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Constitutional Law--Evidence--Evidence Illegally Seized by State Officers Without Participation of Federal Officers Held Inadmissable in Federal Court (Elkins v. United States, 364 U.S. 206 (1960))

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RECENT DECISIONS

CONSTITUTIONAL LAW — EVIDENCE — EVIDENCE ILLEGALLY SEIZED BY STATE OFFICERS WITHOUT PARTICIPATION OF FEDERAL OFFICERS HELD INADMISSIBLE IN FEDERAL COURT.—Petitioners were convicted in a federal district court for intercepting and divulging telephonic communications. Before trial, their motion to suppress evidence obtained by state officers in an allegedly illegal search and seizure was denied. The court assumed that the search and seizure was unreasonable, but stated that since there was no federal participation, the evidence was admissible in a federal court. The Supreme Court, in reversing the conviction, *held* that evidence obtained by a state officer during a search is inadmissible in a federal criminal trial upon the defendant's timely objection, if the acts of the state officer do not meet the standards of the fourth amendment. *Elkins v. United States,* 364 U.S. 206 (1960).

The fourth amendment to the United States Constitution provides that the people shall be secure against unreasonable searches and seizures. Although it establishes a constitutional prohibition, it is silent as to the consequences of its violation. At common law an unreasonable search and seizure was considered a trespass,[1] and as a consequence, the victim had the remedies of resisting the search, suing the searcher and securing restitution of the seized property.[2] Restitution, however, was not granted until the government no longer needed the seized articles as evidence.[3] Thus, at common law and in the United States until 1886, the admissibility of evidence was not affected by the illegal means by which it was obtained. The reason was that the function of the court was to ascertain evidence, not to enforce the law. Moreover, it is a basic rule of evidence that a court will not inquire into matters such as the origin of the evidence because it would confuse the issues and constitute unfair surprise to the proponent.[4]

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[1] See Boyd v. United States, 116 U.S. 616, 626 (1886), referring to Entick v. Carrington, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765); Miller v. United States, 357 U.S. 301 (1957), quoting William Pitt, "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!" *Id.* at 307.

[2] See Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949); Grant, *Circumventing the Fourth Amendment,* 14 So. CAL. L. REV. 359, 365 (1941).

[3] See Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 So. CAL. L. REV. 60 (1941).

[4] See 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

However, the Supreme Court, in *Boyd v. United States*,[5] reviewed a federal forfeiture proceeding in which the "defendant" [6] was ordered to produce certain documents as required by a federal statute. The Court declared that the compulsory production of the documents compelled the "defendant" to be a witness against himself within the meaning of the fifth amendment, and was the equivalent of an illegal search and seizure within the meaning of the fourth amendment.[7] The Court seemingly could have based its decision solely on the fifth amendment; [8] nevertheless it joined the fourth and fifth amendments in a relationship in which each threw light on the other.[9] This decision, in which the Court gave both the fourth and fifth amendments substantially the same meaning in regard to the use in evidence of illegally seized property,[10] planted the first seeds of the federal exclusionary rule.

In *Adams v. New York*,[11] the Court reviewed a state case in which the defendant had been convicted of a gambling violation. Over his objection, evidence was introduced which had been seized by state police. Adams contended that the receipt in evidence of the papers seized violated the fourth and fifth amendments, and that these amendments were applicable to the states through the fourteenth amendment.[12] The Court refused to discuss whether the fourth and fifth amendments were applicable to the states, but nevertheless stated that the admissibility of the evidence was not a violation of the fourth or fifth amendment, because a court will not take notice of how evidence is obtained.[13] The narrow holding of the *Adams* case could simply be that the search there involved was legal.[14] The significance of the case, however, lies in the Court's broad statements that the prohibition of the fourth amendment should not be extended to effect the exclusion of evidence obtained by such seizure.[15]

The theme of the *Boyd* case, despite the hostile treatment accorded it in *Adams*, enjoyed a partial renaissance in *Weeks v.*

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[5] 116 U.S. 616 (1886).

