

The Modern Trend of the Law of Search and Seizure

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THE MODERN TREND OF THE LAW OF SEARCH AND SEIZURE

Now that we are engaged in a struggle for existence, under a mode of life in which our individual liberties are guaranteed, it becomes necessary for us to forego to some extent many of the necessities of life, as a means to our end. Thus, we accept our rationing laws with the attitude of a determined people. However, no society has as yet attained the Utopian stage. There are, of course, the hoarders, and the offenders of our laws. Unfortunately, the tendency to be law-abiding is not something with which we are born. It requires hard and ceaseless effort to be able to guide one's conduct in accordance with certain ethical and legal standards. The temptations of life may often be too strong. There are people that are impervious to deleterious influences, while others are very easily affected by them. Therefore, basic to any discussion of social problems is the proposition that society must utilize every scientific instrumentality for self-protection against destructive elements in its midst, with as little interference with the free life of its members as is consistent with such social self-protection.¹

Thus society will utilize its powers of search and seizure to prevent hoarding or excessive price raising today in an effort to prevent destructive forces from making headway. Under the emergency price control act, the administrator is authorized by regulation or order to require any person engaged in business or who rents or offers for rent or acts as renting broker, to furnish any information under oath or to make and keep records and to make reports *and he may require any such person to permit the inspection and copying of records and other documents.*² The War Production Board has the same power *to require the production of records and documents*, as given to the Office of Price Administration.³

¹ *Theories of Punishment*, condensed from Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453-482. Reprinted by permission in HALL AND GLUECK, *CASES ON CRIMINAL LAW*, p. 19.

² Act of Jan. 30, 1942, c. 26, 56 STAT. 23, U. S. C. A. § 50, App. §§ 901-905, 921-926, 941-946. The administrator may also require by subpoena the appearance and testimony or appearance and production of documents or both. In case of refusal to obey a subpoena the district court may issue an order requiring such person to appear and give testimony or to appear and produce documents or both. Failure to obey such order is punished by contempt. Under subdivision (g) of Section 122 no person excused from complying with any requirements under this section because of his privilege against self-incrimination.

³ "In the interest of the national defense and security and necessary to the effective prosecution of the present war", the Act is intended "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions and scarcities . . . to assist in securing adequate production of commodities and facilities; to prevent a post-emergency collapse of values; to stabilize agricultural prices . . ." and to affect other stated purposes, the War Powers Act of

Constitutional concepts have been broadened, although not without difficulty, so that today the Federal Government exercises greater powers and exerts a greater influence over the activities of all persons than at any time in our history.⁴

The powers germane to the Office of Price Administration Act are: (a) the power to tax and spend to provide for the common defense and general welfare of the United States, (b) the power to regulate interstate commerce, (c) the war powers of Congress, (d) the power to make all laws which shall be necessary and proper for the carrying into execution the enumerated powers. If the power to regulate interstate commerce is the source of the power of the Federal Government to regulate practically all prices for commodities and services and to fix in specific localities, in order to make such price fixing effective, strictly intrastate activities must be regulated and controlled, and the commerce clause and implied powers must be stretched to such an extent as to do away completely with any limitation upon the power of Congress to regulate strictly intrastate activities.⁵

Another delegated power of Congress is the taxing and spending power. In the exercise of this power Congress may provide for the common defenses and general welfare.⁶ The act is, however, a valid exercise of the war powers of Congress. The power granted by the Constitution to the Federal Government to wage war extends to all matters related to the winning of the war and to the employment of all appropriate means to wage war successfully. It carries with it the power to deal with all contingencies arising from the inception, progress and termination of the war.⁷ If in the exercise of its power to regulate interstate commerce Congress may regulate intrastate activities which have a direct bearing upon interstate commerce, then cer-

March 27, 1942, was enacted. Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942).

⁴ Upon proper occasion and appropriate measure a state may regulate a business in any of its aspects, including the prices to be charged for the commodities or services it sells. *Nebbia v. New York*, 291 U. S. 502, 539 (1934), where the Court stated: "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt."

⁵ Joseph W. Aidlin, *Constitutionality of 1942 Price Control Act* (1941-42) 30 CALIF. L. REV. 402.

⁶ *Steward Machine Co. v. Davis*, 301 U. S. 548 (1937). The Emergency Price Control Act makes no pretense at being an exercise of the taxing and spending power of Congress.

