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## FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE— A SECOND CLASS CONSTITUTIONAL RIGHT?

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The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.—*United States Constitution, Fourth Amendment.*

One hundred and sixty years after the adoption of this constitutional prohibition of unreasonable searches and seizures, Mr. Justice Jackson felt compelled to conclude:

We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no first without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tacitly marked as secondary rights, to be relegated to a deferred position.<sup>1</sup>

Contemporaneous support for his observation was supplied the same day he made it by the United States Supreme Court's decision in *Wolf v. Colorado*,<sup>2</sup> in which result Mr. Justice Jackson, ironically, agreed. The *Wolf* decision severely restricted the availability of the right of privacy from unreasonable searches and seizures by regarding as not within the Amendment's prohibition the action of state courts in admitting in evidence the fruits of such activity.<sup>3</sup> Even more recent confirmation of Mr. Justice Jackson's apprehension is to be found in the decision in *United States v. Rabinowitz*<sup>4</sup> which, despite the absence of a search warrant, condones a virtual search at large of premises when accompanied by an arrest in them.

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1. Mr. Justice Jackson dissenting in *Brinegar v. United States*, 338 U. S. 160, 180 (1949). It seems unnecessary to accept Mr. Justice Jackson's "preference" premise in order to agree that evidence abounds to support his principal observation concerning freedom from unreasonable search and seizure.

2. 338 U. S. 25 (1949), discussed in detail *infra* p. 308 *et seq.*

3. See Frank, *The United States Supreme Court: 1948-1949*, 17 U. OF CHI. L. REV. 1, 32 (1949), commenting in part: "In . . . *Wolf v. Colorado*, the majority, like an army on parade, marched impressively up the field and then came back again to where they had started. If the figure may be pursued, the parade was magnificent, but the enemy remained unscathed."

4. — U. S. —, 70 Sup. Ct. 430 (Decided February 20, 1950), discussed in detail *infra* p. 302 *et seq.*

The *Wolf* and *Rabinowitz* decisions seem to have brought the Court to a kind of terminal point in the forging of the law of searches and seizures, and it is the writer's purpose to explore the question of whether these two cases, as well as others recently decided, support Mr. Justice Jackson's thesis that Fourth Amendment freedoms have become second class constitutional rights.

The Fourth Amendment, like the other provisions comprising the Bill of Rights, is not self-executing. These provisions are made meaningful and become the real bulwarks of protection they were intended to be only as they are implemented by law, whether it be by legislative action or judicial decision. Within the past four years the Supreme Court has considered fourteen cases presenting Fourth Amendment issues. Each of these decisions has been by a divided Court, frequently closely divided. Despite the apparent lack of accord among the Justices, and based upon the position taken by the two newest members of the Court as well as that taken by those whom they replaced, predictability of result in future cases seems less hazardous than in the recent past. Accordingly, it seems appropriate to appraise these recent cases and their doctrines and to evaluate the criticism that has been levelled against them, principally by dissenting Justices.<sup>5</sup> It is well to indicate as precisely as possible the principal area of disagreement. It is one of exceedingly narrow scope, albeit fundamental in application. Opposed to the majority view in the *Rabinowitz* case has been the consistent dissent of Mr. Justice Frankfurter whose thesis is, broadly, that all searches and seizures without a warrant are "unreasonable" within the contemplation of the Amendment. Narrowing the area of conflict, however, is Mr. Justice Frankfurter's concession that within narrow limits, and springing from considerations of necessity, some search and seizure without warrant is permissible. It is the limitations which he would impose upon this exception—limitations that the majority has been

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5. Mr. Justice Jackson's views have already been intimated. Mr. Justice Frankfurter has consistently refused to sanction what he regards as inroads upon the Amendment and his dissenting opinions, frequently supported by elaborate appendices, reflect painstaking research and reflection upon the subject. Mr. Justice Murphy consistently voted with Mr. Justice Frankfurter, as did Mr. Justice Rutledge on all but one occasion in the seven cases mentioned (*Brinegar v. United States*, 338 U. S. 160 (1949)). The position of Mr. Justice Douglas is much more uncertain, and it was his shifting vote in the cases through the 1948 term that resolved the conflict of views shared on the one hand by Justices Frankfurter, Murphy, Jackson and Rutledge, and on the other, by Mr. Chief Justice Vinson and Justices Black, Reed and Burton. The reconstituted Court seems to leave Justices Frankfurter and Jackson in a clear minority to decry encroachments upon the Amendment, with the new Justices, Clark and Minton aligned with the Vinson-Black-Reed-Burton view. Speculation would indicate that Mr. Justice Douglas, who did not participate in *Rabinowitz*, might have joined Justices Frankfurter and Jackson in dissent because of the position he had taken in *Trupiano*. Mr. Justice Black who dissented in *Rabinowitz* did so only because of policy considerations involved in the judicial administration of the *Trupiano* rule (a case in which he dissented) and was not concerned with the construction of the Amendment in the light of the facts of the case.

unwilling to accept—which, on the surface at least, marks the basic difference between the two groups of Justices. Mr. Justice Frankfurter's limitations are two: first, a search of the arrested person may be undertaken in order to protect the arresting officer and to deprive the prisoner of any means of escape, and second, following as a corollary, "officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control."<sup>6</sup> Reduced to its lowest terms, the scope of Mr. Justice Frankfurter's exception is to allow such search and seizure as is necessary to make the arrest effective—and no more. The view which prevailed in *Rabinowitz* and other recent cases places a much broader construction on that always elusive term "possession." This is, seemingly, to make the enforcement of a constitutional right turn within a narrow compass indeed. It is nevertheless submitted that this is the fundamental point of departure from which the divergent and important results in the cases are found to flow. Of course, the language of the cases is not devoted to the mere semantics of the problem—although scholarly treatises have been penned on the subject as it has bearing in the field of property.<sup>7</sup> Rather, each of the Court's groups is able to find support for its position from the customary respectable materials utilized in the course of deciding cases involving constitutional issues. The majority of the Court in the cases mentioned have found justification for their judgment in the earlier decisions of the tribunal. Mr. Justice Frankfurter, on the other hand, reads a far different meaning into the Amendment, based upon the history and contemporaneous expressions of opinion concerning its necessity and purpose at the time of its framing and adoption. He also disputes the interpretation which the majority places upon the previously decided cases, showing that with perhaps one exception<sup>8</sup> the language relied upon in those decisions has been dicta, and that the single exceptional case was later most seriously modified by ensuing decisions.

