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Evidence Seized in Foreign Searches: When Does the Fourth Amendment Exclusionary Rule Apply?

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EVIDENCE SEIZED IN FOREIGN SEARCHES: WHEN DOES THE FOURTH AMENDMENT EXCLUSIONARY RULE APPLY?

As travel abroad increases, encounters with foreign governmental authorities also increase. Although most encounters are benign, many occur in criminal settings, yielding evidence that may be used against American citizens in subsequent prosecutions within the United States. Consequently, American courts must often determine whether the fourth amendment to the United States Constitution requires the exclusion of evidence seized by foreign officials.

This Note examines the application of the fourth amendment exclusionary rule to evidence seized in foreign searches. The Note reviews the history of the exclusionary rule and explores the current practice of federal courts regarding evidence seized by foreign officials. The Note then proposes an integral-part test that requires courts to exclude evidence when domestic officials play an integral part in a foreign search and seizure. The integral-part test furthers the purpose of the exclusionary rule by deterring collusion between American and foreign officials who otherwise might conduct unconstitutional searches of United States citizens.

THE EXCLUSIONARY RULE

The fourth amendment to the United States Constitution states that

> 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.[1]

In *Weeks v. United States*,[2] the United States Supreme Court es-

1. U.S. CONST. amend. IV.
2. 232 U.S. 383 (1914).

tablished the exclusionary rule, which prohibits the introduction of evidence obtained in violation of the fourth amendment. In *Weeks*, a United States marshall, who did not have a search warrant, seized various items from the defendant's home.[3] The defendant petitioned the trial court for the return of the seized property,[4] and the court ordered the prosecution to return any property that was not relevant to the issues at trial.[5] The court admitted into evidence the retained property, despite the defendant's objections.[6] The Supreme Court ruled that the trial court, by permitting the prosecution to retain the property and use it against the defendant, committed prejudicial error because the seizure of the evidence violated the fourth amendment.[7]

The Exclusionary Rule and its Rationale

Commentators have suggested three theories to support the exclusionary rule:[8] personal-right; judicial-integrity; and deterrence. The personal-right theory states that the fourth amendment requires the exclusion of unconstitutionally obtained evidence. Thus, if government officials seize evidence from a defendant in violation of the fourth amendment, the defendant has a constitutional right

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3. *Id.* at 386.

4. *Id.* at 387-88.

5. *Id.* at 388.

6. *Id.* The defendant based his objections on the fourth and fifth amendments.

7. *Id.* at 398. *Weeks* was not the first case in which the Supreme Court used the fourth amendment as a basis for excluding evidence from trial. In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court reversed a judgment of forfeiture against the defendants because the trial court, over the objections of the defendants, ordered the production of an invoice that was used against the defendants at trial. Failure by the defendants to produce the invoice would have resulted in an admission of the prosecution's charges. *Id.* at 618. The Supreme Court held that the compulsory production of the invoice and the government's use of it against the defendants violated the fourth and fifth amendments. *Id.* at 638. Thus, although the Supreme Court did not announce the exclusionary rule in *Boyd*, the Court did lay the foundation for the rule. *See generally* W. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 1-219 (1978); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 WASH. U.L.Q. 621.

8. *See* Geller, *supra* note 7, at 640-56; Note, *The Fourth Amendment Exclusionary Rule: Past, Present, No Future*, 12 AM. CRIM. L. REV. 507, 508-17 (1975). *But see* Schlesinger & Wilson, *Property, Privacy and Deterrence: Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225 (1980) (contending that the Supreme Court in *Weeks* based the exclusionary rule on notions of property, and urging a return to a property-based notion of the exclusionary rule.).

to have the evidence excluded from trial. The case law offers some support for this theory. In *Weeks*, the Supreme Court stated that "there was involved in the order refusing the [defendant's] application [for the return of his property] a denial of the constitutional rights of the accused. . . ."[9] In *Olmstead v. United States*,[10] the Supreme Court reaffirmed its support for the personal-right theory, declaring that "[t]he striking outcome of the Weeks Case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment." In *Mapp v. Ohio*,[11] the Court concluded that the "Weeks rule is of constitutional origin," but the Court reversed itself in *Stone v. Powell*,[12] stating that "[p]ost-*Mapp* decisions have established that the rule is not a personal constitutional right."

The second theory of the exclusionary rule suggests that the rule preserves judicial integrity.[13] If the courts admitted evidence seized in violation of the fourth amendment, they would appear to be condoning unconstitutional conduct by government officials. Admission of such evidence would impair the courts' ability to administer justice because citizens would perceive that courts were unjust. Therefore, to promote public confidence in the judicial system and to preserve the courts' ability to administer justice, courts must exclude evidence seized in violation of the fourth amendment. In *Weeks*, the Supreme Court reasoned that "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[14] In *Olmstead*, Justice Brandeis expounded the theoretical and practical reasons that support the judicial-integrity

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9. 232 U.S. at 398.

10. 277 U.S. 438, 462 (1928).

11. 367 U.S. 643, 649 (1961).

12. 428 U.S. 465, 486 (1976).

13. *See generally* Henderson, *Justice in the Eighties: The Exclusionary Rule and the Principle of Judicial Integrity*, 65 JUDICATURE 354 (1982).

14. 232 U.S. at 394. For arguments that the preservation of judicial integrity was the original basis of the exclusionary rule, see Henderson, *supra* note 13, at 354. *See also* Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 142-43 (1978).

theory:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[15]

In *Stone*, however, the Court downplayed the importance of the judicial-integrity theory as a justification for the exclusionary rule.[16]

Deterrence of unconstitutional police conduct supports the third theory of the exclusionary rule.[17] The deterrence theory posits that, by excluding evidence seized in violation of the fourth

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15. 277 U.S. at 485 (Brandeis, J., dissenting). Justice Holmes further explained how unlawful police activity implicated the courts:

> 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 (Holmes, J., dissenting).

16. The Supreme Court stated that "[a]lthough our decisions often have alluded to the 'imperative of judicial integrity,' . . . they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context." 428 U.S. at 485 (citations omitted).

17. The Court first mentioned deterrence of unconstitutional police conduct as a possible rationale for the exclusionary rule in Wolf v. Colorado, 338 U.S. 25 (1949). Holding that the exclusionary rule did not apply to evidence that was seized by state officials and used in state prosecutions, the Supreme Court declared:

> Granting that in practice the exclusion of evidence may be an effective way of *deterring* unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.

Id. at 31 (emphasis added).