[6] Although the forfeiture proceeding was technically civil, the court stated that it was criminal in substance and effect. *Id.* at 633-34.

[7] *Id.* at 633.

[8] *Id.* at 638 (concurring opinion).

[9] *Id.* at 633.

[10] See Kohn, *Admissibility in Federal Court of Evidence Illegally Seized By State Officers*, 1959 WASH. U.L.Q. 229, 231-32.

[11] 192 U.S. 585 (1904).

[12] *Id.* at 594.

[13] *Ibid.*

[14] See Weeks v. United States, 232 U.S. 383, 395 (1914). *But see* Trimble, *Search and Seizure Under the Fourth Amendment as Interpreted By the United States Supreme Court*, 41 KY. L.J. 196 (1952). The author in referring to the *Adams* opinion declares "its confusion almost defies analysis." *Id.* at 202.

[15] Adams v. New York, 192 U.S. 585, 598 (1904).

United States.[16] There, state police illegally seized a number of incriminating documents from Weeks' home. They returned the same day, accompanied by a United States Marshal, who seized additional incriminating evidence. The evidence obtained in both searches was used to convict Weeks in a federal trial. Weeks' application before trial for the return of this evidence was denied, and on appeal to the Supreme Court he contended that the admission of this evidence was in violation of the fourth and fifth amendments. The Court held that evidence obtained by federal agents in violation of the fourth amendment was inadmissible in a federal criminal prosecution.[17] It reasoned that if the evidence were admissible, then the fourth amendment was "of no value, and, . . . might as well be stricken from the Constitution." [18] In order to circumvent the broad statements in the *Adams* case, the Court seized upon the fact that Weeks had made an application for the return of the evidence prior to his trial.[19] The collateral issue of how the evidence was obtained should, therefore, be determined *prior* to the trial, not *during* it, as was attempted in *Adams*. Since the Court did not mention the fifth amendment, the exclusion of the evidence seemed to stem directly from the violation of the fourth amendment.[20] Apparently the Court felt that a necessary, though unexpressed, consequence of a violation of the fourth amendment is exclusion of the illegally seized evidence.

Another rule, later to be characterized as the "silver platter" doctrine,[21] had its inception in the last few lines of the *Weeks* case, when the Court further held that since the fourth amendment applied only to the federal government and not to "individual misconduct," [22] the evidence illegally seized by state officers in the initial search was admissible in a federal prosecution.[23]

In a series of Supreme Court cases the scope of the federal exclusionary rule gradually expanded, at the expense of both the "silver platter" doctrine and the procedural requirements of a preliminary motion.[24] *Gouled v. United States* [25] held that a motion

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[16] 232 U.S. 383 (1914).
[17] *Id.* at 398.
[18] *Id.* at 393.
[19] *Id.* at 395-96.
[20] Weeks v. United States, 232 U.S. 383 (1914).
[21] This phrase describing the admissibility of evidence illegally seized by state officers in federal courts was first used in Lustig v. United States, 338 U.S. 74, 79 (1949).
[22] Evidence seized by a private citizen in an unauthorized search is admissible. See Burdeau v. McDowell, 256 U.S. 465 (1921).
[23] Weeks v. United States, 232 U.S. 383, 398 (1914).
[24] Rule 41(E) of the Federal Rules of Criminal Procedure states that an "aggrieved party" may petition for the return and suppression of illegally seized evidence. The petitioner must establish that he himself was a victim of an invasion of privacy. Anyone legitimately on the premises where the search occurs may challenge its legality by a motion to suppress the evidence seized. Jones v. United States, 362 U.S. 257, 261-65 (1960).
[25] 255 U.S. 298 (1921); *accord,* Amos v. United States, 255 U.S. 313 (1921).

