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The Fourth Amendment And Foreign Searches: A Standard For The Admission Of Evidence

THE FOURTH AMENDMENT AND FOREIGN SEARCHES: A STANDARD FOR THE ADMISSION OF EVIDENCE

The federal and state courts originally adopted the common law rules of evidence which allowed the admission of illegally or unconstitutionally seized evidence.[1] The federal courts recognized that the fourth amendment[2] placed limitations on federal officials, but not until *Weeks v. United States*[3] did the Supreme Court require the exclusion of evidence seized in violation of the fourth amendment by federal officials.[4] In *Weeks* however, the Court stated that property seized by state or local officials not acting under a claim of federal authority was not governed by the fourth amendment, and held that fourth amendment limitations applied only to the United States government and its agencies.[5] Subsequently, in *Wolf v. Colorado,*[6] the Court held that the commands of the fourth amendment were "implicit in the concept of ordered liberty,"[7] and thus were applicable to the states through the due process clause of the fourteenth amendment.[8] The Court, however, refused to require the exclusion of evi-

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[1] *See, e.g.,* Adams v. New York, 192 U.S. 585, 594 (1904); Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841). The courts accepted the common law rule that admitted any evidence relevant to the offense charged if it had been obtained by a method which did not detract from the reliability of the evidence.

[2] U.S. CONST. amend. IV 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.

[3] 232 U.S. 383 (1914).

[4] *Id.* at 391-92. In *Weeks,* the Court asserted that it was the duty of all who were entrusted with the enforcement of the laws under the federal system to insure that the limitations and restraints of the fourth amendment were observed. The Court specifically stated that the practice of securing convictions through the use of evidence unlawfully seized "should find no sanction in the judgment of the courts. . . ." *Id.* at 392. For a discussion of the exclusionary rule, its history, and effectiveness, see Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970).

[5] 232 U.S. at 398 (1914).

[6] 338 U.S. 25 (1949).

[7] *Id.* at 27. *Wolf* followed a series of cases which declared that some of the rights present in the Bill of Rights were incorporated in the due process clause of the fourteenth amendment because these rights were fundamental to the American system. *See, e.g.,* De Jonge v. Oregon, 299 U.S. 353, 364 (1937)(first amendment right to freedom of speech incorporated); *see also* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism,* 66 YALE L.J. 319 (1957).

[8] Wolf v. Colorado, 338 U.S. at 27-28 (1949). U.S. CONST. amend. XIV, §1 states

dence seized unconstitutionally by state officials, stating that the rule was a matter of judicial implication and was not constitutionally required.[9] The Court determined that the states should be allowed to decide what means of enforcement should be adopted to prevent unreasonable searches and seizures.

For twelve years, the Supreme Court allowed the states to consider alternatives, but in *Mapp v. Ohio*,[10] the Court extended the exclusionary rule to prohibit the admission of evidence seized unconstitutionally by state officials.[11] The Court noted that the exclusionary rule is of constitutional origin rather than merely a rule of evidence.[12] Thus, the exclusionary rule currently operates to prevent the admission in state and federal criminal courts of evidence seized by state and federal officials in violation of the Constitution.[13] Federal and state prosecutors, however, may use evidence seized illegally by private persons where there is no impermissible public or governmental compulsion against the accused.[14] Although several United States courts of appeals have considered whether evidence seized by foreign police in violation of fourth amendment standards should be excluded,[15] the Supreme Court has not addressed the issue.[16]

"nor shall any State deprive any person of life, liberty, or property without due process of law. . . ."

[9] Wolf v. Colorado, 338 U.S. at 33 (1949).

[10] 367 U.S. 643 (1961).

[11] *Id.* at 655.

[12] *Id.* at 649. The *Mapp* Court stated:

> There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

Id. The Court provided no support for its assertion that the exclusionary rule is of constitutional origin. In *Weeks* the Court never stated that the rule was constitutionally required, but asserted that the fourth amendment would be meaningless unless an exclusionary rule was adopted to give its limitations force. Weeks v. United States, 232 U.S. at 393 (1914).

[13] In United States v. Janis, 96 S. Ct. 3021 (1976), the Court held that the fourth amendment and the exclusionary rule will not be applied to prevent the admission of unconstitutionally seized evidence in civil proceedings.

[14] Couch v. United States, 409 U.S. 322, 331-32 n.14 (1973), *citing* Burdeau v. McDowell, 256 U.S. 465, 475 (1921)(the fourth amendment's "origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . .").

[15] *See* United States v. Morrow, 537 F.2d 120 (5th Cir. 1976); United States v. Marzano, 537 F.2d 257 (7th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3163 (U.S. Aug. 25, 1976) (No. 279); United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 2226 (1976); United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975)(evi-

Until recently, the question of the admissibility of evidence seized in foreign searches received little discussion.[17] In the past year however, the Court of Military Appeals (COMA)[18] and the Seventh Circuit have adopted opposing rationales governing foreign searches.[19] In *United States v. Marzano,*[20] the Seventh Circuit affirmed the admission of evidence seized by Grand Cayman police.[21] Marzano was con-

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dence seized by Israeli police after contacts with American officials admitted); Kilday v. United States, 481 F.2d 655 (5th Cir. 1973)(evidence seized by Argentine police during an interrogation of Kilday and a search of his belongings admitted); United States v. Tierney, 448 F.2d 37 (9th Cir. 1971); United States v. Callaway, 446 F.2d 753 (3d Cir. 1971), *cert. denied,* 404 U.S. 1021 (1972)(evidence seized during search of two cars by Canadian police admitted); United States v. Shea, 436 F.2d 740 (9th Cir. 1970) (per curiam); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969)(evidence seized during Philippine search of warehouses admitted despite prior knowledge and limited involvement of American official); Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied,* 389 U.S. 986 (1967)(evidence seized during Mexican search of car admitted); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965); Johnson v. United States, 207 F.2d 314 (5th Cir. 1953), *cert. denied,* 347 U.S. 938 (1954)(evidence seized by Cuban police admitted).

[16] In United States v. Janis, 96 S. Ct. 3021, 3033 n.31 (1976)(dictum), the Court noted that the exclusionary rule "is not applicable where a . . . foreign government commits the offending act."

[17] Since the Court of Appeals for the Ninth Circuit decided Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), the federal courts have considered the foreign search only in passing and generally have followed *Stonehill* as dispositive. *See, e.g.,* United States v. Wolfish, 525 F.2d 457 (2d Cir. 1975)(no citation of *Stonehill* but followed same analysis); United States v. Callaway, 446 F.2d 753 (3d Cir. 1971). The *Stonehill* court held that the fourth amendment applied to foreign searches only if American officials substantially participated in the search. 405 F.2d at 743.

