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The Constitutional Rights of Nonresident Aliens Prosecuted in the United States

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The Constitutional Rights of Nonresident Aliens Prosecuted in the United States

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Abstract

Focuses on the protections afforded by the fourth and fifth amendments to aliens prosecuted in the United States for crimes they have committed abroad.

THE CONSTITUTIONAL RIGHTS OF NONRESIDENT ALIENS PROSECUTED IN THE UNITED STATES

INTRODUCTION

Assume, in an effort to curb the rising tide of drug traffic into the United States,[1] American agents entered a foreign country, obtained incriminating evidence and statements in a manner which violated the fourth[2] and fifth[3] amendments from foreign nationals involved in the drug traffic, kidnapped them and then brought them to the United States for prosecution. At their trial, the foreign defendants argued that they were entitled to constitutional rights and therefore the incriminating evidence and statements must be supressed. Whether an alien who is tried in the United States for a crime he committed abroad is entitled to constitutional rights is a question of first impression. Few cases have considered this question and those that have speak in dictum.[4]

In the past, American citizens traveling abroad were not protected by the Constitution's benevolent shield.[5] Moreover, aliens

1. On January 11, 1980, Peter B. Bensinger, head of the United States Drug Enforcement Administration stated, "All of Europe is overflowing with Middle East heroin, and our intelligence strongly indicates what we can expect large amounts to hit the United States in the new year." A bumper crop of 1,500 tons of raw opium—100 times the amount harvested in Mexico—was produced in Iran, Pakistan and Afghanistan for the year 1979. Gage, *Mideast Heroin Flooding Europe*, N.Y. Times, Jan. 11, 1980, at A1, col. 3.

2. U.S. CONST. amend. IV. In part, the fourth amendment guarantees "against unreasonable searches and seizures . . . ."

3. U.S. CONST. amend. V. The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

4. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976).

5. *In re Ross*, 140 U.S. 453 (1891). Ross was an American citizen serving as a seaman on an American vessel in Japanese waters. He was tried and convicted before an American consular court in Japan for killing another American aboard ship. Ross argued that he was denied his constitutional right to an indictment by a grand jury for the crime of murder. The Court sustained Ross' conviction stating that the constitutional protections applied "only to citizens and others within the United States, or [those] who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." *Id.* at 464.

residing in the United States were not accorded constitutional protections by the courts.[6] It is now settled that the Constitution protects American citizens and aliens residing in the United States,[7] as well as American citizens residing abroad if the United States government is involved.[8] It is unclear, however, whether the Constitution protects an alien who commits a crime abroad and then is brought to the United States for prosecution.[9]

An American court will not concern itself with the manner in which a defendant is brought within its jurisdiction[10] unless there is "torture, brutality or similar outrageous conduct."[11] Beyond the threshold question of jurisdiction, courts must determine whether, once at trial, an alien who has committed a crime abroad is entitled to the same constitutional protections as an American citizen under similar circumstances.

The focus of this Note will be on the protections afforded by the fourth and fifth amendments to aliens prosecuted in the United States for crimes they have committed abroad. The prerequisites for obtaining jurisdiction over nonresident aliens are analyzed in Part I of this Note. Part II discusses the constitutional rights of American citizens abroad in order to establish the potential scope of the rights of aliens abroad. Finally, Part III examines the constitutional rights of aliens who are prosecuted in the United States for crimes they have committed abroad. It is submitted that an alien who has committed a crime abroad and then is prosecuted for that crime in the United States has established, by virtue of his presence in an American court and his justified expectation of constitutional rights, sufficient contact with the United States and its system of laws to entitle him to the protection of the Constitution.[12]

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6. The Chinese Exclusion Case, 130 U.S. 581 (1889). In its opinion, a unanimous Supreme Court held that a Chinese resident alien could not return to his home in the United States after a visit abroad because Congress nullified his return certificate in his absence. *See* United States v. Ju Toy, 198 U.S. 253 (1905); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

7. Graham v. Richardson, 403 U.S. 365 (1971). *See* Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 Duke L.J. 583.

8. Reid v. Covert, 354 U.S. 1 (1957). *Reid* held that two American civilian dependents of American servicemen stationed abroad who were convicted by United States military courts for murder were entitled by the Constitution to a trial in a civilian court. *Id.* at 6.

9. *See* note 4 *supra* and accompanying text.

10. Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

11. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

12. *See* Part III *infra*.

I. *JURISDICTION*

Before the United States can prosecute an alien for a crime he has committed abroad, it must establish jurisdiction over the subject matter[13] and the person.[14] In most cases, the United States cannot infringe upon the primary jurisdiction of other nations over persons whom the United States claims to be acting in violation of its criminal laws.[15] The United States may properly attempt prosecution, however, where Americans are injured by aliens engaged in criminal activity which occurs outside the United States but which other nations cannot or will not prosecute.[16] In these instances, the United States must first establish that it has jurisdiction to prosecute such aliens.

A. *Subject Matter Jurisdiction*

When the United States prosecutes an alien for a crime he committed abroad, it bases jurisdiction on the objective territoriality principle.[17] Under this principle, the United States has jurisdic-

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13. *See* Strassheim v. Daily, 221 U.S. 280 (1911); United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968).

14. *See* Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886).

15. Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968).

16. *See, e.g.*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

17. *See Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Spec. Supp. (1935) [hereinafter cited as Harvard Research Draft]. The objective territoriality principle is sometimes referred to as the "effects doctrine." Most nations recognize, in varying degrees, five principles on which jurisdiction with respect to a crime may be based.

> These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offense is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offense; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.

Id. at 445. Traditionally, the United States has relied on the territoriality and nationality principles to establish jurisdiction. *Id.* at 543-44. *See, e.g..*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). Our courts, however, have adopted the objective territoriality principle which is very similar to the protective principle. United States v. Pizzarusso, 388 F.2d at 10. When an alien commits a crime abroad, the United States can not base jurisdiction on the territoriality principle or nationality principle because the crime was neither committed in the United States nor was it committed by an American citizen. In general, the universality principle does not apply because this principle concerns those who are enemies of all mankind. The

tion to prosecute a nonresident alien when he engages in criminal activity that produces detrimental effects within the United States[18] because such effects constitute an element of the offense.[19] Using the hypothetical posed in the Introduction as an illustration, the United States has subject matter jurisdiction over the foreign defendants because their drug operations have a detrimental effect in the United States, *i.e.*, the distribution of illegal drugs to American users.

B. *Personal Jurisdiction*

In 1886, the Supreme Court held in *Ker v. Illinois*[20] that the power of a court to prosecute a person for a crime is not impaired because he was brought within the court's jurisdiction by means of a forcible abduction.[21] Sixty-six years later the Supreme Court reaffirmed the rule announced in *Ker* when it decided *Frisbie v. Collins*.[22] These cases are the mainstay of the doctrine that a court will not divest itself of personal jurisdiction over the defendant because of the method by which he was brought to trial.[23]

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passive personality principle will not be applied because the United States does not recognize its validity. Only the objective territoriality principle may be applied to establish jurisdiction when an alien commits a crime abroad which results in a detrimental effect in the United States.

18. Strassheim v. Daily, 221 U.S. at 280 (1911). Mr. Justice Holmes aptly defined this principle as follows: "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . . ." *Id.* at 285. *See* Judge Learned Hand's opinion in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The objective territoriality principle is a spin-off of the protective principle. Under the protective principle, a country:

> has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided that conduct is generally recognized as a crime under the laws of states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33 (1965). *See also* Harvard Research Draft, *supra* note 17. The protective principle and the objective territoriality principle do have one difference. Under the former, all that need be shown is a "potentially adverse effect" on the security of a country whereas under the latter, an actual adverse effect is required. United States v. Pizzarusso, 388 F.2d at 10-11; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 33, Comment at 93 (1965).

19. United States v. Pizzarusso, 388 F.2d 8, 10-11 (2d Cir.), *cert. denied*, 392 U.S. 936 (1968). *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 18 (1965).

20. 119 U.S. 436 (1886).

21. *Id.*

22. 342 U.S. 519 (1952).

23. *See, e.g.*, Lujan v. Gengler, 510 F.2d at 65.

