

THE INTERNATIONAL SILVER PLATTER AND THE "SHOCKS THE CONSCIENCE" TEST: U.S. LAW ENFORCEMENT OVERSEAS

I. INTRODUCTION

The fourth amendment to the federal Constitution protects the people against "unreasonable searches and seizures" conducted by the government.¹ Although the Constitution provides no remedy for fourth amendment violations, the Supreme Court, in *Weeks v. United States*,² announced the fourth amendment exclusionary rule³ as the judicial remedy⁴ for such violations by law enforcement agents.⁵ The primary pur-

1. The fourth amendment states:

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.

U.S. CONST. amend. IV.

Although the amendment by its terms applies only to the federal government, the United States Supreme Court has incorporated the fourth amendment guarantee into the due process clause of the fourteenth amendment, thus proscribing unreasonable searches and seizures by the states as well. *Wolf v. Colorado*, 338 U.S. 25 (1949).

2. 232 U.S. 383 (1914).

3. There are five primary exclusionary rules in Supreme Court case law. The following are generally inadmissible: (1) evidence or testimony obtained in violation of the fourth amendment, *Weeks v. United States*, 232 U.S. 383 (1914); (2) testimony obtained in violation of the fifth amendment or the *Miranda* doctrine, *Miranda v. Arizona*, 384 U.S. 436 (1966); (3) evidence obtained in violation of the sixth amendment, *Massiah v. United States*, 377 U.S. 201 (1964); (4) evidence secured by methods "shocking the conscience," *Rochin v. California*, 342 U.S. 165 (1952); and (5) evidence secured in violation of the federal anti-wiretap statute, *Nardone v. United States*, 302 U.S. 379 (1937). See Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 2 (1958).

4. The Supreme Court has held that the exclusionary rule is a judicially created remedy not required by the Constitution. *United States v. Calandra*, 414 U.S. 338, 348 (1974). Some scholars maintain that the exclusionary rule is implicitly required by the fourth amendment. For a discussion of the competing views see P. POLYVIUO, *SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW* ch. 7, § (b)(iv) (1982).

This Note focuses only on the fourth amendment exclusionary rule, as distinguished from the fifth amendment and sixth amendment exclusionary rules.

5. The Court has held that the exclusionary rule, like the fourth amendment, applies to the states. *Mapp v. Ohio*, 367 U.S. 643, 655-60 (1961) (evidence unlawfully seized by states is inadmissible in state courts); *Elkins v. United States*, 364 U.S. 206, 223-24 (1960) (evidence unlawfully seized by states is inadmissible in federal courts).

Although the fourth amendment now applies to the states, it does not proscribe so-called private searches, searches conducted by private individuals not acting on behalf of the government or a government official. See, e.g., *Burdeau v. McDowell*, 256 U.S. 465, 474 (1921) (because the fourth

pose of the rule is to deter fourth amendment violations⁶ by barring the prosecution and law enforcement officials⁷ from using unlawfully seized evidence⁸ against the defendant.

The Supreme Court has interpreted the fourth amendment to require that law enforcement agents obtain a warrant, issued by "a neutral and detached magistrate,"⁹ before conducting a search or seizure.¹⁰ The Court's overriding concern is that officers make arrests and conduct searches only upon probable cause, and a warrant represents an independent determination that probable cause exists.¹¹ Warrantless

amendment is a limitation only upon government conduct, evidence secured in private searches should not be excluded from a criminal trial).

6. *United States v. Payner*, 447 U.S. 727, 734-37 (1980); *United States v. Janis*, 428 U.S. 433, 446 (1976).

7. This Note will focus on the defensive use of the fourth amendment exclusionary rule by defendants in criminal and quasi-criminal cases and not on the offensive use of the fourth amendment in civil actions against the United States or state governments.

8. The "fruit of the poisonous tree" doctrine extends the reach of the exclusionary rule by forbidding the use of any evidence uncovered by government investigators as the result of a clue obtained in an illegal search or seizure. *See Nardone v. United States*, 308 U.S. 338, 340-41 (1939) (evidence which is "fruit of the poisonous tree" is inadmissible); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (evidence procured in an unlawful manner may not only "not be used before the Court but . . . it shall not be used at all"). There are exceptions to the doctrine, however. For instance, when, by reason of police misconduct, the evidence is "tainted," it may nevertheless be admissible if "the evidence to which instant objection is made has been come at by . . . means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (defendant's confession admissible because it was voluntarily given after defendant had been released from an illegal arrest). Further, a search conducted pursuant to a facially valid, magistrate-issued search warrant is valid if the executing officer conducted the search in good faith reliance on the warrant. This is so even if the warrant is later determined to be unsupported by probable cause. *United States v. Leon*, 468 U.S. 897, 913 (1984).

9. *E.g.*, *Johnson v. United States*, 333 U.S. 10, 14 (1948) (arrest warrant to be issued by a neutral and detached magistrate). Although strictly speaking only unreasonable searches and seizures are prohibited by the fourth amendment, "[t]he United States Supreme Court has expressed a strong preference for the making of searches and seizures pursuant to search warrant." W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 4.1 (1987).

10. An arrest is a seizure of the person. *United States v. Watson*, 423 U.S. 411, 428 (1976).

11. There are several exceptions to the warrant requirement. Circumstances under which a warrant is not required include: (1) searches incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969); (2) searches of vehicles, *Carroll v. United States*, 267 U.S. 132 (1925); (3) searches required by exigent circumstances, *Schmerber v. California*, 384 U.S. 757 (1966); (4) seizure of items in "plain view," *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); (5) public arrests for felonies, *United States v. Watson*, 423 U.S. 411 (1976); (6) consent searches, *Katz v. United States*, 389 U.S. 347 (1967); and (7) inventory searches, *Illinois v. Lafayette*, 462 U.S. 640 (1983). *See generally* P. POLYVIUO, *supra* note 4, at 152-205.

Moreover, under the long-standing *Ker-Frisbie* doctrine, neither an illegal arrest nor unlawful methods of bringing a suspect into the United States divest a court of its otherwise proper jurisdiction over the defendant. Due process has been satisfied when the defendant is apprised of the

searches or seizures are not, however, per se invalid, and the Court has established various exceptions.¹²

The Bill of Rights protects U.S. citizens against official U.S. action both at home and abroad.¹³ Although the fourth amendment protects U.S. citizens against unreasonable searches conducted by U.S. law enforcement officers, the fourth amendment does not apply to searches conducted exclusively by foreign governments. Further, evidence seized by foreign governments and subsequently given to U.S. law enforcement officials on a "silver platter" is admissible in U.S. courts.¹⁴ However, if U.S. agents abroad and a foreign government conduct a search or seizure as part of a "joint venture," the investigation must comply with the fourth amendment or any evidence seized will be subject to the exclusionary rule.¹⁵ How much U.S. participation is permissible before the

charges against him and is given a fair trial. *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). The Court has declined to retreat from that doctrine. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Crews*, 445 U.S. 463 (1980); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

The Second Circuit has nevertheless held that it may rely on its supervisory power to prevent the district courts within the circuit from exercising jurisdiction over illegally arrested defendants. *Toscanino v. United States*, 500 F.2d 267, 275 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (1974) (en banc). One year later the Second Circuit explained that *Toscanino* was not a departure from the *Ker-Frisbie* doctrine, but rather an exception to it. In *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975), the court held that the *Toscanino* rule applies only to "conduct of the most outrageous and reprehensible kind." For a discussion of the *Ker-Frisbie* doctrine and the legal limitations on the authority of U.S. officers to engage in international kidnapping see *W. LAFAVE, supra* note 9, § 1.9(b) at 227; Note, *Federally Sponsored International Kidnapping: An Acceptable Alternative to Extradition?*, 64 WASH. U.L.Q. 1205 (1986).