[18] COMA is a specialized Article I court which hears only military appeals from courts-martial. The court was given its authority by Congress in Article 67 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §867 (1970). The court was created to enforce procedural safeguards which Congress guaranteed to military personnel. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975); Burns v. Wilson, 346 U.S. 137, 142 (1953). Its decisions with regard to military law are not binding on the federal district courts, but are considered persuasive. Jackson v. McElroy, 163 F. Supp. 257, 266 (D.D.C. 1958). The United States courts of appeals have no jurisdiction to review the actions of COMA, except collaterally by petition for writ of habeas corpus. Schlesinger v. Councilman, 420 U.S. at 746; Burns v. Wilson, 346 U.S. at 144. *See* note 101 *infra.* COMA frequently hears cases involving issues of law similar to those considered by the United States district courts and courts of appeals.

[19] *Compare* United States v. Jordan, 23 U.S.C.M.A. 525, 50 C.M.R. 664 (1975) (hereinafter *Jordan* I), *modified,* 24 U.S.C.M.A. 156, 51 C.M.R. 375 (1976) (hereinafter *Jordan* II) *with* United States v. Marzano, 537 F.2d 257 (7th Cir. 1976).

[20] 537 F.2d 257 (7th Cir. 1976).

[21] Evidence seized included $22,300 in cash, a piece of paper, and two air tickets. United States v. Marzano, 537 F.2d at 277 (7th Cir. 1976)(Swygert, J., dissenting).

victed in a federal court of conspiracy to commit theft of money from Purolator Security, Inc.,[22] taking more than three million dollars belonging to various banks from the possession of Purolator,[23] and transporting the stolen money in interstate and foreign commerce.[24] The evidence, seized during Marzano's arrest in Grand Cayman for refusing to give his name and address, was turned over to agents of the Federal Bureau of Investigation. The FBI had provided the Grand Cayman police with a picture of Marzano and information about his involvement in the United States robbery. United States agents were present throughout the Grand Cayman police investigation, including the period during the arrest and search of Marzano, but did not question him regarding the alleged American crimes and did not physically participate in the search. Marzano was never charged with the Grand Cayman offense, but was placed on a plane accompanied by the FBI agents and was arrested on the United States charges upon his arrival in Miami. In admitting the evidence, the *Marzano* court held that the participation of the FBI agents was "too insignificant" to require the search conducted by a foreign official to be judged by American standards.[25] The court held that the FBI agents were not participants merely because they provided information to a foreign official who then took certain actions based on that information.[26] The court was influenced by the fact that the foreign official carefully limited the authority of the FBI agents while they were in Grand Cayman, and that the FBI agents were merely accompanying the foreign official at the time of Marzano's arrest.[27] The court found that the Grand Cayman police had acted to enforce Grand Cayman laws, the search related to the Grand Cayman arrest, and the Grand Cayman police voluntarily released the seized evidence to the FBI agents.[28]

In contrast to the *Marzano* court, COMA adopted more stringent requirements for the admission of evidence seized in extraterritorial searches in *United States v. Jordan.*[29] COMA held that a foreign search must meet fourth amendment standards regardless of whether the evidence was seized by foreign police acting independently or in

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[22] 18 U.S.C. §371 (1970).

[23] 18 U.S.C. §2113(b) (1970).

[24] 18 U.S.C. §2314 (1970).

[25] 537 F.2d at 270 (7th Cir. 1976).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 271.

[29] 23 U.S.C.M.A. 525, 50 C.M.R. 664 (1975), *modified,* 24 U.S.C.M.A. 156, 51 C.M.R. 375 (1976).

conjunction with American officials.[30] The Air Force, however, petitioned COMA to reconsider its decision and asserted that *Jordan* I encouraged trials in foreign courts with no American constitutional safeguards.[31] The Air Force also argued that the extension of the exclusionary rule to searches directed by foreign officials resulted in minimal deterrence and was not constitutionally required.[32] On rehearing, COMA modified its holding and stated that where evidence is seized by foreign police acting independently of American influence, the prosecution must demonstrate that the search was legal under the law of the foreign country for the evidence to be admissible.[33] COMA rejected the approach of the civilian federal courts reflected in *Marzano* to hold that a search by foreign police with American participation must comply with the fourth amendment as applied in the military community[34] if the prosecution wished to use the

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[30] *Jordan* I, 23 U.S.C.M.A. at 527, 50 C.M.R. at 666 (1975).

[31] *Jordan* II, 24 U.S.C.M.A. at 158, 51 C.M.R. at 377 (1976).

[32] *Id.* at 157, 51 C.M.R. at 376.

[33] *Id.* at 159, 51 C.M.R. at 378.

[34] While COMA rejected the standard adopted by the federal courts for admitting evidence seized in an extraterritorial search, COMA generally follows federal court interpretations in applying the fourth amendment to the military community. *See* United States v. Mayton, 23 U.S.C.M.A. 565, 566, 50 C.M.R. 784, 785 (1975) (per curiam)(consent); United States v. Guerette, 23 U.S.C.M.A. 281, 284, 49 C.M.R. 530, 533 (1975)(probable cause); United States v. Soto, 16 U.S.C.M.A. 583, 585, 37 C.M.R. 203, 205 (1967)(exigent circumstances). COMA appears to have modified the federal court interpretation of the fourth amendment in two significant areas because of the requirements of the military community. *See* note 59 *infra*. First, COMA has held that a base or unit commander constitutionally may issue a search warrant on probable cause although he is charged with the conflicting responsibility of maintaining order and discipline, and thus is required to direct and often participate in investigations. United States v. Staggs, 23 U.S.C.M.A. 111, 113, 48 C.M.R. 672, 674 (1974). *But cf.* United States v. Roberts, No. 30,818, slip op. at 3, n.6 (C.M.A. October 8, 1976)(dictum)(questioning whether unit commander can be a neutral and detached magistrate). Second, at least until recently, an inspection has not been considered to be a search requiring compliance with the warrant requirement of the fourth amendment. United States v. King, 24 U.S.C.M.A. 239, 240, 51 C.M.R. 618, 619 (1976); United States v. Thomas, 24 U.S.C.M.A. 228, 231, 51 C.M.R. 607, 610 (1976). In *King* and *Thomas*, COMA noted that the commander has authority to order inspections of persons and property to determine the fitness, health, welfare, and security of the unit. *Id.* Whether this authority permits the admission of evidence secured during the inspection is in doubt.

The three judges of COMA appear divided on whether an inspection may be used as a pretext to enter a government building for the purpose of investigating a criminal matter. Judge Cook maintains that a serviceman has no reasonable expectation of privacy in the common areas of a military barracks including living quarters, and that an inspection to detect contraband in these areas does not require a warrant. United States v. Thomas, 24 U.S.C.M.A. at 231, 51 C.M.R. at 610. For Judge Cook, fourth

evidence seized.[35] The *Jordan* II court defined "participation" as presence at the scene of the search, requesting the search, or providing information, assistance, or direction which initiates, aids, or furthers the objective of the foreign search.[36] This definition clearly requires application of the fourth amendment to the fruits of any search where American officials have provided information which is used in a foreign investigation culminating in a search, where American officials specifically request a search, or where they are present at the scene during the search.

