The Joint Venture Exception in the International Silver Platter Doctrine: Variability and Devaluation of Cooperation

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This Comment examines the joint venture exception in the international silver platter doctrine in the context of the use of wiretaps in federal narcotics cases. Under the international silver platter doctrine, evidence obtained through searches (like wiretaps) by foreign law enforcement on foreign soil and under foreign law is admissible in U.S. courts. The joint venture exception qualifies the international silver platter doctrine: if participation by U.S. law enforcement in a wiretap by foreign law enforcement on foreign soil constitutes a joint venture, then evidence obtained from the search is admissible only if the wiretap was reasonable under the Fourth Amendment. Federal appellate courts lack uniform guidance on which factors to evaluate and weigh in considering whether a joint venture between U.S. and foreign law enforcement existed. This leads to rare findings of joint ventures. If courts do not find that a joint venture existed, courts admit evidence obtained from joint ventures regardless of whether the wiretap complied with foreign law, which provides defendants with no constitutional protections. Based on an empirical and qualitative analysis, this Comment proposes adopting a uniform balancing test for the joint venture exception that considers: (1) who controlled the wiretap, (2) whether U.S. law enforcement provided substantial resources to foreign law enforcement, and (3) how U.S. and foreign law enforcement describe their relationship. This proposal would lead to increased findings of joint ventures in cases involving cooperation in conducting wiretaps between U.S. and foreign law enforcement abroad. Specifically, the proposal would require that more wiretaps comply with the law of the country where they were intercepted. Because courts would find joint ventures more often with my proposed balancing test, my proposal could also increase judicial legitimacy, since courts would less often be deciding cases based on illegally obtained evidence from abroad.

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INTRODUCTION

Narcotics manufacturing and trafficking pose significant threats to U.S. law enforcement and national security.[1] Drug trafficking occurs through highly complex networks of individuals and groups that manufacture and transport drugs across borders. These groups, organized as drug cartels or drug-trafficking

[1] *See* Christopher M. Pilkerton, *The Bite of the Apple: The Use of Narcotics-Related Foreign Wiretap Evidence in New York City Courts*, 11 INT'L LEGAL PERSP. 103, 103 (1999) ("The global trade of drug trafficking currently poses the most serious threat that U.S. law enforcement has ever had to combat."); Brian Mann, *U.S.-Mexico Efforts Targeting Drug Cartels Have Unraveled, Top DEA Official Says*, NPR (May 3, 2021), https://perma.cc/ZJA5-UWDV; U.S. DEP'T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT 21 (2020).

organizations (DTOs),[2] produce and manufacture drugs in the United States and abroad.[3] They then coordinate and carry out the transportation and sale of drugs across borders.[4]

This process creates substantial violence, crime, and death in the United States and foreign countries, including murder, assault, theft, corruption, human trafficking, and money laundering.[5] The Department of Homeland Security specifically identifies Mexican cartels as posing the greatest threat to the United States,[6] although cartels in other parts of the world also pose threats.[7] Mexican cartels pose a large threat "because of their ability to control territory—including along the U.S. Southwest border—and co-opt parts of [the Mexican] government."[8] The fracturing of Mexican DTOs creates fights over territory, which "almost certainly will lead to increased violence in Mexico[ ] along the U.S. Southwest border."[9] U.S.-based gangs help cartels distribute drugs domestically, and those gangs compete with each other for clientele, contributing to domestic, drug-related violence.[10] Narcotics trafficking also increases narcotics use, contributing to a public health crisis of drug overdoses.[11] Further, cartel

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2 The media uses "drug cartels" and "DTOs" interchangeably. Cartels can comprise a single DTO, or many DTOs can make up one cartel. *See* Nat'l Drug Intel. Ctr., *Drug Trafficking Organizations*, U.S. DEP'T OF JUST. (Feb. 2010), https://perma.cc/UX2N-3Q5Q (stating that cartels function with "the assistance of DTOs that are either a part of or in an alliance with the cartel").

3 *See* Pilkerton, *supra* note 1, at 105.

4 *See id.* This Comment focuses on drug trafficking into the United States, over which U.S. federal courts have jurisdiction.

5 *See* U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., 2020 DRUG ENFORCEMENT ADMINISTRATION NATIONAL DRUG THREAT ASSESSMENT 69, 72, 81 (2021) (discussing murder, theft, corruption, and money laundering); U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 22 (discussing assault, human trafficking, and money laundering for transnational criminal organizations (TCOs)).

6 *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 21.

7 *See id.* at 21 (describing Mexican TCOs); U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., *supra* note 5, at 33, 35, 75 (describing Central American, South American, and Asian DTOs); *Cocaine and Guinea-Bissau: How Africa's 'Narco-state' Is Trying to Kick its Habit*, BBC NEWS (May 28, 2020), https://perma.cc/4QQL-DMYP.

8 U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 21.

9 *Id.*

10 *See id.*; U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., *supra* note 5, at 81 (noting that over 60% of Puerto Rico's homicides are drug related).

11 *See* U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., *supra* note 5, at 31 (noting that deaths from drug poisoning involving cocaine increased by about 251% in the United States between 2010 and 2018).

violence and power have increased during the COVID-19 pandemic.[12]

In response to these threats, the United States has devoted substantial resources to identifying DTOs and prosecuting their members.[13] The transnational structure of drug trafficking facilitates the admissibility of key evidence in narcotics cases.[14] Understanding how narcotics prosecutions work is important because of their prevalence in federal courts and the impact that both drug trafficking and drug-trafficking prosecutions can have on public safety. The easier it is to prosecute narcotics traffickers, the greater the likelihood that these traffickers will be found guilty, which decreases the risk that they will continue to pose to public safety.

The transnational scope of drug trafficking requires the operation of cross-border communication networks to coordinate drug transportation,[15] which gives rise to two features of narcotics prosecutions that impact the admissibility of evidence in trials. First, narcotics investigations require a coordinated, international response—domestic prosecutions can rely (sometimes exclusively) on evidence obtained by foreign police officers abroad or evidence that U.S. and foreign law enforcement have worked together abroad to obtain.[16]

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[12] *See* JUNE S. BEITTEL & LIANA W. ROSEN, CONG. RSCH. SERV., IN11535, MEXICAN DRUG TRAFFICKING AND CARTEL OPERATIONS AMID COVID-19, at 2 (2021) (describing how cartels seemingly exploited the pandemic by increasing prices on drugs, distributing aid packages with cartel logos, and enforcing stay-at-home lockdowns and also noting that Mexico's two biggest cartels, the Sinaloa Cartel and the Jalisco New Generation Cartel, "show signs of expansion in Mexico and have increased their role in production and pill pressing" (quotation marks omitted)).

[13] *See Fact Sheet: The Biden Administration Launches New Efforts to Counter Transnational Criminal Organizations and Illicit Drugs*, WHITE HOUSE (Dec. 15, 2021) [hereinafter White House], https://perma.cc/SVA9-PT28.

[14] *See id*.

[15] *See* Pilkerton, *supra* note 1, at 105 (explaining how federal wiretaps may capture communications between international parties); *Wiretap Report 2020*, U.S. CTS. (Dec. 31, 2020), https://perma.cc/MQ8K-PA5K ("Drug offenses were the most prevalent type of criminal offenses investigated using reported wiretaps.").

[16] *See* Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT'L L. 329, 369–70 (1994). The Drug Enforcement Administration (DEA) stations U.S. agents in countries that pose a narcotics threat to the United States to work with local police. *See North and Central America*, U.S. DRUG ENF'T ADMIN. (2021), https://perma.cc/FM9Z-VXXC. To facilitate intelligence sharing and other forms of cooperation between U.S. police and their foreign counterparts, the United States enters into cooperation agreements with certain foreign countries. *See, e.g.*, Michael C. Kenney, *Intelligence Games: Comparing the Intelligence Capabilities of Law Enforcement Agencies and Drug Trafficking Enterprises*, 16 INT'L J. INTEL. & COUNTERINTELLIGENCE 212, 214 (2010). This Comment further discusses

Second, because cartels rely on communication networks, cartel investigations often involve foreign law enforcement on foreign soil placing wiretaps on particular phone numbers, and these wiretaps are governed by foreign law. U.S. prosecutors can use communications intercepted via such wiretaps as evidence of cartel activity. U.S. federal courts determine the admissibility of communications intercepted via these foreign wiretaps under the "international silver platter doctrine."[17] In this Comment, a search under the international silver platter doctrine means a wiretap by foreign law enforcement on a phone belonging to a U.S. or non—U.S. citizen while that person is located outside of the United States.

Under the international silver platter doctrine, U.S. courts automatically admit this wiretap evidence unless one of two exceptions apply. First, if foreign officials' conduct in obtaining the wiretap "shocks the judicial conscience" of the U.S. court, the court excludes the evidence.[18] This exception is further described in Part I.B.1. This Comment primarily focuses on the second exception: the "joint venture" exception.[19]

The joint venture exception requires courts to engage in a two-step analysis to determine admissibility.[20] First, courts must determine if participation by U.S. law enforcement in a search by foreign law enforcement on foreign soil constituted a joint venture.[21] Second, if a joint venture existed, courts evaluate whether the wiretap was reasonable under the Fourth Amendment.[22] The Fourth Amendment protects against "unreasonable searches and seizures."[23] As a form of digital surveillance, wiretaps constitute

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these agreements and their implications for the international silver platter doctrine in Parts II.A.2 and III.B.

17 The phrase "silver platter" comes from *Lustig v. United States*, 338 U.S. 74 (1949): "[I]t is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." *Id.* at 78–79.

18 *See* United States v. Emmanuel, 565 F.3d 1324, 1330–31 (11th Cir. 2009); Rochin v. California, 342 U.S. 165, 172–73 (1952).

19 Most circuits refer to this exception as the joint venture exception. While the Second Circuit has rejected the exception by name, it refers to the exception's principles by the two rules it applies: virtual agent and intent to evade the Constitution. I discuss these rules in detail in Part II.A.2–3. *See* United States v. Getto, 729 F.3d 221, 233 (2d Cir. 2013); United States v. Lee, 723 F.3d 134, 140 n.4 (2d Cir. 2013). For simplicity, I will refer to this exception as the joint venture exception.

20 *See* United States v. Barona, 56 F.3d 1087, 1091 (9th Cir. 1995).

21 *See, e.g.*, *id.*

22 *See, e.g.*, United States v. Peterson, 812 F.2d 486, 494 (1987).

23 U.S. CONST. amend. IV.

searches under U.S. law.[24] When used by U.S. officials domestically, wiretaps implicate the Fourth Amendment, which requires police officers to obtain a warrant supported by probable cause from a magistrate judge prior to initiating a wiretap unless a delineated exception to the warrant or probable cause requirements applies.[25] The protections of the warrant and probable cause requirements do not apply to searches conducted abroad as part of a joint venture, and instead courts look to foreign law to determine whether a wiretap was reasonable for purposes of the Fourth Amendment.

This Comment addresses a key issue in the first step of applying the joint venture exception that poses constitutional, privacy, and liberty concerns: circuits lack a uniform test for determining what constitutes a joint venture.[26] Accordingly, venue becomes a crucial factor in whether a court will find that a joint venture existed. The lack of a uniform test also allows courts to undervalue certain forms of cooperation.[27]

In practice, the lack of a uniform test leads to few findings of a joint venture in the wiretap context, which poses concerns for U.S. defendants' constitutional rights and their privacy and liberty interests. If courts do not classify U.S.-foreign cooperation as a joint venture, any wiretap interceptions are admissible in U.S. federal courts regardless of whether they complied with foreign or domestic law. An illegally obtained wiretap can thus be used as key evidence in prosecutions against defendants even if U.S. law enforcement did not rely in good faith on representations from foreign police that they complied with foreign law in obtaining the wiretap. There is no parallel to this with domestic wiretaps, where evidence obtained in violation of the Fourth Amendment is only admissible if the good faith exception applies.

Narcotics prosecutions pose a challenging balancing act for the United States. When prosecuting drug-trafficking crimes, U.S. courts are faced with a dilemma in choosing between admitting evidence obtained from foreign wiretaps—which often

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[24] *See* Katz v. United States, 389 U.S. 347, 351–53 (1967).

[25] U.S. CONST. amend. IV; *see Katz*, 389 U.S. at 351–52. Wiretaps also implicate Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2516–2518, which is not discussed in this Comment because it governs only domestic wiretaps. *See* Pilkerton, *supra* note 1, at 113.

[26] *See infra* Part II.A.

[27] *See, e.g.*, Caitlin T. Street, Note, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology*, 49 COLUM. J. TRANSNAT'L L. 411, 434–35 (2011).

provide information crucial to conviction and ultimately increase public safety—and providing constitutional protections for defendants. The United States values international cooperation in combating the international threat posed by narcotics trafficking.[28] This international cooperation, combined with the current application of the joint venture exception, eases the admissibility of evidence obtained abroad in U.S. courts because the Fourth Amendment analysis under the joint venture exception only requires evaluating foreign law. Foreign law generally falls short of the probable cause and warrant requirements of domestic searches.[29] Accordingly, international cooperation and the joint venture exception often strengthen the prosecution's case against drug traffickers. Easier prosecutions of drug traffickers protect the U.S. public against harms associated with drug trafficking.

Constitutional protections sit on the other side of the balancing scale. International cooperation may increase public safety, but it does so at a constitutional cost. For example, the lack of a clear joint venture test decreases the likelihood that courts will find that a joint venture existed. When courts do not find that a joint venture existed, courts admit evidence from wiretaps conducted by foreign law enforcement abroad that did not comply with the law of the country where they were conducted, enabling prosecutors to use illegally obtained evidence to convict defendants. This has the effect of providing U.S. citizens with reduced constitutional protection when they leave U.S. borders. This is problematic because it allows prosecutors to use illegally obtained evidence to convict defendants. Further, the use of illegally obtained evidence also harms judicial legitimacy. Courts provide constitutional protections to U.S. citizens, and failing to carry out this function erodes public trust in the judiciary. Allowing this evidence into U.S. federal courts to be used against U.S. defendants subsequently can harm judicial institutional legitimacy.