Before any critical appraisal of this conflict may be safely attempted, it is necessary to turn to the historical aspects of the question to see what support, if any, may be marshalled for Mr. Justice Frankfurter's position. Then the cases will be considered.

A few other questions should be kept in mind as the review of history and litigation is undertaken, for they will be found to have important bearing on the result. Does the nature or objective of the search have any bearing on the problem; that is, are some kinds of searches prohibited altogether,

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6. *United States v. Rabinowitz*, — U. S. at —, 70 Sup. Ct. at 438. Similar acknowledgment of the exemption and like limitations were also made by the Justice in *Davis v. United States*, 328 U. S. 582, 609 (1946) and in *Harris v. United States*, 331 U. S. 145, 168 (1947).

7. BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY, p. 18; FRYER, READINGS ON PERSONAL PROPERTY, c. 2 (1938).

8. *Marron v. United States*, 275 U. S. 192 (1927).

while others, properly safeguarded, are legally permissible? Does the character of the property seized affect the question; that is, may there be a legal search for some types of property, but not for others? Is it of any significance that the person arrested is actively engaged in the commission of a crime at the very moment of arrest? Finally, does the character of the individual, or his guilt or innocence have any bearing upon the validity of the search and seizure conducted incidental to his arrest?

#### THE HISTORY

It is a commonplace to observe that the objective of the Amendment's framers was protection against those abuses of which they were aware or had experienced with respect to the issuance of general warrants in England and writs of assistance in the colonies at the time of and just prior to the Revolution. Like apprehensions of encroachment by despotic government upon *all* fundamental rights led to the adoption of the *entire* Bill of Rights as an implied, if not expressed, condition to the acceptance and ratification of the Constitution itself.<sup>9</sup> More important, for our present purposes, is the less generally acknowledged, but nevertheless equally accepted fact that the colonists' resistance to the writs of assistance was "the first in the chain of events which led directly and irresistibly to revolution and independence."<sup>10</sup>

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9. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT, pp. 79-82:

Men on all sides contended that, while the first object of a Constitution was to establish a government, its second object, equally important, must be to protect the people against the government. That was something which all history and all human experience had taught.

The first thing that most of the Colonies had done, on separating from Great Britain, had been to assure to the people a Bill of Rights, safeguarding against State Legislative despotism those human rights which they regarded as fundamental. Having protected themselves by restrictions on the power of their State Legislatures, the people of this country were in no mood to set up and accept a new National Government, without similar checks and restraints. As soon as the proposed Constitution was published, the demand for a national Bill of Rights was heard on all sides. It came especially strong from the more radical and democratic elements in the States, the farmers and the country people; but it was also supported by professional and mercantile elements in the towns. \* \* \*

It was not for any mere theory, for a mere doctrinaire adherence to rhetorical, political shibboleths that these men were contending. They were thinking of facts, not theories. They had lived through bitter years, when they had seen Governments, both Royal and State, trample on the human rights which they and their ancestors in the Colonies and in England had fought so hard to secure. In the seven years prior to the signing of the Federal Constitution, they had seen the Legislatures of four states—New Jersey, Rhode Island, New Hampshire, and North Carolina—deprive their citizens of the right to jury trial in civil cases. They had seen the State Legislatures of Virginia, Pennsylvania, and other States pass bills of attainder sentencing men to death or banishment without a criminal trial by jury. They had seen the Legislatures of nearly all the states deprive persons of their property without due

Certainly therefore, the background, nature and origins of these writs, which played so important a part in our national history, deserve careful consideration. Professor Lasson in his excellent treatise<sup>11</sup> has traced the development in carefully documented chronological detail, and no attempt will be undertaken to retell that story here except in general outline.

Early traces of the doctrine that "a man's house is his castle" are to be found in the Bible,<sup>12</sup> and at a later date, with qualifications, in the Roman law.<sup>13</sup> Upon reaching the Anglo-Saxon scene, we find that efforts to found the right of privacy as early as 1215 upon the provisions of Magna Charta are largely unavailing. Madison who took the lead in proposing the Bill of Rights in the First Congress, and whose proposals contained a definite prohibition against unreasonable searches and seizures, acknowledged that England's "Magna Charta does not contain any one provision for the security of these rights, respecting which the people of America are most alarmed."<sup>14</sup> The truth of the matter seems to be that in this area, as in so many others, Lord Coke had seized upon obscure or ambiguous provisions of the Charter<sup>15</sup> to spell out a natural right of privacy, and his devoted followers had accepted his construction without questioning its authenticity. "From this viewpoint more than any other, the Great Charter may be regarded as important in the background of the principle of reasonable search and seizure."<sup>16</sup>

As if to confirm the proposition that Magna Charta did not secure the Englishman from unreasonable searches and seizures, a long series of legislative and executive acts of encroachment upon the right of privacy occurred in the interim between the early years of the fourteenth century and Lord

process, by the passage of laws allowing tender of worthless paper and other property in payment of debts and judgments. They had seen a Massachusetts Legislature impair the freedom of the press by confiscatory taxation. They had seen the Royal Government quarter troops on the inhabitants in time of peace and deny to the people the right of assembly and of petition. They had seen the King's officials search their houses without lawful warrants. They knew that what Government had done in the past, Government might attempt in the future, whether its ruling power should be Royal, State, or Nation—King, Governor, Legislature, or Congress. And they determined that, in America, such ruling power should be definitely curbed at the outset. There should be no uncontrolled power in the government of American citizens. Rightly had Jefferson said, 'an elective despotism was not the government we fought for.'

10. HART, AMERICAN HISTORY LEAFLETS, No. 33, Introduction. See also, LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (1937).

11. LASSON, *op. cit. supra* note 10.

12. LASSON, *op. cit. supra* note 10, at 13-14, citing Joshua 7:10-26, *ibid.* 2:1-7, Genesis 19:4-11, Deuteronomy 24:10 and Exodus 22:2, 3.