Jordan involved a search of an American serviceman and his living quarters for evidence of his involvement in a foreign crime. The search occurred on an American military installation. Glenn Jordan, an airman stationed in Bicester, England, was arrested by the local police in connection with the investigation of several burglaries that had occurred in British-owned housing. Jordan was interrogated by the local police who requested permission to search his room. After being denied the privilege of making a phone call, Jordan agreed to the search, saying, "I can't really stop you."[37] The English police secured Jordan's keys, and after notifying the American air police of their intentions,[38] searched Jordan's room in the presence of the

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amendment requirements must be met only when the government searches the personal property of the serviceman in which he has a reasonable expectation of privacy. *Id.* Chief Judge Fletcher, however, asserted that inspections necessary to perform the command function of maintaining military preparedness were necessary and authorized by the Constitution, but that evidence seized during an inspection could not be admitted in a criminal proceeding nor used to establish probable cause. Id. at 235, 51 C.M.R. at 614 (Fletcher, C.J., concurring in the result). Chief Judge Fletcher contended that this application of the exclusionary rule would prevent abuse of inspections. Senior Judge Ferguson viewed the method by which the evidence was obtained as a search, and refused to distinguish between inspections and searches in determining whether the fourth amendment had been violated. *Id.* at 238, 51 C.M.R. at 617 (Ferguson, S.J., concurring in the result).

Recently, Senior Judge Ferguson was replaced by Judge Perry. In United States v. Roberts, No. 30,818, slip op. at 10 (C.M.A. October 8, 1976), Judge Perry distinguished between "the traditional military inspection which looks at the overall fitness of a unit to perform its military mission" and the shakedown inspection which is designed to find specific evidence of a crime in a general area by means of a thorough search of all persons and things in the area. Judge Perry held that the military inspection was a permissible deviation from civilian standards and probably expected by the serviceman while the shakedown inspection was an unreasonable invasion of a person's expectation of privacy and analogous to an unconstitutional dragnet search. *Id.* Chief Judge Fletcher and Judge Cook continued to hold the same positions as in *Thomas.*

[35] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[36] *Id. See* text accompanying notes 52-66 *infra.*

[37] *Jordan* I, 23 U.S.C.M.A. at 526, 50 C.M.R. at 665 (1975).

[38] Relations between United States armed forces stationed in England and the

American police.[39] The American police officers "took no part in the search other than to unlock a padlock on [Jordan's] locker and to look around the room."[40] In the course of the search, stolen property from the burglarized premises was discovered. The evidence was photographed by an Air Force photographer at the English police officer's request. The seized evidence subsequently was used in Jordan's American court-martial trial.

COMA's holding in *Jordan* marked a sharp divergence from the position of the federal appellate courts as manifested in *Marzano.* The American courts traditionally have held that the exclusionary rule will be applied in the foreign search context only if there is substantial participation by American officials.[41] In contrast, COMA held in *Jordan* II that where American officials provided information, requested a search, or were present during the search, failure to comply with the fourth amendment would result in the application of the exclusionary rule to the evidence seized in the search.[42]

United Kingdom are governed by the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter SOFA]. Article VII, §6(a) of that agreement requires the parties to "assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence." *Id.* at 1800, 199 U.N.T.S. at 78. *See* text accompanying notes 58-66 *infra.*

[39] Under the *Jordan* II definition, mere presence at an investigation constitutes participation. *See* text accompanying note 36 *supra.*

[40] *Jordan* I, 23 U.S.C.M.A. at 526, 50 C.M.R. at 665 (1975).

[41] The substantial participation test was developed by the Ninth Circuit in Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968). Two other circuits have adopted the substantial participation test. United States v. Wolfish, 525 F.2d 457, 463 (2d Cir. 1975); United States v. Callaway, 446 F.2d 753 (3d Cir. 1971). In *Stonehill,* the court held that "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 between the United States and the foreign officials." 405 F.2d at 743. The court stated that in order to determine whether a joint venture existed, the actions of the federal agent in the search and seizure must be compared "with the totality of the acts done in the search and seizure." *Id.* at 744. The *Stonehill* court was persuaded that substantial participation was not present since neither United States nor foreign agents were involved in the selection of evidence for a United States investigation, all activities of United States agents took place before the search or after its termination, and the United States agents objected to the raid. *Id.* at 746. The court concluded that "the casual presence of a Federal officer at the scene of a search is not sufficient to make the Federal officer a participant. . . ." *Id.* No federal court ever has found that the participation of American officials in a foreign search was substantial. *See* cases cited in note 15 *supra.*

[42] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976). In view of the holdings in Marzano v. United States, 537 F.2d 257 (7th Cir. 1976), and Stonehill v. United

In considering whether the application of the fourth amendment and the exclusionary rule is appropriate in a case involving evidence derived from a foreign search in which there was some degree of American involvement, the court's attention should focus on the involvement of the American agents since only they are subject to the fourth amendment.[43] The limitations imposed by the United States Constitution apply to American officials wherever they act in their official capacity, whether at home or abroad.[44] Thus, the activity of the American official in relation to a foreign search is crucial in determining whether the fourth amendment should be applied to the search and the evidence seized.

The Supreme Court has held that the determining factor in applying the fourth amendment to searches occurring entirely within the United States is whether the federal agent shared in the securing or selection of evidence by unconstitutional means.[45] While the Court made this statement prior to *Mapp v. Ohio*[46] and in the context of federal-state searches, analogous reasoning should be applicable to extraterritorial searches.[47] The courts, in the foreign search context,

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States, 405 F.2d 738 (9th Cir. 1968), the courts of appeals probably would term the American participation in *Jordan* as not substantial or too insignificant, and thus admit the evidence. *See* discussion of substantial participation test in note 41 *supra* and discussion of the *Marzano* opinion in text accompanying notes 20-28 *supra.* The test developed in *Jordan* II was explicitly rejected in United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976).

[43] Reid v. Covert, 354 U.S. 1, 5-6 (1957). As the Court stated in *Reid:*

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. 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. The fourth amendment was specifically held to protect United States citizens abroad and to apply to United States military officials in Best v. United States, 184 F.2d 131, 138 (1st Cir. 1950), *cert. denied,* 340 U.S. 939 (1951) ("the United States Army officers who conducted the search were subject to the fourth amendment").

[44] Reid v. Covert, 354 U.S. 1, 5-6 (1957). *See* Stonehill v. United States, 405 F.2d 738, 749 (9th Cir. 1968)(Browning, J., dissenting). Prior to *Jordan* I, the fourth amendment had never been held to limit the actions of foreign officials. *See* Stonehill v. United States, 405 F.2d at 743; Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965).

[45] Lustig v. United States, 338 U.S. 74, 78-79 (1949).

[46] 367 U.S. 643 (1961).

[47] In Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), the Ninth Circuit noted that it was adopting a test analogous to the substantial participation test developed by the Supreme Court prior to *Mapp* for determining when to apply the fourth

should follow this reasoning and focus on whether the American official is involved in the search before its objectives are accomplished.[48] Both COMA in *Jordan* II and the Seventh Circuit in *Marzano* followed this approach. The opinions, however, differ regarding the definition of what constitutes involvement.