This Comment proposes a novel, uniform balancing test for determining what constitutes a joint venture. It uses an empirical and quantitative analysis to address the constitutional and institutional legitimacy concerns without sacrificing international cooperation and public safety. I conducted a comprehensive empirical study of narcotics cases in circuit courts and the District Court for the District of Columbia (D.D.C.) that involved wiretaps

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[28] *See, e.g.*, *Mission*, U.S. DRUG ENF'T ADMIN. (2022), https://perma.cc/27FB-HSR5.

[29] *See* Street, *supra* note 27, at 433; *Barona*, 56 F.3d at 1099 (Reinhardt, J., dissenting).

and the international silver platter doctrine. For each case, I categorized the rules and factors used to determine whether a joint venture existed. Table 1 reflects the results of this analysis and provides a guide to the factors that courts rely on most frequently in their joint venture determinations.

Based on the results in Table 1 and the policy justifications discussed in Part III, this Comment proposes a balancing test involving the following factors: (1) who controlled the wiretap, (2) whether U.S. law enforcement provided substantial resources to foreign law enforcement, and (3) how U.S. and foreign law enforcement describe their relationship. This would lead to increased findings of joint ventures in cases involving cooperation between U.S. and foreign law enforcement in conducting wiretaps abroad.

Finding a joint venture only triggers the most basic constitutional protections for criminal defendants: it requires that wiretaps comply with the law of the country where they were intercepted. This minor increase in constitutional protections for defendants is significant, even if it does not guarantee the domestic protections of a warrant and probable cause, because the current practice—which very rarely finds joint ventures—provides defendants with no constitutional protections at all. Because courts would find joint ventures more often with my proposed balancing test and would therefore decide fewer cases based on evidence illegally obtained abroad, my proposal would also increase judicial legitimacy.

Part I of this Comment offers background on the international silver platter doctrine and describes the elements of the doctrine. Part II analyzes the mechanics of the joint venture exception: whether a joint venture existed, the application of foreign law, and the good faith exception. Lastly, Part III describes a solution to a key issue posed by the joint venture exception by proposing a balancing test for what constitutes a joint venture.[30]

Wiretaps pose the most challenging case study for the joint venture exception—as demonstrated by how rarely courts find joint ventures in wiretap cases—because they involve remote

[30] The most recent scholarship on this comes from former law student Caitlin T. Street. Street described the rules that circuit courts use to evaluate whether a joint venture existed, employed a qualitative analysis to revise the joint venture rules, and provided alternatives to excluding evidence from joint ventures. *See* Street, *supra* note 27, at 448–54. This Comment takes a different approach by focusing on the factors evaluated within the rules rather than on expanding the rules' scope.

cooperation. My proposal can extend beyond the wiretap context to all searches conducted abroad and would have a similar effect of increasing the likelihood of finding a joint venture in these cases.

I. CONSTITUTIONAL AND HISTORICAL BASES FOR THE INTERNATIONAL SILVER PLATTER DOCTRINE

Since the beginning of the twentieth century, the United States has helped foreign countries control the international flow of illicit drugs.[31] The United States provides assistance, in the form of money and cooperation agreements, to "source" and "transit" countries[32] with high incidences of narcotics trafficking.[33] This sets the background of global cooperation against which the international silver platter doctrine operates. As Parts II.A and III discuss, such global cooperation also makes it difficult to define what constitutes a joint venture.

This Part introduces the international silver platter doctrine. Part I.A situates the international silver platter doctrine within the constitutional framework of Fourth Amendment protections. Part I.B then discusses the doctrine's history and its development from domestic to international in scope. Although the international silver platter doctrine now covers a global sphere, its domestic constitutional law origins still affect how it operates today.

A. The Fourth Amendment and Searches on Foreign Soil

In prosecuting narcotics trafficking violations, government agencies often obtain intelligence from electronic sources. This can include communications—such as phone calls, text

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[31] *See* LIANA W. ROSEN, CONG. RSCH. SERV., RL34543, INTERNATIONAL DRUG CONTROL POLICY: BACKGROUND AND U.S. RESPONSES 12 (2015).

[32] Kenney, *supra* note 16, at 214.

[33] *See* U.S. DEP'T OF STATE BUREAU OF INT'L NARCOTICS & LAW ENF'T AFFS., INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, VOLUME I: DRUG AND CHEMICAL CONTROL 27–36 (2021) (describing the forms of assistance that federal agencies provide to international partners in combatting drug trafficking).

messages,[34] and emails—intercepted through wiretapping devices.[35] To place a wiretap on a landline, police insert a wire on the cords associated with the landline to intercept conversations to and from the landline's phone number.[36] Intercepting calls from public phones requires that police insert listening devices on public phone booths.[37] Law enforcement can also intercept calls on cell phones by contacting the carrier to intercept calls to and from a particular phone number.[38] Wiretaps provide a unique window into cartels that would otherwise be obtainable only through confidential informants because cartel operations often occur in private.[39]

As a form of surveillance, wiretaps constitute searches under U.S. law.[40] When used by U.S. officials domestically, wiretaps implicate the Fourth Amendment, which protects individuals against "unreasonable searches and seizures" by the U.S. government.[41] Domestic searches conducted by U.S. officials are reasonable if those officials first obtain a warrant based on probable cause from a magistrate judge, unless a delineated exception to the warrant or probable cause requirements applies.[42]

If law enforcement officers violate the Fourth Amendment by conducting a search without a warrant supported by probable cause, courts can exclude evidence obtained from such a search

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34 Cartel members often communicate over WhatsApp because its encryption software provides them with more protection from government surveillance than standard text messages. Because of WhatsApp's encryption software, the federal government must receive WhatsApp's permission to intercept these communications. *See, e.g.*, Thomas Brewster, *Forget About Backdoors, This Is the Data WhatsApp Actually Hands to Cops*, FORBES (Jan. 22, 2017), https://perma.cc/P48X-YMZV; Natasha Clancy, *Gang in Mexico Offers "Drug Menu" Via Encrypted WhatsApp*, INSIGHT CRIME (Apr. 3, 2019), https://perma.cc/UFP5-2SQE.

35 *See* Kenney, *supra* note 16, at 222; U.S. Dep't of Just., *29. Electronic Surveillance – Title III Affidavits*, U.S. DEP'T OF JUST. ARCHIVES (Jan. 16, 2020), https://perma.cc/MT4B-7S3U (discussing the requirements for a federal wiretap application).

36 *See* Olmstead v. United States, 277 U.S. 438, 456–57 (1928), *overruled by* Berger v. New York, 388 U.S. 41 (1967), *and* Katz v. United States, 389 U.S. 347, 347 (1967).

37 *See Katz*, 389 U.S. at 348.

38 *See* Deedee Sun, *How Federal Agents Can Tap Your Phones*, KWCH (Feb. 14, 2017), https://perma.cc/FC2H-MHSM.

39 *See* Kenney, *supra* note 16, at 229.

40 *See Katz*, 389 U.S. at 351–52.

41 U.S. CONST. amend. IV; *see Katz*, 389 U.S. at 351–52.

42 *See Katz*, 389 U.S. at 357. These exceptions—exigent circumstances, plain view, automobiles, consent, and searches incident to arrest—are outside the scope of this Comment.

under the exclusionary rule.[43] With exceptions, "[t]he exclusionary rule prevents the government from using most evidence gathered in violation of the United States Constitution."[44] A key aim of the exclusionary rule is encouraging U.S. law enforcement to conduct lawful searches.[45] The Supreme Court has explained that, when it comes to searches conducted by U.S. actors, illegally obtained evidence should be excluded to deter unlawful behavior by providing an incentive for law enforcement agents to behave lawfully.[46]

The application of the Fourth Amendment is less straightforward when government actors operate outside of the United States. The Supreme Court has noted that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect [one's] life and liberty should not be stripped away just because [one] happens to be in another land."[47] Similarly, the Ninth Circuit has found that the Fourth Amendment's protections apply to "American citizens at home and abroad."[48] But the Supreme Court has also held that routine searches at or along the border when an individual is entering or suspected of entering the United States do not require a warrant or probable cause.[49] Borders are unique because "[t]he Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border."[50] Areas beyond the border in foreign countries do not pose a similar threat, so there remains ambiguity regarding the extent to which the Fourth Amendment and other constitutional protections apply.

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43 *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961). *See also generally* Weeks v. United States, 232 U.S. 383 (1914), *overruled by Mapp*, 367 U.S. 643.

44 Legal Info. Inst., *Exclusionary Rule*, CORNELL L. SCH. WEX (June 2017), https://perma.cc/H2PM-WUBT.

45 *See* United States v. Peterson, 812 F.2d 486, 491 (9th Cir. 1987) (describing "deterring federal officers from unlawful conduct" as the rationale for excluding evidence). The exclusionary rule also aims to "provide remedies to defendants whose rights have been infringed." *Id.* This Comment is principally concerned with the deterrence rationale and its relation to the joint venture exception.

46 *Cf.* Michigan v. Tucker, 417 U.S. 433, 447 (1974).

47 Reid v. Covert, 354 U.S. 1, 6 (1957).

48 United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (quoting United States v. Verdugo-Urquidez, 856 F.2d 1214, 1234 (1988) (Wallace, J., dissenting)).

49 *See* United States v. Flores-Montano, 541 U.S. 149, 152–53 (2004); United States v. Villamonte-Marquez, 462 U.S. 579, 592–93 (1983).

50 *Flores-Montano*, 541 U.S. at 152.

In *United States v. Verdugo-Urquidez*,[51] the Supreme Court held that the Fourth Amendment does not apply to searches of the residences of non—U.S. citizens outside the United States by U.S. law enforcement.[52] The Court reasoned that the Framers of the Constitution intended the Fourth Amendment to apply only to domestic searches conducted by U.S. law enforcement.[53] Similarly, lower courts have held that the Fourth Amendment does not apply to searches conducted solely by foreign officials who enforce foreign law abroad even if the targets are U.S. citizens.[54] The Fourth Amendment does not apply in these circumstances because the conduct at issue involves nonU.S. law enforcement acting abroad.

Evidence gathered in searches conducted by foreign law enforcement agents in contravention of foreign law abroad is typically considered admissible in U.S. courts because exclusion of that evidence would not deter illegal law enforcement action.[55] Foreign law governs these situations, meaning that foreign law enforcement officers do not have an obligation to follow Fourth Amendment domestic warrant and probable cause requirements. Foreign law enforcement officers are also less concerned than their U.S. counterparts that key evidence can be excluded from court since they do not have as large of a stake in U.S. prosecutions of narcotics traffickers as U.S. law enforcement officers do.

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51 494 U.S. 259 (1990).

52 *See id.* at 274–75 (refusing to extend Fourth Amendment protection to a residence located in Mexico belonging to a Mexican citizen with no voluntary attachment to the United States); Bentley, *supra* note 16, at 333 ("[T]he Fourth Amendment does not reach abroad to protect a foreign suspect who lacks a 'substantial connection' with the United States.").

53 *See Verdugo-Urquidez*, 494 U.S. at 266–67.

54 *Peterson*, 812 F.2d at 490 (citing United States v. Rose, 570 F.2d 1358, 1361 (9th Cir. 1978)); United States v. Rosenthal, 793 F.2d 1214, 1230–31 (11th Cir. 1986), *modified*, 801 F.2d 378 (11th Cir. 1986).

55 *See Rosenthal*, 793 F.2d at 1230 (doubting the deterrent effect on foreign police practices following from punitive exclusion of evidence in question by U.S. courts); United States v. Mount, 757 F.2d 1315, 1317 (D.C. Cir. 1985) (citations omitted):

> The principal purpose of the exclusionary rule is the deterrence of unlawful police conduct, the theory being that such deterrence tends to foster obedience to the mandate of Fourth Amendment. In circumstances where application of the rule does not result in appreciable deterrence, its use is not warranted . . . since United States courts cannot be expected to police law enforcement practices around the world, let alone to conform such practices to Fourth Amendment standards by means of deterrence, the exclusionary rule does not normally apply to foreign searches conducted by foreign officials.

Additionally, U.S. police are not involved, so there is also no unlawful behavior by U.S. law enforcement to deter.

The Supreme Court has analyzed only situations involving solely U.S. law enforcement actions abroad, whereas the international silver platter doctrine deals with combined U.S.-foreign law enforcement efforts. Joint ventures represent a blending of the abovementioned Fourth Amendment considerations of reasonableness and the exclusionary rule since they implicate domestic and international actors. Joint ventures involve foreign law enforcement officials acting abroad under foreign law with U.S. cooperation. If a joint venture between U.S. and foreign law enforcement existed, courts will evaluate the reasonableness of the wiretap under the Fourth Amendment in light of the foreign law of the country in which the wiretap occurred. If foreign law enforcement complied with foreign law in conducting the joint venture wiretap with U.S. involvement, the search will be considered reasonable and courts will admit evidence from the search. However, foreign law generally falls short of the probable cause and warrant requirements of domestic searches.[56] This means that U.S. citizens do not receive the probable cause and warrant protections of the Fourth Amendment in searches conducted abroad by foreign law enforcement even if U.S. law enforcement officers are involved in the investigation.[57]

The inability to deter foreign and U.S. officials in joint ventures by applying the exclusionary rule clarifies why courts look to non-U.S. law to determine the reasonableness of joint venture wiretaps.[58] When a joint venture exists between U.S. and foreign law enforcement, courts posit that requiring a warrant and probable cause would not deter federal officers from unlawful conduct. In joint ventures, foreign and U.S. officers are not deterred from unlawful conduct because if a joint venture wiretap complies with foreign law, U.S. law enforcement are not engaged in illegal behavior under foreign law, and there is no unlawful behavior to deter.[59]

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[56] *See* Street, *supra* note 27, at 433; *Barona*, 56 F.3d at 1099 (Reinhardt, J., dissenting).

[57] *See Barona*, 56 F.3d at 1099 (Reinhardt, J., dissenting) ("Without the probable cause requirement, the Fourth Amendment is without any real force.").