13. LASSON, *op. cit. supra* note 10, at 14-18.

14. ANNALS OF CONGRESS, 1st Congress, 1st Session, p. 453.

15. Especially Article 39, later cited and relied upon by Otis in his protests against writs of assistance in Paxton's case, Quincy's Reports (Mass.) 51, 469-482 (1761).

16. LASSON, *op. cit. supra* note 10, at 21.

Camden's decision in 1765 in the case of *Entick v. Carrington*,<sup>17</sup> (hereinafter discussed) a decision now universally regarded as a landmark of English liberty. Early instances, involving statutes directing innkeepers in special cases to search their guests for imported money, with an added provision for officials to keep a check upon the innkeepers by searching their establishments,<sup>18</sup> were expanded to embrace the search of the premises of various types of tradesmen for adulterated or improperly fabricated merchandise.<sup>19</sup> From these early beginnings, there followed during the Elizabethan and Stuart regimes a constantly recurring resort to searches and seizures authorized by decrees of the Court of Star Chamber as means of enforcing the laws relating to the licensing of books and printing and the suppression of religious freedom, seditious libel and treason.<sup>20</sup> The following is Professor Lasson's description of these warrants:

No limitations seem to have been observed in giving messengers powers of search and arrest in ferreting out offenders and evidence. Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the bearer of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge.<sup>21</sup>

As early as 1634 the general warrant, later expressly authorized by Parliament in conjunction with the customs laws, was being used by authorities in the enforcement of laws governing religion—in apparent contravention of existing law at the time.<sup>22</sup> In 1627, following Parliament's refusal to levy new taxes, Charles I levied a tax by prerogative and effected the imprisonment of delinquents by the device of a warrant, which while naming the person, was general for failure to specify an offense.<sup>23</sup> At about the same time Privy Council warrants of a general character issued to authorize search for documentary evidence.<sup>24</sup>

There were, to be sure, periodic instances of recantation when Parliament sought to halt<sup>25</sup> or at least restrict<sup>26</sup> these oppressive practices, leading in 1640 to the abolition of the Court of Star Chamber<sup>27</sup> which had been a principal

17. 19 HOWELL'S STATE TRIALS 1029 (1765).

18. 9 Edw. III, St. II, Ch. 11 (1335); LASSON, *op. cit. supra* note 10, at 23.

19. 11 Henry VII, Ch. 14 (1495); 3 Henry VIII, Ch. 14 (1511); LASSON, *op. cit. supra* note 10, at 23-24.

20. LASSON, *op. cit. supra* note 10, at 24-27.

21. *Id.*, at 26.

22. *Id.*, at 28.

23. *Id.*, at 29.

24. *Id.*, at 31.

25. 34 Edw. III, Ch. 1 (1360).

26. 4 Henry IV, Ch. 21 (1402).

27. 16 Charles I, Ch. 10 (1640).

offender. But such legislative reform was short-lived. In 1662 Parliament enacted three statutes containing search and seizure provisions quite as sweeping as any previously to be found in Star Chamber decrees. The first of these was the much maligned tax upon fire hearths and stoves at the annual rate of two shillings.<sup>28</sup> The second was "An act for preventing frauds, and regnlating abuses in his Majesty's customs."<sup>29</sup> The third, "An act for preventing abuses in printing seditious, treasonable, and unlicensed books and

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28. 13 and 14 Charles II, Ch. 10 (1662). The search provisions contained in Sec. 3 read as follows:

And be it enacted by the authority aforesaid, That the respective constables, headboroughs, tythingmen, or other such officers, within whose limits any such house or edifice charged by this act as aforesaid are, and the respective treasurers, and other officers of the respective inns of court, inns of chancery, colleges and other societies aforesaid, shall by the last day of May, one thousand six hundred sixty and two, require the several occupiers of every such house, edifice, lodging and chamber aforesaid, to deliver in to them respectively, accounts in writing as aforesaid under their several and respective hands, of all such hearths and stoves as aforesaid, as shall be within their respective houses, edifices, lodgings and chambers, (2) and upon the receipt of the same, or upon default of such account in writing, or in case there be no occupiers, then within six days after notice in writing fixt to the door, requiring such account to be made, the said constables, or other officers respectively as aforesaid, shall enter into the said respective houses in the daytime, and compare such accounts, and see whether the same be truly made, or not; (3) and if no such account be delivered, then shall take information by their own view, of the number of such hearths and stoves, upon pain that every constable, treasurer, and other officer aforesaid, who shall neglect to do the same, shall forfeit for every week he or they shall so neglect, the sum of five pounds, and for every false return wilfully made contrary to this act, he or they shall forfeit and lose for every hearth and stove so falsely returned or omitted the sum of forty shillings.

29. 13 and 14 Charles II, Ch. 11 (1662). The search and seizure provisions, contained in Sec. 5, read as follows:

And be it further enacted by the authority aforesaid, That in case after the clearing of any ship or vessel, by the person or persons which are or shall be appointed by his Majesty for managing the customs, or any their deputies, and discharging the watchmen or tidesmen from attendance thereupon, there shall be found on board such ship or vessel, any goods, wares or merchandizes, which have been concealed from the knowledge of the said person or persons which are or shall be so appointed to manage the customs, and for which the custom, subsidy and other duties due upon the importation thereof, have not been paid; then the master, purser or other person taking charge of such ship or vessel, shall forfeit the sum of one hundred pounds: (2) and it shall be lawful to or for any person or persons, authorized by writ of assistance under the seal of his majesty's court of exchequer, to take a constable, headborough or other publick officer inhabiting near unto the place, and in the daytime to enter, and go into any house, shop, cellar, warehouse or room, or other place, and in case of resistance, to break open doors, chests, trunks and other package, there to seize, and from thence to bring, any kind of goods or merchandize whatsoever, prohibited and uncustomed, and to put and secure the same in his majesty's storehouse, in the port next to the place where such seizure shall be made.

pamphlets, and for regulating of printing and printing presses,"<sup>30</sup> prohibited the printing of "any heretical, seditious, schismatical or offensive books or pamphlets, wherein any doctrine or opinion shall be asserted or maintained, which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall or may tend, or to be to the scandal of religion, or the church, or the government or governors of the church, state or commonwealth,"<sup>31</sup> required the licensing of books, and authorized extensive searches for and seizures of unlicensed books by king's messengers.<sup>32</sup> These statutes and events subsequent to their enactment had important bearing upon subsequent developments in the law, both in England and America.