before trial was unnecessary if the defendant was unaware of the illegal search. In *Agnello v. United States*,[26] it was held that evidence was inadmissible without a motion if the facts of the case clearly showed an illegal search.[27] *Silverthorne Lumber Co. v. United States*[28] held that knowledge obtained from illegally seized documents could not be the basis for the issuance of a subpoena. *Byars v. United States*[29] held that a search conducted jointly by federal and state officers was a federal search, and the illegally seized evidence was therefore inadmissible. The Court went even further in *Gambino v. United States*,[30] holding that evidence illegally seized by state officers solely for the purpose of aiding federal prosecution was also inadmissible. In *Rea v. United States*[31] the Court enjoined a federal officer from introducing illegally acquired evidence in a state court.[32]

The foundation of the "silver platter" doctrine was undermined in *Wolf v. Colorado*.[33] Evidence illegally seized by a state officer was used to convict Wolf in a state court. On certiorari, the Court declared that the core of the fourth amendment was applicable to the states through the fourteenth amendment, and that therefore the Constitution, by virtue of the fourteenth amendment, prohibited unreasonable searches and seizures by state officers.[34] Before reaching the ultimate conclusion that evidence illegally seized by the state was admissible in a state prosecution,[35] the Court had to overcome the following difficulty: if the exclusionary rule was derived from the fourth amendment itself, as *Weeks* had apparently stated, then this rule, of necessity, was also applicable to the states through the fourteenth amendment.[36] The Court simply stated that the exclusionary rule, rather than being a compulsion of the fourth amendment, was merely "judicially implicated" [37] from it.[38]

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[26] 269 U.S. 20 (1925).

[27] See People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). Judge Cardozo stated that the preliminary motion requirement had practically been abandoned. *Id.* at 20-21, 150 N.E. at 587.

[28] 251 U.S. 385 (1920).

[29] 273 U.S. 28 (1927).

[30] 275 U.S. 310 (1927).

[31] 350 U.S. 214 (1956).

[32] *But see* Stefanelli v. Minard, 342 U.S. 117 (1951), where the Court refused to enjoin the use in a state court of evidence illegally seized by a state officer.

[33] 338 U.S. 25 (1949).

[34] *Id.* at 27-28.

[35] *Id.* at 33.

[36] See Galler, *The Exclusion of Illegal State Evidence in Federal Courts*, 49 J. CRIM. L., C. & P.S. 455, 457 n.8 (1958).

[37] Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[38] The shifted basis of the exclusionary rule is vividly illustrated in *Wolf*. where the majority states that the rule is "judicially implicated" from the fourth amendment. The concurring opinion states that it is a rule of evidence,

In the present case the Court reasoned that if evidence seized in violation of the fourth amendment was inadmissible in a federal prosecution, then evidence seized in violation of the fourteenth amendment should likewise be inadmissible [39]—otherwise the Court would be giving undue preference to the fourth amendment.[40] Cognizant of the fact that the federal exclusionary rule had engendered much criticism,[41] the Court fortified the logic of its decision by reiterating that the rule is calculated "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." [42] It also found solace in the fact that many states had adopted an exclusionary rule.[43] Yet the holding indicates that state law is immaterial to the validity of the search for the purpose of determining the admissibility of evidence in a federal prosecution.[44]

The exclusionary rule seems to have reached its limit in the present case, for it is unlikely that the Court will impose this rule upon the states in the future.[45] The rule in the federal courts, however, is firmly embedded, and since scholarly criticism of the rule in the past has been rejected by the Court, further criticism seems futile. Congress may legislate the rule out of existence, as the Court itself has suggested,[46] but this is highly unlikely. Nevertheless, a case will inevitably arise to test the rule. If a basis for the rule is the integrity of the Court, will that integrity withstand

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and the dissent states that it is a part of the fourth amendment itself. Wolf v. Colorado, *supra* note 37.