The traditional view reflected in *Marzano* holds that a violation of the Constitution occurs only where there is substantial participation by American officials in a search which did not comply with the fourth amendment.[49] This definition necessarily allows a degree of involvement in foreign searches which is permissible without violating the Constitution.[50] However, the standard adopted by the courts

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amendment to evidence that state officials had seized and federal prosecutors sought to introduce. The substantial participation test was developed to assist the federal courts in the administration of the "silver platter" doctrine. The doctrine was first recognized in Weeks v. United States, 232 U.S. 383 (1914), where the Court stated that evidence seized by state officers not acting under a claim of federal authority was admissible in a federal prosecution despite the fact that it would have been excluded if seized by federal officers. *Id.* at 398. The doctrine was given its name in Lustig v. United States, 338 U.S. 74, 78 (1949). Under the "silver platter" doctrine, evidence seized by state officers, which would have violated the fourth amendment if the seizure had been by federal officers, was admissible in federal court unless the purpose of the search was to obtain evidence of a federal offense, Gambino v. United States, 275 U.S. 310 (1927), or federal officers participated in the search, Lustig v. United States, 338 U.S. at 78; Byars v. United States, 273 U.S. 28, 33 (1927). The "silver platter" doctrine as applied in federal-state relations was rejected by the Supreme Court in Elkins v. United States, 364 U.S. 206 (1960).

[48] *See* Lustig v. United States, 338 U.S. 74, 79 (1949). In *Lustig,* the Court stated, "It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it." *Id.* Judge Browning argued in dissent in Stonehill v. United States, 405 F.2d 738, 751 (9th Cir. 1968), that under the *Lustig* analysis, the courts must view the search as a functional whole in determining whether American agents participated. The *Lustig* analysis appears to be susceptible to an interpretation that American involvement in the coordination or identification of items to be seized in a search may be sufficient involvement although American agents are not present during the search. While this interpretation was rejected by the *Stonehill* majority, *Id.* at 746, COMA appears to have adopted a similar interpretation in *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[49] *See* cases cited in note 41 *supra.*

[50] *See, e.g.,* Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968). In *Stonehill,* an agent of the Internal Revenue Service learned of potential violations of the United States tax laws and instituted an investigation. Information gathered during the investigation was communicated to Philippine authorities who were gathering evidence for the deportation of Stonehill. The Philippine authorities decided to raid Stonehill's business. Although the American official had objected to the raid, he allowed his home to be used for meetings to plan the raid, and on one occasion asked that a specific building be included in the search. The American official was shown the Philippine

of appeals does not assist the American official who is aware of the impending foreign search in determining whether or to what extent he should become involved.[51] Rather, the standard adopted in *Marzano* and by the other courts of appeals encourages American officials to participate in foreign searches where participation will further American law enforcement interests. The standard fails to provide American officials with guidance as to when their participation will be considered substantial, resulting in the application of the fourth amendment to the search. The uncertainty which results from the adoption of the substantial participation test places the law enforcement official in the position of potentially rendering valuable evidence inadmissible if his participation subsequently is determined to have been substantial. Clearly, the courts have a responsibility to define carefully when the fourth amendment and the exclusionary rule will apply in the foreign search context. *Marzano* fails to provide this necessary guidance.

This analysis would appear to support the holding of COMA in *Jordan* II with regard to a foreign search with American involvement. COMA's holding would discourage any unconstitutional American involvement in foreign searches since it excludes evidence derived from a foreign search in which any form of American assistance, whether providing information or participating in the search, was received where the search violates the fourth amendment.[52] However, the holding of COMA in *Jordan* II regarding evidence seized in a foreign search in which Americans are involved results in the disruption of international cooperation in solving crimes which cross territorial boundaries in the civilian context,[53] and conflicts with the poli-

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warrant, which did not comply with Philippine law, *id.* at 743, prior to the search and secured permission to copy fruits of the search. On the day of the raid, the American official waited at Philippine police headquarters for the raid to be completed. When the Philippine police had difficulty in identifying the evidence for which they were looking, the American official accompanied them to Stonehill's business and assisted by pointing out relevant documents and identifying key rooms to be searched. The American official did not make a detailed examination of any of the documents and did not control the disposition of the seized evidence. *Id.* at 740-42.

[51] *Cf.* Elkins v. United States, 364 U.S. 206 (1960). The Court in *Elkins* commented on the difficulty courts experienced in determining the amount and type of participation necessary to require the suppression of evidence under the "silver platter" doctrine. *Id.* at 212. The Court also noted the inconsistency and unpredictability that resulted from the inability of the courts to lay down a clear standard. *Id.* at 212-13.

[52] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[53] *See* text accompanying notes 55-57 *infra*. *Cf.* United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976) ("communication between law enforcement agencies of different countries [is] beneficial . . . and [is] to be encouraged.")

cies established by the federal courts and Congress in the military context.[54]

Under the *Jordan* II holding, American officials, both civilian and military, may not use evidence acquired in a foreign search that violates American constitutional standards even where they had merely provided information of a crime or the identity of suspects.[55] Such an interpretation seems unjustified since the standards for searches and seizures vary from country to country. American police officials should not be held responsible for the actions of their foreign counterparts which they are unable to control. In the domestic context, federal and state officials operate under the same basic rules with regard to searches and seizures.[56] Both federal and state officials are aware of the limitations of their authority to conduct searches. Therefore, federal and state officials can effectively cooperate since their counterparts are required to observe the same limitations imposed by the fourth amendment. Foreign police likely will observe their own search and seizure law, which may be less restrictive than the fourth amendment.[57] By doing so, they will endanger the admissibility of evidence in American courts under the *Jordan* II rule, even where American involvement is minimal, thus arguably discouraging international cooperation in law enforcement.

In the military context, the *Jordan* II holding appears to conflict with the NATO Status of Forces Agreement (SOFA)[58] and the congressional preference for trials of American servicemen in American courts.[59] SOFA requires the signatory countries to assist in "all neces-

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[54] *See* note 59 *infra.*

[55] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[56] Mapp v. Ohio, 367 U.S. at 655 (1961); Wolf v. Colorado, 338 U.S. at 27-28 (1949).

[57] *See* United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967).

[58] June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67.

[59] The expression of congressional intent is found in Senate Resolution Ratifying SOFA with Reservations, 83d Cong., 1st Sess., 99 CONG. REC. 8780, 8837-38 (1953). The complete resolution is reproduced at 4 U.S.T. at 1828. The Senate Resolution requires commanding officers to review the law of the foreign country, and to request that the country waive jurisdiction if they find that the constitutional rights the accused would enjoy in the United States would be absent or denied in the foreign courts. 99 CONG. REC. at 8780. *See* text accompanying note 63 *infra.* The apparently inevitable increase in foreign trials also seems to contravene judicial preference. *See* Williams v. Froehlke, 490 F.2d 998, 1004 (2d Cir. 1974); Gallagher v. United States, 423 F.2d 1371, 1374 (Ct. Cl.), *cert. denied,* 400 U.S. 849 (1970).