In 1974, the Second Circuit Court of Appeals questioned the validity of the *Ker-Frisbie* doctrine in *United States v. Toscanino.*[24] The defendant in *Toscanino*, an Italian citizen, alleged that American agents employed illegal electronic surveillance against him, kidnapped him from his home in Uruguay, interrogated and tortured him for three weeks in Brazil and finally brought him to the United States for trial.[25] The court held that if the defendant's allegations were true, an American court would lack personal jurisdiction over him.[26]

Judge Mansfield, writing for the court, rejected the age-old *Ker-Frisbie* doctrine reasoning that the Supreme Court had expanded the scope of due process after the *Ker-Frisbie* doctrine was established.[27] The court recognized that due process now reaches illegal acts committed by overzealous police officials prior to trial.[28]

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24. 500 F.2d 267 (2d Cir. 1974).

25. Toscanino alleged that a Uruguayan policeman, acting as the paid agent of the United States, called his home and lured him to a nearby bowling alley where several policemen knocked him unconscious, blindfolded him and drove him to Brazil. While on the way to Brazil, they stopped and he was ordered to lie on the ground and remain silent while troops passed or he would be killed. When in Brazil he was denied food and water and "incessantly tortured." He was forced to walk up and down a hall for hours until he could no longer walk, at which point the Brazilians beat and kicked him. His fingers were pinched with pliers. Alcohol and other liquids were flushed in his eyes, nose and anal passage. Electrodes were attached to his earlobes, toes and genitals and he was then shot through with electricity until unconscious. Toscanino alleged that this was done with the knowledge of United States agents who finally brought him to the United States for trial. 500 F.2d at 268-70.

26. *Id.* at 281.

27. 500 F.2d at 272. *See generally* United States v. Russell, 411 U.S. 423 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Silverman v. United States, 365 U.S. 505 (1961).

28. 500 F.2d at 272. Courts will exclude evidence obtained in violation of the fourth or fifth amendments. The exclusionary rule was established in Weeks v. United States, 232 U.S. 383 (1914). *Weeks* held that evidence obtained in violation of the fourth amendment by federal agents could not be used in federal court. Mapp v. Ohio, 367 U.S. 643 (1961) excluded evidence illegally obtained by state officers from state court. The purpose of the exclusionary rule is to deter future unlawful police conduct and to promote judicial integrity. The primary justification for the rule has become deterrence. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) ("The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.") Chief Justice Burger expressed dissatisfaction with the exclusionary rule arguing that the rule is incapable of attaining its deterrent effect and that "the release of countless guilty criminals" is far too great a price for society to pay. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). *See* Bennett, *Judicial Integrity and Judicial Review: An*

In addition, *Rochin v. California*[29] marked a significant extension of due process when it held that evidence obtained through police brutality should be excluded from trial because it "shocked the conscience" of a civilized society.[30] Judge Mansfield maintained that in light of the expanded scope of due process, the United States was barred from prosecuting a defendant where personal jurisdiction was obtained by flagrantly illegal law enforcement practices.[31]

The Second Circuit retreated from the position it took in *Toscanino* when it decided *Lujan v. Gengler*.[32] The defendant in *Lujan*, an Argentine citizen, was abducted by Bolivian police acting as the paid agents of the United States and was forcibly brought by them to the United States for prosecution.[33] *Lujan* differed from *Toscanino* in that the defendant in *Lujan* did not allege "any acts of torture, terror or custodial interrogation of any kind."[34] Chief Judge Kaufman, writing for the Court of Appeals, held that, absent

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Argument for Expanding the Scope of the Exclusionary Rule, 20 U.C.L.A. L. REV. 1129 (1973); Doppert, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364 (1977).

29. 342 U.S. 165 (1952).

30. *Id.* at 169. In *Rochin*, the defendant swallowed two morphine capsules immediately after police entered his California dwelling. The police took the defendant to a hospital where a doctor induced defendant to vomit by the use of an emetic solution. This was all done against the defendant's will. *Id.* at 165.

31. United States v. Toscanino, 500 F.2d at 267, 274 (2d Cir. 1974).

32. 510 F.2d 62 (1975).

33. *Id.* at 63. Chief Judge Kaufman described the following "grade-B film scenario:"

> Lujan, a licensed pilot, was hired in Argentina by one Duran to fly him to Bolivia. Although Duran represented that he had business to transact there with American interests in Bolivian mines, he in fact had been hired by American agents to lure Lujan to Bolivia. When Lujan landed in Bolivia on October 26, 1973, he was promptly taken into custody by Bolivian police who were not acting at the direction of their own superiors or government, but as paid agents of the United States. Lujan was not permitted to communicate with the Argentine embassy, an attorney, or any member of his family.
>
> On the following day the Bolivian police, commanded by Police Major Guido Lopez, took Lujan from Santa Cruz to La Paz, where he was held until November 1, 1973. On that date a Lieutenant Terrazas and other Bolivian police, acting together with American agents, brought Lujan to the airport and placed him on a plane bound for New York. Upon his arrival at Kennedy Airport, Lujan was formally arrested by federal agents. At no time had he been formally charged by the Bolivian police, nor had a request for extradition been made by the United States.