In Elkins v. United States, 364 U.S. 206 , 217 (1960), the Court explicitly adopted the deterrence theory by declaring that "[t]he rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." The Court did not propose that deterrence was the sole purpose of the exclusionary rule; it noted that the rule also preserved judicial integrity. *Id.* at 222.

amendment, courts will discourage the police from engaging in unconstitutional conduct.[18] The Supreme Court currently has adopted the deterrence theory. In *United States v. Janis*,[19] the Court announced that its decisions had "established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' "

The Exclusionary Rule and Foreign Searches

The exclusionary rule applies to evidence seized by federal officials[20] or state officials[21] during domestic searches. The rule also applies to evidence seized by domestic officials when they act against United States citizens abroad.[22] Conversely, the exclusionary rule does not apply to evidence seized by foreign officials because the United States Constitution does not protect United States citizens from the actions of foreign officials.[23] Therefore, regardless of the theory underlying the exclusionary rule—personal-right, judicial-integrity, or deterrence—evidence seized independently by foreign officials need not be excluded.[24] In fact, the Su-

18. For criticism of the exclusionary rule's effectiveness as a deterrent device, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Schlesinger, *The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?*, 62 JUDICATURE 404 (1979); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973). *But see* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U.L. REV. 740 (1974).

19. 428 U.S. 433, 446 (1976) (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

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

21. Mapp v. Ohio, 367 U.S. 643 (1961).

22. Reid v. Covert, 354 U.S. 1 (1957). The Court reasoned that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.* at 6.

23. United States v. Toscanino, 500 F.2d 267, 280 n.9 (2d Cir. 1974); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965). *See also* Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741, 746 (1980).

24. The personal-right theory of the exclusionary rule protects a citizen from unconstitutional searches and seizures by those officials sworn to uphold the United States Constitution. Foreign officials, of course, are not so sworn. The personal-right theory, therefore, is inapplicable to searches and seizures conducted by foreign officials. The admission of evi-

preme Court has stated that "[i]t is well established . . . that the exclusionary rule . . . is not applicable where . . . a foreign government commits the offending act."[25]

In determining the admissibility of evidence seized by foreign officials, the lower federal courts have heeded the Supreme Court's admonition in *United States v. Calandra*[26] that the exclusionary rule applies only when the deterrent purpose of the rule is "most efficaciously served." The courts have concluded that the exclusion of evidence seized by foreign officials ordinarily would not further the policy of deterrence.[27] The courts reason that the fourth amendment does not, by its terms, require exclusion of evidence obtained in violation of its provisions.[28] Rather, the exclusionary rule is a judicially created prophylactic policy designed to deter unconstitutional conduct by domestic officials. Because American courts cannot force foreign officials to abide by the United States Constitution, exclusion of evidence seized by foreign officials would serve no deterrent purpose.

Federal courts will exclude evidence seized by foreign officials, however, if domestic officials sufficiently participated in the foreign search or if foreign officials acted as agents of the United States government in conducting the search.[29] The courts invoke the ex-

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dence seized by foreign officials also does not impair judicial integrity because no unconstitutional conduct has occurred. *See supra* notes 13-16 and accompanying text. Similarly, because American courts have no authority over foreign officials, a refusal to admit evidence seized by foreign officials would not deter their activity. *See supra* notes 18-19 and accompanying text.

25. United States v. Janis, 428 U.S. 433, 455 n.31 (1976).

26. 414 U.S. 338, 348 (1974).

27. *See* United States v. Marzano, 537 F.2d 257, 271 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); United States v. Cotroni, 527 F.2d 708, 712 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969). *See also* Comment, *The Applicability of the Exclusionary Rule to Evidence Seized and Confessions Obtained in Foreign Countries*, 16 COLUM. J. TRANSNAT'L L. 495, 496 (1977); Note, *The Fourth Amendment Abroad: Civilian and Military Perspectives*, 17 VA. J. INT'L L. 515, 523 (1977).

28. The personal-right theory challenges this premise. *See supra* text accompanying notes 8-12.

29. *See* Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966). In *Powell*, agents of the Air Force Office of Special Investigations (OSI), in cooperation with Japanese officials, searched Powell's off-base apartment. *Id.* at 639. The Japanese search warrant did not comport with the constitutional requirements of domestic search warrants. *Id.* at 640. United States offi-

clusionary rule under these circumstances because the effect of the search is the same as if domestic officials had conducted the search themselves. Consequently, exclusion of the improperly obtained evidence deters unconstitutional conduct by domestic officials who act against United States citizens abroad.

Courts also exclude evidence when the circumstances surrounding a foreign search shock the judicial conscience.[30] The shocking-conduct rule is founded on the supervisory power of the federal courts over the administration of justice, a power that arises from the need to preserve judicial integrity.[31] In *McNabb v. United*

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cials used the evidence against Powell, resulting in his discharge from civilian employment with the Air Force. *Id.* at 639. The United States Court of Appeals for the District of Columbia Circuit held that the trial court should have excluded the evidence because "OSI agents [had] requested the search and actually conducted it." *Id.* at 640. *See also* United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972). *But see* United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975). In *Mundt*, the United States Court of Appeals for the Tenth Circuit stated that "[t]he test, according to our view, is not whether American officers have played a substantial role in events leading up to the arrest." *Id.* at 907. The court emphasized that the American agent was "merely coordinating with the foreign officers and was not at that time seeking evidence for use in an American case." *Id.* at 906. The court also noted that the investigative efforts of the foreign police led to an independent prosecution. *Id.* at 907. Apparently, under the Tenth Circuit's analysis, if an American official does not intend to use the evidence in future litigation in a United States court, and if the foreign officials have their own reasons for conducting the search, the extent of the American official's participation is irrelevant and a court may admit the evidence. For a discussion of *Mundt* see Saltzburg, *supra* note 23, at 762-64. *See also* Comment, *supra* note 27 at 507-08.

30. The exclusion of evidence because of the shocking conduct of the officials who seized it originated in Rochin v. California, 342 U.S. 165 (1951). In *Rochin*, the defendant was convicted for possessing morphine. *Id.* at 166. Two morphine pills introduced as evidence were obtained by forcing an emetic solution into the defendant's stomach to induce vomiting. *Id.* The United States Supreme Court stated that the "proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.* at 172. *See also* United States v. Hawkins, 661 F.2d 436, 456 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981); Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); United States v. Rose, 570 F.2d 1358, 1362 (9th Cir. 1978); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977). *See generally* Comment, *supra* note 27, at 514-19.