Although an illegal arrest does not affect jurisdiction, an illegal arrest may have other consequences. For instance evidence or confessions which are the "fruit" of an illegal arrest are inadmissible unless the taint created by the illegal arrest is subsequently attenuated. *Wong Sun v. United States*, 371 U.S. 471 (1963). See *supra* note 8.

12. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

13. *Reid v. Covert*, 354 U.S. 1, 12 (1957). "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.* *Accord* *Powell v. Zuckert*, 366 F.2d 634, 640-44 (D.C. Cir. 1966) (Air Force could not discharge civilian employee on the basis of evidence seized in Japan by Air Force officials in violation of the fourth amendment.).

14. "[S]ince United States courts cannot be expected to police law enforcement practices around the world, let alone to conform such practices to fourth amendment standards by means of deterrence, the exclusionary rule does not normally apply to foreign searches conducted by foreign officials." *United States v. Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985). The exclusionary rule does not apply even when a U.S. citizen is the subject of the questionable foreign search. *Id.* See also *United States v. Janis*, 428 U.S. 433, 455 (1976) ("[i]t is well established . . . that the exclusionary rule . . . is not applicable where . . . a foreign government commits the offending act").

15. See *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968) ("Fourth amendment

operation becomes a "joint venture" triggering the fourth amendment remains unclear.

This Note addresses the constitutional limitations federal courts have placed upon U.S. law enforcement agents conducting investigations abroad.¹⁶ Part II briefly examines the origin and purpose of the "silver platter" doctrine. It then synthesizes from the "international silver platter" cases a general rule delineating the extent of allowable U.S. participation in foreign investigations. Part II also examines what the fourth amendment, once triggered, requires of U.S. agents abroad. Finally, Part III focuses on the rationale and validity of the courts' frequent assertions that they may exercise their supervisory power to exclude evidence seized by foreign governments if the circumstances surrounding that seizure "shock the judicial conscience." This Note concludes that the courts lack authority to exclude evidence seized by a foreign government under circumstances which "shock the judicial conscience."¹⁷ However, the courts should require compliance with the fourth amendment in any case involving more than minimal U.S. participation.¹⁸

could apply to raids by foreign officials only if federal agents so substantially participated in the raids so as to convert them into a joint venture between the United States and the foreign officials."), *cert. denied*, 395 U.S. 960 (1969). See *infra* notes 40-54 and accompanying text.

16. Several related topics are beyond the scope of this Note. For example, fourth amendment analysis with respect to searches on the high seas differs from traditional fourth amendment analysis because the mobility and location of vessels present exigent circumstances justifying warrantless searches. See *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987); *United States v. William*, 617 F.2d 1063 (5th Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc). For a discussion of high seas fourth amendment search and seizure law see Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L. L. 741, 747-60 (1980); CARMICHAEL, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51 (1977); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725 (1980).

Similarly, this Note does not address the effect of international treaties upon the admissibility of evidence procured in foreign searches or seizures.

Finally, this Note does not address the issue of what protection aliens abroad have against illegal searches and seizures conducted by U.S. officials. For two differing views on this issue compare *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1218-24 (9th Cir. 1988) (fourth amendment protect aliens abroad from illegal U.S. searches and seizures) with *id.* at 1230-37 (Wallace J., dissenting) (aliens abroad are not part of the class "the people" to whom the fourth amendment applies). See also *United States v. Toscanino*, 500 F.2d 267, 275, 280 (2d Cir.) (fourth amendment applies in criminal trials of "aliens who are the victims of unconstitutional action abroad"), *reh'g denied*, 504 F.2d 1380 (1974) (en banc). The Supreme Court has not resolved this issue.

17. The courts have asserted repeatedly supervisory power. No court, however, has suppressed evidence on that basis. See *infra* notes 142-165 and accompanying text.

18. See *infra* notes 119-125 and accompanying text.

II. THE INTERNATIONAL "SILVER PLATTER" DOCTRINE

A. Origin

Cases involving cooperation between federal agents and state officials provided the analytical framework that courts have applied to searches conducted by foreign governments with the participation of U.S. agents.¹⁹ Prior to the Supreme Court's decision in *Elkins v. United States*,²⁰ evidence seized by state officials during searches which offended fourth amendment standards was admissible in federal courts, provided that the search and seizure met two requirements. First, the federal government must not have participated in the search.²¹ Second, the state officer must have seized the evidence for a state purpose, not on behalf of the federal government.²² The federal use of evidence seized by state officers was permitted under the silver platter doctrine. Justice Frankfurter clearly enunciated the doctrine:

The crux of the . . . 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 authorities on a silver platter. . . . So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.²³

The *Elkins* Court, however, rejected the silver platter doctrine, holding state-seized evidence handed to federal agents must be obtained through procedures that comply with the fourth amendment.²⁴ Thus, before the courts had formulated any tests for determining what federal conduct constitutes "having a hand in" a state search, *Elkins* rendered the issue moot. The issue, however, resurfaced in the Court's earliest attempts to apply the doctrine in foreign government search cases.

19. See, e.g., *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 382 U.S. 963 (1969). See also Comment, *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, 503-05 (1977) (noting how the *Stonehill* majority derived its rule by analogy to state seized evidence cases). But see Saltzburg, *supra* note 16, at 768 (arguing that the state "silver platter cases are of little help in the international context because of the unique problems of international law enforcement").

20. 364 U.S. 206 (1960).

21. *Gambino v. United States*, 275 U.S. 310, 318 (1927).

22. *Id.*

23. *Lustig v. United States*, 338 U.S. 74, 78-79 (1949).

24. 364 U.S. at 222. Later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court extended the application of the exclusionary rule to the states, requiring state courts to exclude state-seized evidence not procured in compliance with the fourth amendment.

B. Application

Under the fourth amendment, evidence seized from U.S. citizens by U.S. law enforcement officers, even if seized in a foreign country, is inadmissible in U.S. courts unless the search and seizure comply with the fourth amendment.²⁵ Conversely, evidence that is the product of a search conducted exclusively by a foreign government *is* admissible in U.S. courts, even when the search does not meet fourth amendment standards.²⁶ The rationale for this international silver platter doctrine is that U.S. courts can do little, if anything, to deter unreasonable searches by foreign governments.²⁷ The law regarding foreign searches involving U.S. agents is, however, not so well defined because of the recurring, yet unresolved, question: how much U.S. involvement is necessary to trigger the fourth amendment?

Generally, federal courts of appeals require U.S. involvement²⁸ either to be "substantial" or to reach the level of "joint venture" to implicate the fourth amendment.²⁹ At least one circuit appears to hold that U.S. presence and cooperation is insufficient to trigger the fourth amendment.³⁰ In addition, one circuit has refused to adopt either standard in determining what level of U.S. participation triggers fourth amendment protection.³¹ Some circuits that appear to apply a joint venture approach have refrained from using the phrase "joint venture."³² Others openly

25. See *supra* note 9-10 and accompanying text.

26. See *supra* note 14 and accompanying text.

27. *United States v. Mount*, 757 F.2d 1315, 1317 (D.C. Cir. 1985).