[58] *See, e.g.*, *Peterson*, 812 F.2d at 491 (considering Philippine law in determining whether a search was reasonable).

[59] *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring); *id.* at 279 (Stevens, J., concurring).

B. Introduction to the International Silver Platter Doctrine

The international silver platter doctrine emerged in U.S. jurisprudence around six decades ago.[60] Part I.B.1 discusses the history and development of the doctrine, focusing on the state silver platter doctrine. Part I.B.2 explains its modern-day elements—namely, the "shocks the conscience" and joint venture exceptions.

1. Historical background.

The international silver platter doctrine emerged from the application of the Fourth Amendment to state action before the Fourteenth Amendment was incorporated against the states. Prior to that incorporation, the Fourth Amendment did not cover searches by local law enforcement.[61] Under this legal context, the state silver platter doctrine determined when the Fourth Amendment applied to searches that were jointly conducted by federal and local law enforcement under the test[62] set forth by *Byars v. United States*[63] and *Lustig v. United States*.[64] The *Byars-Lustig* test aimed to prevent federal law enforcement officers from circumventing the Constitution by joining local police searches to obtain evidence without following the Fourth Amendment's requirements that applied to federal searches.[65] Although the test has been rejected in the domestic context,[66] the test and justifications underpinning this state-oriented doctrine still influence the modern international silver platter doctrine.

The *Byars-Lustig* test established that federal-agent participation in a search with local police constitutes a joint venture between federal and local law enforcement if local law enforcement acted as an agent of federal law enforcement.[67] An agency relationship exists when "the effect is the same as though [a federal

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60 *See* Birdsell v. United States, 346 F.2d 775, 782 (5th Cir. 1965).

61 *See Mapp*, 367 U.S. at 655.

62 *See* Keith Raffel, *Searches and Seizures Abroad in the Federal Courts*, 38 MD. L. REV. 689, 694 (1979).

63 273 U.S. 28 (1927).

64 338 U.S. 74 (1949).

65 *See Byars*, 273 U.S. at 32.

66 *See generally* Elkins v. United States, 364 U.S. 206 (1960) (citing a desire to foster cooperation "under constitutional standards" between federal and state law enforcement officials as well as judicial integrity as reasons to eliminate the silver platter doctrine in the federal-state context).

67 *See Byars*, 273 U.S. at 32 ("[T]he federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer.").

law enforcement officer] had engaged in the undertaking as one exclusively his own."[68] This can occur if federal law enforcement has an "actuality of a share . . . in the total enterprise of securing and selecting evidence by other than sanctioned means."[69] In *Byars*, federal law enforcement had an actuality of a share in the state search because they conducted the search with state law enforcement and seized items not authorized under the state search warrant.[70] Similarly, in *Lustig*, federal law enforcement had an actuality of a share in the state search because they were physically present at the search.[71] Thus, under the *Byars-Lustig* test, determining whether an agency relationship existed was heavily dependent on the physical presence of federal law enforcement at state searches. The Supreme Court also described such involvement as federal law enforcement "ha[ving] a hand in [the search]."[72]

2. Modern-day elements of the doctrine.

Currently, the international silver platter doctrine dictates whether federal courts should admit evidence from searches of U.S. or non—U.S. citizens conducted abroad by foreign law enforcement under foreign law. According to the doctrine, that evidence is admissible with two exceptions: the shocks the conscience exception and the joint venture exception.

The shocks the conscience exception stems from "a federal court's inherent 'supervisory powers over the administration of federal justice'"[73] to "preserve the integrity of the criminal justice system."[74] Applying the exception preserves the criminal justice system's integrity by excluding evidence if the conduct of the foreign officials shocks the conscience of the U.S. court.[75] The exception "is meant to protect against conduct that violates fundamental international norms of decency."[76] Lower courts generally find that wiretaps do not shock the conscience. Wiretaps fall

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68 *Id.* at 33.

69 *Lustig*, 338 U.S. at 79.

70 *See Byars*, 273 U.S. at 29–31.

71 *See Lustig*, 338 U.S. at 79–80.

72 *Id.* at 78.

73 United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009) (quoting *Birdsell*, 346 F.2d at 783 n.10).

74 *Barona*, 56 F.3d at 1091.

75 *See Emmanuel*, 565 F.3d at 1330–31; Rochin v. California, 342 U.S. 165, 172–73 (1952).

76 *Emmanuel*, 565 F.3d at 1331.

outside of the Supreme Court's responsibility to "exercise [ ] judgement upon the whole course of the proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice."[77]

The joint venture exception is more complicated than the shocks the conscience exception and allows for the introduction of evidence in a few circumstances. Analysis of the joint venture exception involves two steps. First, courts must make a threshold determination of whether U.S. law enforcement's involvement with foreign law enforcement in the wiretap constituted a joint venture.[78] If a court does not find a joint venture, the evidence is automatically admissible, regardless of the legality of the methods used to obtain it. Although the joint venture exception descended from the state silver platter doctrine, unlike *Lustig*, finding a joint venture in the modern context requires proof of more involvement than just U.S. law enforcement having had a hand in the search.[79] Part II discusses the factors courts use to determine if a joint venture existed.

Second, if a joint venture existed, courts must evaluate whether the wiretap was reasonable under the Fourth Amendment.[80] When courts evaluate reasonableness, however, they do not look to U.S. law. Rather, courts consult the law of the country where the wiretap occurred to determine if the search was reasonable.[81] So long as the wiretap complied with foreign law, the wiretap is considered reasonable under the Fourth Amendment and courts admit the evidence.[82] If the wiretap did not comply with foreign law, U.S. federal courts exclude the evidence unless the good faith exception to the exclusionary rule applies.[83] Courts apply the good faith exception when U.S. law enforcement

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77 *Rochin*, 342 U.S. at 169 (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

78 *See Rosenthal*, 793 F.2d at 1231; United States v. Maturo, 982 F.2d 57, 60 (2d Cir. 1992); *Barona*, 56 F.3d at 1191; United States v. Behety, 32 F.3d 503, 510–11 (11th Cir. 1994); Street, *supra* note 27, at 433–34.

79 *See* Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 323 (2013).

80 *See* Street, *supra* note 27, at 434.

81 *See Barona*, 56 F.3d at 1093.

82 *See id.* at 1091 n.1 (noting that the law of the country where the search occurred "governs whether the search was reasonable" (citing *Peterson*, 812 F.2d at 491)).

83 *See* Street, *supra* note 27, at 434.

"reasonably relied on [ ] representations that the wiretaps were legal under [foreign] law."[84]

II. THE JOINT VENTURE EXCEPTION IN NARCOTICS CASES

The modern formulation of the joint venture exception stems from the factors used in the *Byars-Lustig* test. There are three rules that courts consider when determining whether a joint venture existed: substantial participation,[85] virtual agent,[86] and intent to evade the Constitution.[87] Some circuits have adopted one rule in particular, while others use a combination of two rules.

This Part discusses how courts currently evaluate the joint venture exception to the international silver platter doctrine. Part II.A evaluates the three rules that courts use to determine whether a joint venture existed. Parts II.B and II.C discuss what happens after a court finds that a joint venture existed: applying foreign law to determine whether the wiretap was reasonable and applying the good faith exception if the wiretap failed to comply with foreign law. Although this Comment focuses on the threshold inquiry of whether a joint venture exists, analyzing foreign law and the good faith exception is important because once defendants get past the threshold inquiry, these two analyses provide defendants with a higher level of protection than if the court finds no joint venture: either the wiretap must have complied with foreign law or U.S. officials must have thought that it did. While these protections are far from domestic Fourth Amendment requirements,[88] they provide more protection than simply admitting illegally obtained evidence without conducting a reasonableness analysis.

A. Rules and Factors for Establishing a Joint Venture

Understanding what rules and factors courts use to evaluate whether a joint venture existed is important for providing defendants with constitutional protections. If the rules—or the factors which comprise them—are too challenging to satisfy, U.S. federal courts automatically admit evidence from U.S.-foreign operations

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[84] United States v. Ferguson, 508 F. Supp. 2d 1, 6 (D.D.C. 2007); *see also, e.g.*, *Peterson*, 812 F.2d at 492.

[85] *See infra* Part II.A.1.

[86] *See infra* Part II.A.2.

[87] *See infra* Part II.A.3.

[88] *See* Street, *supra* note 27, at 433; United States v. Barona, 56 F.3d 1087, 1099 (9th Cir. 1995) (Reinhardt, J., dissenting).

abroad, regardless of the legality of the means used to obtain that evidence. If the rules and factors lower the burden of finding a joint venture, courts then start to provide defendants with some constitutional protections under the Fourth Amendment. The First, Ninth, Tenth, and Eleventh Circuits and the D.D.C. use the "substantial participation" and "virtual agent" rules.[89] The Second and Third Circuits use the virtual agent and "intent to evade the Constitution" rules.[90]

Table 1 catalogs circuit court and D.D.C. cases on federal narcotics prosecutions involving wiretaps conducted by foreign law enforcement authorities abroad. The horizontal axis lists the factors courts use to determine whether a joint venture existed. A case receives a "1" for each factor if the court considered it in determining whether a joint venture existed. For each court, the bolded numbers represent the total number of times the court considered that factor. The table helps identify which factors courts rely on most when making a joint venture determination, which assists in forming a uniform balancing test.

The table shows that within each rule, courts balance different factors to determine if a joint venture existed, but some of the rules evaluate similar factors. For example, the substantial participation and virtual agent rules tend to involve similar factors, except in some of the Second and Third Circuits' applications of the virtual agent rule. This Comment will argue that none of the circuits have struck the right balance of factors. To make that critique, however, it is important to first describe the balance that they have struck.

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89 *See* United States v. Valdivia, 680 F.3d 33, 52 (1st Cir. 2012); United States v. Mitro, 880 F.2d 1480, 1482 (1st Cir. 1989); *Barona*, 56 F.3d at 1096 (finding that Italian law enforcement telling U.S. officers about a wiretap did not constitute substantial participation); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968); United States v. Peterson, 812 F.2d 486, 490 (1987); United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009) (citing United States v. Rosenthal, 793 F.2d 1214, 1231 (11th Cir. 1986), *modified*, 801 F.2d 378 (11th Cir. 1986)); United States v. Delaplane, 778 F.2d 570, 573 (10th Cir. 1985); United States v. Behety, 32 F.3d 503, 510–11 (11th Cir. 1994); United States v. Ferguson, 508 F. Supp. 2d 1, 4 (D.D.C. 2007).

90 *See* United States v. Maturo, 982 F.2d 57, 61 (2d Cir. 1992); United States v. Getto, 729 F.3d 221, 228, 235 (2d Cir. 2013); United States v. Minaya, 827 F. App'x 232, 236 (3d Cir. 2020).

TABLE 1: RISKS AND FACTORS USED BY CIRCUITS IN DETERMINING JOINT VENTURES FOR WIRETAPS IN DRUG CASES

		Who controlled the investigation?			
		Who initiated the investigation?	Who initiated or requested the wiretap?	Who supervised and intercepted the wiretap?	Was U.S. law enforcement participation active?
First Circuit Rules: substantial participation and virtual agent	**Total First Circuit**	**2**	**2**	**1**	**1**
	United States v. Valdivia, 680 F.3d 33 (1st Cir. 2012).	1	1	1	1
	United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989).	1	1		
Second Circuit Rules: virtual agent and intent to evade the Constitution	**Total Second Circuit**	**2**	**4**	**3**	**0**
	United States v. Lee, 723 F.3d 134 (2d Cir. 2013).	1	1	1	
	United States v. Getto, 729 F.3d 221 (2d Cir. 2013).	1	1	1	
	United States v. Maturo, 982 F.2d 57 (2d Cir. 1992).		1		
	United States v. Cotroni, 527 F.2d 708 (2d. Cir. 1975).		1	1	
Third Circuit Rules: virtual agent and intent to evade the Constitution	**Total Third Circuit**	**0**	**1**	**1**	**1**
	United States v. Minaya, 827 F. App'x 232 (3d Cir. 2020).		1	1	1
Fifth Circuit	**Total Fifth Circuit**	**0**	**0**	**0**	**0**
	United States v. Rojas, 812 F.3d 382 (5th Cir. 2016).				
Ninth Circuit Rules: substantial participation and sometimes virtual agent	**Total Ninth Circuit**	**0**	**3**	**2**	**3**
	United States v. Barona, 56 F.3d 1087 (9th Cir. 1995).		1		
	United States v. LaChapelle, 869 F.2d 488 (9th Cir. 1989).		1	1	1
	United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).				1
	United States v. Maher, 645 F.2d 780 (9th Cir. 1981).		1	1	1
Tenth Circuit Rules: substantial participation and virtual agent	**Total Tenth Circuit**	**1**	**1**	**1**	**0**
	United States v. Delaplane, 778 F.2d 570 (10th Cir. 1985).	1	1	1	
Eleventh Circuit Rules: substantial participation and virtual agent	**Total Eleventh Circuit**	**0**	**0**	**0**	**1**
	United States v. Emmanuel, 565 F.3d 1324 (11th Cir. 2009).				
	United States v. Behety, 32 F.3d 503 (11th Cir. 1994).				1
District Court for D.C. Rules: substantial participation and virtual agent	**Total D.D.C.**	**1**	**1**	**1**	**1**
	United States v. Ferguson, 508 F. Supp. 2d 1 (D.D.C. 2007).	1	1	1	1
Total All Circuits and D.D.C.		**6**	**12**	**9**	**7**