31. *See supra* note 30 and cases cited therein. *See generally* Recent Development, *Exclusion of Evidence Under the Supervisory Power* 66 CORNELL L. REV. 382 (1981).

States,[32] the Supreme Court asserted that courts should not be implicated in unlawful conduct by federal officials. Justice Brandeis expressed a similar sentiment in *Olmstead* when he stated that the theory of judicial integrity is a justification for the exclusionary rule.[33] Thus the theory of judicial integrity is a basis for the shocking-conduct rule.

The judicial-integrity justification fails, however, when applied to foreign searches. Judicial integrity is impaired only when the courts are implicated in unconstitutional conduct. A foreign official acting in his own country is incapable of engaging in conduct that violates the United States Constitution.[34] Therefore, the admission of evidence independently seized by foreign officials does not impair a court's judicial integrity, regardless of the shocking circumstances surrounding the seizure.[35] Because the judicial-integrity theory does not support application of the shocking-conduct rule to actions by foreign officials, a court in the United States could admit evidence obtained by foreign officials without impairing its integrity.

Another justification for the shocking-conduct rule is that it ensures the reliability of evidence.[36] Courts should view with suspicion any evidence obtained under circumstances that shock the conscience because evidence obtained by coercion or duress is often unreliable. The reliability rationale is valid when applied to confessions, but fails when applied to physical evidence.[37] If foreign officials seize contraband through coercive means, the coercion

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32. 318 U.S. 332, 347 (1943). In *McNabb*, the police questioned the defendants for two days without allowing the defendants to see a lawyer. *Id.*

33. *See supra* text accompanying note 15.

34. *See supra* note 24.

35. *But see* United States v. Jordan, 23 C.M.A. 525, 1 M.J. 145 (1975), *modified*, 24 C.M.A. 156, 1 M.J. 334 (1976). In *Jordan*, the court observed that "[i]t is American judicial power that is being exerted against [the defendant] and in such a case, it is by American constitutional standards that he should be judged." 23 C.M.A. at 527, 1 M.J. at 149. The court also noted that the defendant's status as a United States serviceman ordered overseas demanded significant solicitude for his fourth amendment rights. *Id.* On the government's petition for reconsideration, the court cited the deterrent purpose of the exclusionary rule as the basis for its decision. 24 C.M.A. at 157, 1 M.J. at 336. For a discussion of *Jordan*, see Note, *supra* note 27.

36. Saltzburg, *supra* note 23, at 765 n.125.

37. In Rochin v. California, 342 U.S. 165, 173 (1951), however, the Supreme Court rejected the distinction between oral and physical evidence.

does not affect the reliability of the evidence. The contraband speaks for itself. If, on the other hand, foreign officials force a person to admit that he previously possessed contraband, the reliability of the statement is suspect. The reliability rationale, therefore, justifies the shocking-conduct rule only when applied to confessions.

Courts rarely invoke the shocking-conduct rule to exclude evidence seized by foreign officials because the courts have been unwilling to find anything less than torture shocking as a matter of law.[38] When courts have invoked the shocking-conduct rule, United States officials usually have participated in the shocking conduct.[39] Moreover, the shocking-conduct rule has no logical or constitutional basis when the issue concerns tangible evidence seized by foreign officials acting independently.[40] Consequently, when intangible evidence seized by foreign officials is the object of a suppression motion, courts should determine whether sufficient participation by domestic officials exists to apply the exclusionary rule.

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38. *Compare* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) *with* United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). The two cases arose out of a conspiracy to import heroin. In *Toscanino*, foreign authorities denied the defendant sleep and food for days at a time. They kicked, beat, and otherwise physically abused the defendant before returning him to the United States for trial. 500 F.2d at 270. The United States Court of Appeals for the Second Circuit held that "a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here." *Id.* at 276. The court added that "[w]e could not tolerate such an abuse without debasing 'the processes of justice.'" *Id.* In *Lujan*, the defendant merely charged that the "law was violated" during the process of bringing him into the United States. 510 F.2d at 66. The Second Circuit in *Lujan* declared that "not every violation by prosecution or police is so egregious that *Rochin* and its progeny requires nullification of the indictment." 510 F.2d at 66.

39. For example, in *Toscanino* some of the foreign officials were paid agents of the United States government. 500 F.2d at 269. American officials were aware of the interrogation, received progress reports and, at one point, participated in the interrogation. *Id.* at 270.

40. *See* Saltzburg, *supra* note 23, at 775. Saltzburg suggests that the courts could exclude evidence that police procured in violation of "fundamental international norms of decency." *Id.* Exclusion would demonstrate that "no civilized nation should countenance violations of fundamental human rights." *Id.* The role of the courts in the United States, however, is not to enforce fundamental international norms of decency. The courts should interpret and apply domestic law. If exclusion has no basis in the applicable law, then the courts should not exclude relevant evidence.

Because the United States Supreme Court has not decided when a domestic official's participation in a foreign search is sufficient to invoke the exclusionary rule, lower courts have had to reason by analogy. Some courts have relied on earlier Supreme Court decisions involving the participation of federal officials in state searches.[41] Prior to *Wolf v. Colorado*,[42] the Court had not applied the fourth amendment to searches conducted by state, rather than federal, officials. When the Supreme Court announced the exclusionary rule in *Weeks v. United States*,[43] the Court limited application of the rule to searches conducted by federal officials. This limitation encouraged federal officials to seek the aid of state officials in conducting searches and seizing evidence, thereby subverting the exclusionary rule. Participation by federal officials transformed a state search into a federal undertaking, however, thus violating the fourth amendment.

Searches conducted by foreign officials are analogous to pre-*Wolf* searches conducted by state officials because foreign officials are not subject to the fourth amendment.[44] Consequently, some courts have applied the analysis developed in the pre-*Wolf* cases to searches conducted by foreign officials.

In *Byars v. United States*,[45] the Supreme Court invoked the exclusionary rule to exclude evidence seized by state officials. In *Byars*, local police officials requested that a federal agent participate in a search of the defendant's home.[46] The federal agent searched

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41. *See infra* notes 45-68 and accompanying text.

42. 338 U.S. 25 (1949). In *Wolf*, the Supreme Court held that the fourth amendment bound the states as well as the federal government. The Court did not extend the exclusionary rule to evidence seized by state officials and used in state prosecutions, however. The Court declared that freedom from arbitrary intrusions by the police was a basic right in a free society, but added that "the ways of enforcing such a basic right raise questions of a different order." *Id.* at 28. The court observed that the exclusionary rule was only one method of enforcing the fourth amendment, and that the states might find other methods. *Id.* at 31.