28. A court's decision to admit illegally seized evidence does not itself constitute impermissible participation. *United States v. Calandra*, 414 U.S. 338, 348 (1974) (decisions to admit illegally seized evidence do not "constitute distinct violations of . . . Fourth Amendment rights"). See also LAFAVE, *supra* note 9, at § 1.8(f), (g).

29. Apparently, the courts regard the "joint venture" to be a stricter standard. However, as this Note argues, the difference in the standards is more apparent than real. See *infra* notes 119-129 and accompanying text. See also *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968) ("The 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."), *cert. denied*, 395 U.S. 960 (1969).

30. *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied* 382 U.S. 963 (1965). In *Birdsell*, the court held the fourth amendment inapplicable "even though American officials were present and cooperated in some degree in the foreign search." *Id.* at 782-83.

31. *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). For a discussion of *Marzano* see *infra* notes 55-70 and accompanying text.

32. *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985) ("participated in some significant way"; cites *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), with approval); *United States v. Marzano*, 537 U.S. 257, 270 (7th Cir. 1976) (participation was "too insignificant"), *cert. denied*, 429 U.S. 1038 (1977).

use the term.³³ Notwithstanding the circuits' failure to apply a uniform test or uniform terminology, the results in almost all of the reported cases have been the same. The circuits are reluctant to exclude the evidence regardless of the level of U.S. involvement.³⁴ Thus any differences among the circuits are more apparent than actual.

In one of the earliest cases, *Birdsell v. United States*,³⁵ the Fifth Circuit held the fourth amendment inapplicable to a foreign government in its own land, "even though American officials were present and cooperated in some degree."³⁶ In *Birdsell*, a Texas deputy sheriff traveling in Mexico acted as an interpreter for Mexican police who were questioning two U.S. citizens suspected of transporting stolen cars.³⁷ Mexican authorities subsequently summoned an FBI agent to Mexico where he participated with Mexican police in a search of the suspects' car which yielded incriminating evidence.³⁸

Despite the court's conclusion that the U.S. law enforcement officials were merely "present and cooperating" in the Mexican search, the court's version of the facts clearly reveals that the level of U.S. involvement was considerably more significant, at least after the arrival of the FBI agent.³⁹ While the fruits of the first phase, when the deputy sheriff merely interpreted for Mexican police, were clearly admissible in U.S. courts, the question of the admissibility of the evidence seized in the second phase, where the FBI agent assisted in a search of the defendants' car, is more complex. U.S. and Mexican officials discovered evidence during a joint, warrantless search. If the fourth amendment circumscribes U.S. officers' conduct abroad, then U.S. officers should have prob-

33. See *United States v. Rosenthal*, 793 F.2d 1214, 1231 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Delaplaine*, 778 F.2d 570, 574 (10th Cir. 1985), *cert. denied*, 479 U.S. 827 (1986); *United States v. Hensel*, 699 F.2d 18, 25 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

34. See *infra* notes 35-125 and accompanying text. *But see* *United States v. Verdugo-Urquidez*, 854 F.2d 1214 (9th Cir. 1988) (excluded evidence after finding a "joint venture"). In the context of the fifth amendment the Tenth Circuit suggested if the foreign officials have an independent interest in conducting the investigation, the level of U.S. participation is irrelevant. The Tenth Circuit described the "joint venture" standard as indefinite, vague and unreliable. *United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975). See also Saltzburg, *supra* note 16, at 762-64.

35. 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

36. *Id.* at 782.

37. *Id.*

38. *Id.* at 782-83.

39. *Id.* Only the first phase of the search, in which the Texas deputy sheriff merely served as an interpreter, was purely Mexican. When the FBI agent arrived, he actually "inspected [the cars] with the Mexican police." *Id.*

able cause before engaging in a joint search with foreign governments. In any event, the practical result of *Birdsell* was that a joint U.S.-Mexican search did not trigger the fourth amendment constraints.

Three years later in *Stonehill v. United States*,⁴⁰ the Ninth Circuit articulated the "joint venture" standard for application of the fourth amendment. The Court defined "joint venture" as one in which "[f]ederal agents so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials."⁴¹

In *Stonehill*, IRS agents helped the Philippine National Bureau of Investigation (N.B.I.) to plan and conduct raids of two U.S. taxpayers' business premises in the Philippines.⁴² The IRS agents were present while the N.B.I. searched the taxpayers' business files and told N.B.I. agents which records were "most significant from an accounting point of view."⁴³ Based on these facts, the court held that U.S. officials did not participate in the foreign search and they did obtain the evidence lawfully.⁴⁴

Just as in *Birdsell*, the *Stonehill* court's recitation of the facts demonstrates substantial U.S. participation and undermines its conclusion that the U.S. involvement in the search did not constitute a joint venture.⁴⁵ First, the majority found that the Philippine government seized the evidence for its own use and not for use in a U.S. prosecution.⁴⁶ However, the fact that the N.B.I. seized the evidence under IRS supervision and that the evidence was likely to be probative of the defendants' compliance with the Internal Revenue Code suggests that the Philippine seizure was not solely for Philippine purposes.⁴⁷

40. 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).

41. *Id.* at 743.

42. *Id.* at 750 (Browning, J., dissenting).

43. *Id.* at 742.

44. *Id.* at 746. The court listed six factors that led to its conclusion. First, the raids were instigated and planned by Philippine agents. Second, all U.S. activity occurred prior to or after the raids. Third, only after the raids were U.S. agents allowed to copy documents in which they were interested in. Fourth, there was no evidence U.S. agents were attempting to "short circuit" the fourth amendment rights of the taxpayers. Fifth, U.S. agents objected to the raids. Finally, when U.S. agents made information about the defendants available to the Philippine government they were not requesting that any action be taken. *Id.* at 746.

45. *Id.* at 746.

46. *Id.* The Philippine government hoped to deport Stonehill and Brooks as "undesirable aliens." *Id.* at 741.

47. *Id.*

Second, the court found that all U.S. participation had occurred either before the raids began or after they finished.⁴⁸ The court's statement of the facts, however, indicates that the IRS agents were on the premises *during* the raid, instructing the N.B.I. agents as to what they should seize.⁴⁹ As the dissent pointed out, the majority reached a result that contradicts its own version of the facts by using the word *raids* in a "highly restricted sense."⁵⁰

Third, the majority found no evidence that the "agents were attempting to short circuit the Fourth Amendment."⁵¹ Indeed, the court found that since the U.S. agents objected to the raids⁵² and had at no time requested any Philippine action, there was no constitutionally defective conduct on the part of the IRS agents.⁵³ Had the U.S. agents purposefully attempted to circumvent the fourth amendment, the court would have had no other alternative but to conclude that the agents had participated so substantially as to convert the operation into a "joint venture." The court's analysis is flawed, however, because the agents, while not intending to circumvent the fourth amendment, nevertheless did violate it. That the agents were not attempting to circumvent the Constitution is irrelevant to whether enough U.S. participation existed to convert the search into a joint U.S.-Philippine venture.⁵⁴

The Seventh Circuit in *United States v. Marzano*,⁵⁵ declined to adopt either the *Birdsell* or the *Stonehill* standards,⁵⁶ yet reached the same result: mere U.S. involvement in a foreign search is not enough to implicate the fourth amendment.