		Consideration of a general cooperation agreement between the countries	Did U.S. law enforcement provide substantial resources, such as translation and interpretation?	Did U.S. law enforcement receive information from the wiretaps?	How do U.S. and foreign law enforcement describe their relationship?
First Circuit Rules: substantial participation and virtual agent	**Total First Circuit**	**0**	**0**	**1**	**1**
	United States v. Valdivia, 680 F.3d 33 (1st Cir. 2012).			1	1
	United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989).				
Second Circuit Rules: virtual agent and intent to evade the Constitution	**Total Second Circuit**	**1**	**2**	**0**	**0**
	United States v. Lee, 723 F.3d 134 (2d Cir. 2013).	1	1		
	United States v. Getto, 729 F.3d 221 (2d Cir. 2013).				
	United States v. Maturo, 982 F.2d 57 (2d Cir. 1992).		1		
	United States v. Cotroni, 527 F.2d 708 (2d. Cir. 1975).				
Third Circuit Rules: virtual agent and intent to evade the Constitution	**Total Third Circuit**	**0**	**0**	**1**	**1**
	United States v. Minaya, 827 F. App'x 232 (3d Cir. 2020).			1	1
Fifth Circuit	**Total Fifth Circuit**	**0**	**0**	**0**	**0**
	United States v. Rojas, 812 F.3d 382 (5th Cir. 2016).				
Ninth Circuit Rules: substantial participation and sometimes virtual agent	**Total Ninth Circuit**	**0**	**2**	**2**	**1**
	United States v. Barona, 56 F.3d 1087 (9th Cir. 1995).		1	1	
	United States v. LaChapelle, 869 F.2d 488 (9th Cir. 1989).				
	United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).		1	1	1
	United States v. Maher, 645 F.2d 780 (9th Cir. 1981).				
Tenth Circuit Rules: substantial participation and virtual agent	**Total Tenth Circuit**	**0**	**0**	**0**	**0**
	United States v. Delaplane, 778 F.2d 570 (10th Cir. 1985).				
Eleventh Circuit Rules: substantial participation and virtual agent	**Total Eleventh Circuit**	**0**	**0**	**0**	**0**
	United States v. Emmanuel, 565 F.3d 1324 (11th Cir. 2009).				
	United States v. Behety, 32 F.3d 503 (11th Cir. 1994).				
District Court for D.C. Rules: substantial participation and virtual agent	**Total D.D.C.**	**0**	**1**	**1**	**0**
	United States v. Ferguson, 508 F. Supp. 2d 1 (D.D.C. 2007).		1	1	
Total All Circuits and D.D.C.		**1**	**5**	**5**	**3**

		Did foreign law enforcement act as agents of U.S. law enforcement?	Did the U.S. law enforcement agents attempt to avoid constitutional requirements?	Did a foreign court authorize the wiretap?	Was the person searched a U.S. or foreign citizen?
First Circuit Rules: substantial participation and virtual agent	**Total First Circuit**	**1**	**0**	**2**	**0**
	United States v. Valdivia, 680 F.3d 33 (1st Cir. 2012).			1	
	United States v. Mitro, 880 F.2d 1480 (1st Cir. 1989).	1		1	
Second Circuit Rules: virtual agent and intent to evade the Constitution	**Total Second Circuit**	**4**	**2**	**1**	**0**
	United States v. Lee, 723 F.3d 134 (2d Cir. 2013).	1			
	United States v. Getto, 729 F.3d 221 (2d Cir. 2013).	1	1		
	United States v. Maturo, 982 F.2d 57 (2d Cir. 1992).	1	1	1	
	United States v. Cotroni, 527 F.2d 708 (2d. Cir. 1975).	1			
Third Circuit Rules: virtual agent and intent to evade the Constitution	**Total Third Circuit**	**1**	**0**	**0**	**0**
	United States v. Minaya, 827 F. App'x 232 (3d Cir. 2020).	1			
Fifth Circuit	**Total Fifth Circuit**	**0**	**0**	**0**	**1**
	United States v. Rojas, 812 F.3d 382 (5th Cir. 2016).				1
Ninth Circuit Rules: substantial participation and sometimes virtual agent	**Total Ninth Circuit**	**2**	**0**	**1**	**0**
	United States v. Barona, 56 F.3d 1087 (9th Cir. 1995).			1	
	United States v. LaChapelle, 869 F.2d 488 (9th Cir. 1989).				
	United States v. Peterson, 812 F.2d 486 (9th Cir. 1987).	1			
	United States v. Maher, 645 F.2d 780 (9th Cir. 1981).	1			
Tenth Circuit Rules: substantial participation and virtual agent	**Total Tenth Circuit**	**0**	**0**	**0**	**0**
	United States v. Delaplane, 778 F.2d 570 (10th Cir. 1985).				
Eleventh Circuit Rules: substantial participation and virtual agent	**Total Eleventh Circuit**	**1**	**0**	**0**	**1**
	United States v. Emmanuel, 565 F.3d 1324 (11th Cir. 2009).	1			1
	United States v. Behety, 32 F.3d 503 (11th Cir. 1994).				
District Court for D.C. Rules: substantial participation and virtual agent	**Total D.D.C.**	**0**	**0**	**0**	**0**
	United States v. Ferguson, 508 F. Supp. 2d 1 (D.D.C. 2007).				
Total All Circuits and D.D.C.		**9**	**2**	**4**	**2**

The circuit "split" regarding the different rules and factors courts rely on can be described as the First, Ninth, Tenth, and Eleventh Circuits versus the Second and Third Circuits. Given the similar factors courts use to evaluate joint ventures under each rule, the variety of rules that the circuits use represents more of a divergence in naming conventions than a divergence in the factors themselves. However, circuits weigh the factors within the rules differently. Therefore, focusing on the rules themselves overlooks the variability among circuits. The rules do not set standard factors that courts must evaluate under each rule, nor do they provide guidance on how to weigh the factors that are considered. Consequently, circuits choose which factors to evaluate and weigh them differently. This makes venue important in determining whether a court will find that a joint venture existed.

The following sections describe the factors that courts use to establish a joint venture under each rule. Part II.A.1 explains the factors involved in the substantial participation rule by looking at cases from the Ninth Circuit. Part II.A.2 describes the factors involved in evaluating the virtual agent rule with a case from the Second Circuit. Lastly, Part II.A.3 uses a Second Circuit case to examine the analysis for the intent to evade the Constitution rule.

1. Substantial participation.

Under the substantial participation rule, courts determine whether U.S. law enforcement involvement with foreign law enforcement was substantial enough to constitute a joint venture.[91] The First,[92] Ninth,[93] Tenth,[94] and Eleventh[95] Circuits and the D.D.C.[96] use the substantial participation rule in their joint venture analyses. Unlike the *Byars-Lustig* test,[97] the substantial participation rule requires more than U.S. law enforcement having a hand in the foreign wiretap. In determining whether U.S. law

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91 *See, e.g.*, *Barona*, 56 F.3d at 1091.

92 *See, e.g.*, *Valdivia*, 680 F.3d at 52; *Mitro*, 880 F.2d at 1482.

93 *See Peterson*, 812 F.2d at 490; *Barona*, 56 F.3d at 1091 (citing *Peterson*, 812 F.2d at 490).

94 *See, e.g.*, *Delaplane*, 778 F.2d at 573.

95 *See, e.g.*, *Emmanuel*, 565 F.3d at 1330 (citing *Rosenthal*, 793 F.2d at 1231); *Behety*, 32 F.3d at 511 (noting that DEA agents being aboard a ship during the search and videotaping the search did not create a joint venture because they did not assist Guatemalan officials in the physical search).

96 *See, e.g.*, *Ferguson*, 508 F. Supp. 2d at 4.

97 *See, e.g.*, *Lustig*, 338 U.S. at 78–79 ("The crux of . . . [the test] is that a search is a search by a federal official if he had a hand in it.").

enforcement participation in a search was substantial enough to create a joint venture, the Ninth Circuit emphasizes who initiated and controlled the wiretap.[98] The question of initiation or control asks whether U.S. law enforcement requested the wiretap, participated in decoding or translating the wiretap, and obtained information from the wiretap.[99] Although the absence of these factors did not negate finding a joint venture in *Lustig*,[100] the modern international silver platter doctrine stresses their importance.

One of the issues with the current application of the substantial participation rule is that courts weigh the factors comprising the substantial participation rule differently.[101] This leads to some courts, such as the Ninth Circuit, finding joint ventures more frequently than others.

The Ninth Circuit's decision in *United States v. Peterson*[102] exemplifies how it evaluates whether a joint venture existed when U.S. law enforcement officers were not physically present during a wiretap. Drug Enforcement Administration (DEA) agents notified Thai law enforcement of a scheme to smuggle marijuana from Thailand into the United States.[103] The DEA agents identified Stephen Falk and Timothy Peterson as participants, and with this information, Thai officials wiretapped Falk's and Peterson's phones.[104] The intercepted communications provided DEA and Thai officials with information on two ships that Falk and Peterson used to transport drugs: the *Allyson* and *Pacific Star*.[105] The DEA notified Philippine authorities when these ships were en route to the Philippines.[106] Philippine law enforcement then began monitoring Falk, tapped his radios and phone, and intercepted communications about the location of the *Pacific Star*.[107] Subsequently, Philippine law enforcement provided the

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98 *See, e.g.*, *Peterson*, 812 F.2d at 490; *Barona*, 56 F.3d at 1096; United States v. LaChapelle, 869 F.2d 488, 490 (9th Cir. 1989) (finding no joint venture because U.S. law enforcement did not initiate or control the wiretap); *see also* United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981) (finding no agency relationship between U.S. and Canadian law enforcement because Canadian law enforcement initiated and controlled the wiretap and U.S. law enforcement only assisted when the defendant entered the United States).

99 *See Peterson*, 812 F.2d at 490; *Barona*, 56 F.3d at 1090.

100 *Lustig*, 338 U.S. at 78–79.

101 *See infra* Part III.

102 812 F.2d 486 (9th Cir. 1987).

103 *Id.* at 488.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Peterson*, 812 F.2d at 488–89.

DEA with the *Pacific Star*'s coordinates, which the DEA conveyed to the U.S. Coast Guard.[108] With this information, the Coast Guard located, boarded, and searched the *Pacific Star* and recovered marijuana.[109] The defense challenged the search in part as the fruit of illegal wiretaps conducted by Philippine law enforcement, which triggered a joint venture analysis.[110]

The Ninth Circuit concluded that a joint venture existed between the DEA agents and Philippine law enforcement because the DEA substantially participated in the wiretap.[111] The DEA's role was not "subordinate to the role of [the] Philippine authorities" because the U.S. agents translated and decoded the wiretaps daily and advised Philippine authorities of their relevance.[112] The DEA also treated the marijuana as destined for the United States, thus assuming a substantial role in the investigation.[113] Additionally, the Ninth Circuit supported its finding of a joint venture by referencing a U.S. agent's trial testimony that the DEA conducted a "joint investigation" with Philippine authorities.[114]

The First, Tenth, and Eleventh Circuits and the D.D.C. follow a similar analysis to the Ninth Circuit—but these courts either place less emphasis on how law enforcement agents describe their relationship or have not had the opportunity to consider the relationship at all.[115] When courts weigh factors differently, joint venture findings become variable across jurisdictions even with the same facts.

The Ninth Circuit reached a similar conclusion to *Peterson* in *United States v. Barona*[116] with respect to wiretaps conducted in Denmark. *Barona* involved a series of related investigations in Denmark and Italy culminating in the arrest of Maria Barona for trafficking cocaine into the United States on behalf of Mario Ernesto Villabona-Alvarado (Villabona) and Brian Bennett.[117] DEA agents had surveilled Villabona traveling to Copenhagen

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[108] *Id.* at 489.

[109] *Id.* U.S. law enforcement searched both the *Allyson* and the *Pacific Star*, but the discussion of the legality of the searches of the ships is outside the scope of this Comment.

[110] *Id.* at 489.

[111] *See Id.* at 490.

[112] *Peterson*, 812 F.2d at 490.

[113] *Id.*

[114] *Id.*

[115] *See, e.g.*, *Valdivia*, 680 F.3d at 52 (finding that a DEA agent describing an investigation with Turkish authorities as "our investigation" did not factor into the joint venture analysis).

[116] 56 F.3d 1087 (9th Cir. 1995).

[117] *Id.* at 1089.

and Aalborg, Denmark and Milan, Italy.[118] As part of their investigation, the DEA agents asked Danish law enforcement to place wiretaps on two Danish phone numbers used by Villabona; these wiretaps revealed incriminating conversations.[119] The Ninth Circuit concluded that U.S. participation in the Danish wiretap was so substantial as to constitute a joint venture.[120] Three factors influenced its analysis: the DEA agents had asked Danish police to place the wiretaps, had immediately obtained intercepts from the wiretaps, and had provided the Danish police with an interpreter.[121] However, the Ninth Circuit also found that the wiretap conducted in Milan by Italian officers did not constitute a joint venture.[122] Unlike the Danish wiretaps, the Italian officers had received authorization from a local court to place the wiretap,[123] making U.S. involvement in the wiretap unsubstantial under the Ninth Circuit's test for substantial participation.

Although the Ninth Circuit often considers the substantial participation rule on its own,[124] the First,[125] Tenth,[126] and Eleventh Circuits,[127] the D.D.C.,[128] and sometimes the Ninth Circuit[129] evaluate the substantial participation rule together with the virtual agent rule.

2. Virtual agent.

Under the virtual agent rule, a joint venture exists "where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials."[130] This rule comes from the Supreme Court's reasoning in

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118 *Id.* at 1090.

119 *Id.*

120 *Id.* at 1094.

121 *Barona*, 56 F.3d at 1090.

122 *Id.* at 1096.

123 *Id.*

124 *See, e.g.*, *id.* at 1091 (citing *Peterson*, 812 F.2d at 490).

125 *See, e.g.*, *Valdivia*, 680 F.3d at 52; *Mitro*, 880 F.2d at 1482 (finding no joint venture because defendant Paul Mitro did "not allege[ ] nor [was] there any indication that American agents participated in the Canadian wiretap or that the [Royal Canadian Mounted Police] acted as mere agents for [the] DEA").

126 *See, e.g.*, *Delaplane*, 778 F.2d at 573.