43. 232 U.S. 383, 398 (1914).

44. *But see* Saltzburg, *supra* note 23, at 769. Saltzburg argues that the utility of this analogy is limited because the pre-*Wolf* position of state governments and the contemporary status of foreign governments are not analogous.

45. 273 U.S. 28 (1927).

46. *Id.* at 30.

the house with the police, seized some evidence, and received additional evidence seized by the local police.[47] Although the state search warrant was defective by fourth amendment standards, the federal district judge admitted the evidence and found the defendant guilty of violating federal prohibition laws.[48]

The Supreme Court reversed, finding that "the search in substance and effect was a joint operation of the local and federal officers."[49] Because the search was a joint operation, "the effect [was] the same as though [the federal agent] had engaged in the undertaking as one exclusively his own."[50] Even though the search was ostensibly conducted by state officials, the federal agent's participation justified application of the exclusionary rule. The Court added, however, that it did not "question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely on their own account."[51] Thus, if the local police had conducted the search for their own reasons and had given the evidence to federal officials to use in a federal prosecution, the Court would not have excluded the evidence.

Shortly after *Byars*, the Court again considered the applicability of the exclusionary rule to evidence seized by state officials. In *Gambino v. United States*,[52] two New York state troopers arrested the defendants and, without a warrant, seized liquor from the defendants' vehicle. The state troopers delivered the liquor to federal officials, who prosecuted the defendants for violating the National Prohibition Act.[53] Even though no federal officer participated in the search of the defendants' vehicle, the Supreme Court reversed the convictions.[54]

The Court noted that the state troopers had not acted at the direction of federal officers, and that federal officials had not attempted to circumvent the exclusionary rule.[55] In holding that the

47. *Id.* at 31.
48. *Id.* at 29.
49. *Id.* at 33.
50. *Id.*
51. *Id.* This is basically a statement of the silver platter doctrine. *See infra* note 68 and accompanying text.
52. 275 U.S. 310 (1927).
53. *Id.* at 313.
54. *Id.* at 319.
55. *Id.* at 316.

trial court should have excluded the evidence, however, the Court took judicial notice "that the state troopers believed that they were required by law to aid in enforcing the National Prohibition Act, and that they made this arrest, search, and seizure, in performance of that supposed duty, solely for the purpose of aiding in the federal prosecution."[56] Admission of the evidence in the federal prosecution violated the defendants' fourth amendment rights because "[t]he wrongful arrest, search and seizure were made solely on behalf of the United States."[57] Thus, the trial court should have excluded the evidence because the state troopers seized the evidence while acting as agents of the federal government.

The development of the law pertaining to federal participation in searches conducted by state officials culminated in *Lustig v. United States*.[58] In *Lustig*, a Secret Service agent informed local police that he believed the defendants were engaged in suspicious activity in their hotel room. The local police searched the room for evidence of violations of local law.[59] The local police found evidence of counterfeiting, the activity that the federal agent had suspected. The federal agent went to the hotel room and inspected the evidence.[60] The local police gave all of the seized items to the federal agent, and federal authorities used the evidence to convict the defendants.[61] The Supreme Court subsequently reversed the convictions.[62]

The Court recognized that the federal agent did not request or instigate the search, and that the local police did not undertake the search to enforce federal law.[63] Nevertheless, the Court held that the trial court should have excluded the evidence because a "search is a functional, not merely a physical, process."[64] The Court reasoned that the search was a federal search subject to the

56. *Id.* at 315.
57. *Id.* at 316.
58. 338 U.S. 74 (1949).
59. *Id.* at 76. Local law required "known criminals" to register with local police within 24 hours of arriving in the jurisdiction. *Id.*
60. The secret service agent had waited at police headquarters during the search because he "was curious to see what [the police] would find." *Id.* at 77.
61. *Id.* at 75.
62. *Id.* at 80.
63. *Id.* at 78.
64. *Id.*

prohibitions of the fourth amendment because the federal agent's participation could not be severed from the rest of the search.[65] Under the Court's analysis, whether the federal agent originated the search or joined in later was immaterial. As long as he joined the search before the accomplishment of the search's purpose, the Court would find that he had participated.[66]

Reaffirming the principle developed in *Byars*, the Supreme Court declared in *Lustig* that "[t]he crux of [the *Byars*] doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to federal officials on a silver platter."[67] In *Lustig*, the federal authorities could have used the evidence of counterfeiting if the local police had searched the defendants' hotel room without the federal agent's participation. Consequently, after *Lustig* federal authorities were free to use evidence seized by state authorities and gratuitously turned over to federal officials on a "silver platter."[68]

In *Byars*, *Gambino*, and *Lustig*, the Supreme Court delineated the circumstances under which evidence seized by state officials would be subject to the exclusionary rule. If federal officials participated in a state search or if state officials acted as agents of the federal government when conducting a search, federal courts would exclude the evidence. These are the precise circumstances under which the federal courts now exclude evidence seized by foreign officials. The courts have adopted the silver platter doctrine, either explicitly[69] or implicitly,[70] because foreign officials are not subject

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65. *Id.*

66. *Id.* at 79. The Court continued: "[t]he decisive factor in determining the applicability of the *Byars* case is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means." *Id.*

67. *Id.* at 78-79.

68. The Supreme Court later rejected the silver platter doctrine in the federal-state context in Elkins v. United States, 364 U.S. 206 (1960), citing Wolf v. Colorado, 338 U.S. 25 (1949), which had made the fourth amendment applicable to the states. The silver platter doctrine was based on the theory that a jurisdiction not subject to the fourth amendment could violate constitutional standards and voluntarily provide admissible evidence to a jurisdiction subject to the fourth amendment. Thus, the Court reasoned that *Wolf* removed the underpinning of the silver platter doctrine. The silver platter doctrine is still applicable in the context of foreign searches, however, because foreign officials are not subject to the fourth amendment.

69. *See* Stonehill v. United States, 405 F.2d 738, 743-46 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

70. *See* United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956

to the fourth amendment's prohibition against unreasonable searches and seizures. Like state officials prior to *Elkins v. United States*, [71] foreign officials can violate constitutional standards and provide domestic officials with evidence that will be admissible against the defendant in a domestic prosecution.[72] Therefore, the silver platter doctrine remains a viable method for determining the admissibility of evidence seized by foreign officials.

