if, for example, foreign officials seized contraband only after torturing a person to discover its location? Under the

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210. *See* pp. 697-99 *supra*.

211. PHIL. CONST. art. III, § 1(3). *See* Stonehill v. United States, 405 F.2d 738, 747 (9th Cir. 1968) (Browning, J., dissenting), *cert. denied*, 395 U.S. 960 (1969).

212. Stonehill v. Diokno, 20 Phil. Sup. Ct. 383, 392 (1967).

213. 405 F.2d 738, 746 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), *See* pp. 697-99 *supra*.

214. Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

215. *See id.* at 470-71.

common law doctrine, the contraband could be introduced into evidence in a federal court.[216]

Although courts have mentioned the possibility of rejecting evidence gathered in a foreign search or seizure in a manner that "shocks the conscience,"[217] none has yet found conduct on the part of a foreign official meeting the standard. However, courts have defined conduct that "shocks the conscience" in another context. In *Rochin v. California*,[218] three deputy sheriffs broke into the defendant's room, where they saw him swallow two capsules. The officers "jumped upon" the defendant to try to extract the capsules, then took him to a hospital where an emetic solution was forced into his stomach. In the vomited matter extracted by this procedure, two capsules which contained morphine were found. The Supreme Court held that this evidence should be suppressed. Mr. Justice Frankfurter, writing for the majority, stated that these measures constituted conduct that "shocks the conscience," were "close to the rack and the screw," and thus were "bound to offend even hardened sensibilities."[219] A later decision, *Irvine v. California*,[220] implied that only cases comparable to *Rochin* involving coercion, violence, or brutality to the person would warrant exclusion of the evidence.[221]

The Court of Appeals for the Second Circuit in the controversial *Toscanino*[222] case relied to some extent on *Rochin*, holding that "due process . . . now require[s] a court to divest itself of jurisdiction over

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216. The common law rule would permit introduction of evidence that is otherwise reliable such as contraband but exclude a confession extracted by torture as incompetent on the grounds of untrustworthiness. *See, e.g.*, Bram v. United States, 168 U.S. 532, 542-48 (1897).

217. United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); United States v. Cotrani, 527 F.2d 708, 712 n.10 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); Brennan v. University of Kan., 451 F.2d 1287, 1290 (10th Cir. 1971); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971), *cert. denied*, 404 U.S. 102 (1972); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Stonehill v. United States, 405 F.2d 738, 745 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965); United States v. Jordan, 1 M.J. 334, 338 (C.M.A. 1976).

218. 342 U.S. 165 (1952).

219. *Id.* at 172.

220. 347 U.S. 128 (1954).

221. *Id.* at 133. *Cf.* Schmerber v. California, 384 U.S. 757, 779 (1966) (Fortas, J., dissenting) (blood sample taken from alleged drunken driver without consent; "[T]he State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence."); Breithaupt v. Abram, 352 U.S. 432, 435-38 (1957) (blood sample taken from alleged drunken driver without consent).

222. *See* note 2 *supra*.

the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[223] In *Toscanino,* the defendant claimed he was kidnapped in Uruguay by foreign agents paid by the United States government and was taken to Brazil. He was allegedly tortured by local police and drugged by Brazilian-American agents, with the implicit consent of federal officials. He was later flown to New York to stand trial. In a later case, *United States* ex rel. *Lujan v. Gengler,*[224] the Second Circuit restricted the *Toscanino* holding to cases in which American and foreign agents secure the presence of a defendant in the United States "by the use of torture, brutality and similar outrageous conduct."[225] The *Lujan* court recognized that it was the physical abuse suffered by Toscanino, and not the mere illegality of the action or the fact that the defendant was forcibly abducted, that rendered this conduct violative of due process. Without the element of brutality, such action does not "shock the conscience" and will not bar the defendant's subsequent prosecution.

The "shock the conscience" standard of *Rochin* and *Toscanino* was applied when there was federal or state governmental action, and there are difficulties in extending it to cases dealing with searches and seizures wholly conducted by and for foreign governments. As the Supreme Court has observed: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[226] Thus, the federal courts will not interfere with the decision of the executive branch to permit extradition of Americans for offenses committed in foreign countries in which they might receive few of the protections considered fundamental in this country.[227] Yet, there must be limits to this general policy of judicial disregard of the acts of foreign sovereignties. For example, a court should not permit extradition to a country where the penalty for larceny is amputation of a limb lest it appear to be condoning such an inhumane punishment.[228]

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223. 500 F.2d 267, 275 (2d Cir. 1974).

224. 510 F.2d 62 (2d Cir. 1975). *See* note 2 *supra.*

225. *Id.* at 65.

226. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812), *cited with approval in* Wilson v. Girard, 354 U.S. 524, 529 (1957) & Holmes v. Laird, 459 F.2d 1211, 1216 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972).