Id.

34. *Id.* at 66.

"torture, brutality and similar physical abuse," a court will not divest itself of personal jurisdiction over a defendant because of the manner in which he was brought to trial.[35] While recognizing that *Toscanino* established that government agents could not bring defendants from abroad by means of torture or brutality, Judge Kaufman emphasized that conduct by American agents which does not amount to physical abuse of the defendant will not divest the court of jurisdiction.[36]

The other circuits that have considered this issue are in accord with *Lujan* in limiting *Toscanino* to cases involving torture, brutality and similar outrageous conduct.[37] *Ker* and *Frisbie* remain the basis of the doctrine that, barring extraordinary circumstances,[38] "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.' "[39] Applying this doctrine to the initial hypothetical, the American court need not divest itself of personal jurisdiction over the foreign defendants who were kidnapped by the American agents because forcible abduction alone does not constitute torture, brutality or similar physical abuse.

II. *CONSTITUTIONAL RIGHTS OF AMERICANS COMMITTING CRIMES ABROAD*

It is axiomatic that aliens abroad cannot have greater constitutional rights than American citizens abroad.[40] Therefore, a determination of the rights of Americans abroad (vis-á-vis the fourth and fifth amendments) will establish the potential scope of the rights of aliens abroad.

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35. *Id.* at 69.

36. *Id.* at 65. Judge Kaufman stated:

> in recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court.

Id. (emphasis in original).

37. United States v. Lira, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); United States v. Winter, 509 F.2d 975 (5th Cir.), *cert. denied*, 423 U.S. 825 (1975); United States v. Lovato, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 965 (1975).

38. Lujan v. Gengler, 510 F.2d at 68.

39. Frisbie v. Collins, 342 U.S. at 522. *See* Gernstein v. Pugh, 420 U.S. 103 (1975).

40. *See generally* Graham v. Richardson, 403 U.S. 365 (1971); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

In 1957, in the landmark case of *Reid v. Covert*,[41] the Supreme Court held that the Constitution applied to Americans residing in foreign countries.[42] Mr. Justice Davis, writing for the Court, stated: "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."[43]

With respect to the extraterritorial application of the fourth and fifth amendments, courts have not applied the exclusionary rule in certain circumstances.[44] The Supreme Court stated that the exclusionary rule is not a personal constitutional right, but a "judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect . . . ."[45] Where American agents alone illegally obtain evidence from American citizens abroad, courts exclude such evidence because it deters similar conduct by American agents in the future.[46] Where foreign officials, acting independently, obtain evidence from American citizens abroad in a manner which violates the fourth or fifth amendments, courts will not exclude such evidence, absent extreme circumstances,[47] because its exclusion will not deter similar conduct by foreign officials in the future.[48]

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41. 354 U.S. 1 (1957) *See* note 8 *supra* and accompanying text.

42. *Id.* at 6.

43. *Id.*

44. *See, e.g.*, Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 906 (1967); Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

45. United States v. Calandra, 414 U.S. 338, 348 (1974). *See, e.g.*, Kaufman v. United States, 394 U.S. 217 (1969); Tehan v. Shott, 382 U.S. 406 (1966). *See also* Doppert, *supra* note 28; Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 671 (1970).

> A defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally, in the words of the amendment, may be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . ."

Friendly, *supra* at 951.

46. *See* notes 50-54 *infra* and accompanying text.

47. Lujan v. Gengler, 510 F.2d at 62, 69 (1975). *See* notes 32-36 *supra* and accompanying text.

48. *See, e.g.*, Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 906 (1976); Kaplan, *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 (1977).