THE INTERNATIONAL SILVER PLATTER DOCTRINE

Federal courts are reluctant to apply the exclusionary rule to evidence seized by foreign officials[73] because exclusion rarely serves the primary purpose of the exclusionary rule, which is to deter unconstitutional conduct by domestic officials. Consequently, without a significant degree of participation by domestic agents in a foreign search, courts in the United States will not exclude evidence seized by foreign officials.[74] By requiring significant participation by domestic officials, the courts assure that the exclusion of evidence will deter unconstitutional conduct. The courts, however, have overlooked vital principles underlying the silver platter doctrine. Moreover, by requiring significant participation by domestic officials in foreign searches, the courts have failed to protect American

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(1977). The Fifth Circuit in *Morrow* did not refer explicitly to any of the pre-*Wolf* silver platter cases. The court noted, however, that evidence seized by foreign officials would be excluded by courts in the United States if United States agents had participated in the foreign search, or if foreign officials acted as agents of the United States government in seizing the evidence. *Id.* at 139.

71. 364 U.S. 206 (1960). *See supra* note 68.

72. *See supra* notes 23-24 and accompanying text.

73. *See supra* notes 26-28 and accompanying text.

74. *See* Marzano v. United States, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (FBI agents requested that the Grand Cayman Island police conduct a search for the defendants, were present when the police searched the defendants, and helped catalogue the items seized); United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975) (DEA agent helped Peruvian agents plan a search and seizure, monitored the room where the drug transaction occurred, and field-tested the drugs seized from the defendant); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969) (IRS agent in the Philippines helped plan a search of the defendants' business, was present during the police search, indicated additional areas to be searched, and inspected documents seized on the premises). *See generally* Comment, *supra* note 27, at 502-10.

citizens from attempts by domestic officials to circumvent the fourth amendment.

Stonehill v. United States

The leading case on the international silver platter doctrine, *Stonehill v. United States*,[75] exemplifies the weaknesses of the judicial analysis used to decide whether to exclude evidence seized by foreign officials. In *Stonehill*, a former employee of the defendants provided information to an Internal Revenue Service (IRS) representative stationed abroad. The information indicated that the defendants might be liable for back taxes.[76] The IRS agent referred the employee to Philippine officials who were conducting an investigation of the defendants.[77] Subsequently, the Philippine authorities decided to search the business premises of the defendants.[78]

Some of the preparations for the search occurred in the IRS agent's home, and he suggested including an additional building in the search.[79] During the search, IRS agents complied with a request by Philippine officials for assistance in the selection of significant records.[80] They also directed the Philippine authorities to a storage room that had been overlooked.[81] The Philippine officials gave some of the seized records to the IRS agents, and a tax fraud investigation ensued.[82]

The United States government used the records to establish tax assessments against the defendants.[83] At trial, the defendants unsuccessfully sought to suppress the evidence seized by the Philippine authorities. The defendants argued that the court should exclude the evidence because United States officials had participated in a search that would have violated the fourth amendment if con-

75. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).
76. *Id.* at 740.
77. *Id.* at 741.
78. *Id.*
79. *Id.*
80. *Id.* at 742.
81. *Id.*
82. *Id.*
83. *Id.*

ducted in the United States.[84] The trial court denied the defendants' motion to suppress the evidence, and the Ninth Circuit affirmed.[85]

The Ninth Circuit noted that evidence seized by foreign officials in a foreign jurisdiction generally was not subject to the exclusionary rule.[86] The court then defined the degree of participation by domestic agents in a foreign search required to invoke the exclusionary rule: a court should exclude evidence seized by foreign officials only if participation by domestic agents was so substantial that the search was a "joint venture" between the domestic agents and the foreign officials.[87] The Ninth Circuit concluded that the IRS agents' participation in the unlawful search was insufficient to make the search a joint venture.[88]

In adopting the joint venture standard in *Stonehill*, the Ninth Circuit relied on *Byars*, *Gambino*, and *Lustig*. Although the court drew the "joint venture" language from *Byars*,[89] the court misinterpreted *Byars* and its progeny. The dissent in *Stonehill* noted that the Supreme Court in *Byars* did not establish a joint venture standard for determining whether to exclude evidence seized in a state search; "joint venture" was merely the Supreme Court's description of what had transpired.[90]

Even more significant than the court's misreading of *Byars* was its disregard of the principles enunciated in *Lustig*.[91] *Lustig* should have been controlling in *Stonehill* because the status of foreign

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84. *Id.* at 740. The Philippine search warrant was defective because it failed to allege a specific offense. The Ninth Circuit stated that "[i]f the raids had been conducted by United States agents, they would have been illegal under our Constitution." *Id.* at 743.

85. *Id.* at 740.

86. *Id.* at 743. For a discussion of the rationale underlying this general rule, see *supra* notes 26-28 and accompanying text.

87. 405 F.2d at 743. An economic joint venture arises when two or more parties agree to undertake a particular enterprise and to dissolve the relationship after completing the project. *See, e.g.*, H. HENN, CORPORATIONS 77-78 (2d ed. 1970).

88. 405 F.2d at 746. The elements of an economic joint venture are an express or implied agreement, a joint interest, the sharing of profits, and the mutual right to control. *See, e.g.*, H. HENN, *supra* note 87, at 78.

89. 273 U.S. 28, 33 (1927).

90. 405 F.2d at 748 (Browning, J., dissenting). The dissent added that "[i]f this was not clear in *Byars* itself, the Supreme Court made it so in *Lustig*." *Id. See also* Comment, *supra* note 27, at 503.

91. 338 U.S. 74 (1949).

governments is analogous to the pre-*Wolf* status of state governments in the context of fourth amendment analysis.[92] Consequently, the Ninth Circuit should have examined the participation of federal officials in the Philippine search by the standards established in *Lustig*, rather than by the joint venture standard.[93]

The Ninth Circuit in *Stonehill* failed to apply the standards established in *Lustig* for several reasons. The court concluded that Philippine officials had planned and instigated the search before the IRS agents became involved.[94] This conclusion was inconsistent with the court's finding that some of the preparations for the search occurred at an IRS agent's home and that the agent suggested searching an additional building.[95] The absence of federal involvement in the preliminary stages of a search is also immaterial; domestic officials need not instigate or plan a foreign search to invoke the exclusionary rule. In *Lustig*, the Supreme Court stated that federal instigation of a state search was not a prerequisite for application of the exclusionary rule to evidence seized by state officials during a search.[96] A similar standard should apply when courts analyze the participation of domestic officials in a foreign search.