Contemporaneously with these legislative and executive activities, the judiciary was developing the common law along lines more consonant with the concept of individual freedom and liberty against unreasonable searches and seizures in the administration of the law. In the main, it was England's judges, not its legislators, who fashioned the principle of freedom from these oppressive practices. A most significant exception occurred in 1679 when Chief Justice Scroggs advised Charles II that seditious libel could be regarded as a common law offense, thus enabling the King to continue to use the general warrant to prolong the enforcement of the provisions of the book-licensing act

30. 13 and 14 Charles II, Ch. 33 (1662).

31. *Id.*, § 2.

32. *Id.*, § 15. The search and seizure provisions contained in § 15 read as follows:

And for the better discovering of printing in corners without licence, be it further enacted by the authority aforesaid, That one or more of the messengers of his Majesties chamber, by warrant under his Majesties sign manual, or under the hand of one or more of his Majesties principal secretaries of state, or the master and wardens of the said company of stationers, or any one of them, shall have power and authority with a constable, to take unto them such assistance as they shall think needful, and at what time they shall think fit, to search all houses and shops where they shall know, or upon some probable reason suspect any books or papers to be printed, bound or stitched, especially printing-houses, booksellers shops and warehouses, and book-binders houses and shops, and to view there what is imprinting, binding or stitching, and to examine whether the same be licensed, and to demand a sight of the said license; (2) and if the said book so imprinting, binding or stitching, shall not be licensed, then to seize upon so much thereof, as shall be found imprinted, together with the several offenders, and to bring them before one or more justices of the peace, who are hereby authorized and required to commit such offenders to prison, there to remain until they shall be tried and acquitted, or convicted and punished for the said offences; (3) and in case the said searchers shall upon their said search, find any book or books, or part of books unlicensed, which they shall suspect to contain matters therein contrary to the doctrine or discipline of the church of England, or against the state and government; then upon such suspicion to seize upon such book or books, or part of book or books, and to bring the same unto the said lord archbishop of Canterbury, and lord bishop of London for the time being, or one of them, or to the secretaries of state, or one of them respectively, who shall take such further course for the suppressing thereof, as to them or any of them shall seem fit.



of 1662, notwithstanding its expiration and failure of re-enactment due to Charles' refusal to summon Parliament. One year later the House of Commons made this action of Scroggs and his issuance of general warrants pursuant thereto one of the grounds upon which it adjudged his impeachment.<sup>33</sup>

Sir Matthew Hale's work, *The History of the Pleas of the Crown*, which is both contemporary<sup>34</sup> and generally accepted as authoritative,<sup>35</sup> best reflects the accepted practice of the courts of this period concerning the issuance of warrants in criminal cases. Hale tells us, in the first place, that upon application being made to a justice of the peace for a warrant of arrest, "He must take information of the prosecutor or witness in writing upon oath<sup>36</sup> . . . as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances, that may induce the granting of a warrant to arrest."<sup>37</sup> Next, the warrant, when issued, must "express the name of the party to be taken, for a warrant granted with a blank and sealed, and after filled up with the name of the party to be taken is void in law,"<sup>38</sup> and, furthermore, "where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected and bring them before him, this was ruled a void warrant . . . and was not a sufficient justification in false imprisonment."<sup>39</sup> And, finally, upon the basis of the foregoing observations Hale concludes that general warrants were invalid,<sup>40</sup> although acknowledging that there was some support for a contrary view, based upon current practices of the Crown and some earlier judicial precedents cited by Dalton.<sup>41</sup>

Based upon these observations of Hale, we may conclude that at the very time when the Parliament and the Crown were utilizing the general warrant and writs of assistance to invade the individual security of person and home, the common law was at work developing its protection. In the requirement of oath, probable cause and particularity of person to be apprehended, the

33. LASSON, *op. cit. supra* note 10, at 38.

34. Hale was admitted to Lincoln's-Inn on November 28, 1629, became a judge of Common Pleas in 1653, Lord Chief Baron of the Court of Exchequer on November 7, 1660, and Lord Chief Justice of the court of King's Bench on May 18, 1671 from which position he resigned on February 20, 1676, and died on December 25, 1676. The manuscript of his work was apparently compiled over the period of his years as practitioner and judge and it was ordered printed by the House of Commons, November 29, 1680.

35. HOLDSWORTH VI, 574-595 (1871).

36. HALE I, 586 (1736).

37. HALE II, 110 (1736).

38. HALE I, 577.

39. HALE II, 112.

40. HALE II, 580: ". . . a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, etc., was ruled void, and false imprisonment lies against him that takes a man upon such a warrant."

41. HALE II, 114: "But the general warrant to search all places, whereof the party and officer have suspicion, though it be usual, yet it is not so safe upon the reason of justice Swallowe's case before cited; and yet see precedents of such general warrants. Dalt. p. 353, 354."

rules of the common law were sowing the seeds of the Fourth Amendment as well as building the foundation for English liberty. It was inevitable that these two opposing ideologies of seventeenth century English government could not long coexist, but must, sooner or later, collide with the destruction of one and the survival of the other. And collide they did in a series of lesser skirmishes on the legislative front<sup>42</sup> but with finality of result in a series of judicial proceedings culminating in *Entick v. Carrington*,<sup>43</sup> decided by the Court of Common Pleas in 1765. Entick had authored an unlicensed book, "The Monitor or British Freeholder," which offended the government and was hence regarded as a seditious libel. In keeping with the practice of continuing the enforcement of the book-licensing act despite its failure to be re-enacted, the secretary of state issued a warrant directing the king's messengers to seize Entick and his private books and papers. The warrant, while specific in naming the person, was general respecting the articles to be taken. Carrington and three other of the king's messengers, armed with the warrant, proceeded to Entick's house where, without his consent, they broke and entered and for four hours ransacked his rooms, chests, drawers, and other property and carried away several hundred charts and pamphlets. Entick sued the messengers in trespass for damages.<sup>44</sup> The defendants asserted that the warrant was a complete defense to their actions,<sup>45</sup> thus putting the issue of its validity squarely before the court. In affirming the action of the trial court which had resulted in a verdict for Entick in the amount of £300, the Court of Common Pleas, through Lord Camden<sup>46</sup> said:

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42. LASSON, *op. cit. supra* note 10, at 40-42.