The difficulty in applying the exclusionary rule arises when American agents act in conjunction with foreign officials.[49] The circuit courts have developed various tests to determine the extent to which American officials must participate, if at all, before the exclusionary rule is applied to evidence obtained through illegal foreign searches and seizures.[50] In 1968, the Ninth Circuit adopted the "joint venture" test under which American agents must "substantially participate" in the illegal search of American citizens abroad for the exclusionary rule to be invoked.[51] The Ninth Circuit also established the "participation" test which requires somewhat less involvement by American agents in the foreign search.[52] Illegally obtained evidence will not be suppressed under the Tenth Circuit's "purpose" test unless American agents seized such evidence with the intention of using it in an American trial of an American citizen.[53] The "*Jordan* doctrine," developed by the United States

49. Kaplan, *supra* note 48, at 502.

50. The following tests have developed to determine the degree of American participation necessary to invoke the exclusionary rule: The "joint venture" test, the "participation" test, the "purpose" test and the "*Jordan* doctrine." Kaplan, *supra* note 48, at 502-10.

51. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), established the joint venture test. In *Stonehill*, Philippine authorities conducted a search of an American citizen in the Philippines. American agents helped in the investigation and in the planning of the raid but did not take part in the search. *Stonehill* held that American agents must "substantially participate" in the illegal search of an American citizen abroad for the fourth amendment exclusionary rule to be applied. Simple cooperation is insufficient. *Id.* at 743. The joint venture test is a vague standard which permits American agents considerable latitude when conducting searches abroad; such latitude runs counter to the Supreme Court's trend of extending the Constitution to protect Americans traveling abroad.

52. Brulay v. United States, 383 F.2d 345 (9th Cir.), *cert. denied*, 382 U.S. 966 (1967); and Birdsell v. United States, 346 F.2d 775 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965), established the participation test. American agents must actively take part in illegal searches of American citizens abroad before the fourth amendment exclusionary rule applies. In *Brulay*, United States customs agents gave Mexican police information indicating that the defendant was associated with drug traffic. The court held that this conduct did not constitute participation. 383 F.2d at 348. The participation test is vague. Although less is required than under the joint venture test, how much less is uncertain. Kaplan, *supra* note 48, at 505.

53. United States v. Mundt, 508 F.2d 904 (10th Cir.), *cert. denied*, 421 U.S. 949 (1975), adopted the purpose test. In *Mundt*, an American narcotics agent, acting in conjunction with Peruvian police, played a substantial part in the planning of the search, monitoring of defendant's room, and field testing the evidence which was seized. Despite the American agent's substantial role, the court held that the exclusionary rule did not apply because his purpose in gathering the evidence was not to use it in an American trial of the American defendant. 508 F.2d at 906-07. The purpose test is flawed because it ignores the primary justification for the exclusionary rule, *i.e.*, deterrence.

Court of Military Appeals, requires only minimal participation by American agents in the foreign search for the exclusionary rule to be applied.[54] Unfortunately, as the Fifth Circuit has noted, the tests are inconsistent in their approach to the problem.[55]

Applying the foregoing analysis of the rights of Americans abroad to the rights of aliens abroad, illegally obtained evidence will be suppressed only where American officials or their agents are involved. As long as deterrence remains the primary justification for the exclusionary rule, evidence obtained exclusively by foreign officials in a manner which violated the fourth or fifth amendments will not be suppressed whether such evidence was obtained from an American citizen or an alien abroad.

III. *CONSTITUTIONAL RIGHTS OF ALIENS COMMITTING CRIMES ABROAD*

The constitutional rights of aliens have developed slowly.[56] While aliens residing in the United States are protected by the fourth and fifth amendments in common with American citizens,[57] it is unclear whether this protection extends to nonresident aliens to be prosecuted in the United States for crimes they committed

54. United States v. Jordan, 23 C.M.A. 525, 50 C.M.R. 665 (1975), *on rehearing*, [1976] 19 Crim. L. Rep. 2025, represents the most expansive application of the fourth amendment exclusionary rule to illegal searches of American citizens abroad. *Jordan*, on first hearing before the United States Court of Military Appeals, held that evidence seized abroad from American citizens by foreign officials should be excluded from court even though American agents were not involved whatsoever. 23 C.M.A. at 527, 50 C.M.R. at 667. On rehearing, the court retreated from its earlier position and held that evidence seized solely by foreign officials in accordance with the laws of the foreign nation should not be excluded from court. If, however, an American agent participates in any manner in the foreign search, the illegal evidence will be excluded. 19 Crim. L. Rep. at 2025. This author maintains that *Jordan* set forth the most desirable test. *Jordan* is consistent with the underlying justification for the exclusionary rule as well as the Supreme Court's trend in extending the Constitution to protect Americans residing in foreign countries.