The court also found that the activities of the IRS agents occurred either before or after the search.[97] This conclusion was inconsistent with the court's findings that agents visited the premises during the search, selected significant documents for the Philippine officials to seize, and directed them to a storage area that they had overlooked.[98] The court's conclusion that the IRS agents had not participated in the search, even if correct, would not determine the applicability of the exclusionary rule. In *Lustig*, the Supreme Court held that a search was a functional, as well as a physical, process. A "[s]earch is not completed until effective ap-

92. *See supra* note 44 and accompanying text.

93. *See supra* notes 64-68 and accompanying text. *See also* United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974) (describing the joint venture test as indefinite, vague, and unreliable), *cert. denied*, 421 U.S. 949 (1975).

94. 405 F.2d at 746.

95. *Id.* at 741.

96. 338 U.S. at 79.

97. 405 F.2d at 746.

98. *Id.* at 742.

propriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense."[99] A court must view a search in its entirety If a domestic official has participated in the "effective appropriation" of the evidence, he has participated in the search. Thus, even if the IRS agents in *Stonehill* did not participate in the actual physical process of the seizure, he participated functionally in the search because his input led to the seizure of the evidence.

Finally, the court concluded that the IRS agents had not requested any action or instigated the search by making the information from the defendants' former employee available to the Philippine authorities.[100] In *Lustig*, however, the Supreme Court stated that "[it was] immaterial whether a federal agent originated the idea or joined in it while the search was in progress."[101] Thus, even if the IRS agents in *Stonehill* did not instigate the search of the defendants' premises, they participated because they joined the search while it was in progress.

The Ninth Circuit's conclusion in *Stonehill* implied that a court should not exclude evidence seized in a foreign search if the domestic agent did not jointly control the actual search. The Ninth Circuit's analysis, however, ignored the fundamental principle of *Lustig* that a search is also a functional process. As the dissent in *Stonehill* stated, "The enterprise must be viewed as a functional whole."[102] Consequently, although the IRS agents did not participate in all phases of the search and seizure, they contributed to the appropriation of the evidence, and the court should have excluded the evidence.

United States v. Marzano

In *United States v. Marzano*,[103] the United States Court of Appeals for the Seventh Circuit also had to decide whether to exclude evidence seized by foreign officials. *Marzano* involved the theft of

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99. 338 U.S. at 78.
100. 405 F.2d at 746.
101. 338 U.S. at 79.
102. 405 F.2d at 751 (Browning, J., dissenting).
103. 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

more than $3,000,000 from an armored car company.[104] The Federal Bureau of Investigation (FBI) traced the defendants to Grand Cayman Island.[105] Two FBI agents met with Grand Cayman Island police officials and informed them that the FBI was seeking the defendants.[106] The Island police searched for the defendants, arrested them for violating a local law,[107] and seized money and other items from them.[108] Grand Cayman officials then returned the defendants to the United States.[109] At trial, the defendants moved to suppress the evidence seized by the Island police on the grounds that the FBI agents had participated in an unconstitutional search and seizure on Grand Cayman Island.[110] The trial judge denied the motion to suppress the evidence because the FBI agents "throughout the time in question were mere observers."[111] The Seventh Circuit affirmed the trial court's ruling.[112]

The Seventh Circuit agreed with the defendants' assertion that the Island police would not have arrested the defendants without the information provided by the FBI.[113] The court concluded, however, that "the law is clear that providing information to a foreign functionary is not sufficient involvement for the Government to be considered a participant in acts the foreign functionary takes based on that information."[114] The Seventh Circuit did not propose a standard for determining the degree of involvement by domestic officials that would make the officials participants in a foreign search. The court simply concluded that "the involvement of the Government agents in this case was too insignificant for them to be considered participants in the actions of the foreign police

104. *Id.* at 261.

105. *Id.*

106. *Id.* at 270.

107. *Id.* The Island police arrested the defendants for refusing to give their names to the local police upon request. *Id.* at 277 (Swygert, J., dissenting).

108. *Id.* at 269.

109. *Id.*

110. The defendants alleged that the Island police lacked probable cause. 388 F. Supp. 906, 911 (N.D. Ill. 1975). The Seventh Circuit assumed, for purposes of its decision, that the Island police and the FBI lacked probable cause. 537 F.2d at 269.

111. 388 F. Supp. at 908.

112. 537 F.2d at 276.

113. *Id.* at 270.

114. *Id.*

official."[115] The court based its decision on the deterrent purpose of the exclusionary rule.[116] Because the FBI agents had not participated in the search, excluding the evidence would not deter unconstitutional conduct.

The result in *Marzano* appears defensible. Crime is often international in scope, and law enforcement officials must share information. Excluding evidence from a domestic prosecution solely because domestic officials provided foreign officials with information that eventually led to a seizure of evidence would serve little purpose and could cripple international efforts to combat crime.[117] *Marzano*, however, was more than a simple case of providing information that led to the seizure of evidence. When the FBI agents arrived on Grand Cayman Island, they had no warrants for the arrests of the defendants.[118] The FBI agents gave the Island police photographs of the defendants, and explicitly requested the police to find the defendants.[119] The ensuing search for the defendants culminated in their arrest in the presence of an FBI agent.[120] Subsequently, the FBI agents inspected and helped inventory the items seized from the defendants.[121]

Even if the FBI agents' participation in the physical search and seizure was too insignificant to justify exclusion of the evidence, *Lustig* requires a court to look beyond the physical search process,

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115. *Id.*

116. *Id.* at 271.

117. *See* United States v. Morrow, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977). In *Morrow*, the defendants were convicted of conspiracy to distribute stolen and counterfeited securities. *Id.* at 125. The FBI had informed Canadian police officials that an American who was living in Toronto had information about stolen securities. *Id.* at 139. The United States Court of Appeals for the Fifth Circuit held that the trial court properly admitted the evidence that Canadian officials had seized in a search undertaken on the basis of information provided by the American citizen. *Id.* at 141. The court saw

> no possible way in which the goal of deterring unlawful conduct by American law enforcement officials can be served by excluding the evidence in question for the simple reason that there was no unlawful or unreasonable conduct on the part of the FBI. . . .

Id. at 140. *See also* United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); United States v. Rose, 570 F.2d 1358 (9th Cir. 1978); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

118. 537 F.2d at 276 (Swygert, J., dissenting).

119. *Id.*

120. *Id.* at 277.