In *Marzano*, the Court held that the "[m]ere presence of federal officers [during a foreign investigation and search] is not sufficient to make the officers participants."⁵⁷ Two FBI agents requested and received the assistance of the Grand Cayman government in a search for two bank

48. *Id.* at 746.

49. *Id.* at 742.

50. *Id.* at 751 (Browning, J., dissenting). The majority concluded that the raids were already complete when the IRS was finally allowed to copy the records. *Id.* at 746.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 743. See *supra* note 28 and accompanying text.

55. 537 F.2d 257, 270 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

56. *Id.* The court noted that the Fifth Circuit *Birdsell* test, unlike the *Stonehill* test, purportedly requires application of the fourth amendment even before U.S. participation in a foreign search reaches the level of a "joint venture."

57. *Id.*

robbery suspects.⁵⁸ A Grand Cayman policeman, accompanied by an FBI agent, located the suspects and arrested them after they refused to give him their names and addresses.⁵⁹ After taking the suspects into custody, the policeman, still accompanied by the FBI agent, took the suspects to the police station where another Grand Cayman officer searched the suspects and seized evidence from them.⁶⁰ Both FBI agents were present during the search and seizure.⁶¹ In addition, they helped inspect and inventory the seized articles.⁶² The next morning, when the suspects were put on a plane bound for Miami, Grand Cayman police gave the seized evidence to the FBI agents who took the same flight.⁶³ Upon their arrival in Miami, the FBI agents arrested the suspects.⁶⁴

The Seventh Circuit's holding is illogical for several reasons. First, the court found the Grand Cayman police arrested the suspects for a violation of Cayman law which apparently requires a person to identify himself upon the request of a Grand Cayman policeman.⁶⁵ However, but for the FBI's instigation,⁶⁶ the Grand Cayman police would not have asked the defendants for their names and addresses, the defendants would not have had to divulge the information, and the defendants would never have been arrested or searched for violation of Grand Cayman law.⁶⁷ The Grand Cayman officers' primary intention, not their secondary intention as the court labels it,⁶⁸ was to help the U.S. government apprehend two burglary suspects. Second, the Grand Cayman police never formally charged the defendants with a violation of Grand Cayman law.⁶⁹ Finally, the FBI received all of the evidence seized by the Grand Cayman police.⁷⁰

The few cases in which the courts have found substantial participation

58. *Id.*

59. *Id.* at 277 (Swygert, J., dissenting).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 270, 278.

64. *Id.* at 279.

65. *Id.* at 271.

66. Apparently, the FBI provided information about the defendants to the Grand Cayman police. In addition, the FBI provided photographs of the defendants. *Id.* at 280 (Swygert, J., dissenting).

67. *Id.*

68. *Id.* at 271.

69. *Id.* at 277-78 (Swygert, J., dissenting).

70. *Id.* at 277 n.2 (Swygert, J., dissenting).

to trigger fourth amendment protection are of little help in determining what degree of U.S. involvement in foreign searches makes foreign-seized evidence inadmissible. For example, in *United States v. Hensel*,⁷¹ the First Circuit found a "joint venture" between the United States and Canada when the U.S. Coast Guard attempted to intercept a boat which it suspected of drug smuggling.⁷² In *Hensel*, the Coast Guard requested Canadian assistance when the U.S. Coast Guard was unable to intercept the boat before it escaped into Canadian waters.⁷³ The U.S. Coast Guard provided machine gun cover while three armed Canadian agents boarded and searched the boat. The agents found nearly nineteen tons of marijuana.⁷⁴ Without determining whether this series of events constituted a U.S.-Canadian joint venture, the First Circuit simply upheld the district court's conclusion that the operation was a joint venture because that conclusion was not clearly erroneous.⁷⁵ Even though the court found that a joint venture existed, it nevertheless held that the evidence was admissible on other grounds.⁷⁶

Recently, the Ninth Circuit found joint ventures in *United States v. Peterson*⁷⁷ and in *United States v. Verdugo-Urquidez*.⁷⁸ In *Peterson*, the Drug Enforcement Agency (DEA) alerted the Philippine Narcotics Command (NARCOM) that a suspected drug smuggling boat was en route to the Philippines.⁷⁹ The defendants moved to suppress evidence seized in two search incidents. In the first incident, NARCOM taped and the DEA translated radio transmissions between the boat and an apartment in the Philippines.⁸⁰ In the second incident, NARCOM administered a wiretap of the phone conversations from the apartment and

71. 699 F.2d 18 (1st Cir.), *cert. denied*, 461 U.S. 958 (1983).

72. *Id.* at 21-22, 25. As noted above, there is a legal distinction between fourth amendment requirements on the high seas and those in other international contexts. *See supra* note 16.

73. The Canadian government sent a Canadian Coast Guard plane to assist the U.S. government. The U.S. Coast Guard informed Canada that U.S. officers could not board the boat without the permission of the State Department which would take 24 to 48 hours to obtain. *Id.* at 21-22.

74. *Id.*

75. *Id.* at 25.

76. *Id.* at 26. The court justified the search as a search conducted on the high seas. A warrantless search on the high seas is valid if the search is based on probable cause. Thus, the court found that the district court did not abuse its discretion in admitting the contraband into evidence. *Id.* *See supra* note 16.

77. 812 F.2d 486 (9th Cir. 1987).

78. 856 F.2d 1214 (9th Cir. 1988).

79. 812 F.2d at 488.

80. *Id.*

provided the DEA with tapes of those calls.⁸¹ The Coast Guard thereafter intercepted the boat and confiscated marijuana it found on board.⁸²

In concluding that the U.S. and Philippine governments participated in a joint venture, the court first noted that a DEA agent in his testimony at trial described the operation as a "joint investigation."⁸³ Furthermore, the court found that the DEA "assumed a substantial role in the case"⁸⁴ and that its role was not "subordinate to the role of Philippine authorities."⁸⁵ The court nevertheless held the evidence the U.S. government seized admissible.⁸⁶ The court admitted the intercepted radio transmissions because the defendants had no legitimate expectation of privacy in the radio communications.⁸⁷ The court also allowed admission of the evidence obtained in the warrantless search partly because its occurrence on the high seas was an exigent circumstance justifying the failure to obtain a search warrant.⁸⁸

The Ninth Circuit's disposition of most of the *Peterson* case is sound. The facts amply demonstrate that the DEA conducted a joint venture with NARCOM by any standard.⁸⁹ The DEA described the operation as a "joint investigation," and it was involved in the investigation on a daily

81. *Id.* at 489.

82. *Id.* The boat had left the Philippines and was headed toward Panama.

83. *Id.* at 490.

84. *Id.*

85. *Id.*

86. *Id.* at 489. The suspicious behavior of the crew on the boat justified the Coast Guard search. *Id.* at 492. The court also relied on the broad statutory authority the Coast Guard has to search vessels. *Id.* at 492-93. Hence, the court rejected the defendants' evidentiary challenge that the search and seizure of the boat was tainted by the illegal wiretap and the intercepted transmissions.

87. *Id.* at 490. This requirement is derived from Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347, 361-364 (1967). Harlan argued that the fourth amendment applies only if the defendant had "an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361.

This test has been adopted by a majority of the Court in later cases. See generally *United States v. Knotts*, 460 U.S. 276, 282 (1983) (use of "beeper" inside barrel of chemicals bought by defendant not a violation of any expectation of privacy); *Smith v. Maryland*, 442 U.S. 735, 741 (1979) (no expectation of privacy in telephone numbers defendant dialed).