[39] Elkins v. United States, 364 U.S. 206, 215 (1960). This remedied the evil of the "silver platter" doctrine that permitted federal courts to flout state policy by accepting illegally seized evidence in states that had adopted an exclusionary rule. *Id.* at 221. It also remedied the defect that Cardozo pointed out: federal officers were on one side of the law and state police on the other. People v. Defore, 242 N.Y. 13, 22-23, 15 N.E. 585, 588 (1926).

[40] Elkins v. United States, 364 U.S. 206, 215 (1960).

[41] *Id.* at 208 n.2.

[42] *Id.* at 217. *But see* Irvine v. California, 347 U.S. 128, 135 (1954), where the Court stated that it is doubtful if the exclusionary rule deters illegal searches and seizures.

[43] Elkins v. United States, *supra* note 40, at 218-19. See the Court's survey of individual states in appendix. *Id.* at 224.

[44] *Id.* at 223-24. See Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers,* 1959 WASH. U.L.Q. 229, 240 n.76. It is conceivable that there could be evidence gathered in a state search, legal by the standards of the fourteenth amendment, which would be inadmissible in a federal court because of illegality under the standards of the fourth amendment. *Ibid.* See Grant, *Circumventing the Fourth Amendment,* 14 So. CAL. L. REV. 359, 368 n.43 (1941), criticizing this double standard.

[45] See Irvine v. California, 347 U.S. 128, 132-34 (1954), where the Court stated that it would not foist upon the states a vague rule about which the Court itself cannot be consistent. Stefanelli v. Minard, 342 U.S. 117 (1951), stated that because of the delicate federal-state relationship, this rule should not be applied to the states.

[46] See Wolf v. Colorado, 338 U.S. 25, 33 (1949).

the reaction to a case in which the Court cannot use a murdered body [47] as evidence because a "constable has blundered"? [48]

CONSTITUTIONAL LAW—FIFTH AMENDMENT—DISMISSAL OF PUBLIC EMPLOYEES FOR INSUBORDINATION IN REFUSING TO ANSWER QUESTIONS OF INVESTIGATIVE COMMITTEE ON FIFTH AMENDMENT GROUNDS HELD LAWFUL.—A California statute [1] provided that it was the duty of any state employee subpoenaed before a state or federal committee to answer any questions concerning membership in certain organizations. Petitioners, subpoenaed before a congressional investigative committee, were further ordered by their employer, the County of Los Angeles, to answer any questions which might be asked of them. Upon their refusal to do so on fifth amendment grounds, they were discharged. The United States Supreme Court, affirming the California Supreme Court, *held* that the dismissal was lawful because the Court concluded that petitioners were dismissed for insubordination in refusing to answer proper questions and not because they invoked their constitutional privilege. *Nelson v. County of Los Angeles,* 362 U.S. 1 (1960).

"This," as Mr. Justice Brennan sadly remarked, "is another in the series of cases involving discharges of state and local employees from their positions after they claim their constitutional privilege against self-incrimination before investigating committees." [2] The area has been marked by a series of close decisions and bitter dissents. In *Garner v. Board of Pub. Works,*[3] city employees were discharged for their refusal to execute a loyalty affidavit. A declaratory judgment in *Adler v. Board of Educ.*[4] upheld a statute which provided for the dismissal of state employees knowingly belonging to subversive organizations as unfit. These earlier cases established the validity of dismissals based on insubordination or subversive activities casting doubt on the employee's fitness.[5] They rested on the doctrine that

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[47] See Grant, *Circumventing the Fourth Amendment,* 14 So. CAL. L. REV. 359, 364-65 (1941).

[48] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[1] CAL. GOV'T CODE § 1028.1 (Deering 1958).

[2] Nelson v. County of Los Angeles, 362 U.S. 1, 10 (1960) (dissenting opinion).

[3] 341 U.S. 716 (1951) (Frankfurter and Burton, JJ., dissenting in part in separate opinions; Black and Douglas, JJ., dissenting in separate opinions).

[4] 342 U.S. 485 (1952) (Frankfurter, Black, and Douglas, JJ., dissenting in separate opinions).

[5] Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951).