43. 19 HOWELL'S STATE TRIALS 1029 (1765).

44. Entick was no doubt encouraged by John Wilkes' earlier successful prosecution of an action for damages against Wood, the undersecretary of state, in connection with Wilkes' publication, *THE NORTH BRITON*. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763). The warrant there was wholly general because of the anonymity of the author of the publication. LASSON, *op. cit. supra* note 10, at 43-44 observes:

Under this 'roving commission,' they proceeded to arrest upon suspicion no less than forty-nine persons in three days, even taking some from their beds in the middle of the night.

See also *Huckle v. Money*, 2 Wils. K. B. 206, 93 Eng. Rep. 768 (1763); *Money v. Leach*, 3 Burr. 1692, 1742, 97 Eng. Rep. 1050, 1075; 19 HOWELL'S STATE TRIALS 1001 (1768) which arose out of the same incident.

45. There was an alternative defense, that the messengers being ministerial officers and having had no hand in the preparation of the warrant, were to be excused on that ground. It was denied.

46. Lord Camden, previously Chief Justice Pratt, had sustained the jury's verdict of £1,000 in favor of Wilkes in the *North Briton* case, saying:

The defendants claimed a right under precedents to force persons' houses, break open exchiroires, seize their papers, upon a general warrant, where no inventory is made of the things taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the

. . . if this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even suspect, a person to be the author, printer, or publisher of a seditious libel . . .

This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself: the great executive hand of criminal justice, the lord chief justice of the court of King's-bench, chief justice Scroggs excepted, never having assumed this authority . . .

If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.

If it is law it will be found in our books. If it is not to be found there, it is not law . . .

I answer [to the defense of long usage and practice in connection with the general warrant, that] there has been a submission of guilt and poverty to power and terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law which a few criminal book-sellers have been afraid to dispute.<sup>47</sup>

Thus was the conflict of ideologies, between the Crown and Parliament on the one hand and the common law on the other, resolved in England. It is of significance to note that these proceedings grew out of an attempt to enforce, upon common law principles, the odious provisions of one of the three statutes passed in 1662. Entick's victory, "regarded as one of the permanent monuments of the British Constitution,"<sup>48</sup> resulted in a definite change in Parliament's policy and the ultimate abandonment of the general warrant.<sup>49</sup>

The American story, while perhaps more important for our purpose, may nevertheless be more briefly told in the light of the foregoing account of English history. In the colonies the controversy over unreasonable search and seizure centered about the enforcement of another of the statutes of 1662, that for "preventing frauds and regulating abuses in his Majesty's customs,"<sup>50</sup> and resort to the judicial process here<sup>51</sup> did not achieve the freedom from oppressive practices attained in England by the *Entick* case.

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subject. If higher jurisdictions should declare my opinion erroneous, I submit as will become me, and kiss the rod; but I must say I shall always consider it as a rod of iron for the chastisement of the people of Great Britain.

47. 19 HOWELL'S STATE TRIALS 1063-1068.

48. *Boyd v. United States*, 116 U. S. 616, 626 (1886).

49. LASSON, *op. cit. supra* note 10, at 48-50.

50. 13 and 14 Charles II, Ch. 11 (1662); see footnote 42 *supra* for the enforcement provisions, relating to search and seizure.

51. *Paxton's Case*, Quincy's Reports (Mass.) 51 (1761) discussed more fully, *infra*.

By an Act of 1696 "for the more effectual preventing of frauds, and regulating abuses in the plantation trade in America," Parliament had extended the application of the 1662 statute to ships arriving in and departing from the colonies, rendering them "subject and liable to the same rules, visitations, searches, penalties and forfeitures" as in England.<sup>52</sup> Likewise extended and made applicable in the colonies was the power to search buildings for uncustomed goods and to have "the like assistance . . . given to the said officers in the execution of their office . . . as is provided for the officers in England." Whether this statute accomplished the purpose for which it was designed, as a strict matter of legal interpretation, seems at

52. 7 and 8 Charles II, Ch. 22 (1696). Sec. 6 is the specific provision, reading as follows:

And for the more effectual preventing of frauds, and regulating abuses in the plantation trade in America, be it further enacted by the authority aforesaid, That all ships coming into, or going out of, any of the said plantations, and lading or unlading any goods or commodities, whether the same be his Majesty's ships of war, or merchants ships, and the masters and commanders thereof, and their ladings, shall be subject and liable to the same rules, visitations, searches, penalties and forfeitures, as to the entring, lading or discharging their respective ships and ladings, as ships and their ladings, and the commanders and masters of ships, are subject and liable unto in this kingdom, by virtue of an act of parliament made in the fourteenth year of the reign of King Charles the Second, intituled, An Act for preventing frauds, and regulating abuses in his Majesty's customs: and that the officers for collecting and managing his Majesty's revenue and inspecting the plantation trade, any of the said plantations, shall have the same powers and authorities, for visiting and searching of ships, and taking their entries, and for seizing and securing or bringing on shore any of the goods prohibited to be imported or exported into or out of any the said plantations, or for which any duties are payable, or ought to have been paid, by any of the before mentioned acts, as are provided for the officers of the customs in England by the said last mentioned act made in the fourteenth year of the reign of King Charles the Second, and also to enter houses or warehouses, to search for and seize any such goods; and that all the wharfingers, and owners of keys and wharfs, or any lightermen, barge-men, watermen, porters, or other persons assisting in the conveyance of such goods, shall be subject to the like pains and penalties, as are provided by the same act made in the fourteenth year of the reign of King Charles the Second, in relation to prohibited or uncustomed goods in this kingdom; and that the like assistance shall be given to the said officers in the execution of their office, as by the said last mentioned act is provided for the officers in England; and also that the said officers shall be subject to the same penalties and forfeitures, for any corruptions, frauds, connivances, or concealments, in violation of any the before mentioned laws, as any officers of the customs in England are liable to, by virtue of the said last mentioned act; and also that in case any officer or officers in the plantations shall be sued and molested for any thing done in the execution of their office, the said officer shall and may plead the general issue, and shall give this or other custom acts in evidence, and the judge to allow thereof, have and enjoy the like privileges and advantages, as are allowed by law to the officers of his Majesty's customs in England.

best doubtful,<sup>53</sup> although at present, academic. As a matter of fact the odious writs of assistance did issue from the colonial courts of several of the colonies. They took their name from the fact that they commanded all of the king's representatives and subjects to aid their holders in executing them. The writs, wholly general as to the persons and places to be searched, and the things to be seized (beyond the requirement that they be uncustomed goods) were subject to the further criticism that once issued, they were not returnable, but remained as continuing licenses in the hands of their holders, expiring only at the end of six months after the death of the monarch in whose reign they were issued. They did not, however, authorize arrest, and while vessels might be searched at any time, buildings, dwellings, storehouses, etc., situated on land were to be searched only "in the day time."