88. 812 F.2d at 494. See *supra* note 16. The court also held the wiretapped conversations admissible. At the outset, the court consulted Philippine law to determine the reasonableness of the extraterritorial search. *Id.* at 490. Failing to find a Philippine judicial pronouncement on the legality of a wiretap like the one involved in *Peterson*, the court assumed that the wiretap did violate Philippine law, and thus was unreasonable under the fourth amendment. *Id.* Nonetheless, the court relied on *United States v. Leon*, 468 U.S. 897 (1984) in finding the DEA agents had relied in good faith on the NARCOM agents' assurances that the wiretap complied with Philippine law and that the exclusionary rule, therefore, did not apply. *Id.* at 492.

89. *Id.* at 490.

basis.⁹⁰ Thus, the *Peterson* case is of little help in defining what constitutes a joint venture.

One significant aspect of *Peterson* is that, despite the existence of a joint venture, the U.S. agents apparently did not need a search warrant from an U.S. magistrate.⁹¹ Rather, the *Peterson* court measured the conduct of the U.S. agents abroad by the law of the foreign sovereign. Thus, under *Peterson* the focus shifts to the propriety of the acts under foreign law rather than under U.S. constitutional law. The court's application of Philippine law to determine reasonableness under the fourth amendment is startling. The court neither cited authority for the proposition nor even suggested a rationale for its conclusion. According to *Peterson*, if a U.S. agent relies in good faith on the foreign government's representations that the joint venture complies with that country's law, he has carried out his constitutional duty to refrain from unreasonable searches and seizures. This rule, however, was apparently shortlived. In *United States v. Verdugo-Urquidez*,⁹² the same court held the law of the foreign sovereign is irrelevant to whether a fourth amendment violation occurred.⁹³

The *Verdugo-Urquidez*⁹⁴ court also addressed the question of what constitutes a joint venture. In *Verdugo-Urquidez*, the United States Marshals Service and Mexican officials joined in a cooperative effort to apprehend Rene Martin Verdugo-Urquidez, a reputed drug smuggler, killer and one of the leaders of a large Mexican criminal operation. The joint effort led to Verdugo-Urquidez's arrest by the U.S. Marshals Service which transported him to the United States. Once in the United States, the DEA took custody of him.⁹⁵ The DEA subsequently sought cooperation from the Mexican government in a search of Verdugo-Urquidez's Mexicali residence, which it hoped would disclose documentary evidence and cash proceeds of narcotics transactions.⁹⁶ The DEA and a team of Mexican Federal Judicial Police (M.F.J.P.) officers also proceeded to

90. *Id.*

91. *Id.* at 492.

92. 856 F.2d 1214 (9th Cir. 1988).

93. *Id.* at 1229. Moreover, since *Peterson* the Supreme Court in *California v. Greenwood*, 108 S. Ct. 1625, 1630-31 (1988) held that the "reasonableness" of a search does not depend on the law of the particular state in which the search occurs. This holding seriously undermines the *Peterson* approach.

94. 856 F.2d 1214 (9th Cir. 1988).

95. *Id.* at 1215-16. The DEA had obtained an arrest warrant for Verdugo-Urquidez for violations of federal criminal laws. *Id.*

96. *Id.* at 1216-17. DEA surveillance revealed that a house in Mexicali was Verdugo-Ur-

Verdugo-Urquidez's other Mexican residence in San Felipe. A two hour search of the house ensued.⁹⁷ Most of the M.F.J.P. officers "stood a perimeter watch" while the others, including DEA agents, conducted the search of the house.⁹⁸ At the conclusion of the search, all of the seized items, except weapons, were turned over to the DEA.⁹⁹

The DEA agents and M.F.J.P. team then drove to Verdugo-Urquidez's Mexicali residence where M.F.J.P. officers and DEA agents conducted a room-by-room search of the house.¹⁰⁰ Another DEA agent supervised the M.F.J.P. officers' search, deciding whether the DEA wanted the items they found.¹⁰¹ Having decided it was too late to continue the search, the M.F.J.P. commandante placed in a briefcase all of the documents that the DEA officials had not yet examined,¹⁰² and instructed the DEA agents to take the briefcase and sort through the documents at a later time.¹⁰³ The DEA agents then returned to the United States with the seized documents.¹⁰⁴

The Ninth Circuit held that the U.S. participation in the search was "so great that no court could logically conclude anything other than that the search was an American operation from start to finish."¹⁰⁵ The court enumerated several factors which it considered in reaching this conclusion. First, the DEA planned and instigated the search for the express purpose of securing evidence for a U.S. trial.¹⁰⁶ Second, the DEA was

quidez's principal residence in Mexico but that he also owned a home in San Felipe, Baja California, Mexico. *Id.* at 1225.

97. *Id.* at 1227.

98. *Id.* at 1226-27.

99. *Id.* at 1227.

100. *Id.* Four DEA agents drove to the M.F.J.P. office in Mexicali where they met with the local M.F.J.P. commandante. *Id.* at 1217, 1226. From there a team of between ten and fifteen M.F.J.P. officers and the four DEA agents drove to the Mexicali residence. *Id.* at 1226. Before the search team left the M.F.J.P. office, "[the commandante] told the DEA agents that they would be permitted to take back to the United States any documentary items they found." *Id.* The M.F.J.P. conducted a "security sweep" around the perimeter of the house and the DEA agents then entered the house but did not begin their search. *Id.* The commandante and the DEA agents then decided to drive to Verdugo-Urquidez's San Felipe residence because it was getting late, and the drive to San Felipe would take two hours. *Id.* A few of the M.F.J.P. officers were left behind to secure the Mexicali residence. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1228.

involved before, during and after the searches.¹⁰⁷ Third, before the search began the M.F.J.P. told the DEA it could keep all the evidence seized.¹⁰⁸ Last, the DEA not only sought Mexican assistance in the investigation, but asked for "permission to run [its] own operation."¹⁰⁹

After concluding that U.S. participation in the search sufficiently established a joint venture, the court considered what the fourth amendment requires of U.S. agents under such circumstances.¹¹⁰ The *Verdugo-Urquidez* majority held that Mexican law is irrelevant to the question of whether the search violated the fourth amendment,¹¹¹ implicitly overruling *Peterson*. First acknowledging that, in the absence of exigent circumstances, the fourth amendment requires U.S. officers to obtain a search warrant before entering a residence in the United States,¹¹² the court then considered whether the requirement applies to searches of homes abroad.¹¹³ The court conceded that "a warrant issued by an American magistrate would be a dead letter in Mexico."¹¹⁴ Nevertheless, the court held the DEA should have obtained a warrant, not for its legal value in Mexico, but rather for its "substantial constitutional value in this country. A warrant issued by a detached magistrate here would reflect the magistrate's determination that probable cause to search existed."¹¹⁵

The Ninth Circuit correctly asserted that no court could fail to find a joint venture on the facts of *Verdugo-Urquidez*.¹¹⁶ Had the court failed to find a joint venture in *Verdugo-Urquidez*, the doctrine could arguably have been considered abandoned, at least in the Ninth Circuit. Thus, like the *Peterson* decision, the *Verdugo-Urquidez* opinion adds little to the definition of "joint venture." Nevertheless, the court's fourth amendment analysis was significant. As Judge Wallace accurately charged in his dissent,¹¹⁷ the majority ignored the implicit holding of *Peterson* that a warrant is not required before U.S. agents may conduct an extraterrito-

107. *Id.*

108. *Id.*

109. *Id.* The court's fourth factor was merely a restatement of the first. "Fourth, it was the DEA who took the initiative in ensuring the search took place soon after Verdugo-Urquidez's arrest." *Id.*

110. *Id.*

111. *Id.* at 1229.