55. United States v. Morrow, 537 F.2d 120 (5th Cir. 1976). Courts "that have considered the question of how much American participation . . . is required to mandate application of the exclusionary rule have not been consistent in their choice of the precise test to be applied." *Id.* at 140.

56. Gordon, *The Alien and the Constitution*, 9 CALIF. W.L. REV. 1, 1 (1972).

57. Graham v. Richardson, 403 U.S. 365 (1971). *See* Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Yi Au Lau v. United States Immigration and Naturalization Serv., 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971); Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 Duke L.J. 583.

abroad.[58] Thus, the question arises whether an American court should exclude evidence obtained by American agents from aliens abroad because the manner in which it was obtained violated the fourth and fifth amendments.

A. *Alien's Presence in the United States*

An alien tried in the United States for a crime he committed abroad arguably has established sufficient identity[59] with the United States by virtue of his trial and possible imprisonment in this country to entitle him to the constitutional protections afforded resident aliens.[60]

In the landmark case of *Johnson v. Eisentrager*,[61] twenty-one German soldiers were tried and convicted by a United States military commission sitting in China for violating the laws of war[62] by continuing military activity in China after Germany had surrendered on May 8, 1945.[63] The German soldiers petitioned for writs of habeas corpus[64] claiming that their imprisonment violated Articles I[65] and III[66] of the Constitution and the fifth amendment.[67] The Supreme Court held that the petitioners, as nonresident enemy aliens, were not entitled to the rights of personal security and immunity from military trial guaranteed by the Constitution.[68] The Court, distinguishing between nonresident enemy and nonresident

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58. *See, e.g.*, Canadian Transport Co. v. United States, 430 F. Supp. 1168, 1172 n.4 (D.D.C. 1977).

59. In Johnson v. Eisentrager, the term "identity" was used to characterize the contacts an alien must have with the United States to entitle him to constitutional rights, *i.e*, "his identity with our society." 339 U.S. at 770.

60. *See* note 57 *supra* and accompanying text.

61. 339 U.S. 763 (1950).

62. *See* M. GREENSPAN, SOLDIER'S GUIDE TO THE LAWS OF WAR 79 (1969). The United States recognizes the validity of the laws of war. *See, e.g.*, Convention for the Amelioration of the Condition of Wounded in Armies in the Field, *done* at Geneva, 22 August 1864, 22 Stat. 940, T.S. No. 337 (effective 26 July 1882).

63. 339 U.S. at 766. The German soldiers gave intelligence information to the Japanese concerning the movement of the American armed forces. *Id.*

64. *See* 28 U.S.C. § 2255 (1976). A writ of habeas corpus allows a person imprisoned in an American prison to contest the constitutionality of his trial or confinement. *Id.*

65. Article 1 of the U.S. Constitution delineates the powers delegated to Congress under the Constitution.

66. Article III of the U.S. Constitution delineates the powers of the Judiciary of the federal government.

67. 339 U.S. at 765.

68. *Id.* at 785.

friendly aliens,[69] relied on the petitioners' status as nonresident enemy aliens as the basis for denying them the constitutional rights of personal security and immunity from military trial.[70]

In dictum, the *Johnson* Court stated that a nonresident friendly alien is entitled to an ascending scale of rights as he increases his identity with the United States. "Mere lawful *presence* in [this] country . . . gives him certain rights . . . ."[71] The Court emphasized that it is necessary to establish the alien's presence in the United States in order to trigger the protective mechanism of the Constitution: "[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[72] *Johnson* noted several factors that demonstrated presence: (1) location of the trial, (2) place of residence, (3) locale of captivity, (4) site of the offense, and (5) place of confinement.[73] The Court indicated that, assuming that petitioners were nonresident friendly aliens, they remained, nonetheless, strangers to the United States because they met none of the requirements of presence.[74]

It is submitted that a nonresident friendly alien who is being tried in the United States for a crime committed abroad has established sufficient identity with the United States, by virtue of his presence at trial and possible imprisonment in this country,[75] to entitle him to the same degree of constitutional protection afforded the resident alien.