⁷ Although the Supreme Court has held that the war powers are limited by the Fifth and Sixth Amendments (*United States v. Cohen Grocery Co.*, 255 U. S. 81 [1921]) in *Paige v. United States* it was held not to be so (78 U. S. [11 Wall.] 268 [1870]) and although it has been held not to extend to intrastate matters, if power to wage war is to be effective, it must allow for whatever legislation by Congress is necessary successfully to prosecute the war and is no less inconsistent with the Fifth and Sixth Amendments than a state act under the police power necessary for the general welfare would be to the Fourteenth Amendment.

tainly Congress may, in the exercise of its war power, enact legislation of uniform application which is necessary to prosecute the war. It is true that in the United States the fundamental right to security in the home against unlawful search and seizure is protected by the Fourth Amendment of the Federal Constitution.⁸ Congress has adhered rather closely to this amendment in its statutory enactments concerning searches and seizures. The grounds for the issuance of a federal search warrant are restricted to searches for stolen or embezzled property, for property used as the means for committing a felony, and for papers or property used in violation of "any penal statute" or of international obligations of the United States.⁹ Such warrants may be issued by the United States judiciary, by state or territorial courts of record, or by United States commissioners to be served by any officer mentioned in its direction.¹⁰ The states are not bound by the amendments to the Federal Constitution,¹¹ but most state constitutions contain equivalent safeguards. Accordingly, the New York State statute on search warrants is very similar to the federal statute.¹² No general exploratory search and seizure of either persons, houses, or effects can ever be justified, either with or without a warrant.¹³ The Court, speaking through Mr. Justice Bradley, said in *Boyd v. United States*¹⁴ that the search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof, are totally different things from search and seizure of a man's books and papers for the purpose of obtaining information for evidentiary purposes.

Whether, therefore, the nation in time of proclaimed emergency, or during a state of war, may extend the scope of its searches would seem to depend on the expansion of the number or type of penal laws.

⁸ "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The right of the people to be secure in their persons, houses searches and seizures was not created by the Fourth Amendment, but existed as a common law right before the Constitution was adopted but the amendment established it as a Constitutional right which Congress itself cannot violate. *Angello v. United States*, 290 Fed. 671, *aff'd in part and reversed in part*, 46 Sup. Ct. 269, 269 U. S. 20, 70 L. ed. 145 (1923).

⁹ FED. CODE OF CR. PROC. tit. 11, § 612, 98.

¹⁰ *Id.* tit. 11, §§ 611, 617.

¹¹ *Barron v. Baltimore*, 7 Pet. 243 (U. S. 1833). The clause in the Federal Constitution prohibiting the issuance of a warrant, except on probable cause supported by oath, restrains the issuance of warrants only under the laws of the United States and has no application to state process. *The Volant*, 59 U. S. 71, 18 How. 71, 15 L. ed. 267 (1855).

¹² N. Y. CODE OF CR. PROC. §§ 791-796.

¹³ *United States v. Rembert*, 284 Fed. 996 (1922). "Federal search warrants must not be used as a means for gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence against him in a criminal or penal proceeding . . ." *Gouled v. United States*, 255 U. S. 309 (1921).

¹⁴ 116 U. S. 616 (1885).

Where seizure is impossible except without a warrant, the seizing officer acts unlawfully and at his peril in acting without a warrant unless he can show the court probable cause. If the securing of a search warrant is reasonably practicable, it must be used and when properly supported by affidavits and issued after judicial approval it protects the seizing officer against actions for damages.¹⁵ To justify search and seizure without a warrant, the officer must have direct personal knowledge through sight or other sense, of the commission of the crime, by the accused.¹⁶ A person who does not claim ownership of the property taken cannot question the legality of a search and seizure. The constitutional protection against unreasonable searches and seizures is personal and can be availed of only by the person wronged, and is not extended beyond the person whose individual and personal rights are violated.¹⁷

The history of this amendment took its origin in the determination of the framers of the amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the Government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them. Such practices had received sanction under warrants and seizures under the so-called writs of assistance, issued in the American colonies.¹⁸ Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers.¹⁹

In the Federal Court, evidence illegally procured by federal agents, such as by unlawful search and seizure, is inadmissible. This Court takes the position that the only way to discourage illegal search and seizure by agents of the Government is to exclude from evidence the matter so procured.²⁰ New York and a number of other states have taken the view that although the search and seizure may be un-

¹⁵ Walker v. United States, 125 F. (2d) 395 (1942).

¹⁶ Hague v. Committee for Industrial Organization, 101 F. (2d) 774 (1939), *modifying*, Committee for Industrial Organization v. Hague, 25 F. Supp. 127 (1938), *certiorari granted*, Hague v. Committee for Industrial Organization, 59 Sup. Ct. 486, 316 U. S. 624, 83 L. ed. 1028 (1939), *modified*, 59 Sup. Ct. 954, 307 U. S. 496, 83 L. ed. 1423 (1939).

¹⁷ Schenck *ex rel.* Chow Fook Hong v. Ward, 24 F. Supp. 776 (1938).

¹⁸ See 2 WATSON, CONSTITUTION 1414 *et seq.* "One of the causes of the American Revolution was the blanket right of the English government to enter and search the homes of the colonists and the framers of our constitution were careful to deny the new government any such privilege." O'TOOLE, CASES AND MATERIALS ON EVIDENCE (1937).