112. *Id.* See also *supra* note 12.

113. 856 F.2d at 1229.

114. *Id.*

115. *Id.* at 1230.

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

117. 856 F.2d 1249.

rial search.¹¹⁸ In addition, the court rejected the astounding *Peterson* rule that foreign law determines the reasonableness of an extraterritorial search and, instead, consulted U.S. law as the standard for reasonableness under the fourth amendment.

The international silver platter cases demonstrate that only indisputable U.S. participation gives rise to a finding of a joint venture. *Peterson* and *Verdugo-Urquidez*, unlike the other cases, involved actual seizures by the United States. In *Hensel*, the United States gave the Canadians armed cover to facilitate the Canadian search and seizure. However, the *Birdsell*, *Stonehill* and *Marzano* opinions teach that even in operations where there is substantial U.S. participation, the courts may still refuse to find a joint venture. Accordingly, when U.S. agents obtain information during an extraterritorial operation, the evidence will more likely than not be admissible in a U.S. trial provided that U.S. agents did not seize any of the evidence or facilitate the foreign seizure.¹¹⁹

The *Stonehill*, *Birdsell*, and *Marzano* decisions appear result oriented,¹²⁰ with each court evidently intent upon avoiding the obvious conclusion that each operation was a joint venture between the United States and a foreign government.¹²¹ Perhaps one explanation for the reluctance of the courts to impose strict fourth amendment requirements on U.S. law enforcement officials investigating abroad is the fear of impairing necessary law enforcement practices. The fourth amendment warrant re-

118. *Id.* at 1229.

119. See *United States v. Morrow*, 537 F.2d 120, 140 (5th Cir. 1976) (the courts "have as a statistical matter been virtually unanimous in rejection of undue participation"), *cert. denied sub nom.*, *Martin v. United States*, 430 U.S. 956 (1977).

120. The courts are unquestionably reluctant to suppress foreign-seized evidence. For example, the courts have never held it impermissible for U.S. officials to give tips to foreign governments, *Brulay v. United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied sub nom.* *Martin v. United States*, 430 U.S. 956 (1977); *United States v. Hawkins*, 661 F.2d 436 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); to convey suspicions to foreign governments, *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978); or to supply information to foreign governments, *United States v. Delaplane*, 778 F.2d 570 (10th Cir. 1985), *cert. denied*, 479 U.S. 827 (1986); *United States v. Phillips*, 479 F. Supp. 423 (M.D.Fla. 1979).

In addition, foreign wiretaps that federal agents do not "initiate, supervise, control or direct" do not trigger the fourth amendment. *United States v. Cotroni*, 527 F.2d 708 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976). In short, the cases illustrate that courts require very "substantial participation" by U.S. agents in foreign searches before excluding the evidence.

121. In *Marzano*, for instance, an FBI agent admitted to a joint U.S.-Caymanian effort. The defense attorney asked the FBI agent at trial whether he told his office "that there was a joint Caymanian-Bureau effort to find the defendants?" The agent responded, "I told them what information had been developed [in the Cayman Islands] since we were there, through [the Cayman policeman]. I kept them informed, yes." 537 F.2d at 280 n.6 (Swygert, J., dissenting).

quirement, however, would be no greater a burden to bear for U.S. agents abroad than for agents within the United States. All but the most trivial U.S. participation in a foreign investigation should constitute a joint venture triggering fourth amendment requirements. To avoid adding burdens on agents abroad, courts should exclude evidence seized in a joint U.S.-foreign search only if the U.S. officials could have obtained a warrant from a U.S. court yet failed to do so.¹²² As the court in *United States v. Verdugo-Urquidez*¹²³ pointed out, even though a U.S. warrant would carry no legal authority in a foreign country, it would serve the purpose of ensuring that probable cause existed to justify a U.S. search or seizure.¹²⁴ If, however, exigent circumstances prevent officers from obtaining a warrant before conducting the search, then a court should apply the same exception it does for agents in the U.S.: exigent circumstances justify a warrantless search or seizure unless the officers acted without legally sufficient probable cause.¹²⁵

In sum, if U.S. officers do not possess a facially valid search warrant, or if they lack probable cause coupled with exigent circumstances, then they should not participate to any significant degree in a foreign search. This approach would infuse life into the fourth amendment as it applies abroad, without unduly interfering with extraterritorial U.S. investigations.

III. THE "SHOCKS THE JUDICIAL CONSCIENCE" TEST

Courts repeatedly have stated in dictum that they can suppress foreign-seized evidence¹²⁶ if the circumstances surrounding the search and seizure "shock the judicial conscience,"¹²⁷ though no court has ever done

122. One option available to U.S. law enforcement officials abroad is to seek, by telephone, a magistrate's authorization to conduct a search in a foreign country. See *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 160 n.10 (D.D.C. 1976) (expressing approval of such a procedure). See also *United States v. Robinson*, 533 F.2d 578, 588 (D.C. Cir.) (expressing approval of telephonically issued warrants), *cert. denied*, 424 U.S. 956 (1976). Since *Robinson* was decided, the Federal Rules of Criminal Procedure have been amended to authorize the issuance of a warrant "upon sworn oral testimony communicated by telephone or other appropriate means" when "circumstances make it reasonable to dispense with a written affidavit." FED. R. CRIM. P. 41(c)(2).

123. 856 F.2d 1214, 1228-30.

124. See *supra* notes 112-115 and accompanying text. See also 18 U.S.C. § 3042 (1982) which authorizes extraterritorial arrests and the issuance of extraterritorial arrest warrants.

125. See *supra* notes 9-12 and accompanying text.

126. See, e.g., *United States v. Hensel*, 699 F.2d 18, 25 (1983); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976); *Birdsell v. United States*, 346 F.2d 775, 782 n. 10 (5th Cir. 1965).

127. The language comes from *Rochin v. California*, 342 U.S. 165 (1952), where Justice Frank-

so. The courts justify this exclusionary rule as an exercise of their "supervisory power" over the administration of criminal justice in the federal courts.¹²⁸ Because suppressing relevant evidence is a drastic measure,¹²⁹ the talismanic invocation of the "supervisory power" as a justification for excluding evidence deserves close scrutiny. This section of the Note discusses the origin and purpose of the supervisory power and examines the scope of the supervisory power, particularly as it relates to the suppression of evidence.

A. *The Origin and Purpose of the Supervisory Power*

In *McNabb v. United States*,¹³⁰ the Supreme Court for the first time explicitly excluded evidence on the basis of the Court's "supervisory authority."¹³¹ In *McNabb* the Court held inadmissible confessions that federal agents obtained in violation of a federal statute during a post-arrest

furter found that state officers violated the due process clause of the fourteenth amendment by forcing an emetic solution into the defendant's stomach to induce him to vomit narcotic capsules. Writing for the Court, Justice Frankfurter stated that this intrusion does "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.* at 172.