227. Holmes v. Laird, 459 F.2d 1211, 1217-19 (D.C. Cir.), *cert. denied,* 409 U.S. 869 (1972).

228. After stating that the legal produres to be used by the extraditing country have not ordinarily been reviewed by the federal courts, a unanimous court added,

Although courts have not explained the doctrinal basis for the "shock the conscience" doctrine in foreign search and seizure cases, such a fear of condoning inhumane practices must be operating. In truly unconscionable cases, accepting the evidence would be, in Mr. Justice Frankfurter's words, "to afford brutality the cloak of law."[229] Certainly other countries might not afford defendants the same degree of protection of individual privacy as the fourth or the fourteenth amendment, but the mere fact that the search was conducted under another country's standards does not warrant exclusion. Only the existence of physical brutality by foreign officials outweighs the need for probative evidence. Suppression of the evidence thus acquired is the appropriate means of demonstrating the court's disapproval of such conduct and avoiding the appearance of acquiescence. To exclude the evidence, "the procedure followed in executing [the] search [must be] so shocking to the forum community that it cannot be countenanced."[230]

Federal courts do have the power to exclude evidence even though no constitutional violation is involved. As the Fifth Circuit observed, a federal court, in the exercise of its supervisory powers over the administration of federal justice, might exclude the fruits of a foreign search or seizure that "shocked the conscience."[231] The Supreme Court explained this supervisory power in *McNabb v. United States*:[232]

> The principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, this Court has, from the very beginning of

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"We can imagine situations where the [person being extradited], upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require reexamination of the principle set out above." Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) (dictum).

229. Rochin v. California, 342 U.S. 165, 173 (1952).

230. Brennan v. University of Kan., 451 F.2d 1287, 1290 (10th Cir. 1971). *Cf.* Cooley v. Weinberger, 518 F.2d 1151, 1155 (10th Cir. 1975) (although Iranian procedures were not consistent with due process protections guaranteed in United States criminal proceedings, Iranian judgment recognized because foreign procedure was not "shocking to the forum community"); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 93 (1971) (evidence not excluded because obtained by "methods of interrogation of another country, at least equally civilized" as those of United States — Canada — and in manner that was not shocking).

231. Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965). *See* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

232. 318 U.S. 332 (1943).

its history, formulated rules of evidence to be applied in federal criminal prosecutions.[233]

Although *McNabb* dealt with activity illegal under a federal statute, the Court's general approach to the responsibility of federal courts for supervising the administration of criminal justice in the cases before them "implies the duty of establishing and maintaining civilized standards of procedure and evidence" that go beyond "observance of those minimum historic safeguards for securing trial by reason which are summarized as 'due process of law.' "[234] Thus, federal courts do in fact have a basis and rationale for excluding evidence from a foreign search and seizure conducted in a manner that "shocks the conscience."

CONCLUSION

As has been shown, the courts that have attempted to deal with the problems of federal involvement in ostensibly foreign searches and seizures have sidestepped many of the salient issues. In the modern world, constitutional protections must not vanish as soon as a person — whether or not an American citizen — leaves the United States. After all, the Constitution circumscribes governmental authority no matter where exercised.

Before the protections embodied in the fourth amendment were extended to actions by state officials, federal courts designed strict rules to insure that agents of the state did not conduct activities on behalf of federal officials that fell below constitutional norms. While acknowledging these standards, courts dealing with foreign searches and seizures have failed to apply the "bright line" test envisioned by these earlier federal-state cases; they have tolerated a certain degree of federal participation in a foreign search or seizure without applying constitutional safeguards. But once the Constitution has been breached — no matter to what degree — certain consequences such as exclusion of evidence, tort liability, or injunctive relief must come into play.

Because courts have rarely found a foreign search or seizure susceptible to constitutional safeguards, the technical details of their application have not yet emerged. It appears that courts have an inherent power to issue warrants or, possibly, to accept warrants issued by a foreign magistrate that would meet fourth amendment

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233. *Id.* at 341 (citation omitted); *accord,* Elkins v. United States, 364 U.S. 206, 216 (1960).

234. 318 U.S. at 340; *accord,* Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting). *See* Schrock & Welsh, *supra* note 97, at 282-87.

standards. Because this area remains murky, however, legislation would be helpful.

On strictly constitutional grounds, there exists no acceptable rationale for rejecting evidence offered by foreign officials who have acted, at least in part, to enforce foreign law without United States participation. However, on the basis of two non-constitutional doctrines frequently applied in other contexts, some of this evidence might be excluded. First, when a foreign court itself excludes the evidence, United States courts should, as a matter of comity, not admit the evidence. Second, when the evidence has been obtained in a manner that "shocks the conscience," the United States courts should not admit the fruits of the search or seizure. The mere fact that foreign police might search on the basis of criteria different than those in the United States is no reason to exclude evidence. But when physical brutality is involved, federal courts should not appear to countenance such behavior.

Although courts have had relatively little experience in dealing with searches and seizures abroad, there are indications that the number of such cases will increase. Of the leading cases to date, almost all have occurred in the last fifteen years. Because international travel and commerce have become commonplace, cooperation between national law enforcement agencies is a necessity and federal courts will therefore undoubtedly be confronted with the problems raised by foreign searches and seizures with greater frequency in the future.