127 *See, e.g.*, *Emmanuel*, 565 F.3d at 1330 (noting that a joint venture existed "if American law enforcement officials substantially participated in the search or if the foreign officials conducting the search were actually acting as agents for their American counterparts" (citing *Rosenthal*, 793 F.2d at 1231)); *Behety*, 32 F.3d at 511.

128 *See, e.g.*, *Ferguson*, 508 F. Supp. 2d at 4–6.

129 *See, e.g.*, *Maher*, 645 F.2d at 783.

130 *Maturo*, 982 F.2d at 61.

Byars, where the Court evaluated whether "the effect [of the coordinated federal and local activity] is the same as though [federal law enforcement] had engaged in the undertaking as one exclusively his own."[131] The *Byars* Court described this as federal officers having a hand in the local search.[132] When evaluating the virtual agent rule today—like in the analysis of the substantial participation rule—courts require more than U.S. law enforcement having a hand in the wiretap to establish an agency relationship, unlike under the *Byars-Lustig* test. All circuits that have evaluated the joint venture exception in the wiretap context have looked at whether a joint venture existed under the virtual agent rule. The First,[133] Ninth,[134] Tenth,[135] and Eleventh Circuits[136] and the D.D.C.[137] all use the same factors—initiation and control of the wiretap—to satisfy both the substantial participation and virtual agent rules.

The Second[138] and Third[139] Circuits also use the virtual agent rule. However, the Second Circuit has explicitly noted that it does not consider the virtual agent rule to be synonymous with the substantial participation rule nor with the phrase "joint venture."[140] Despite this professed aversion, the Second and Third Circuits use the same factors as the First, Ninth, Tenth, and Eleventh Circuits and the D.D.C.

Although the different circuits invoke different factors, all of the circuits undervalue key forms of cooperation. For example, they all undervalue cooperation agreements. The Second and

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131 *Byars*, 273 U.S. at 33.

132 *See id*.

133 *See, e.g.*, *Valdivia*, 680 F.3d at 52; *Mitro*, 880 F.2d at 1482.

134 *See Maher*, 645 F.2d at 783.

135 *See Delaplane*, 778 F.2d at 574 (concluding that there was no joint venture between U.S. and Canadian officials because "the investigation leading to the Canadian wiretap was solely Canadian in nature" and U.S. law enforcement only became involved after Canadian officials executed the wiretaps).

136 *See Emmanuel*, 565 F.3d at 1330 (citing *Rosenthal*, 793 F.2d at 1231).

137 *See Ferguson*, 508 F. Supp. 2d at 5–6.

138 *See Maturo*, 982 F.2d at 61; *Getto*, 729 F.3d at 228, 230.

139 *See Minaya*, 827 F. App'x at 236 ("[T]he foreign officials are acting as 'agents . . . of United States law enforcement.'" (quoting *Maturo*, 982 F.2d at 61)).

140 *Getto*, 729 F.3d at 233 (noting that the Fourth Amendment's deterrent purpose "is not served in instances where American law enforcement officers, not intentionally seeking to evade our Constitution, participate in a so-called 'joint venture' but do not direct or otherwise control the investigation").

Third Circuits also undervalue robust information sharing between U.S. and foreign law enforcement.[141]

When determining who initiated and controlled the wiretap under the virtual agent rule, no circuits have treated cooperation agreements between the United States and a foreign country as evidence of a joint venture.[142] In *United States v. Lee*,[143] the Second Circuit evaluated the impact of a cooperation agreement—called the Memorandum of Understanding (MOU)—between the United States and Jamaica. The Jamaican Constabulary Force Narcotics Division Vetted Unit (VU) and U.S. law enforcement conducted separate but parallel investigations of Stephen Lee, a suspected narcotics trafficker.[144] At the time, the MOU required Jamaican law enforcement to "monitor intercepted phone conversations authorized by Jamaican court orders" and provide the DEA with evidence to help in narcotics investigations.[145] In exchange, the United States gave the VU surveillance equipment and training.[146] The Second Circuit found that the MOU did not make the VU agents of U.S. law enforcement.[147] It explained that cooperation agreements provide for generalized assistance to foreign law enforcement entities, not for cooperation on specific investigations.[148] The Second Circuit noted that joint venture findings must relate to specific investigations; therefore, the MOU did not indicate that a joint venture existed.[149]

3. Intent to evade the Constitution.

Under the intent to evade the Constitution rule, a joint venture exists if U.S. law enforcement cooperated with foreign law enforcement to "evade constitutional requirements applicable to American officials."[150] Like the virtual agent rule, the intent to evade the Constitution rule also stems from the *Byars-Lustig* test.

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141 *See Getto*, 729 F.3d at 231 (stating that mere, albeit robust, information sharing and cooperation across parallel investigations do no demonstrate that a foreign-led investigation was controlled or directed by U.S. law enforcement).

142 Courts also do not evaluate cooperation agreements under the substantial participation rule.

143 723 F.3d 134 (2d Cir. 2013).

144 *Id.* at 137.

145 *Id.*

146 *Id.*

147 *See id.* at 141.

148 *See Lee*, 723 F.3d at 141; *see also* United States v. Angulo-Hurtado, 165 F. Supp. 2d 1363, 1371 (2001).

149 *See Lee*, 723 F.3d at 141; *Angulo-Hurtado*, 165 F. Supp. 2d at 1371.

150 *Maturo*, 982 F.2d at 61.

This rule aims to prevent U.S. law enforcement from skirting the warrant and probable cause requirements applicable to domestic searches by working together with foreign law enforcement operating abroad and governed by foreign law.

United States v. Maturo[151] demonstrates the Second Circuit's application of the intent to evade the Constitution rule. In evaluating whether U.S. law enforcement used foreign wiretaps to evade constitutional requirements, the Second Circuit in *Maturo* considered why U.S. law enforcement did not wiretap U.S. phone numbers.[152] In making calls to Turkish phone numbers, the defendant randomly used pay phones with different telephone numbers in the United States, which made it difficult for law enforcement to establish a consistent domestic number for a U.S.-based wiretap.[153] As a result, U.S. law enforcement relied on the Turkish National Police (TNP) to initiate the wiretap on Turkish phone numbers.[154] The Second Circuit concluded that the Turkish wiretaps were not an attempt by U.S. law enforcement to evade constitutional requirements associated with a domestic wiretap because practical necessity mandated cooperation with foreign officials.[155]

Although the intent to evade the constitution rule stems from the *Byars-Lustig* test, few circuits use this test, and it does not actually offer constitutional protections. The rule also does not clarify what constitutes a joint venture. In fact, it is self-defeating. If courts find that U.S. law enforcement intended to evade constitutional requirements, then U.S. law enforcement and foreign law enforcement cooperation constituted a joint venture. If a joint venture existed, courts will look to foreign law to determine whether the evidence from the wiretap should be admissible in court. Foreign law often falls below the probable cause and warrant requirements associated with domestic searches under the Fourth Amendment. Therefore, perversely, finding a joint venture existed because of intent to evade the Constitution fulfills U.S. law enforcement's goal of circumventing U.S. constitutional standards.

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151 982 F.2d 57 (2d Cir. 1992).

152 *Id.* at 62 ("[I]t is clear that the TNP's wiretapping of phones in Turkey was prompted not by a desire to circumvent constitutional constraints, but by the logistical problem caused by Pontillo's random selection of pay phones.").

153 *Id.*

154 *Id.*

155 *See id.*

After courts evaluate whether a joint venture existed under one or more of the three abovementioned rules, courts then analyze foreign law to determine whether the wiretap was reasonable and apply the good faith exception if the wiretap failed to comply with foreign law. These next two steps of the joint venture–exception analysis potentially provide defendants with a greater degree of protection than if the court finds no joint venture. Courts rarely find joint ventures in wiretaps and accordingly rarely proceed to the analysis of foreign law. In practice, this means that courts often admit intercepted wiretap communications without checking if the wiretap complied with the law where it occurred. As a result, illegally intercepted communications are used as key evidence in U.S. federal courts against narcotics defendants.

B. Analysis of Foreign Law

After establishing the existence of a joint venture between U.S. and foreign law enforcement, courts look to the law of the country where the wiretap occurred to determine if the wiretap was reasonable.[156] This highlights the importance of courts finding that a joint venture existed. If courts do not find that one existed, the analysis ends, and evidence intercepted from wiretaps is admissible regardless of the interception's legality under any legal system. Finding that a joint venture existed at least provides the minimal protection that the wiretap must comply with the law of the country where it occurred, even if that law provides reduced protection relative to Fourth Amendment requirements. If the search complies with foreign law, the search is considered reasonable under the Fourth Amendment.[157] If reasonable, courts admit the wiretap evidence.[158]

Ninth Circuit case law provides two examples of courts evaluating foreign law to determine whether a wiretap was reasonable. These examples are also instances where foreign law does not provide comparable protections to the warrant and probable cause requirements for domestic searches. Foreign laws often require neither a warrant nor probable cause to place wiretaps.[159] This means that U.S. law enforcement officers do not need a warrant supported by probable cause when they engage in a joint

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156 *See Barona*, 56 F.3d at 1093. For purposes of this Comment, a wiretap "occurs" on foreign soil if the target of the wiretap is physically located outside of the United States.

157 *See id.* (citing *Peterson*, 812 F.2d at 491).

158 *See id.*

159 *See, e.g.*, *id.* at 1101 (Reinhardt, J., dissenting); *Peterson*, 812 F.2d at 491.

venture with foreign law enforcement to wiretap U.S. citizens. Yet U.S. courts usually admit evidence from joint venture wiretaps against U.S. citizens.

Peterson is a case in which the Ninth Circuit analyzed foreign law that does not have warrant and probable cause requirements. After concluding that a joint venture existed between U.S. and Philippine law enforcement, the court evaluated the wiretap under Philippine law and determined that the wiretap was illegal.[160] This necessitated an analysis of the good faith exception, discussed in Part II.C below. For many enumerated crimes, Philippine law at the time of *Peterson* did not require that courts find that officers had probable cause to authorize a wiretap, and for other crimes touching on public safety, law enforcement could bypass courts altogether. The Ninth Circuit held that placing a wiretap in this context required court authorization for two reasons: (1) "no Philippine court decision" had interpreted the public safety exception to include narcotics trafficking and investigations, and (2) the Ninth Circuit concluded that Philippine courts had a noted preference for maximizing individual liberties.[161]

Conversely, in *Barona*, which involved joint venture wiretaps obtained by U.S. and Danish officials, the Ninth Circuit concluded that the wiretaps complied with Danish law.[162] Therefore, the Ninth Circuit found that the Danish wiretaps were reasonable under the Fourth Amendment and admitted the recorded communications into evidence.[163] If the *Barona* court had not found a joint venture existed, the wiretap would have been automatically admissible without an analysis of foreign law. The foreign law analysis at least ensured that the wiretap was legal in Denmark before introducing the recorded communications into evidence, even if the Danish standard for placing a wiretap was not comparable to the Fourth Amendment's domestic probable cause requirement.[164]

Mexico's prominence as one of the United States' biggest narcotics threats means that many narcotics cases originate in Mexico.[165] This underscores the importance of Mexican law

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[160] *Peterson*, 812 F.2d at 491 (first citing An Act to Prohibit and Penalize Wire Tapping and Other Related Violations of the Privacy of Communication, Rep. Act No. 4200, § 1–3 (June 19, 1965) (Phil.); and then citing PHIL. CONST. art. VI, § 4).

[161] *Id.*

[162] *See Barona*, 56 F.3d at 1096.

[163] *See id.*

[164] *See id.* at 1101 (Reinhardt, J., dissenting).

[165] U.S. DEP'T OF HOMELAND SEC, *supra* note 1, at 21.

regarding wiretaps. In Mexico, the judicial criteria to authorize wiretaps remains unclear. One Mexican government official noted that "everyone [wiretaps] as if it were a sport."[166] The statutes, codes, and laws in Mexico support that claim because they broadly authorize police to engage in wiretapping without many protections against government invasions of privacy. The *Código Nacional de Procedimientos Penales* (National Code of Criminal Procedures) authorizes the Mexican Attorney General or delegated persons to request authorization from a court to intercept communications of individuals "when the Public Prosecutor deems it necessary."[167] These requests need only state the objective and necessity of the wiretap.[168]

Similarly, the *Ley de la Policía Federal* (Federal Police Law) authorizes Mexican police to request judicial authorization of wiretaps in writing for specific enumerated crimes, including money laundering and violent offenses related to organized crime.[169] These crimes often occur alongside drug trafficking. One Mexican statute, the *Ley Federal Contra la Delincuencia Organizada* (Federal Law Against Organized Crime), specifies that requests for wiretaps "be duly justified by reasons of fact and law."[170] None of the abovementioned laws match the requirements for U.S. domestic searches. But they still provide some protection for defendants. Requiring joint venture wiretaps to comply with foreign law provides more protection than allowing the admission of wiretap evidence that does not comply with foreign law.

C. The Good Faith Exception

If the wiretap does not comply with foreign law, courts analyze whether the evidence from the wiretap is still admissible under the good faith exception. Under this exception, courts admit illegally obtained evidence but still provide defendants with more protections than if the court had found no joint venture existed to start. Because courts rarely find joint ventures (and thus rarely evaluate whether wiretaps complied with foreign law), analyses of the good faith exception are scarce. The good faith exception

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166 Reuters Staff, *Mexican Senate Majority Leader Favors Wiretapping Regulation*, REUTERS (Sept. 30, 2020), https://perma.cc/PJ29-YNDW.

167 *See* Privacy International & Red in Defensa de los Derechos Digitales, *State of Privacy Mexico*, PRIV. INT'L (Jan. 26, 2019), https://perma.cc/9Z54-S2TH.