COMA is a specialized Article I court that Congress created in 1950 under its power "to make Rules for the Government and Regulation of the land and naval

sary investigations into offences, and in the collection and production of evidence. . . ."[60] Under *Jordan* II however, military police, in direct contravention of SOFA, must refuse to assist the investigation by foreign police into the possible criminal activities of American servicemen where the foreign police do not comply with the fourth amendment. If the military police chose to comply with SOFA and assisted foreign police in searches of American servicemen, evidence seized during that search necessarily would be suppressed in American courts-martial.[61] This logically should result in the trial of more servicemen in foreign courts since the foreign countries have primary jurisdiction over American servicemen who commit crimes in their territory.[62] Since trials in foreign courts often ignore American consti-

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Forces." U.S. CONST. art. I, §8, cl. 14. *See* note 18 *supra.* Congress recognized that the necessities of military discipline would require a special system of courts to balance the requirements of discipline against the interest of insuring fairness to servicemen charged with military offenses. Schlesinger v. Councilman, 420 U.S. 738, 757-58 (1975); O'Callahan v. Parker, 395 U.S. 258, 261 (1969). Although COMA is a legislative court, it has the same responsibility as the Article III courts to protect persons from violations of their constitutional rights. Burns v. Wilson, 346 U.S. 137, 142 (1953). COMA clearly has authority to make interpretations of the Constitution in fulfilling its responsibility within its area of expertise. United States v. Burney, 6 U.S.C.M.A. 776, 782-83, 21 C.M.R. 98, 104-05 (1956). *Cf.* Burns v. Wilson, 346 U.S. at 140 (discussing separate existence of military law); Schlesinger v. Councilman, 420 U.S. at 757-58 (COMA created to balance military interests with constitutional rights). COMA has recognized that it is subject to the Constitution as interpreted by the Supreme Court, and that it must abide by the restrictions of Congress expressed in the UCMJ, 10 U.S.C. §§801 *et seq.* (1970), except where inconsistent with the Constitution. United States v. Burney, 6 U.S.C.M.A. at 782-83, 21 C.M.R. at 104-05. As early as 1953, COMA assumed that it had authority to declare an act of Congress unconstitutional. United States v. Frantz, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 39 (1953). Thus, it does not appear that COMA exceeded it authority as a legislative court by contravening congressional intent or interpreting the Constitution.

[60] SOFA, 4 U.S.T. at 1800, T.I.A.S. No. 2846, 199 U.N.T.S. at 78. *See* note 38 *supra.*

[61] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[62] SOFA, 4 U.S.T. at 1800, T.I.A.S. No. 2846, 199 U.N.T.S. at 78. Article VII, §3(b) states that "[i]n the case of any . . . offence [not against the property or security of the sending state] the authorities of the receiving State shall have the primary right to exercise jurisdiction." A court-martial may be held only when the foreign country waives jurisdiction. *Id.* Article VII, §3(c) states, "The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance." *Id.* Under the Senate ratification of SOFA, a request for waiver of jurisdiction would be of particular importance where an American serviceman in a foreign court would be denied constitutional rights that would be available to him in a United States court. S. Res., 83d Cong., 1st Sess., 99 CONG. REC. 8780 (1953). Under *Jordan* II, the American commanding officer might

tutional rights,[63] trial of American servicemen in these courts would contravene the policy of Congress and the federal courts favoring trial in American courts.[64] The *Jordan* II holding results in the neutralization of SOFA's requirement of cooperation in necessary investigations[65] because compliance would result in a violation of the Constitution. SOFA, like other treaties, is subject to the commands of the Constitution.[66] Thus, the *Jordan* II holding would seem to require American officials to refuse to cooperate with foreign authorities where American constitutional standards may not be observed.

In *Jordan,* COMA also departed from the traditional position of the federal courts, exemplified by the *Marzano* discussion, to develop a standard for judging the admissibility of evidence seized by foreign police acting alone.[67] In *Jordan* I, COMA held that a search in which evidence was seized by foreign police acting alone must comport with the fourth amendment for the evidence to be admissible in an American court-martial.[68] Prior to *Jordan* I, however, the fourth amendment had never been held to apply to the actions of foreign officials or to evidence seized by them in violation of the fourth amendment.[69]

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still request waiver of jurisdiction to try the serviceman by court-martial. Unless untainted evidence was available, the suppression of evidence seized in the foreign search most likely would result in an unsuccessful court-martial. The foreign country presumably would not waive jurisdiction in such a situation because of SOFA's provisions against double jeopardy. SOFA, art. VII, §8, 4 U.S.T. at 1802, T.I.A.S. No. 2846, 199 U.N.T.S. at 80.

[63] SOFA guarantees only certain rights to individuals prosecuted by the foreign country. These rights include confronting witnesses against him, a prompt and speedy trial, information concerning the specific charges, compulsory process to obtain witnesses, legal counsel of his own choosing or provided by the foreign state, an interpreter, and the presence of a representative of his government. SOFA, art. VII, §9, 4 U.S.T. at 1802, T.I.A.S. No. 2846, 199 U.N.T.S. at 80. SOFA does not guarantee the following rights that would be present in an American court: grand jury indictment, public trial, trial by jury, prohibition against excessive bail and against cruel and unusual punishment, and prohibition against compelling a witness to testify against himself. In addition, COMA has asserted that trial in foreign court may deny the serviceman access to the liberal rules of evidence, presumption of innocence, and thorough review normally found in American courts. United States v. Burney, 6 U.S.C.M.A. 776, 802, 21 C.M.R. 98, 124 (1956).

[64] *See* text accompanying note 59 *supra.*

[65] *See* text accompanying note 60 *supra.*

[66] *See* Missouri v. Holland, 252 U.S. 416, 419 (1920).

[67] *Jordan* I, 23 U.S.C.M.A. at 527, 50 C.M.R. at 666 (1975), *modified, Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[68] 23 U.S.C.M.A. at 527, 50 C.M.R. at 666 (1975).

[69] *See* Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968)("there is nothing our courts can do that will require foreign officers to abide by our Constitu-

The federal courts, in contrast to COMA, noted that the suppression of evidence seized by foreign authorities acting independently would be required only when the methods used by the foreign authorities "shocked the conscience" of the court.[70] The effect of the *Jordan* I holding was to require the application of fourth amendment limitations to the actions of foreign officials in a way that seems neither constitutionally required nor justified in view of the sovereignty of foreign countries.[71]

Additionally, the holding of *Jordan* I with regard to seizure solely by foreign officials ignored the purpose of the exclusionary rule. The Supreme Court has used two rationales to support the adoption of the exclusionary rule: to insure the integrity of the judicial process,[72] and to require American officials to abide by the fourth amendment.[73] The judicial integrity rationale is based on the belief that to preserve public respect for the judiciary, courts must not sanction official lawlessness in the form of illegal searches and seizures.[74] In foreign searches without American participation however, there is no lawlessness by the United States government. Therefore, the American

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tion."); Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967); Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965).

[70] *See* United States v. Cotroni, 527 F.2d 708, 712 (2d Cir. 1975); United States v. Callaway, 446 F.2d 753, 755 (3d Cir. 1971); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970), *cert. denied*, 401 U.S. 939 (1971); Stonehill v. United States, 405 F.2d 738, 745 (9th Cir. 1968); Birdsell v. United States, 346 F.2d 775, 782 n.10 (5th Cir. 1965). In none of these cases did the courts exclude any evidence because the methods used "shocked the conscience" of the court.