¹⁹ Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746 (1885).

²⁰ O'TOOLE, CASES AND MATERIALS ON EVIDENCE (1937).

lawful, evidence obtained thereby is admissible; the injured party being remitted to a suit for damages or to an effort to have the offending officer punished for his improper conduct. This in contrast to the federal law as stated *supra* in which the United States Supreme Court has adopted the view that the enforcement of the constitutional guaranty requires the suppression of illegally obtained evidence upon proper motion or objection.²¹

In modern times a main problem of unlawful search and seizure seems to evolve around the question of the legality of wire tapping and the use of detectaphones. In 1928 the Court held that the Fourth and Fifth Amendments to the Federal Constitution do not protect a citizen against interception of his telephone messages by wire tapping or their use in evidence against him.²² The common law rule that admissibility of evidence is not affected by the illegality of the means by which it is obtained, subject to the established exception that excludes all evidence in the procuring of which Government officials have invaded the right of privacy protected by the Fourth and Fifth Amendments, was approved by the Court. The authority of Congress to protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal cases was expressly recognized, but the Court declined to extend the established exception to the common law rule to cover intercepted telephone messages "without sanction of congressional enactment." The Federal Communications Act was passed in 1934,²³ that "no person not being authorized by sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person".

The *Nardone* case²⁴ which followed, approved the further exception to the common law rule which the Court in the *Olmstead* case refused to recognize without legislative sanction. Thus a policy excluding evidence of intercepted messages was held to be established by Section 605 of the Federal Communications Act and is apparently accepted in lieu of the policy admitting such evidence previously approved by the Court in the *Olmstead* case. In reply to the argument that it is improbable that Section 605 was intended to hamper the activities of federal officers in detecting and punishing crime the Supreme Court observes, "The answer to the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive

²¹ See *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. ed. 652, L. R. A. 1915B 834 (1914).

²² *Olmstead v. United States*, 277 U. S. 438, 48 Sup. Ct. 564, 72 L. ed. 944, 66 A. L. R. 376 (1928).

²³ 48 STAT. 1103, 47 U. S. C. A. § 605 has been construed to forbid the use of intercepted telephone communications in evidence in a criminal trial in the federal courts. *Nardone v. United States*, 302 U. S. 379, 58 Sup. Ct. 275, 82 L. ed. 314 (1937).

²⁴ *Ibid.*

of personal liberty."²⁵ When the F. B. I. began tapping intrastate communications it was held that these things were within the scope of the Federal Communications Act.

The New York State Constitution permits the tapping of wires.²⁶ The question arises, whether or not this state constitutional provision violates the Federal Communications Act. There has been no decision either way but it is submitted that it would be considered violative in interstate communications.

Where federal agents placed a detectaphone against a partition wall of an office in which members of a conspiracy engaged in conversations among themselves and over the telephone, evidence of conversations obtained by the use of the detectaphone was not inadmissible on the ground that the use of the detectaphone violated the Fourth Amendment, since it was not a violation of the home, the detectaphone being placed on the outside.²⁷

In spite of the direction taken by the development of the law of search and seizure the interception of telephone and telegraphic communications should be sustained during a period of war. All measures necessary and proper to aid Congress in carrying into effect the determination of Congress to wage war would necessarily be sustained.

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THE EXTRATERRITORIAL EFFECT OF EQUITY DECREES—FULL FAITH AND CREDIT CLAUSE

A recent decision¹ brought into prominence the applicability of the full faith and credit clause of the Federal Constitution² to foreign decrees.³ *A* sues *B* for specific performance in State *X*, and *A* obtains therein a decree over land in State *Y*. To what extent *must* State *Y* recognize the decree rendered in State *X*?⁴ This has been the subject of much discussion and theorization among legal authori-

²⁵ *Ibid.*

²⁶ N. Y. CONST. Art. I, § 12 (1938). The Constitution of 1938 does not change the rule that even though evidence in a criminal case is obtained in violation of law, it is not thereby rendered inadmissible. *People v. La Combe*, 170 Misc. 669, 9 N. Y. S. (2d) 871 (1939).

²⁷ *Goldman v. United States*, 62 Sup. Ct. 993, *aff'g*, *United States v. Goldman*, 118 F. (2d) 310, *certiorari denied*, 61 Sup. Ct. 1109, 1111, 313 U. S. 1588, 85 L. ed. 1543 (1941).

¹ *Williams v. North Carolina*, 317 U. S. 287, 87 L. ed. 189, 63 Sup. Ct. 207 (1942).

² U. S. CONST. Art. IV, § 1.

³ An order of a court as distinguished from a common law judgment for money.

⁴ The law relating to the applicability of the full faith and credit clause as to common law judgments is well-settled.