168 *See id.*

169 *See id.*

170 *See id.*

applies if U.S. agents "reasonably rel[y] on [ ] representations that the wiretaps were legal under [foreign] law."[171]

In *Peterson*, the Ninth Circuit concluded that the good faith exception applied.[172] Although the wiretap did not comply with Philippine law, "federal officers sought, and received, assurances from high ranking law enforcement authorities in the Philippines that all necessary authorization was being obtained."[173] Because U.S. law enforcement relied on these representations while participating in the wiretap, the good faith exception applied, and the court admitted the wiretap evidence.[174]

Although the good faith exception essentially allows courts to admit illegally intercepted communications into evidence, going through the steps of evaluating foreign law and applying the good faith exception still provides narcotics defendants with greater constitutional protections than if a court had not found a joint venture in the first place. Evidence from illegal wiretaps is admissible under the good faith exception only if U.S. law enforcement can demonstrate that they reasonably relied on representations that the wiretap had complied with foreign law.[175] In contrast, when a court does not find that a joint venture existed and does not reach the good faith exception step, evidence from illegal wiretaps is admissible regardless of the legality of the wiretap and regardless of whether U.S. law enforcement knew that the wiretap was illegal. Under the good faith exception, if U.S. law enforcement blatantly ignored warnings that the wiretap was illegal, the intercepted communications from the wiretap would not be admissible. Because there is only one example of the good faith exception's application in the narcotics wiretap context, it is unclear how difficult it is in practice to meet the "reasonably rely" threshold. Even if it is not a difficult threshold to meet, it still provides greater protection than if courts did not engage in this analysis at all.

III. CREATING A UNIFORM BALANCING TEST TO ESTABLISH A JOINT VENTURE

A key issue in the application of the joint venture exception is that circuits lack a uniform test for determining what

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171 *Ferguson*, 508 F. Supp. 2d at 6.
172 *See Peterson*, 812 F.2d at 492.
173 *Id.*
174 *See id.*
175 *See Ferguson*, 508 F. Supp. 2d at 6.

constitutes a joint venture. This causes courts to undervalue some forms of cooperation between the United States and foreign countries, such as cooperation agreements. When courts undervalue forms of cooperation, they are less likely to find a joint venture, resulting in courts admitting intercepted communications from joint venture wiretaps regardless of whether they were legally obtained. Relatedly, it also makes venue play a crucial role in the joint venture determination. In the wiretap context, only the Ninth Circuit has found joint ventures to exist in narcotics cases, and it did so by taking a broad view of what constitutes a joint venture. This translates into only the Ninth Circuit evaluating the legality of joint venture wiretaps. All other courts have simply allowed the intercepted communications into evidence regardless of the legality of the wiretap under foreign law.

Advancements in technology allow U.S. law enforcement to engage in remote wiretaps with foreign law enforcement, which makes joint venture findings even less likely.[176] It is harder to conclude that U.S. law enforcement officials have control over a wiretap when they are not located in the foreign country where the wiretap occurred. Despite technological advances making remote cooperation easier and more frequent, physical presence still plays an important role in the joint venture analysis, creating difficulties in finding joint ventures in remote contexts. This again raises the issue that because courts rarely find joint ventures exist in the wiretap context, illegally obtained evidence from these wiretaps is admissible. To address this issue, I propose a balancing test. Given courts' reluctance to conclude that a joint venture existed based on a single factor,[177] a balancing test seems more appropriate than a bright-line rule.

Table 1 demonstrates that courts evaluate similar factors in wiretap cases despite their purported use of different rules. Therefore, the variety in the rules represents more of a difference in naming convention than a difference between the factors considered by the circuits. The nomenclature creates the illusion of unnecessary discord between the circuits. Thus, in my proposal, I discard the named rules and focus on the factors that courts use.

Based on the empirical analysis and policy considerations discussed in further detail in the first three sections of this Part, I propose a balancing test for determining whether a joint venture

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[176] *See* Street, *supra* note 27, at 441.

[177] *See supra* Part II.A.

between U.S. and foreign law enforcement exists. Part III.A introduces the first factor of this test: who initiated or controlled the wiretap. This factor turns on (1) who requested, initiated, supervised, and intercepted the wiretap, which includes evaluating whether U.S. law enforcement participation was active, (2) whether U.S. law enforcement received intercepted communications from the wiretap, and (3) who initiated the investigation into the defendant. Part III.B discusses the second factor: whether U.S. law enforcement provided substantial resources to foreign law enforcement, including whether the United States offered translation services during or after the wiretap interception and whether the United States has or had a cooperation agreement with the foreign country. Part III.C introduces the final factor: how U.S. and foreign law enforcement agents describe their cooperation in court. Part III.D then discusses factors that should not be considered in the balancing test. Finally, Part III.E concludes with applications of the proposed balancing test.

Table 1 guided my reasoning for including the first factor in my proposal.[178] However, for my second and third factors, I focused less on the frequency of use of the factors and more on the level of cooperation the factors described. Table 1 was still helpful for my second and third factors because it allowed me to understand which factors courts undervalue. My balancing test differs from the status quo because it elevates important factors that courts currently give little weight to in their analyses, imposes a clear set of factors courts must evaluate, and eliminates unhelpful factors. My balancing test goes even further than the Ninth Circuit's factors under the substantial participation and virtual agent rules—currently the broadest interpretation of what constitutes a joint venture with respect to narcotics-related wiretaps—by including cooperation agreements in the joint venture calculus.[179]

A. Initiation or Control of the Wiretap

Most circuits focus on who initiated or controlled the wiretap—questions courts generally consider under the virtual agent and substantial participation rules.[180] I propose focusing on the

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[178] *See supra* Part II.A.1–2; Table 1.

[179] *See Barona*, 56 F.3d at 1091 (citing *Peterson*, 812 F.2d at 490); United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981).

[180] *See supra* Part II.A.1–2; Table 1.

key factors that circuits evaluate rather than engaging in a separate analysis of whether U.S. and foreign law enforcement cooperation constitutes an agency relationship or substantial participation. This would reduce pushback from the Second and Third Circuits, which profess an aversion to the joint venture doctrine and only use the virtual agent and intent to evade the Constitution rules.[181] In my proposal, the more factors that indicate U.S. control of the wiretap, the greater U.S. involvement in the law enforcement enterprise, which should correspond to a greater likelihood of finding that a joint venture existed.

The empirical data in Table 1 guided my reasoning for including initiation or control of the wiretap. Including key factors that courts already rely on in a new proposed balancing test can encourage judicial buy-in to my proposal. Additionally, courts rely heavily on analyzing who initiated or controlled the wiretap because these factors implicate the core responsibilities and access that U.S. law enforcement officers have when conducting wiretaps on their own. In working with foreign law enforcement, the more U.S. law enforcement personnel act as if they exclusively conduct the wiretap, the greater the likelihood of finding a joint venture.

The questions of who initiated or controlled the wiretap encompass a few subsidiary questions addressed below. Part III.A.1 discusses requesting, initiating, supervising, and intercepting the wiretap, which includes evaluating whether participation by U.S. law enforcement in the wiretap was active. Part III.A.2 evaluates whether U.S. law enforcement received intercepted communications from the wiretap, and Part III.A.3 analyzes the initiation of the investigation.

1. Requesting, initiating, supervising, and intercepting the wiretap and active participation in the wiretap.

Circuits tend to lean most heavily on who requested or initiated the wiretap and who supervised and intercepted the wiretap.[182] I include these factors in my analysis because they

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[181] *See* United States v. Getto, 729 F.3d 221, 233 (2d Cir. 2013).

[182] *See, e.g.*, *Maturo*, 982 F.2d at 59, 61; United States v. Minaya, 827 F. App'x 232, 236–37 (3d Cir. 2020); *Lee*, 723 F.3d at 141; United States v. Cotroni, 527 F.2d 708, 712 (2d Cir. 1975); *Barona*, 56 F.3d at 1090; United States v. Valdivia, 680 F.3d 33, 52 (1st Cir. 2012); United States v. Delaplane, 778 F.2d 570, 574 (10th Cir. 1985); United States v. Mitro, 880 F.2d 1480, 1481 (1st Cir. 1989); United States v. LaChapelle, 869 F.2d 488,

encompass key elements of U.S. control over the wiretap. If U.S. law enforcement requested that foreign law enforcement place the wiretap, it indicates some U.S. command over the process. For example, in *Barona*, the DEA requested that Danish law enforcement place the wiretap.[183] DEA agents thus acted as the catalyst for wiretapping the suspects. Without the DEA's request, it is unclear whether Danish law enforcement would have placed the wiretap. Using this factor in my proposed balancing test carries forward courts' past practice of analyzing who initiated the wiretap and should continue to be considered as strong evidence of a joint venture.

Initiating the wiretap means placing the government wire on the target phone's wires,[184] installing a listening device,[185] or contacting the cell phone provider.[186] When foreign law enforcement members initiate a wiretap on their own, the United States does not play as central a role in the wiretap (as compared to when the United States works together with foreign law enforcement), and thus the Fourth Amendment should not be implicated. If U.S. law enforcement members initiate or supervise and intercept the wiretap, they play a role similar to the one they would play if they conducted the wiretap on their own. This demonstrates U.S. control over the wiretap and ought to be considered strong evidence in favor of finding a joint venture.

A related question is whether U.S. law enforcement participation is active. Active participation can include U.S. officers placing the wiretaps on phone lines or intercepting conversations from the wiretaps in real time.[187] These are actions that domestic officers would take in U.S.-exclusive wiretaps, which indicates U.S. control over a wiretap. Intercepting communications involves listening to or reading the conversations from the wiretap in real time.

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490 (9th Cir. 1989); *Maher*, 645 F.2d at 783; United States v. Ferguson, 508 F. Supp. 2d 1, 5–6 (D.D.C. 2007).

183 *Barona*, 56 F.3d at 1090.

184 *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 457 (1928).

185 *See, e.g.*, Katz v. United States, 389 U.S. 347, 348 (1967).

186 *See* Sun, *supra* note 38.

187 *Cf. Valdivia*, 680 F.3d at 52 ("Aruban officers actively participated in the implementation of wiretaps and recording of conversations.").

2. Receiving intercepted communications from the wiretap.

The Ninth Circuit also evaluates whether U.S. law enforcement received information from wiretaps placed by foreign law enforcement when determining who controlled the wiretap.[188] Receiving intercepted communications differs from active participation in timing: receiving intercepted communications happens after intercepting the communication, while active participation involves U.S. law enforcement intercepting communications in real time. For example, in *Barona*, Danish police intercepted communications on the wiretap and then immediately provided the DEA access to those intercepted conversations.[189] The DEA did not listen to the conversations as they were intercepted in real time, but it still gained access to them later, which indicates some U.S. participation in the wiretap. The more participation and control domestic officers have over a joint venture wiretap, the stronger the evidence that a joint venture exists.

Not every circuit considers this factor under the current joint venture analysis. For instance, the Second Circuit does not consider "robust information sharing and cooperation across parallel investigations" between U.S. and foreign law enforcement as demonstrating that U.S. law enforcement controlled or directed the investigation.[190] In disregarding this factor, the Second Circuit undervalues an important form of cooperation. I include this factor in my new balancing test because access to information indicates control over a wiretap just as denial of information indicates a lack of control. For example, foreign law enforcement restricting U.S. law enforcement's access to information obtained from wiretaps demonstrates the former's dominance in the wiretap. Therefore, if U.S. law enforcement personnel receive access to information, they should be considered to have played a larger role in the wiretap. Similarly, the more information they receive without restriction, the stronger the inference of U.S. control and the more likely a joint venture existed.

Courts will be more likely to find joint ventures if their analyses include an inquiry into who listened to or read the conversations from the wiretaps. U.S. law enforcement may not have complete control over administering the wiretap, but if they

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188 *See Peterson*, 812 F.2d at 490; *Barona*, 56 F.3d at 1094.

189 *See Barona*, 56 F.3d at 1094 ("[The] information obtained was immediately forwarded to [U.S. officers].").

190 *See Getto*, 729 F.3d at 231.

receive access to the intercepted communications, they still play a large role in the wiretapping process. This role should be recognized as cooperation under the joint venture exception. Recognizing that receipt of wiretapped communications indicates substantial U.S. law enforcement involvement in the enterprise would reduce the threshold for finding that a joint venture existed. This in turn would increase defendants' constitutional protections against illegal intrusions into their privacy that lead to having illegally obtained evidence used against them in court. My proposal aims to achieve this goal not by reducing what constitutes a joint venture to a meaningless standard that applies in all cases but by accurately capturing what cooperation looks like between U.S. and foreign law enforcement.

3. Initiation of the investigation.

Determining who initiated the investigation into the defendant can also help clarify the extent of U.S. involvement in the wiretap. Typically, when the United States initiates an investigation, it also exerts some level of power in determining the scope of the investigation. This power could include asking foreign law enforcement to place wiretaps on specific targets as part of a broader investigation, like in *Barona*. Recall that in *Barona*, DEA agents began investigating Barona for trafficking cocaine and then asked Danish law enforcement to place wiretaps on him and additional suspects.[191] Similar to the factors above, this also can demonstrate extensive U.S. cooperation with foreign law enforcement in a wiretap, but it is not a necessary factor for a joint venture to exist. Even if the United States did not initiate the investigation, U.S. initiation of the wiretap should weigh in favor of finding a joint venture because the joint venture analysis focuses on the wiretap and not on the investigation as a whole.

B. Provision of Substantial Resources

Only two circuits consider whether U.S. law enforcement provided substantial resources—like translation services—to foreign law enforcement,[192] but this factor can strongly indicate

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[191] *See Barona*, 56 F.3d at 1089.

[192] *See, e.g.*, *id.* at 1094; *Peterson*, 812 F.2d at 490 (weighing the fact that the DEA "was involved daily in translating and decoding intercepted transmissions, as well as advising the [foreign] authorities of their relevance" when determining whether there was a joint venture); *Maturo*, 982 F.2d at 59.

cooperation in a joint venture. Part III.B.1 discusses translation as a substantial resource and Part III.B.2 provides the argument for including cooperation agreements under the "provision of substantial resources" factor.