128. *Birdsell v. United States*, 346 F.2d at 782 n.10. *See also* *United States v. Mount*, 757 F.2d 1315, 1322 (D.C. Cir. 1985) (Bork, J., concurring) ("[S]everal other circuits have previously stated that we should use our supervisory power to suppress evidence of a foreign search by means which 'shock the conscience.'").

129. In *United States v. Payner*, 447 U.S. 727 (1980), Justice Powell, for the majority, wrote:

The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.

Id. at 734. (citations omitted).

The fact that no court has ever excluded evidence seized by a foreign government underscores the fact that the courts consider exclusion a draconian penalty. Only alleged foreign conduct of an extremely outrageous nature would come within the "shocks the conscience" rule. *See United States v. Toscanino*, 500 F.2d 267, 270 (2d Cir.) (only case where a court has held alleged foreign conduct to shock the conscience), *reh'g denied*, 504 F.2d 1380 (1974) (en banc).

130. 318 U.S. 332 (1943).

131. *Id.* at 341. For a general discussion of the supervisory power see Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984). Prior to *McNabb*, in *Funk v. United States*, 290 U.S. 372 (1933), the Court had asserted its authority to modify the common law rules of evidence, in effect creating a federal common law of evidence. The *Erie* doctrine does not prohibit federal courts from developing a federal common law in cases where no state law governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See, e.g., Delcostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 159-61 n.13 (1983) (*Erie* cannot "be taken as establishing a mandatory rule that we apply state law in federal interstices."). *Erie* applies only to those cases which are governed by state law.

detention.¹³² The statute required prompt presentation of an arrestee before a U.S. commissioner.¹³³ The Court reasoned that to allow the convictions to stand would “[make] the courts themselves accomplices in wilful disobedience of the law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.”¹³⁴ Thus, mere congressional failure to forbid the use of such evidence prompted the Court to create a new rule of evidence. Resting its decision on neither constitutional nor statutory grounds,¹³⁵ the Court proclaimed that “[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.”¹³⁶

Since *McNabb*, the Supreme Court has invoked the supervisory power

P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 857-63 (3d ed. 1988).

With the advent of the Federal Rules of Evidence, the scope of the court's authority to modify the rules of evidence is less clear, though undoubtedly more narrow. Beale, *supra* note 131, at 1483-90.

132. 318 U.S. at 341-42.

133. 18 U.S.C. § 595 (1940), amended by 18 U.S.C. § 3501 (c) (1985). The 1940 version commanded federal officers to take any arrested person “before the nearest United States commissioner or the nearest judicial officer . . . for a hearing, commitment, or taking bail for trial”

134. 318 U.S. at 345.

135. Despite the Court's discussion of congressional policy, it did not find a statutory intent that such evidence be excluded. *Id.* at 346. *Cf.* *Nardone v. United States*, 308 U.S. 338, 339 (1939) (finding an implicit congressional intent that courts exclude evidence procured through wiretaps in violation of § 605 of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 1103).

136. 318 U.S. at 340. Since 1793, federal courts sitting in equity had statutory authority to “make rules and orders for their respective courts directing the returning of writs and processes, the filing of declarations and other pleadings” The Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333, 335. Since 1792, the Supreme Court has had authority to prescribe rules of equity; actions at law were governed by state law, subject to modification by either the Supreme Court or the lower federal courts. The Act of May 8, 1792, § 2, 1 Stat. 275, 276. The Court first exercised its power when it prescribed thirty-three Equity Rules (7 *Wheat.* xvii).

In 1934, along with the power to prescribe rules of procedure for actions in equity and at law, Congress empowered the Court to merge law and equity. The Act of June 19, 1934, § 2, 48 Stat. 1064. Four years later, the Court promulgated rules of procedure to merge law and equity. *Sup. Ct. R.* 1-86, 308 U.S. 645-766 (1938). In addition, a series of enactments beginning with the Act of February 24, 1933, 47 Stat. 904, and culminating with the Act of June 29, 1940, 54 Stat. 688, gave the Court broad power to promulgate rules of criminal procedure.

The Court first submitted Rules of Evidence to Congress in 1972. *See* 56 F.R.D. 183 (1972). Justice Douglas dissented, arguing that rules of evidence were not within the Court's delegated authority. *Id.* at 185. When Congress enacted the Federal Rules of Evidence in 1975, (88 Stat. 1926 (1975)), it simultaneously enacted a new “Enabling Act” to govern the promulgation and amendment of the Rules of Evidence. 28 U.S.C. § 2076. (1982).

on several occasions to create new rules of evidence.¹³⁷ Congress has modified or overruled several of these supervisory power decisions.¹³⁸ Notwithstanding the uncertainty respecting the contours of the Supreme Court's supervisory power, the lower federal courts have invoked a supervisory power of their own, apparently with the Supreme Court's approval.¹³⁹ Assuming, however, that federal courts do have broad supervisory power to create rules of procedure¹⁴⁰ and remedies for violations of federal law,¹⁴¹ there remains the issue of the courts' authority to establish new rules of evidence.

B. *The Use of the Supervisory Power to Exclude Evidence*

Congress delegated to the Supreme Court the authority to promulgate rules of evidence through a formal rulemaking procedure.¹⁴² Unlike

137. See, e.g., *Mesarosh v. United States*, 352 U.S. 1, 3, 14 (1956) ("The decision herein passes only on the integrity of a criminal trial in the federal courts. . . . [It is the Court's duty] to see that the waters of justice are not polluted."); *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124 (1956) (invoking the supervisory power in "fastidious regard for the honor of the administration of justice"); *Rea v. United States*, 350 U.S. 214, 216-17 (1956) (a case raising "not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies").

138. Congress modified the *McNabb-Mallory* rule, which requires the suppression of confessions unless there had been a prompt arraignment, so that if a confession is voluntary and made within six hours of arrest, a court cannot exclude it solely because of a delay in taking a defendant before a magistrate. 18 U.S.C. § 3501(c) (1985). Similarly, following *Jencks v. United States*, 353 U.S. 657 (1957), Congress adopted the Jencks Act, 18 U.S.C. § 3500(a),(e) (1982), which provides that the government need not disclose a government witness' statements until the witness has testified on direct examination at trial. The Act also defined which statements of government witnesses the prosecution must disclose to the defense. 18 U.S.C. § 3500(a),(e) (1982).

139. See, e.g., *United States v. Hasting*, 461 U.S. 499, 506-07 (1983) ("[R]eversals of convictions under the [appellate] court's supervisory power must be approached 'with some caution'"); *United States v. Payner*, 447 U.S. 727, 735 n. 7 (1980) ("Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the *defendant* by 'willful disobedience of law.'"). See also Beale, *supra* note 131, at 1455-62.

140. The phrase "rules of procedure" as used in this Note refers to only those rules regulating "technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process." Beale, *supra* note 131, at 1465. This Note will treat rules of procedure and rules of evidence separately.

141. See, e.g., *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971) (recognizing a federal common law cause of action for federal violations of the fourth amendment).