[71] Judge Cook raised this point in his dissent in *Jordan* I, 23 U.S.C.M.A. at 528, 50 C.M.R. at 667 (1975)(Cook, J., dissenting). This argument was adopted in *Jordan* II to support the modification of the *Jordan* I holding. 24 U.S.C.M.A. at 157, 51 C.M.R. at 376 (1976).

[72] Weeks v. United States, 232 U.S. at 392 (1914). The *Weeks* Court stated, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgment of the courts. . . ." *Id.* The judicial integrity reasoning perhaps received its strongest support as a rationale in Elkins v. United States, 364 U.S. 206, 222-23 (1960) and Mapp v. Ohio, 367 U.S. at 659 (1961).

[73] Weeks v. United States, 232 U.S. at 393 (1914). The deterrence rationale was lucidly set forth in Elkins v. United States, 364 U.S. 206, 217 (1960), where the Court stated, "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

[74] *See* note 72 *supra*. In Brulay v. United States, 383 F.2d 345, 349 n.5 (9th Cir. 1967), the court stated that the exclusionary rule is applied not because the Constitution requires it, "but because it is inappropriate to sanction the previous violations of law by federal officers." The court maintained that this policy could not be exported. *Id.*

courts would not associate themselves with official misconduct by admitting the evidence, and the judicial integrity rationale thus would seem to be inapplicable. In addition, the rationale is based on the duty of the courts to enforce the commands of the Constitution.[75] Nevertheless, the courts can only enforce the prohibition of unreasonable searches and seizures against federal officials through the fourth amendment and against state officials through the fourteenth amendment.[76] Exclusion of evidence independently secured by foreign police does not support the courts' duty to enforce the Constitution since the Constitution cannot be applied to the actions of foreign officials.[77]

In recent years, the Supreme Court has placed primary emphasis on the deterrence rationale as a justification for the exclusionary rule.[78] Under the deterrence rationale, the exclusionary rule has been viewed as a remedy designed to compel respect for the fourth amendment. It is not a personal constitutional right of the individual injured by the search.[79] The deterrence justification cannot support the *Jordan* I holding regarding the seizure of evidence solely by foreign officials. The Constitution does not and could not compel specific, affirmative action by foreign governments to alter their search policies.[80] Moreover, the exclusionary rule does not serve any educational purpose for foreign officials, since they will follow the laws and constitutions of their own jurisdictions in conducting searches.[81]

Because the exclusionary rule is primarily a remedial device, its application is justified only where that objective is best served.[82] When a court chooses to apply the rule, the benefits and effectiveness of the application must clearly be demonstrated, since a consequence of the rule is the loss of reliable evidence.[83] Contrary to the assertion

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[75] In Weeks v. United States, 232 U.S. at 392 (1914), the Court stated that "the duty of giving [the fourth amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

[76] *See* text accompanying notes 1-16 *supra.*

[77] United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967). *See* text accompanying notes 69-71 *supra.*

[78] United States v. Janis, 96 S. Ct. 3021, 3028 (1976); United States v. Peltier, 422 U.S. 531, 534 (1975); United States v. Calandra, 414 U.S. 338, 347-48 (1974).

[79] United States v. Calandra, 414 U.S. 338, 348 (1974).

[80] Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); Brulay v. United States, 383 F.2d 345, 348 (9th Cir..1967).

[81] *See* United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); United States v. Tierney, 448 F.2d 37, 39 (9th Cir. 1971). *See also* note 57 *supra.*

[82] United States v. Calandra, 414 U.S. 338, 348 (1974).

[83] *Id. See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971)(Burger,

of the *Jordan* I majority,[84] the *Jordan* I holding would not encourage foreign officials to observe our constitutional safeguards. Instead, the *Jordan* I holding could lead to a greater number of trials of American servicemen in foreign courts because of the inadmissibility of the evidence in American courts,[85] a result contrary to congressional intent and judicial preference.[86] Thus, the application of the fourth amendment and the exclusionary rule to evidence seized in foreign searches is unjustified since no deterrence results.

After granting a petition for reconsideration filed by the Air Force, COMA modified its decision in *Jordan* I.[87] COMA held in *Jordan* II that as a prerequisite to the admission of evidence seized by foreign police acting alone, the prosecution must demonstrate that the search by foreign police was legal under the law of their country.[88] The courts of appeals, however, have held that evidence seized in a search conducted only by foreign police is not subject to the fourth amendment and is admissible even though the search violates the law of the foreign country.[89] The *Jordan* II court compared the foreign search in which Americans were not included to the "silver platter" doctrine,[90] and rejected the doctrine in the foreign context.[91] Under the "silver platter" doctrine, federal prosecutors were permitted to use evidence seized by state officials, despite the fact that the seizure would have required the suppression of evidence under the fourth amendment if the seizure had been conducted by federal officials.[92] The reasons for rejecting the "silver platter" doctrine in federal-state relations, however, are inapplicable to the foreign context when American officials are not involved. The doctrine is no longer used in federal-state relations because the fourteenth amendment prohibits unreasonable searches and seizures on the part of state officers.[93] No section of the

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C.J., dissenting).

[84] 23 U.S.C.M.A. at 527, 50 C.M.R. at 666 (1975).

[85] *See* note 62 *supra.*

[86] *See* note 59 *supra.*

[87] *Jordan* II, 24 U.S.C.M.A. at 159, 51 C.M.R. at 378 (1976).

[88] *Id.* at 159, 51 C.M.R. at 378.

[89] United States v. Cotroni, 527 F.2d 708, 711 (2d Cir. 1975); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968)(when Americans do not participate in a foreign search, evidence seized should not be excluded although the foreign police violated the fourth amendment and the constitution of the foreign government in conducting the search).

[90] *See* note 47 *supra.*

[91] 24 U.S.C.M.A. at 158, 51 C.M.R. at 377 (1976).

[92] Lustig v. United States, 338 U.S. 74 (1949); Gambino v. United States, 275 U.S. 310 (1927). *See* note 47 *supra.*

[93] Elkins v. United States, 364 U.S. 206, 213-14 (1960). The *Elkins* Court main-

Constitution has been or could be held to prohibit unreasonable searches and seizures by foreign police.[94] Furthermore, the doctrine was rejected because it encouraged federal officials to test how far they could go in assisting state police in a search because of the vagueness of the term "participation."[95] COMA cited the vagueness of "participation" as a reason for not adopting the doctrine in the foreign context.[96] The "silver platter" doctrine is not relevant, however, to the foreign search where foreign police act alone. Since Americans are not involved, admitting the evidence seized by the foreign officials cannot be said to encourage violation of the United States Constitution. COMA apparently has made the logical error of applying a doctrine relevant in federal-state relations to foreign searches conducted only by foreign officials, a factual circumstance which is not analogous.[97]

In addition, by requiring the exclusion of evidence seized in illegal foreign searches conducted only by foreign officials, the *Jordan* II holding continues to ignore the lack of support for exporting the sanctions of the exclusionary rule. Neither the judicial integrity rationale nor the deterrence justification support the *Jordan* II holding when the search is conducted only by foreign officials.[98] Little strength can be drawn from the deterrence justification because the United States is the only country that has adopted the exclusionary rule as a method of enforcing its constitutional standards.[99] The deterrence justification would support the imposition of the *Jordan* II holding only if the evidence also would have been suppressed in the foreign country. Where foreign police have acquired evidence of an American offense, its suppression in an American court should make little difference to foreign police since they are not concerned with acquiring

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tained that the underpinnings of the "silver platter" doctrine had been removed by the decision in Wolf v. Colorado, 338 U.S. 25 (1949), which held that the fourteenth amendment prohibited unreasonable searches and seizures on the part of state officers.