1. Translation.

Circuits that look at whether the United States provided substantial resources consider translation services a "substantial resource" that U.S. officers provide to foreign law enforcement because these services involve substantial time and effort by U.S. officers.[193] Additionally, if U.S. law enforcement were to not provide these translation services, foreign law enforcement would likely need to separately pay someone to translate the wiretaps for them. When U.S. law enforcement officers translate intercepted wiretaps from foreign languages into English, they demonstrate their intention to use the wiretaps—similar to how translation from English to a foreign language indicates foreign law enforcement's intention to use the wiretaps.[194] To use a wiretap in U.S. courts, the evidence must be presented in English for the judge and jury to understand. On this view, translation describes quintessential U.S. involvement and should be evidence of a joint venture. Foreign law enforcement officers conduct the wiretap and U.S. law enforcement officers create the finished product to use in prosecutions.

2. Cooperation agreements.

More broadly, the provision of substantial resources can indicate that a strong, codified relationship between U.S. and foreign law enforcement existed. Cooperation agreements provide an example of these codified relationships. They facilitate information sharing between countries and create financial commitments for the United States to provide foreign countries with money to fund increases in police personnel, police training, and intelligence-gathering equipment.[195] Given those considerations, my proposal contends that the existence of a cooperation agreement between the U.S. and another country should strongly indicate evidence of

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193 *See, e.g.*, *Barona*, 56 F.3d at 1094.

194 *See Maturo*, 982 F.2d at 59, 61 (concluding that Turkish officers asking U.S. officers to translate English wiretaps into Turkish demonstrates that the Turkish officers planned to use the wiretaps in their own independent investigation).

195 *See, e.g.*, ROSEN, *supra* note 31, at 14–18.

a joint venture. These agreements are common[196] and memorialize cooperation between U.S. and foreign law enforcement.

Previous literature on the joint venture exception has overlooked the issue posed by cooperation agreements and their absence from the joint venture analysis. For example, Caitlin Street noted that counterterrorism agreements between the United States and foreign countries would have an impact on the joint venture analysis.[197] This assertion presupposes that courts currently take these cooperation agreements into account, when they do not.

Cooperation agreements have previously been insufficient to constitute a joint venture.[198] Courts argue that cooperation agreements do not shed light on the specific cooperation between U.S. and foreign law enforcement required to form a joint venture. They posit that while cooperation agreements describe the general relationship between the United States and a foreign country, the joint venture analysis is a fact-specific, case-by-case determination.

Placing an emphasis on the general versus specific nature of the cooperation-agreement–joint venture analysis overlooks, and as a result undervalues, a key form of cooperation between U.S. and foreign law enforcement. Cooperation agreements create the foundations upon which U.S. and foreign law enforcement work together. Therefore, my balancing test proposes that courts should consider cooperation agreements in their joint venture determinations as prima facie evidence of a joint venture.

Agreements like the Mérida Initiative, the U.S.-Mexico Bicentennial Framework for Security, and the MOU with Jamaica should raise red flags. For example, the national security threat posed by both governmental officials and private actors in Mexico encourages cooperation between U.S. and Mexican law enforcement to investigate and prosecute narcotics violations.[199] Until recently, this cooperation across investigations operated largely under the Mérida Initiative, which emphasized "shared

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196 *See id.* (describing U.S.-funded countrywide and regional initiatives in Mexico, Central America, the Caribbean, Colombia, Afghanistan, and West Africa).

197 *See, e.g.*, Street, *supra* note 27, at 446 n.155.

198 *See Lee*, 723 F.3d at 141.

199 *See* BEITTEL & ROSEN, *supra* note 12, at 2; U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., *supra* note 5, at 65; JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 4 (2020).

responsibility" between the United States and Mexico.[200] The Mérida Initiative was a roughly $3.3 billion "package of U.S. antidrug and rule of law assistance to Mexico [and Central America]" to assist in "bilateral [security] efforts" between the United States and Mexico.[201] The Initiative led to improvements in intelligence sharing and cooperation among U.S. and Mexican police and aided in the capture and extradition of high-profile narcotics players.[202]

However, corruption of Mexican law enforcement and the Mexican government weakened the Mérida Initiative and cooperative efforts between the United States and Mexico.[203] In its place, the U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities promotes "information exchange, inter-agency cooperation and training of personnel."[204] Cooperation between U.S. and Mexican law enforcement seems likely to rise with the new initiative given the Biden administration's hope "that cooperation [will be] deepened" under the new agreement.[205] The United States also provides similar support to and has cooperation agreements with countries in Latin America, Africa, Europe, and Asia.[206]

Under the current formulation of the joint venture exception, the United States can—and does—provide foreign countries, such as Mexico, with billions of dollars to support antitrafficking law enforcement mechanisms, yet courts still find that U.S. and foreign law enforcement cooperation does not constitute a joint venture absent some other form of control, such as initiation of the wiretap. This means that despite pervasive cooperation and support, courts do not require evidence obtained from these situations to even comply with foreign law.

When the United States and foreign countries have comprehensive cooperation agreements in place, courts should require evidence collected via these robust collaborative frameworks to

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200 CLARE RIBANDO SEELKE, CONG. RSCH. SERV., IF10578, MEXICO: EVOLUTION OF THE MÉRIDA INITIATIVE, FY2007-FY2022, 1 (2021); *see* ANDRÉS MARTÍNEZ-FERNÁNDEZ, AM. ENTER. INST., MONEY LAUNDERING AND CORRUPTION IN MEXICO: CONFRONTING THREATS TO PROSPERITY, SECURITY, AND THE US-MEXICO RELATIONSHIP 10 (2021).

201 SEELKE, *supra* note 200, at 1.

202 BEITTEL, *supra* note 199, at 4.

203 *See, e.g.*, MARTÍNEZ-FERNÁNDEZ, *supra* note 200, at 10–11; SEELKE, *supra* note 200, at 1.

204 Dave Graham & Drazen Jorgic, *U.S., Mexico Prepare New Security Deal to Replace the Merida Initiative*, REUTERS (Oct. 7, 2021), https://perma.cc/EJW5-8V6J.

205 *Id.* at 2.

206 *See* ROSEN, *supra* note 31, at 14–18; Kenney, *supra* note 16, at 215.

comply with the law of the country where the wiretap occurred. Including cooperation agreements in a uniform balancing test would resolve the dissonance created by the U.S. government offering financial and personnel assistance to many countries to combat narcotics trafficking, and yet courts not seeing that assistance as evidence of a joint venture. These agreements provide key insight into cooperation between U.S. and foreign law enforcement. On its own, evidence of an existing cooperation agreement between the United States and the foreign country involved in the wiretap should constitute prima facie evidence of a joint venture. If the two countries have a cooperation agreement, courts should conclude that a joint venture existed if one of the other factors discussed in Parts III.A and III.C is present. However, if none of the factors in Parts III.A and III.C are present, the prima facie case could be rebutted and finding a joint venture would be more difficult.

A balancing test that includes evaluating whether U.S. law enforcement provided substantial resources to foreign law enforcement also accounts for remote operations. As technology continues to advance, it allows for U.S. law enforcement to remotely participate in wiretaps through translation and by receiving electronic copies of transcripts. These factors can be viewed in light of the overall goal of the joint venture analysis: to provide constitutional protections to defendants. A higher threshold for what constitutes a joint venture means that fewer wiretaps involving U.S.-foreign cooperation would constitute a joint venture and that the intercepted communications from these wiretaps would be admissible regardless of the wiretap's legality. Requiring a lower threshold to find that a joint venture existed means that courts would more often evaluate whether the joint venture wiretap complied with foreign law. This would lead courts to evaluate wiretaps under foreign law more regularly, providing increased constitutional protections for defendants.

Creating a balancing test that lowers the threshold for what constitutes a joint venture comports with the reasoning of the exclusionary rule. A lower threshold would provide U.S. law enforcement officers participating in joint ventures with incentives to make sure that wiretaps comply with foreign law, lest the evidence be excluded. A lower threshold for what constitutes a joint venture would thus deter unlawful behavior by U.S. law enforcement.

Foreign law enforcement personnel would also have an incentive to make sure that their wiretaps complied with foreign law because joint ventures involve repeat actors. Especially when cooperation agreements exist between the United States and a foreign state, foreign law enforcement officers have two incentives to undertake legal wiretaps. First, a successful cooperative relationship between U.S. and foreign law enforcement revolves around trust. If foreign law enforcement officers continue to illegally wiretap individuals, and this evidence continues to be excluded in U.S. courts, U.S. law enforcement may be less willing to work with foreign law enforcement because they will not be able to use any of the evidence obtained by foreign law enforcement. Second, if a joint venture wiretap is legal under foreign law and therefore admissible in court under the joint venture exception, law enforcement will be able to prosecute narcotics traffickers more easily. The easier it is to prosecute narcotics traffickers, the more likely they will be incarcerated following the prosecution and thus no longer pose public safety concerns to the foreign country involved in the joint venture.

C. Describing the Relationship

How U.S. and foreign law enforcement describe their coordination in conducting the wiretap in trial testimony should factor into whether a joint venture existed. Currently, only the Ninth Circuit considers this.[207] My proposal recommends giving this factor more weight. These descriptions represent how law enforcement officers conceptualize their working relationship. However, it is important to note that law enforcement agents may describe their relationship with foreign officers as a joint venture despite minimal coordination because they do not recognize the legal significance of using the phrase joint venture as a descriptor. For this reason, courts should not exclusively rely on these descriptions by law enforcement. Yet officers are in the best position to describe their relationship: they know the most about what their cooperation with each other in investigations looks like. In cases where other evidence points to a joint venture, descriptions like the one in *Peterson*[208] should support finding that a joint venture existed. This factor could also help categorize more instances of

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[207] *See, e.g.*, *Peterson*, 812 F.2d at 490.

[208] *See id.* (referencing a U.S. agent's trial testimony that described a "joint investigation" between the DEA and Philippine authorities).

remote cooperation enabled by technology as joint ventures. For the same reasons articulated above, this makes it more likely that defendants will be provided with some constitutional protections.

D. Factors that Should Not Be Considered

In creating my balancing test, I evaluated other factors that courts currently consider in their joint venture analyses and eliminated some from consideration that are either not used by many courts—as shown in Table 1—or do not add any helpful information about U.S.-foreign cooperation to the joint venture analysis. To begin, considering whether foreign courts authorized the wiretap does not seem like a fruitful factor to include in a uniform balancing test because it is irrelevant to the question of U.S. participation. If foreign countries require court authorization to conduct a wiretap, foreign authorities would—and should—receive such authorization regardless of whether U.S. law enforcement participated in the wiretap.

The intent to evade the Constitution rule should also be left out of any uniform balancing test for the reasons noted in Part II.A.3. U.S. law enforcement officers seeking to evade the constitutional requirements of a domestic search can do so by conducting a search with a foreign law enforcement officer on foreign soil in a joint venture. Even if a joint venture existed, the Fourth Amendment reasonableness determination will be based on foreign law, not domestic constitutional requirements. This means that the intent to evade the Constitution analysis is not a fruitful inquiry.

E. Applying the Balancing Test

To demonstrate how my proposal changes the joint venture analysis, I apply it to *Lee* and *Maturo*. The *Lee* example discussed in Part III.E.1 demonstrates the impact of a cooperation agreement on the joint venture determination. The *Maturo* example in Part III.E.2 shows how my proposal operates when no cooperation agreement exists.

1. *United States v. Lee*: Evidence of a cooperation agreement constitutes a prima facie case of a joint

venture.

In *Lee*, The Jamaican VU and U.S. law enforcement conducted separate but parallel investigations of Lee.[209] The MOU between the United States and Jamaica required Jamaican law enforcement to conduct wiretaps as requested by U.S. law enforcement and provide interceptions to the DEA.[210] In exchange, the United States provided the VU with surveillance equipment and training.[211] The evidence tends to initially weigh against a finding of a joint venture under the first factor—initiation or control of the wiretap. This is the only factor that the Second Circuit evaluated,[212] and accordingly, it concluded that a joint venture between U.S. and Jamaican law enforcement did not exist.

In finding that a joint venture between U.S. and Jamaican law enforcement did not exist, the Second Circuit focused on three pieces of evidence suggesting that U.S. law enforcement did not initiate or control the wiretap. First, it found that Jamaican law enforcement had initiated the investigation into Lee prior to U.S. authorities and treated that fact as evidence against finding a joint venture.[213] Second, the court emphasized that Jamaican authorities "did not solicit the views, much less approval, of DEA agents prior to conducting surveillance."[214] Third, the Second Circuit noted that U.S. law enforcement did not translate or intercept the wiretaps in real time.[215]

An analysis under my proposed first factor—initiation or control of the wiretap—would not rule out a finding of a joint venture like the Second Circuit's analysis did. U.S. and Jamaican law enforcement ran parallel investigations into Lee's trafficking activities.[216] Therefore, the question of which investigation formally started first seems insignificant. Given that U.S. law enforcement officers started their investigation later, it makes sense that U.S. law enforcement joined ongoing Jamaican surveillance efforts. Additionally, the MOU required the Jamaican VU to conduct wiretaps as requested by U.S. law enforcement. Although the Jamaican VU did not solicit the approval or views of the DEA, the

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209 *Lee*, 723 F.3d at 137.
210 *Id.*
211 *Id.*
212 *Id.* at 141.
213 *Id.*
214 *Lee*, 723 F.3d at 141.
215 *Id.*
216 *Id.* at 137.

DEA had the option to play a role in initiating the wiretap. U.S. law enforcement also ultimately did receive access to all the intercepted wiretaps under the MOU.[217] While these factors may indicate that U.S. law enforcement lacked explicit control over the wiretap, U.S. law enforcement demonstrated cooperation in another significant area: access to information.

The second factor of my proposed balancing test strongly weighs in favor of finding a joint venture. The United States had an MOU with Jamaica.[218] The MOU created a strong partnership between U.S. and Jamaican law enforcement that unfolded in *Lee*. U.S. law enforcement provided Jamaican law enforcement with the training and tools that the Jamaican VU utilized to conduct the wiretaps.[219] This produced evidence that the VU shared with U.S. law enforcement for use in U.S. courts.[220] This clearly describes interconnected conduct amounting to a joint venture. Under my proposed balancing test, the MOU should establish a prima facie case of a joint venture; that prima facie case is then supported by the fact that U.S. law enforcement received access to the intercepted conversations. The third factor of my proposal is not applicable since U.S. and Jamaican law enforcement officers did not describe their cooperation in court. Balancing the factors, I conclude that a joint venture existed. As exemplified by applying my proposal to *Lee*, the proposed uniform balancing test makes a joint venture finding more likely.