Following the death of George II and the attendant expiration of outstanding writs issued during his reign, application was made to the superior court of Massachusetts for new writs for the customs officials there in 1761. By this date the smuggling of uncustomed goods, notably sugar and molasses from the non-British West Indies was no longer the harmless pastime it had been tolerated to be prior to the outbreak of the Seven Years War between England and France.<sup>54</sup> England, pressed by the exigencies of war, was resolved to enforce the provisions of the Molasses Act of 1733 although prior to 1760 they had been regarded so oppressively obnoxious that they were "enforced in lax fashion, evaded universally, and merchants resorted to petty bribery of custom officials."<sup>55</sup> The prospect of vigorous enforcement of this inequitable law, implemented by the writs of assistance, led indignant Boston merchants to oppose the application for renewal of the writs.

The controversy culminated in the now famous episode of *Paxton's Case*,<sup>56</sup>

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53. There are at least two points of doubt concerning the question. In the first place, the original act of 1662 designated the court of the exchequer as the agency to issue the writ of assistance; whereas the practice developed in the colonies for the colonial superior courts to issue the writ. Thatcher made this his principal point of argument in *Paxton's case*. See LASSON, *op. cit. supra* note 10, at 61-62. In the second place, there is real doubt whether even the original act authorized the type of writ that was thereafter issued both in England as well as the colonies. It has been forcefully argued that the law officer who was to "assist" was to do no more than witness the search carried on by the custom official, whereas, in fact, the writs as issued often to all subjects of the king and directed them actively to engage in the search. Thus the term "writs of assistance" sometimes appears as "writs of assistants." See DICKERSON, WRITS OF ASSISTANCE AS A CAUSE OF THE REVOLUTION, IN THE ERA OF THE AMERICAN REVOLUTION—a series of studies inscribed to E. B. Greene—40 *et seq.* (1939).

54. For an excellent account of the economic causes and scope of these activities, see McCLELLAN, SMUGGLING IN THE AMERICAN COLONIES (1912).

55. LASSON, *op. cit. supra* note 10, at 52.

56. Quincy's Reports (Mass.) 51 (1761). John Adams, who was present, made notes and they are contained in the Appendix to Quincy's Reports (*ibid.*) pp. 471 *et seq.* Another version, based upon an expansion of Adam's notes, is to be found in II MINOT, HISTORY OF MASSACHUSETTS, 1748-1765, 87-99. See also COMMAGER, DOCUMENTS OF AMERICAN HISTORY 45.

in which James Otis, representing the merchants, made his impassioned denunciation of the general warrant. Although no formal or official text of the argument was made or preserved, a number of unofficial versions prepared by contemporaries trace the development of Otis' argument. It proceeded upon the basis, later to be adopted by England's Court of Common Pleas in the *Entick* case with respect to the general warrants, that the writs of assistance were unknown to the common law (except for Scrogg's aberration, which he acknowledged) which sanctioned only special warrants, and then only "for flagrant crimes and in cases of great public necessity . . . upon process and oath . . . sworn to be suspected and good grounds of suspicion appearing." He contended also, concerning the permanency of the writs, that "If an officer will justify under a writ, he must return it." He insisted that the original Act of 1662 did not authorize the issuance of writs in the broad form that had developed in usage, but that customs officials were restricted to the use of the special writ authorized by an earlier statute of 1660.<sup>57</sup> And finally, in the alternative, he urged that if the act authorized these writs, it was void because opposed to Magna Charta and Coke's dictum in *Dr. Bonham's Case*, that "An act against the Constitution is void."

At the conclusion of the argument in February of 1761 decision was postponed to enable the court to obtain information from England concerning the precise nature of the practice of the court of exchequer there in such matters. In December of the same year, however, new writs were granted to Paxton on the basis of the information thus received.<sup>58</sup>

Despite the fact that he lost his case, Otis' argument is consistently cited, both in historical literature,<sup>59</sup> as well as in the cases arising under the Fourth Amendment,<sup>60</sup> in support of the proposition that the writs of assistance were a principal contributing cause of the revolution. John Adams, then a young man and a spectator at the argument, reported more than fifty years later:

I do say in the most solemn manner, that Mr. Otis' oration against the *writs of assistance* breathed into this nation the breath of life.<sup>61</sup>  
[Otis] was a flame of fire! Every man of a crowded audience

57. 12 Charles II, Ch. 19 (1661).

58. For an interesting account of what transpired in connection with the inquiry directed to England and the reply, see LASSON, *op. cit. supra* note 10, at 62-63.

59. "American histories without exceptions list writs of assistance as one of the active causes of the American Revolution. An examination of the treatment of this topic reveals that most of the material is drawn from Massachusetts experience and centers around the agitation in 1761 and especially the part taken by James Otis in that affair." DICKERSON, *op. cit. supra* note 53.

60. Otis' speech is expressly referred to in the following cases, *Boyd v. United States*, 116 U. S. at 625, *Marron v. United States*, 275 U. S. at 195 and in the dissenting opinions of Mr. Justice Frankfurter in *Davis v. United States*, 328 U. S. at 604, *Harris v. United States*, 331 U. S. at 157, and *United States v. Rabinowitz*, — U. S. at —, 70 Sup. Ct. at 436.