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69. But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between . . . aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and non-resident enemy aliens who at all times have remained with, and adhered to, enemy governments.

Id. at 769

70. *Id.* at 773. The Court observed that "[i]t is war that exposes the relative vulnerability of the alien's status." *Id.* at 771. For example, nonresident enemy aliens do not have access to our courts. *See id.* at 776. It is important to note that a nonresident alien defendant in a criminal prosecution is not considered an enemy alien. A person is an enemy alien if the nation of his allegiance is at war with the United States. *Id.* at 773.

71. 339 U.S. at 770 (emphasis added).

72. *Id.* at 771.

73. *Id.* at 781.

74. *Id.*

75. *See* note 73 *supra* and accompanying text.

B. *Justified Expectation of Constitutional Rights*

An alien who is tried in the United States for a crime he committed abroad arguably has a justified expectation that he is entitled to the full scope of advantages afforded by the legal system with which he is forced to deal. *Berlin Democratic Club* v. *Rumsfeld*,[76] in dictum, supports this contention.

In *Berlin*, American citizens and one Austrian citizen, all residing in West Germany, brought a civil action in the United States District Court for the District of Columbia against United States Army officials, alleging that the army had engaged in a series of operations which constituted violations of their fourth and fifth amendment rights.[77] As to the claims of the American citizens, the court held that the army had violated their fourth and fifth amendment rights.[78] As to the claims of the Austrian citizen, however, the court held that he lacked standing to sue.[79]

The Austrian citizen unsuccessfully argued that *United States v. Toscanino*[80] signaled a trend toward permitting nonresident aliens to sue United States officials for alleged violations of their constitutional rights.[81] In rejecting this argument, Chief Judge Jones, writing for the court, distinguished the cases noting that *Toscanino* dealt with a nonresident alien who had been seized abroad in order to prosecute him in a domestic court[82] while *Berlin* concerned a nonresident alien plaintiff in a civil action whose presence in an American court was voluntary.[83] Judge Jones reasoned that there are different expectations of treatment when a nonresident alien is forced to appear and defend himself in a domestic criminal proceeding than when a nonresident is merely subjected to improper conduct by American agents abroad.[84] The nonresident alien prosecuted in the

76. 410 F. Supp. 144 (D.D.C. 1976).

77. The plaintiffs alleged that United States Army officials conducted illegal electronic surveillance, infiltrated organizations, opened mail and other harassment. *Id.* at 147-48.

78. *Id. See* Part II *supra*.

79. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. at 153.

80. 500 F.2d 267 (2d Cir. 1974). *See* notes 24-31 *supra* and accompanying text.

81. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. at 152.

82. *Id.*

83. *Id.* at 153.

84. "[W]hen a non-resident alien is brought from abroad to appear and be the subject of a domestic criminal prosecution, there are different expectations of treatment than when a non-resident is simply affected by United States officials abroad." *Id.* at 152.

United States justifiably expects that he is entitled to the full scope of advantages of the legal system with which he is forced to deal.[85] By contrast, the nonresident alien who brings a civil action is not forced into an American court and should not expect that he is entitled to all of the advantages afforded by the legal system within which he has chosen to bring suit.[86] Consequently, *Berlin* held that the Austrian citizen lacked standing to sue United States officials for improper conduct abroad because he was not entitled to constitutional rights as a plaintiff in a civil action.[87]

At least where the government attempts to use the fruits of its illegal conduct in a criminal proceeding against the nonresident alien in the United States, there is no sound reason to protect an alien residing in the United States from unconstitutional action and not to protect aliens residing abroad from similar unlawful conduct.[88] Laws which "make unjust . . . discriminations between persons in similar circumstances" are prohibited by the Constitution.[89] Since both aliens residing in the United States and nonresident aliens forcibly brought to the United States are within our territorial jurisdiction and subject to our laws, it is submitted that it is fair and just to grant each the same constitutional protections.[90]

C. *Policy Considerations*

Arguably, the denial of constitutional rights to aliens prosecuted in the United States for crimes committed abroad conflicts with American foreign policy with respect to human rights.[91] Con-

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85. *Id.*

86. *Id.* at 153.

87. *Id.*

88. United States v. Toscanino, 500 F.2d at 267, 280 (2d Cir. 1974). The court noted that the "Constitution . . . applies only to the conduct abroad of agents acting on behalf of the United States. It does not govern the independent conduct of foreign officials in their own country." *Id.* at 280 n.9. *See, e.g.*, Part II *supra*.

89. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). In *Yick Wo*, a law passed by the city of San Francisco prohibited anyone from operating a laundry business without first obtaining a permit from the city. All American citizens were granted permits whereas all Chinese aliens were denied them. The Supreme Court held that aliens were protected by the fourteenth amendment in common with American citizens. The Court reasoned that the fourteenth amendment applied "to all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality . . . ." *Id.* at 369.

90. Although *Berlin* held that nonresident alien plaintiffs are not entitled to constitutional rights, that case is distinguishable for the reasons previously set forth. *See* notes 82-87 *supra* and accompanying text.

91. The human rights movement is based on the principle that all persons pos-

stitutional rights are fundamentally the substantive and procedural application of basic human rights in our system of laws.[92] The fourth and fifth amendments were adopted because of "the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction," illegally seizes evidence or obtains a coerced confession.[93] The United States has championed the cause of human rights for many years.[94] President Carter has spoken vigorously against human rights violations in other countries[95] and Congress has enacted legislation denying military assistance and economic aid to governments engaged in a consistent pattern of gross human rights violations.[96] Denying constitutional rights to nonresident aliens prosecuted in the United States conflicts with this express foreign policy.

D. *The* Uranium Club *Cases*

In the *Uranium Club* cases,[97] Westinghouse, an American corporation, was sued in federal court for breach of contracts to supply uranium.[98] In defense, Westinghouse contended that an international cartel of uranium producers created artificially high prices of uranium and thereby made performance of the contracts commercially impractical.[99] At the request of Westinghouse, the federal

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sess basic human rights which no country may violate. "Unlike other international law, the law of human rights serves idealistic ends, not particular national interests . . . ." L. HENKIN, HOW NATIONS BEHAVE 229 (2d ed. 1979).

92. "[T]he fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws . . . ." Yick Wo v. Hopkins, 118 U.S. at 370.

93. Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960).

94. L. HENKIN, *supra* note 91, at 236-37.

95. *See id.* at 237.

96. Congress has passed laws which make trade concessions to the U.S.S.R. depend on respecting human rights in that country. The United States obtained commitments for human rights from the Soviet Union in exchange for political acceptance of the status quo in Eastern Europe when the Conference on National Security and Cooperation in Europe was held in Helsinki in 1975. *See* L. HENKIN, *supra* note 91, at 237.

97. Rio Tinto Zinc Corp. v. Westinghouse Electric Corp. [1978] 1 All E.R. 434; Re Westinghouse Electric Corp. Uranium Contract Litigation MDL Docket No. 235, [1977] 3 All E.R. 703.

98. [1978] All E.R. 434, 436-37.

99. *Id.* at 434.

court issued letters rogatory to the High Court in England requesting that the High Court summon certain non-party British witnesses who were allegedly involved in the cartel.[100] The witnesses, when examined in London, claimed that they were entitled to the protection of the fifth amendment of the United States Constitution on the ground that the testimony they would give might subject them to civil and criminal proceedings in the United States for violations of the United States antitrust laws.[101] The Court of Appeals in England referred this issue to Judge Merhige, the judge presiding over the federal action in the United States,[102] who ruled that the British witnesses were entitled to the fifth amendment privilege.[103] Judge Merhige's ruling is significant because the British witnesses were nonresident aliens who might be subjected to civil and criminal proceedings in the United States and supports the contention that nonresident aliens prosecuted in the United States are entitled to constitutional rights.

CONCLUSION

As few cases have considered the question whether an alien who is tried in the United States for a crime he committed abroad is entitled to constitutional rights, this Note contends that an American court should exclude evidence obtained by American agents from aliens abroad because the manner in which it was obtained violated the fourth or fifth amendments. Arguably, an alien prosecuted in the United States for a crime he committed abroad is entitled to constitutional rights because of his presence in the United States while on trial and in prison and his justified expectation that he is entitled to the advantages of the legal system with which he is forced to deal. Because of the constitutional requirement that laws be applied equally, evidence obtained illegally by American agents should be suppressed at trial, whether the defendant is an American citizen or a nonresident alien.

Bruce Bryan

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100. *Id.* at 435.
101. *Id.*
102. *Id.* at 436.
103. *Id.*