142. 28 U.S.C. § 2076 (1982). Section 2072, enabling the Court to prescribe rules of procedure, and § 2076, enabling the Court to prescribe rules of evidence, both provide that no changes shall go into effect until 90 days after they have been reported to Congress (180 days for rules of evidence). 28 U.S.C. §§ 2072, 2076. Some question exists, however, concerning the Court's authority to bypass these procedures and make rules through adjudication. See Beale, *supra* note 131, at 1482-83.

rules of procedure, which all federal courts have authority to prescribe absent a controlling statute or rule,¹⁴³ Federal Rule of Evidence 402¹⁴⁴ effectively divests the lower courts of authority to create a federal common law of evidence.¹⁴⁵ *McNabb* recognized the Court's power to formulate rules of evidence only in "areas not governed by statute."¹⁴⁶ Thus, the courts' invocation of a supervisory power to create a new exclusionary rule of evidence is almost certainly misplaced and without authority.¹⁴⁷

The Supreme Court addressed the propriety of the lower courts' use of the supervisory power to exclude evidence in *United States v. Payner*.¹⁴⁸ In *Payner*, Justice Powell explained that the primary purpose for excluding evidence under the exclusionary rule or the supervisory power is deterrence of unconstitutional law enforcement.¹⁴⁹ Two years later, in *United States v. Hastings*,¹⁵⁰ the Court noted that the purposes of the courts' supervisory power are threefold: to remedy violations of recognized rights, to preserve the integrity of the courts "by ensuring that a conviction rests on appropriate considerations validly before the jury," and to deter illegal law enforcement conduct.¹⁵¹

The Court cited *McNabb*¹⁵² and *Rea v. United States*¹⁵³ in support of

("[T]he Court's statutorily granted authority extends only to legislative rulemaking, not to the announcement of general rules in the course of adjudication.").

143. 28 U.S.C. § 2071 (1982).

144. FED. R. EVID. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." *Id.*

145. Beale, *supra* note 131, at 1487-90. Rule 402 may provide for the formulation of exclusionary rules as remedies for violations of the Constitution and violations of federal statutes by the language "except as otherwise provided by the Constitution of the United States, [or] by Act of Congress. . . ."

146. 318 U.S. at 341 n.6.

147. However, invocation of the supervisory power to exclude evidence obtained by U.S. officers through *unconstitutional* means is probably not precluded by Rule 402 and may even be authorized by its caveat that "evidence is admissible, except as otherwise provided by the Constitution"

148. 447 U.S. 727 (1980).

149. *Id.* at 736-37. Justice Powell wrote:

The values assigned to the competing interests do not change because a court has elected to analyze the questions [of exclusion] under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding evidence remain precisely the same.

Id.

150. 461 U.S. 499 (1982).

151. *Id.* at 505.

152. 318 U.S. 332 (1943).

153. 350 U.S. 214 (1956).

the assertion that one of the purposes of the supervisory power is to remedy violations of recognized rights.¹⁵⁴ As noted previously, *McNabb* involved an illegal, post-arrest detention,¹⁵⁵ while in *Rea*, the Court prevented a state court from using evidence which a federal agent illegally seized.¹⁵⁶ Notably, both cases involved the remedying of violations of federal law.¹⁵⁷ Similarly, the cases which support the proposition that a court may invoke its supervisory powers to preserve judicial integrity involved violations of federal law.¹⁵⁸ The third purpose of the supervisory power, to deter illegal law enforcement conduct, explicitly contemplates some violation of law.¹⁵⁹ Hence, regardless of the purpose a court cites for invoking its supervisory powers to exclude evidence, *Hasting* suggests there must be an underlying violation of the law. Moreover, excluding evidence solely on the basis of a court's notion of fundamental fairness would be a violation of Rule 402,¹⁶⁰ could raise questions of separation of powers¹⁶¹ and would not fulfill any of the three *Hasting* purposes.

In the international silver platter cases, the courts lack any authority to prescribe a "shocks the conscience" rule of evidence.¹⁶² Rule 402 expressly limits the courts' authority to declare relevant evidence inadmissible unless specifically provided by the Constitution, statute or rule.¹⁶³

154. *Hasting*, 461 U.S. at 505.

155. *See supra* notes 130-134 and accompanying text.

156. More particularly, the Court ordered the agent to "reacquire the evidence and destroy it or transfer it to other agents." 350 U.S. at 216. In addition, the Court enjoined him from testifying in the state proceedings. *Id.* The decision in *Rea*, asserting a supervisory power "over federal law enforcement agencies," implicates a potentially serious separation of powers problem. *See* Beale, *supra* note 131, at 1506-10; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1657 (1963).

157. *McNabb* involved a federal officer's violation of a federal statute, 418 U.S. at 342; *Rea* involved a violation of Rule 41(a) of the Federal Rules of Criminal Procedure, 350 U.S. at 214-15.

158. *See, e.g.,* *Elkins v. United States*, 364 U.S. 206 (1960) (involving a fourth amendment violation).

159. The Court cited *Payner*, 447 U.S. 727 (1980), which involved a fourth amendment violation. *Hasting*, 461 U.S. at 505.

160. *See supra* note 144.

161. Judicial formulation of exclusionary rules of evidence on the basis of a court's notion of fundamental fairness would be tantamount to judicial supervision of law enforcement agencies. *See supra* note 156.

162. *See supra* notes 142-147 and accompanying text. Judge Bork, concurring in *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985) objected to the oft-repeated dictum recognizing a supervisory power to exclude foreign-seized evidence. *Id.* at 1320-24.

163. *See supra* notes 142-147 and accompanying text.

Neither the Constitution,¹⁶⁴ federal statute, Federal Rules of Evidence nor any rule promulgated by the Supreme Court makes evidence procured by foreign governments inadmissible under any circumstances.¹⁶⁵ Rule 402, therefore, prohibits the courts from suppressing any relevant evidence, even if it is seized by a foreign government in a manner that "shocks the conscience."

IV. CONCLUSION

Occasional U.S. involvement in foreign searches and seizures has become a necessity of international law enforcement. The courts have refused to exclude evidence seized by foreign governments in searches which fail to meet fourth amendment requirements, unless U.S. officers significantly participated in the search and seizure or the foreign government's conduct "shocks the judicial conscience." Courts have interpreted both rules of exclusion narrowly. This Note argues that the federal courts, without acknowledgment, are applying the fourth amendment only when the United States actually seizes evidence during a foreign search or when U.S. conduct makes the foreign seizure possible. As an alternative to the "joint venture" standard which has proved to be only a nominal limit upon U.S. agents abroad, this Note proposes that even minimal U.S. participation in a foreign search should trigger the fourth amendment, particularly its warrant requirement.

This Note also challenges the validity of the "shocks the judicial conscience" formula for the exclusion of foreign-seized evidence. The lower federal courts lack authority to exclude evidence merely because the method of its procurement "shocks the conscience." Until the Congress or the Supreme Court grants such authority to the courts, foreign-seized evidence should be excluded only if U.S. agents participate in the search and, absent exigent circumstances, fail to obtain a warrant from a U.S. magistrate. By following this rule the courts will both protect the fourth

164. The Constitution does not require the exclusion of evidence procured by foreign governments, even where the seizure was effectuated by means that "shock the conscience." The Court, in *Rochin v. California*, 342 U.S. 165 (1952), required the exclusion of evidence seized by shocking means because the state officer's shocking conduct was deemed to violate the due process clause of the fourteenth amendment. Because the fourteenth amendment applies only to the states, and the fifth amendment applies only to the federal government, neither the fourteenth nor fifth amendments apply where the shocking conduct is purely foreign.

165. *United States v. Janis*, 428 U.S. 433, 455 (1976) (the exclusionary rule does not apply to foreign governments).

amendment rights of U.S. citizens abroad and insure United States participation in international law enforcement.

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