2. *United States v. Maturo*: Shifting judicial focus to viewing the evidence in a light favorable to finding a joint venture.

Absent an explicit cooperation agreement, the joint venture analysis should focus both on whether the wiretap would have occurred without U.S. involvement and on what U.S. involvement looked like. In *Maturo*, Joseph Samuel Pontillo appealed his conviction of conspiring to and knowingly and intentionally importing heroin.[221] Pontillo argued that evidence obtained through a wiretap conducted by the Turkish National Police (TNP) should have been suppressed under the exclusionary rule of the Fourth

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217 *Id.*
218 *Id.*
219 *Lee*, 723 F.3d at 137.
220 *Id.*
221 *Maturo*, 982 F.2d at 58.

Amendment.[222] After receiving information from the New York Port Authority Police that Pontillo was engaged in drug smuggling,[223] the DEA began surveilling Pontillo and his codefendant, John Maturo, and subpoenaed phone records for Pontillo.[224] The records revealed Turkish phone numbers to which Pontillo had made calls.[225] The DEA passed these numbers along to the TNP, who investigated the numbers and determined that they belonged to Turkish drug traffickers.[226] Then, the TNP obtained authorization from a Turkish court to wiretap those numbers.[227]

The Second Circuit concluded that the TNP had not acted as an agent of U.S. law enforcement and therefore did not find that a joint venture existed. Under my balancing test, the court would have reached the opposite conclusion. Unlike *Lee*, no cooperation agreement between the United States and Turkey existed to guide the relationship between the TNP and U.S. law enforcement. Similar to *Lee*, the last factor of my proposal—how the law enforcement officers describe their participation in court—does not apply here. Therefore, the analysis should center on my first factor (initiation and control) and my second factor (provision of substantial resources, but in this instance, in the absence of a cooperation agreement).

Under my test, the first factor points in favor of finding a joint venture. The Second Circuit concluded that the DEA did not initiate or control the wiretap after finding that there was no evidence that the DEA was "involved in the decision to seek a wiretap."[228] However, the DEA asked Turkish law enforcement for background information on specific Turkish phone numbers, including the numbers that the DEA agents wanted Turkish police to wiretap.[229] The Second Circuit's analysis robotically focused on which law enforcement agents placed the wiretap, overlooking that the DEA asked to start the wiretap. This strongly indicates not only that the DEA requested the wiretap but that its participation was instrumental to the wiretap. It is unclear whether, without prompting from the DEA, the TNP would have placed the wiretap. Additionally, the DEA received immediate access to the

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222 *Id.*
223 *Id.* at 59.
224 *Id.*
225 *Id.*
226 *Maturo*, 982 F.2d at 59.
227 *Id.*
228 *Id.* at 61.
229 *Id.*

wiretap recordings. Together, this demonstrates the DEA's active role in the wiretap.

Under my test, the second factor also points in favor of finding a joint venture. Here again, the Second Circuit concluded that Turkish authorities asking the DEA agents to translate English conversations to Turkish weighed against a joint venture finding.[230] The Second Circuit reasoned that translating the wiretaps from English to Turkish indicated that Turkish authorities wanted to use the wiretaps in Turkish proceedings.[231] However, the court's focus was misplaced. The DEA provided substantial resources to the TNP through translation. Just because the DEA translated the wiretaps into Turkish does not mean that they did not plan to use the English versions in U.S. courts. Moreover, "the TNP never acted on the information it obtained."[232] The evidence that the TNP obtained from the wiretaps also would have been inadmissible in Turkish courts.[233] These facts undercut the Second Circuit's conclusion that the English-to-Turkish translation indicated a lack of DEA control over the wiretap. To the contrary, it shows that the DEA had access to the wiretaps and used its resources to collaborate with the TNP. As with the evidence above, this exemplifies active participation by the DEA and provision of substantial resources.

3. This proposal increases the likelihood of finding a joint venture, which provides some—but not complete—constitutional protections.

The international silver platter doctrine demonstrates the United States' commitment to international cooperation to combat the drug threat to the United States. When evidence collected through international cooperation is governed by the international silver platter doctrine, the doctrine eases the admissibility of evidence obtained from these wiretaps in U.S. courts because it allows the introduction of evidence from foreign wiretaps that is not subject to the same level of protection as wiretaps in the United States. This strengthens the prosecution's case against drug traffickers by admitting critical evidence. The stronger the case against drug traffickers, the greater the protection of the

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230 *See id.*

231 *See Maturo*, 982 F.2d at 61.

232 *Id.*

233 *Id.*

U.S. public against the well-documented harms[234] associated with drug trafficking.

The international silver platter doctrine as it currently stands eases the admissibility of evidence from foreign wiretaps both when courts find that a joint venture existed and when courts find that a joint venture did not exist because of the high joint venture threshold. When courts find that a joint venture existed, relying on foreign law to evaluate reasonableness under the Fourth Amendment means that when U.S. agents act abroad, even when wiretapping U.S. citizens, they are subject to reduced legal thresholds to justify invasions of privacy. This has the effect of providing U.S. citizens with reduced constitutional protection when they leave U.S. borders. With my proposed balancing test, defendants are at least offered the protection that wiretaps will more often have to comply with foreign law in order for evidence collected from them to be admissible.

Because of the uncertainty of domestic Fourth Amendment protections for U.S. citizens abroad,[235] if an individual chooses to go abroad, they may choose to be subject to that country's laws. Although a U.S. citizen may choose to go abroad and thus be subject to the laws of that country, the international silver platter doctrine as it currently stands permits wiretap evidence to be used in U.S. courts even when foreign law enforcement officers did not comply with their own laws when conducting wiretaps. The current high threshold for determining what constitutes a joint venture allows foreign and U.S. law enforcement to work together, obtain evidence from illegally placed wiretaps, and then use that evidence in U.S. courts without fear of exclusion, even against U.S. citizens. This high threshold is concerning because as soon as a court finds that a joint venture did not occur, that court will not inquire into foreign law at all to determine the admissibility of intercepted communications. This means that adopting a broader conception of what constitutes a joint venture would provide defendants with protection against illegal intrusions by foreign-U.S. law enforcement joint ventures and prevent the use of evidence from these intrusions against them in courts.

My proposal would lead courts to more frequently find that joint ventures exist, which in turn would increase the opportunities for courts to evaluate joint venture wiretaps under foreign

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234 *See supra* text accompanying notes 5–14.

235 *See supra* Part I.A.

law. It prioritizes upholding the integrity of the courts through protecting the privacy of defendants in narcotics cases and articulating a uniform interpretation of the law, and it does not do so at the expense of international cooperation. My proposal does not provide U.S. defendants with the same constitutional protections they would have against a domestic wiretap, but it still provides some protection by requiring legality under the laws of the country where the wiretap occurred. A joint venture finding only requires that the wiretap comply with the law of the country where it occurred to be admissible. This seems like a strikingly low bar considering that many foreign countries' laws concerning wiretaps fall below U.S. constitutional standards, but it is a compromise that balances some constitutional protections with public safety concerns of facilitating successful narcotics prosecutions.

In the wiretap context for narcotics cases, only the Ninth Circuit has found the existence of a joint venture between U.S. and foreign law enforcement. Practically, this means that only the Ninth Circuit requires wiretaps obtained by foreign and U.S. law enforcement on foreign soil to comply with foreign law. Other circuits admit evidence from these wiretaps without requiring that these wiretaps actually comply with foreign law. This makes venue an important factor for whether wiretap evidence will be admissible in court. Venue should have no role in this process. The admissibility of wiretap evidence obtained by foreign law enforcement abroad under foreign law should depend solely on uniform factors under the international silver platter doctrine.

Given the considerations noted above, my proposal may improve judicial legitimacy. Courts' legitimacy depends in part on whether decisions accord with constitutional legal norms.[236] Applying a policy or doctrine like the international silver platter doctrine can impact judicial legitimacy because of how courts treat the right to privacy of U.S. citizens, who usually enjoy constitutional protections against government searches. Although prosecution for drug-trafficking offenses decreased in 2020,[237] the Biden administration's renewed attention to prosecuting narcotics offenses indicates a future rise in narcotics prosecutions.[238] Because of the international nature of narcotics trafficking, U.S.

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[236] *See* Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 358 (2020).

[237] *See* U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2020, at 5 (2021).

[238] *See generally* White House, *supra* note 13.

prosecutors will continue to rely on international sources of evidence. And given that narcotics prosecutions rely heavily on evidence from wiretaps, we can expect more use of wiretaps obtained abroad. Collectively, this will place the international silver platter doctrine more in the public eye. The more scrutiny it receives, the more it will become apparent that courts are admitting evidence from foreign wiretaps obtained in contravention of foreign law. Courts sometimes admit illegally obtained evidence from domestic wiretaps that do not comply with the warrant and probable cause requirements if the good faith exception applies. In this scenario, prior to admitting illegally obtained evidence, the good faith exception still provides some protection for defendants—U.S. law enforcement cannot intentionally avoid the warrant and probable cause requirements. The international silver platter doctrine as it is currently used does not provide even that basic protection if courts do not find that a joint venture existed.

A critique of my proposal is that it may increase the difficulty of admitting wiretap evidence from joint ventures in cases involving U.S. defendants, which can implicate the government's ability to prosecute narcotics cases and ultimately public safety concerns. A lower threshold for finding a joint venture means that more courts will evaluate whether a wiretap complied with foreign law. This may pose some institutional difficulties for courts that lack familiarity with other countries' laws and interpretations of those laws. In these instances, the Ninth Circuit's analyses of foreign law provide helpful examples of how U.S. courts should approach foreign law: with deference to foreign courts.[239] Analyzing foreign law will no doubt require the expenditure of additional judicial resources, but parties will presumably brief the foreign law issues, therefore potentially alleviating judicial strain. This sacrifice seems reasonable compared to the alternative—the carte blanche admission of illegally obtained evidence. In cases where the wiretap did not comply with foreign law, the evidence gained from the wiretap could still be admissible if the good faith exception applies. If the wiretap neither complied with foreign law nor is eligible for that exception, the prosecution cannot use the evidence in U.S. courts. Prosecutors would need evidence from other sources, which may be impossible or time-consuming to obtain. This may result in a delay of the case's prosecution, which taxes judicial time and resources.

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[239] *Peterson*, 812 F.2d at 491.

Wiretaps can produce key evidence against narcotics traffickers because they provide a unique window into private cartel operations.[240] Therefore, finding more joint ventures—and accordingly excluding more wiretap evidence—may make prosecuting narcotics trafficking cases involving joint ventures more difficult.

Consequently, this creates potential public safety concerns. The harder it becomes to prosecute narcotics violations, the easier it will be for defendants accused of these crimes to evade punishment and instead return to their narcotics trafficking activities. Narcotics production and trafficking pose a real danger. My proposal does not seek to minimize that danger but rather to question the way courts balance that danger against threats to privacy. The current formulation of joint venture rules treats international cooperation and defendants' constitutional protections like a zero-sum game in which international cooperation must always come before even the most basic constitutional protections for defendants. This contradicts the foundations of the Fourth Amendment, which was drafted to protect people against unlawful government intrusions into their private lives.

CONCLUSION

The joint venture exception to the international silver platter doctrine suffers from a lack of standardization. This issue is especially prominent in narcotics cases involving wiretaps, but this Comment's reasoning and solution apply broadly to other types of searches. The lack of a uniform test for what constitutes a joint venture undervalues heavy U.S. cooperation with foreign countries and makes venue an important factor in whether a court finds that a joint venture existed. I propose adopting a balancing test involving the following factors: (1) who initiated or controlled the wiretap, (2) whether U.S. law enforcement provided substantial resources to foreign law enforcement, and (3) how the U.S. and foreign law enforcement describe their relationship. The proposal would make finding a joint venture easier and thus reflect the true level of cooperation between U.S. and foreign law enforcement. Similarly, it would take account of technological advancements that might otherwise decrease the likelihood of finding a joint venture under the current doctrine.

Joint venture findings are important because they provide narcotics defendants with minimal, basic constitutional

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[240] *See* Kenney, *supra* note 16, at 224, 229.

protections. Even if courts conclude that a joint venture existed, while narcotics defendants have some constitutional protections, the admission of evidence remains an easy feat. Finding a joint venture only requires that the wiretap complied with the foreign law where the wiretap occurred, which is a strikingly low bar considering that foreign laws regarding wiretaps often fall below constitutional requirements for domestic wiretaps. However, this low bar is still better than the status quo, which provides no protection for defendants.

The international silver platter doctrine prioritizes international cooperation to combat global threats like drug trafficking. My proposal does not diminish this international cooperation—even if it may make the prosecution of narcotics cases more difficult in certain instances where wiretaps were conducted illegal. These circumstances balance two competing values: protecting the public from narcotics threats and protecting defendants against unauthorized government intrusions on their liberty and privacy. Since joint venture wiretaps often provide key evidence in narcotics cases, defendants face the hurdle of arguing their innocence against illegally obtained evidence.

Which side of the balance wins depends on what prosecutors and judges view as the larger threat: narcotics or the admission of illegally obtained evidence. This balancing should not pose a zero-sum game. My proposal recommends reducing the threshold for what constitutes a joint venture so as to allow admission of important evidence *only* if it complied with the baseline legal protections of foreign legal systems. Otherwise, U.S. law enforcement must reasonably rely on assertions that the wiretap was legal. This prioritizes upholding the integrity of the courts through protecting the privacy of defendants in narcotics cases but does not impose an unreasonable task on foreign and U.S. law enforcement. In fact, creating a balancing test that requires wiretaps to be legal in order for the evidence from those wiretaps to be admissible is exactly how U.S. courts treat domestic wiretaps.