61. X ADAM'S WORKS 276, a letter to H. Niles.

appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.<sup>62</sup>

Yet, the skeptical may ask, why was revolution prolonged fifteen years if resistance to these burdensome writs had reached such a fevered pitch in 1761? And why is it there is no more tangible evidence of uniform resistance of a similar character outside the Massachusetts colony? History tells us that the writs did in fact continue to issue from at least some of the colonial courts and were used to enforce even more burdensome customs and taxes in subsequent years prior to the Revolution.<sup>63</sup> And we know further that smuggling continued in the colonies in evasion of these heavy customs duties.<sup>64</sup> The answer to these questions is not easily obtainable, but the notion nevertheless persists that there was opposition to the writs, else why was unreasonable search and seizure made the entire subject of a single amendment when other highly cherished freedoms, such as those relating to speech, religion, press and trial by jury were lumped in together with others when the Bill of Rights was drafted? The true answer to these questions seems to be disclosed by Professor Dickerson in his comparatively recent study<sup>65</sup> indicating that the resistance was converted into a sort of judicial "underground" movement following the Massachusetts incident, with the colonial courts playing the part of the opposition by simply failing to act upon or by actually denying the applications for the writs when made by the customs officials. Apparently the writs were never applied for in New Jersey or North Carolina. Massachusetts, as already indicated, issued the writs in the *Paxton* case, and New Hampshire and New York followed her lead. The judges of the other colonial courts, however, were more impressed with the merits of Otis' argument, and there developed a form of judicial opposition ranging from inaction, to protracted delay, to outright refusal to grant the applications.

The courts of Rhode Island, Connecticut and Maryland simply failed to take any action with respect to the customs officials' applications; the courts in Pennsylvania and Delaware, upon being pressed for action by these zealous officials, denied the applications, and similar denials were also made in later years in Georgia and Florida following probably a contrary practice at first. In Virginia the court promptly agreed to issue warrants but directed the attorney general to prepare one which conformed to its standards of legality.

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62. *Id.*, at 247-248, a letter to William Tudor.

63. The Sugar Act of 1764, The Stamp Act of 1765, The Townshend Acts of 1767 and 1768.

64. McCLELLAN, SMUGGLING IN THE AMERICAN COLONIES, Ch. III; LASSON, *op. cit. supra* note 10, at 67.

65. DICKERSON, *op. cit. supra* note 53, at 40-75.

The writ thus granted was special and returnable, in the form authorized by the earlier statute of Charles II which Otis had relied upon in his argument.<sup>66</sup> The customs officials found themselves, so equipped, to be seriously impeded in the effective enforcement of the laws, and made application for a writ in the usual form in which it issued in England. Their new applications were denied and correspondence with the King's Attorney General in England ensued. In a long and revealing letter of reply,<sup>67</sup> the Attorney General advised the customs officials of the law as it was construed and applied in England authorizing the writ, and directed them to re-apply for the broader writ which was again and emphatically denied by the Virginia court.

Although it appears that there was a considerable element of spontaneity surrounding this pattern of judicial resistance to applications for the writs, based upon judicial conceptions of their fundamental illegality, there is also some evidence of concert of action. Chief Justice Trumbull of the Connecticut court "entered into correspondence with judges in other colonies to find out how they proposed to rule on the question. Some of his letters indicate that this correspondence was intended to unite all the courts in America in uniform opposition."<sup>68</sup>

Thus it was that the opposition to the writs was transferred from the comparative notoriety of the open courtroom of Otis' day<sup>69</sup> to the more quiet and secluded inner sanctums of judges' chambers, the offices of attorneys general and clerks of courts in the years that followed. So effective had this opposition become that Dickerson concludes, "The evidence indicates that the outbreak of the Revolutionary War alone averted efforts to secure judicial changes that would have forced American judges to comply with the official British interpretation of law."<sup>70</sup> In this manner the opposition to the writs

66. See note 57 *supra*.

67. The letter of opinion concludes with the following paragraph:

The Supreme Court of Virginia seems to have proceeded upon a mere mistake of the law. They have issued an illegal warrant, proceeded on an obsolete law, the 12 C 2 c 19; at the same time refusing to issue a lawful one on 13th C 2 c 11 not observing as it would seem, that the first Act has a different object, and proceeds by different means. These were found useless and inconvenient, and to remedy the mischief, the second act was made on which the present Writ of Assistance in England is founded. This kind of authority has been in constant use above a century, has often been recognized and confirmed by judicial decisions; and it seems strange indeed, that any judge in the colonies should think the laws of the mother too harsh for the temper of American Liberty. I am therefore inclined to suppose that they proceed upon a mere mistake of the Law.

DICKERSON, *op. cit.*, *supra* note 53, at 70-71.

68. *Id.*, at 53. See also p. 63.

69. There is even reason to speculate concerning the degree of publicity accorded Otis' famous speech, since it was delivered in a small courtroom, attended by comparatively few persons and not reported in the press at the time. See DICKERSON, *op. cit. supra* note 53, at 42-43.

70. *Id.* at 75.



was effectively continued, with the leading roles being played by lawyers and observed by lawyers—a group which later had a very substantial part in the drafting of the Constitution and the Bill of Rights. In fact Chief Justice Trumbull, his judicial colleague, Roger Sherman, and William S. Johnson, Connecticut's colonial agent in London, between whom correspondence passed concerning the writs, were all three elected to the First Congress which proposed the Fourth Amendment.<sup>71</sup>

Based upon the history reviewed to this point there seems little doubt that the Fourth Amendment's framers had at least two objectives in mind as they approached their task. First, they clearly intended to prohibit the use of general warrants and writs of assistance as means of law enforcement; and, second, in the fulfillment of this end, they intended that the guilty should be protected as well as the innocent. In fact, it is not too much to say that protection of the guilty was a matter of particular concern. Wilkes and Entick were harrassed by general warrants because of their publication of seditious libels; and the American colonists were being similarly harrassed by the writs of assistance in connection with their smuggling activities in violation of existing customs laws. It is true, of course, that these laws were considered burdensome and oppressive, but nevertheless, they were the valid and existing laws of the land,<sup>72</sup> to be obeyed, altered or repealed by orderly political processes, or rendered inapplicable by revolution.