121. *Id.*

and consider the search as a functional whole.[122] In *Lustig*, the Supreme Court noted that "[t]he decisive factor in determining the applicability of the [exclusionary rule] is the actuality of a share by a federal official in the total enterprise. . . ."[123] In *Marzano*, the Grand Cayman police would not have arrested the defendants without the FBI agents' request for assistance.[124] Thus, the FBI agents shared in a search that would not have occurred without their actions. The FBI agents did not provide information that merely led the local police to seize the evidence; the FBI instigated the search for the defendants on Grand Cayman Island, and local police officials conducted the search and seizure on behalf of the FBI agents.[125] The Island police, therefore, acted as agents of the United States when they arrested and searched the defendants.

In *Marzano*, the Seventh Circuit allowed domestic officials to circumvent the exclusionary rule.[126] The court sanctioned the FBI agents' enlistment of foreign officials in conducting what was essentially a domestic investigation.[127] By accepting the government's argument that the exclusionary rule did not apply because the FBI agents had not seized the evidence themselves, the court misapplied the silver platter doctrine. Proper application of the doctrine requires the exclusion of evidence seized by foreign authorities if domestic officials have participated in the foreign search or if foreign officials have acted as agents of domestic officials. The foreign officials must give the evidence to domestic officials on a silver platter to avoid exclusion. The decision in *Marzano* undermines the deterrent policy underlying the silver platter doctrine.

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122. 338 U.S. at 78.

123. *Id.* at 79.

124. *See supra* text accompanying note 113.

125. *Cf.* Gambino v. United States, 275 U.S. 310 (1927) (requiring exclusion of evidence when state officials seized evidence on behalf of federal officials).

126. In *Marzano*, the FBI officials might not have intended to circumvent the exclusionary rule, but the decision increased the probabililty of future intentional evasion and collusion.

127. The Island police did not investigate the defendants before speaking to the FBI agents. Moreover, the Island police never formally charged the defendants for refusing to give their names. 537 F.2d at 276, 277 (Swygert, J., dissenting).

DOMESTIC PARTICIPATION IN A FOREIGN SEARCH: A PROPOSED STANDARD

Stonehill and *Marzano* demonstrate the shortcomings of the analysis that the courts currently employ to determine the admissibility of evidence seized by foreign officials. Both cases ignore major principles enunciated in *Lustig*, *Gambino*, and *Byars*. Consequently, both cases undermine the original purpose of the silver platter doctrine, which was to prevent federal officials from circumventing the fourth amendment.

In *Stonehill* and *Marzano*, the courts established a high threshold for applying the exclusionary rule due to the involvement of domestic officials in foreign searches. The rationale for this high threshold is that the exclusion of evidence interferes substantially with the fact-finding process.[128] To justify such interference, a court must be certain that exclusion of the evidence will deter unconstitutional conduct by domestic officials.[129] Because the exclusionary rule achieves its deterrent purpose only if domestic agents actually have participated in the search, a stringent test for finding actual participation in a foreign search should be used to avoid the unnecessary exclusion of relevant evidence.

Courts should apply the exclusionary rule to further its deterrent purpose. If courts purport to apply the silver platter doctrine as the Seventh Circuit did in *Marzano*, however, they should enforce the primary requirement that there be no involvement by domestic officials in the seizure of evidence obtained by foreign officials. Courts should admit only evidence that foreign officials deliver to domestic officials gratuitously. If domestic officials participate in the instigation, planning, or execution of a foreign search, the courts should exclude the evidence to discourage attempts by federal officials to circumvent the exclusionary rule. The decisions in *Stonehill* and *Marzano* encourage domestic officials to participate in the functional aspects of foreign searches, and to seek the protection of the silver platter doctrine when defendants move to suppress the evidence. The fourth amendment should pro-

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128. *See* Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring).

129. "The inquiry must focus on what the federal officers did, since only they are subject to the Fourth Amendment." Stonehill v. United States, 405 F.2d 738, 749 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

tect United States citizens abroad from involvement by domestic officials in both the physical and functional aspects of foreign searches.

The Supreme Court did not intend for the silver platter doctrine to limit the effectiveness of the exclusionary rule. Rather, the doctrine developed to protect citizens. The Supreme Court devised the silver platter doctrine at a time when state officials were not subject to the fourth amendment. The Court sought to prevent federal officials from circumventing the exclusionary rule by using state officials to obtain evidence for a federal prosecution. Indirect violations of an individual's fourth amendment rights worried the Court as much as direct violations. The Court in *Byars* declared that

> 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. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[130]

In the foreign-search cases, however, the courts have adapted the silver platter doctrine to serve an entirely different purpose. The courts have viewed the silver platter doctrine as a manifestation of the deterrent purpose of the exclusionary rule, rather than as a protection of personal rights. Although deterring unconstitutional police conduct is an essential goal, using the silver platter doctrine solely as a deterrent ignores the doctrine's original purpose and its original rationale—the protection of personal rights.

If the sole purpose of the silver platter doctrine is to deter unconstitutional police conduct, courts should use a lenient standard to determine when a federal official's participation in a foreign search justifies invoking the exclusionary rule. The courts should resolve any doubts about a domestic official's participation in a foreign search by admitting the evidence. Such a resolution will

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130. 273 U.S. 28, 32 (1927) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)). The Court stated that the fourth amendment was "not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." 273 U.S. at 33-34.

avoid the exclusion of relevant evidence, a policy hindered by the exclusionary rule, but may encourage domestic officials to undermine the protections of the fourth amendment. Conversely, if the purpose of the silver platter doctrine is to protect personal rights, then even minimal participation by domestic officials in a foreign search would violate the exclusionary rule. A court should resolve doubts by excluding the evidence.

The silver platter doctrine can serve both purposes—deterrence of unconstitutional conduct by domestic officials and protection of fourth amendment rights—if the courts give meaning to the term "participation." In *Stonehill*, the Ninth Circuit enunciated the joint venture standard for judging whether domestic participation in a foreign search was sufficient to invoke the exclusionary rule. Although the adoption of some standard is an essential step, the joint venture standard fails to protect citizens from officials who circumvent the fourth amendment.[131] Other courts have concluded that participation by domestic agents in foreign searches was insufficient to warrant exclusion of the evidence without articulating any standard.[132] A standard for determining when the participation of domestic officials in foreign searches violates the exclusion-

131. In *Stonehill*, the court acknowledged the possibility that domestic agents might attempt to circumvent the fourth amendment by enlisting the aid of foreign officials in conducting a search. 405 F.2d at 742-46. The court concluded, however, that there was "no evidence that any United States agents were attempting to shortcircuit the Fourth Amendment rights" of the defendants. 405 F.2d at 746. The joint-venture standard does not prevent attempts to "shortcircuit" the fourth amendment; in fact, it encourages such attempts.