[94] Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973); Brulay v. United States, 383 F.2d 345, 348 (9th Cir. 1967).

[95] Elkins v. United States, 364 U.S. 206, 212 (1960).

[96] *Jordan* II, 24 U.S.C.M.A. at 158-59, 51 C.M.R. at 377-78 (1976).

[97] *See generally* I. COPI, INTRODUCTION TO LOGIC 85-87 (4th ed. 1972).

[98] *See* text accompanying notes 74-77 *supra.*

[99] Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415 (1971)(Burger, C.J., dissenting). The English courts allow the trial judge discretion to suppress evidence "if the strict rules of admissibility would operate unfairly against the accused." Kuruma v. The Queen, [1955] A.C. 197, 204. In *Kuruma,* the House of Lords stated that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained." *Id.* at 203.

a conviction. Because the exclusion of evidence in an American court should have little or no effect upon the search methods of foreign police, the holding results only in the suppression of potentially reliable, relevant evidence in American courts. If the evidence seized relates to a foreign offense, the American citizen would be tried in foreign court where the evidence would be admitted nonetheless. Finally, since primary jurisdiction over the American serviceman who commits a foreign offense is vested in the foreign country, suppression of the evidence in an American court-martial possibly becomes immaterial since the serviceman may be tried in the foreign courts.[100] Thus, the individual actions of foreign police in a foreign search, whether conducted independently or in conjunction with American officials, should not be governed by American constitutional standards.

American courts should carefully consider the issues presented by the use of evidence seized in a foreign search and develop a standard which will provide guidance to American officials who cooperate with foreign police. The standard developed in *Jordan* II can only fetter international cooperation;[101] the substantial participation test devel-

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[100] *See* note 62 *supra.*

[101] *See* text accompanying notes 52-66 *supra.* A peripheral issue raised by the conflict between the *Jordan* holdings and the traditional position of the courts of appeals is the reviewability of COMA decisions. If the fourth amendment is applicable to extraterritorial searches, it should not mean one thing in civilian trials and another in military trials. *Cf.* Burns v. Wilson, 346 U.S. 137, 153 (1953)(Douglas, J., dissenting) (discussing meaning of prohibition against coerced confessions under the fifth amendment in military and civilian trials). If the conflict arose among the courts of appeals, the Supreme Court could grant certiorari to resolve the conflicting interpretations. 28 U.S.C. §1254 (1970); SUP. CT. 19 (1)(b). However, Congress has not conferred jurisdiction on any Article III court to review court-martial determinations directly, including the decisions of COMA. Schlesinger v. Councilman, 420 U.S. 738, 746 (1975). When certiorari is not available as a means of review, mandamus, injunction, declaratory judgment, or habeas corpus are the only procedures available to seek review. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 177 (1965) [hereinafter cited as JAFFE]. The federal courts may review by writ of habeas corpus court-martial determinations where the serviceman is imprisoned, forfeits pay or allowances, or receives any penalty. Burns v. Wilson, 346 U.S. at 144. The federal courts will not allow the use of habeas corpus until the injured party has exhausted all administrative remedies provided under the UCMJ, 10 U.S.C. §§801 *et. seq.* (1970). Schlesinger v. Councilman, 420 U.S. at 758; Burns v. Wilson, 346 U.S. at 142. Habeas corpus, however, may not be employed by the federal courts simply to re-evaluate the evidence. Burns v. Wilson, 346 U.S. at 142. Rather, habeas corpus requires the federal courts to determine only whether the military courts have jurisdiction and have given full consideration to each of the injured party's claims. O'Callahan v. Parker, 395 U.S. 258, 272-74 (1969); Burns v. Wilson, 346 U.S. at 142. Nevertheless, the writ of habeas corpus only provides a mechanism for collateral review of a determination adverse to a court-martial defen-

dant. In addition, court-martial determinations adverse to the accused serviceman may be reviewed collaterally through an action in the Court of Claims against the United States for pay improperly withheld. 28 U.S.C. §1491 (1975). *See, e.g.,* Cason v. United States, 471 F.2d 1225 (Ct. Cl. 1973). In *Jordan* however, the defendent was acquitted because of the suppression of evidence, and thus the government would desire review.

The limitation on direct review by the federal courts found in Article 76 of the UCMJ, 10 U.S.C. §876 (1970), does not change the subject-matter jurisdiction of the Article III courts. Schlesinger v. Councilman, 420 U.S. at 749. The remedy most likely to be used by the government to seek review of an adverse decision by COMA would be the writ of mandamus. 28 U.S.C. §1361 (1970). To secure a writ of mandamus, the government would still be required to exhaust all administrative remedies. Schlesinger v. Councilman, 420 U.S. at 756. In addition, the courts generally are reluctant to grant mandamus where the duty is discretionary rather than ministerial. Wilmot v. Doyle, 403 F.2d 811, 816 (9th Cir. 1968). *See* JAFFE, *supra* at 181-82. Where COMA acts within its jurisdiction as defined by Congress, its choices are normally unimpeachable. *See* JAFFE, *supra* at 182. *Cf.* Barr v. United States, 478 F.2d 1152, 1155 (10th Cir.), *cert. denied,* 414 U.S. 910 (1973) (agency may be ordered to exercise discretion but its choice cannot be compelled). Nevertheless, where an Article III court is convinced that a legislative court's decision is clearly contrary to the legislative court's jurisdiction or statutory purpose, the Article III court may issue mandamus or other equitable relief. *See* Miller v. Ackerman, 488 F.2d 920, 921-22 (8th Cir. 1973); Drew v. Lawrimore, 380 F.2d 479, 483 (4th Cir.), *cert. denied,* 389 U.S. 974 (1967); JAFFE, *supra* at 184.

Since COMA was established specifically to deal with the legal and constitutional questions arising from the conflict between the demands of military discipline and the constitutional rights of servicemen, Schlesinger v. Councilman, 420 U.S. at 758; O'Callahan v. Parker, 395 U.S. 258, 261 (1969), *Jordan* clearly falls within this purpose. Nevertheless, the issue raised in *Jordan* seems to require little expertise in military matters; it is, instead, primarily a constitutional question. The federal courts thus could make the decision as easily as COMA. *Cf.* Sherman, *Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement,* 55 VA. L. REV. 483, 498 (1969)(arguing that the exhaustion requirement may be avoided where a substantial constitutional question is raised that is outside the expertise or authority of the military tribunal). Allowing the government to seek collateral review by mandamus would not violate the justiciability requirements of the federal courts since an active conflict would continue to exist. Thus, there seems to be no bar to the government maintaining an action for collateral review of the *Jordan* holding.

The major difficulty the government would need to confront in bringing such an action is the discretionary character of COMA. COMA is free to interpret the Constitution in the military context and is limited only by the Constitution as interpreted by the Supreme Court and the directions of Congress. United States v. Burney, 6 U.S.C.M.A. 776, 782-83, 21 C.M.R. 98, 104-05 (1956). *See* note 59 *supra.* COMA is thus free to choose among competing considerations so long as it does not exceed these limitations. In this sense, its actions are discretionary. *Cf.* JAFFE, *supra* at 181 (defining discretion as the power to choose among competing considerations). Nevertheless, the government might argue that in exercising its discretion, COMA has developed a rule in *Jordan* II that is clearly contrary to the position of the federal courts. *See* text accompanying note 41 *supra.* In interpreting the fourth amendment in this way, COMA may have exercised its discretion contrary to the law, and perhaps violated its clear duty to abide by the Constitution. If the federal courts may overrule a determination of COMA which is contrary to the position of the federal courts through the use of habeas corpus, *see, e.g.,* O'Callahan v. Parker, 395 U.S. 258 (1969), there would

oped by the federal courts fails to provide necessary guidance to American officials to assist them in determining the extraterritorial application of the fourth amendment.[102] Rather than adopting the strict position of COMA or the vague and excessively flexible position of the courts of appeals, American courts should consider a third position. Since all actions of American officials are governed by the Constitution,[103] and since American courts cannot control the actions of foreign officials,[104] the standard applied to determine the admissibility of evidence seized in foreign searches where American officials are involved should be specific and focus exclusively on whether the involvement of American officials in the search violated the fourth amendment.[105] If the actions of the American officials are by themselves unconstitutional, evidence seized by the American officials

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appear to be no bar to the use of mandamus under similar circumstances. Congress could also provide for review of COMA's determinations by amending Article 76 of the UCMJ, 10 U.S.C. §876 (1970), to allow discretionary review in the United States Court of Appeals for the District of Columbia Circuit.

In addition, servicemen might seek review of COMA's holding in *Jordan* II through the use of mandamus, declaratory judgment, and injunction. If an accused serviceman were confronted with a factual situation similar to *Jordan*, he arguably could seek mandamus to compel his commanding officer to request a waiver of the foreign country's jurisdiction over him to allow trial by court-martial. *See* 28 U.S.C. §1361 (1970); note 60 *supra*. In the same action in which the serviceman seeks mandamus, he also could seek a declaratory judgment as to the constitutional validity of COMA's holding in *Jordan* II, *see* 28 U.S.C. §2201 (1970); *cf.* Steffel v. Thompson, 415 U.S. 452 (1974)(state criminal statute's constitutionality may be attacked by request for declaratory judgment); Robson v. United States, 279 F. Supp. 631 (D.Pa.), *vacated on other grounds*, 404 F.2d 885 (3d Cir. 1968)(constitutionality of prior conviction may be attacked by request for declaratory judgment), and request an injunction against the application of the rule to evidence presented in his case. Of course, the serviceman would have to demonstrate irreparable injury, *see* JAFFE, *supra* at 193-94, but this should not be difficult because he may simply demonstrate the denial of constitutional rights that would occur under the foreign country's judicial system, and the adverse consequence of imprisonment in the foreign country's prisons. The serviceman might avoid the reluctance of the courts to grant equitable relief where the action is discretionary by asserting that COMA has acted contrary to the law, and thus has violated its clear duty to abide by the Constitution. The action could be maintained under 28 U.S.C. §1361 (1970) against the serviceman's commanding officer and the judges of COMA as officers of the United States. 5 U.S.C. §2104 (1970). The theoretical action for mandamus, declaratory judgment, and injunction should be brought as a single action, because the officials of the foreign country may be reluctant to waive jurisdiction unless there is some guarantee that relevant evidence crucial to a successful court-martial would not be excluded. *See* note 62 *supra*.

[102] *See* text accompanying note 51 *supra*.

[103] *See* text accompanying notes 43-44 *supra*.

[104] *See* text accompanying notes 67-100 *supra*.

[105] *See* text accompanying note 45-48 *supra*.

should be excluded. In addition, if the American officials suggest actions to foreign officials that would be unconstitutional if performed by Americans, and the foreign officials then follow the suggestions, the evidence should be excluded as having been secured in violation of the fourth amendment because of unconstitutional American involvement. The independent actions of the foreign police should be irrelevant to the court's consideration of whether to admit the evidence. This method of applying the fourth amendment to foreign searches would deter American officials from violating the fourth amendment, and would encourage the continued cooperation of international law enforcement officials.[106]

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[106] On the *Marzano* facts, no suppression on fourth amendment grounds would result under this test since it does not appear that American officials searched Marzano, recommended that a search be initiated, or suggested to the Grand Cayman police what should be seized. On the *Jordan* facts, the American officials neither recommended that a search be initiated nor suggested that British police seize anything in Jordan's room. Their presence at the scene of the search thus would become the central element of inquiry. Military police have authority to enter a government building including a barracks to protect the government's property. *See* United States v. King, 24 U.S.C.M.A. 239, 240, 51 C.M.R. 618, 619 (1976); United States v. Thomas, 24 U.S.C.M.A. 228, 231, 51 C.M.R. 607, 610 (1976). *But see* United States v. Roberts, No. 30,818, slip op. at 7 (C.M.A. October 8, 1976). The British police already had keys to Jordan's room and there was no indication that the American police could have prevented them from entering Jordan's room. The photographs taken by the Americans were requested by the British police and seized by them along with other evidence of the burglary. Furthermore, the American police unlocked Jordan's locker at the request of the British police. Although Jordan clearly had an expectation of privacy protected by the fourth amendment, *see* Katz v. United States, 389 U.S. 347, 353 (1967), the American police did not search the locker or seize anything. Thus, while it might be argued that the action of unlocking the locker violated Jordan's fourth amendment rights, the American police did not search the locker, seize any evidence from the locker, or direct the British police to seize any evidence. The Americans merely prevented the destruction of Jordan's property because the British police could have broken the lock without American assistance. The actions of the military police therefore do not appear unconstitutional. The better practice perhaps would be for American military police to secure a warrant from the commanding officer in a situation similar to *Jordan*. *See* note 34 *supra*. Thus, no evidence would be suppressed under the proposed standard in either *Jordan* or *Marzano*.

However, the proposed standard would result in the suppression of the evidence seized in Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *see* note 50 *supra*. In *Stonehill*, the actions of the American agent were unconstitutional since he entered Stonehill's business without a search warrant and identified evidence to be seized by Philippine police. In addition, the American agent recommended that one specific building be searched by the Philippine police. Thus, the American agent recommended actions to foreign officials that would have been unconstitutional if performed by the American. The foreign officials followed the American official's recommendations and thus the evidence should be excluded as having violated the fourth amendment because of unconstitutional American involvement.