132. *E.g.*, United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976) ("[W]e have no occasion to choose between the joint venture test of *Stonehill* or the apparently more relaxed test of *Birdsell*. Under either test, the minimal participation of American law enforcement officials is insufficient to invoke the protections of the fourth amendment."), *cert. denied*, 430 U.S. 956 (1977); United States v. Marzano, 537 F.2d 257, 270 (7th Cir. 1976) ("We need not adopt the Ninth Circuit's standard at this time but only need to hold that the involvement of the Government agents in this case was too insignificant for them to be considered participants in the actions of the foreign police official."), *cert. denied*, 429 U.S. 1038 (1977); United States v. Mundt, 508 F.2d 904, 907 (10th Cir. 1974) ("The test, according to our view, is not whether American officials played a substantial role in events leading up to the arrest. Nor is the test a question of joint venture. The trial court found that [the American agent] merely cooperated with the Peruvian Police and this finding is supported by the evidence."), *cert. denied*, 421 U.S. 949 (1975); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971) (The fourth amendment exclusionary rule did not apply because "the challenged searches occurred in a foreign country, [and] were conducted by law enforcement officials who were not acting in connection or cooperation with domestic law enforcement authorities. "), *cert. denied*, 404 U.S. 1021 (1972).

ary rule is necessary. Such a standard would provide a principled basis for analyzing individual cases and would guide domestic officials in their conduct abroad.[133] In *Lustig v. United States*,[134] the Supreme Court declared that "a search is a search by a federal official if he had a hand in it." Judge Browning, dissenting in *Stonehill*, articulated the meaning of that language when he concluded that the acts of the IRS agents "were clearly an integral part of the 'effective appropriation' of the illicitly seized evidence."[135]

Judge Browning's statement in *Stonehill* provides a more workable standard than any present standard for determining when to exclude evidence seized in a foreign search. If domestic agents played an integral part in a foreign search that does not comply with the fourth amendment, a court should exclude the evidence. That is, if the actions of domestic agents were essential to the completeness of the foreign search,[136] and the search would not meet constitutional standards if conducted in the United States, then the court should exclude the evidence. The integral-part test gives meaning to the silver platter doctrine by protecting citizens from "stealthy encroachments" upon their fourth amendment rights. For example, in *Marzano* the FBI agents' actions were an integral part of the foreign search because the FBI instigated the search.[137] Under the circumstances in *Marzano*, the integral-part test would

133. The need for a standard increases as the incidence of international crime increases. Crime involving Americans abroad has increased dramatically because of the international drug trade. Drug smuggling prosecutions often require courts to rule on the admissibility of evidence seized by foreign officials. *See* United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); United States v. Benedict, 647 F.2d 928 (9th Cir.), *cert. denied*, 454 U.S. 1087 (1981); United States v. Maher, 645 F.2d 780 (9th Cir. 1981); Canal Zone v. Sierra, 594 F.2d 60 (5th Cir. 1979); Stowe v. Devoy, 588 F.2d 336 (2d Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); United States v. Schmidt, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978); United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976); United States v. Mundt, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975); United States v. Nagelberg, 434 F.2d 585 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

134. 338 U.S. 74, 78 (1949).

135. Stonehill v. United States, 405 F.2d 728, 751 (9th Cir. 1968) (Browning, J., dissenting), *cert. denied*, 395 U.S. 960 (1969).

136. Webster's Dictionary defines integral as "essential to completeness." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1173 (P. Gove ed. 1969).

137. *See supra* text accompanying note 119.

require exclusion of the evidence seized by the foreign officials, thereby foreclosing attempts by domestic officials to circumvent the fourth amendment.

The integral-part test also advances the deterrent purpose of the exclusionary rule. Under the integral-part test, courts will exclude evidence only if domestic officials play a role that is essential to the completeness of the search. When the participation of domestic agents is essential to the completeness of a foreign search, their participation justifies excluding evidence in light of the deterrent purpose of the exclusionary rule.

The integral-part test is superior to the joint venture standard because the integral-part test does not require that domestic agents have joint control of a foreign search to violate the exclusionary rule. For example, although the IRS agents in *Stonehill* were not involved in all phases of the search and seizure, they played an integral part in the seizure of the evidence by suggesting that a certain building be searched, selecting significant documents for the Philippine officials to seize, and directing the officials to a storage room that the officials had overlooked.[138] The IRS agents' contribution to the seizure of the evidence was essential to the completeness of the search. The IRS agent's actions changed the nature of the search, prompting the Philippine authorities to seize evidence that they otherwise would not have seized.

Finally, the integral-part test does not preclude cooperative international efforts to combat crime. The test only prevents cooperation that circumvents the protections of the fourth amendment. Merely sharing information with foreign officials would not constitute an integral part in a search subsequently conducted by foreign officials on the basis of the information. The integral-part test, however, would require the exclusion of evidence if more significant conduct by American agents accompanies the transmission of the information. For instance, if domestic agents share information with foreign officials and also ask the foreign officials to act on the information in a specific manner, as they did in *Marzano*, the integral-part test would require exclusion of the evidence seized by the foreign officials. If domestic agents share information with foreign officials and also join in a search conducted on the basis of the

138. *See supra* text accompanying notes 79-81.

information, as they did in *Stonehill*, the integral-part test also would require exclusion of the evidence. Therefore, the integral-part test protects citizens from government efforts to circumvent the fourth amendment, and serves the deterrent purpose of the exclusionary rule without hampering international efforts to combat crime.

Conclusion

The current practice of not applying the exclusionary rule to evidence seized by foreign officials acting independently is sound. The federal circuit courts have recognized two exceptions to the general rule. First, the courts will exclude evidence if domestic officials participated in the foreign search or if foreign officials acted as agents of the United States government. Second, the courts also will exclude evidence if the circumstances of the foreign search shock the judicial conscience. Courts should apply the integral-part test to either exception to determine whether the participation of domestic officials in foreign searches requires exclusion of the evidence.

Involvement by domestic officials in any stage of a foreign search—initiation, planning, or execution—should trigger a close examination of the facts to determine whether the participation by domestic officials was essential to the completeness of the search. The integral-part test provides the most satisfactory approach because it serves the deterrent purpose of the exclusionary rule while protecting citizens from attempts to circumvent the fourth amendment.

Steven H. Theisen