With at least this much of an objective in mind the members of the First Congress set about their task. Was the goal accomplished? It is submitted that it was, *and a great deal more!* On August 17, 1789, the House of Representatives, sitting as a Committee of the Whole, came to consider the proposal that ultimately emerged as the Fourth Amendment, which read as follows:

The right of the people to be secured in their persons, houses, papers, and effects; shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.<sup>73</sup>

At this point Gerry objected to what he presumed to be a mistake in the opening phrase and proposed its amendment to read "The right of the people to be *secure*, in their persons, houses, papers, and effects, *against unreasonable*

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71. I BENTON, ABRIDGMENT OF THE DEBATES OF CONGRESS 20.

72. Some doubt exists concerning the validity of the seditious libel laws under which Wilkes and Entick were prosecuted in view of the expiration of the statute creating them and their extremely tenuous common law footing at the date in question. It is probable, however, that their offenses were common law crimes. See VIII HOLDSWORTH, HISTORY OF ENGLISH LAW 336-346 (1871).

73. ANNALS OF CONGRESS, 1st Congress, 1st Session, p. 783.

*seizures and searches*" etc.<sup>74</sup> (emphasis added) The amendment carried, and then:

Mr. Benson objected to the words 'by warrants issuing.' This declaratory provision was good as far as it went, but he thought it was not sufficient; he therefore proposed to alter it so as to read 'and no warrant shall issue.'

The question was put on this motion, and lost by a considerable majority.<sup>75</sup>

Nevertheless, on August 24, when the Committee of Three, appointed to arrange the amendments as agreed upon, Benson, as its chairman reported the Fourth in the form in which his motion would have cast it, but which had been defeated. The change apparently went unnoticed, and as the Amendment, so worded, was adopted by the Senate, with the House thereafter concurring on the full bill of ten amendments, it became a part of the Constitution when ratified by the states, notwithstanding the rejection of Benson's proposal by the House when originally made.

The significance of this incident is extremely far reaching, as Benson himself contemplated. The amendment as first proposed did no more than protect the people against the evils of general warrants and writs of assistance by prescribing the basic elements of a valid warrant. Even the Gerry amendment's reference to "unreasonable seizures and searches" was simply "declaratory," and while "good as far as it went," it failed to go far enough to accomplish Benson's purposes, namely to create two distinct rights rather than one. His proposal has the necessary effect of creating a wholly independent right of freedom from unreasonable searches and seizures, completely separate from the designation of requirements for valid warrants; the Amendment in the form adopted contains these two clauses rather than the single one in which form it originated. Thus it came to pass that the Amendment offers two guarantees: one that all warrants shall hereafter be specially issued under the safeguard of oath, probable cause and particularity *plus* the other, that *no* searches or seizures shall be made, even with an otherwise valid warrant, if they are unreasonable.

The significance of this "double barrelled" aspect of the Amendment has not been overlooked by the commentators. It has been asserted that in practical application: (1) the Amendment's first clause prohibits a search for mere evidence even though the warrant authorizing it be valid, and (2) the second clause prohibits the seizure of persons or property (a) without a warrant, or (b) under a warrant authorizing the search for and seizure of other or different persons or property.<sup>76</sup> To what extent have these observations

74. *Ibid.*

75. *Ibid.*

76. See Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 366, 379 (1921); Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 15-27 (1931); 1 Cooley, *Constitutional Limitations* 424-434 (4th ed.), 610-636 (5th ed.); Black, *Constitutional Law* 606-616 (1927).

been confirmed by the courts? For the answer to this question let us turn now to a consideration of the cases.

### THE CASES

For a better analysis of the issues involved, the discussion of the cases is divided into four sections. The first concerns the application of the Amendment to individuals in cases where there is no incidental arrest. The second analyzes the scope of the Amendment as applied to corporations. The cases involving searches and seizures incidental to arrest are discussed in the third section. And the fourth treats the remedial problem.<sup>77</sup>

#### *Case Involving Individuals and No Incidental Arrest*

Almost a century passed between the ratification of the Amendment and 1886, when the Supreme Court in *Boyd v. United States*<sup>78</sup> rendered the first important interpretative decision. The principal reason contributing to the delay undoubtedly is that the Fifth Amendment's protection against self-incrimination, entwined as it is with the Fourth's freedom from unreasonable search and seizure, was not drawn into question until after the enactment of federal legislation in 1878, permitting a defendant in a criminal case to testify at his own request.<sup>79</sup> The intermingling of the provisions of the two Amendments is well illustrated by the *Boyd* case, where the action was for forfeiture of certain goods alleged to have been imported by the defendants in violation of the custom law. Pursuant to an act of Congress the government moved that the defendants be ordered to produce certain documents in their possession, which if not produced would, under the statute, be conclusively presumed to contain the matter alleged by the prosecution. It was contended in defense that so to compel the defendants to make available their books, papers and records in a forfeiture proceeding was to compel them to give testimony against themselves in substantiation of the charges made, contrary to the Fifth Amendment's self-incrimination clause. The Court was unanimous in sustaining the defendants' contentions based on the Fifth Amendment; but seven of the judges went further, holding that the act of Congress authorized an unreasonable search and seizure in violation of the Fourth Amendment as

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77. Literal and precise compartmentalization along the lines indicated is, of course, neither entirely possible nor wholly desirable, and some admixture of the cases will be found, but in the main, the cases will be taken up and discussed in the order mentioned.

78. 116 U. S. 616 (1886). In two earlier decisions the Court had held that the Amendment applied only to criminal proceedings and had no relation to civil proceedings for the recovery of delinquent taxes, *Murray v. Hoboken Land Co.*, 18 How. 272 (U. S. 1855). Cf. *District of Columbia v. Little*, 178 F.2d 13 (D. C. 1949) *aff'd on other grounds*, — U. S. —, 70 Sup. Ct. 468 (1950); and that letters and packages committed to the United States mail, and not subject to inspection, could not be opened without a warrant, *in re Jackson*, 96 U. S. 727 (1877).

79. 20 STAT. 30 (Act of March 16, 1878, c. 37). See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1; 11, 13 (1931).

well. The Court's opinion, written by Mr. Justice Bradley, reviewed the English and early American history, the *Entick* case and Otis' argument in *Paxton's Case* and observed that, while no physical search or seizure had occurred here, nevertheless, ". . . a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be; because it is a material ingredient and effects the whole object and purpose of search and seizure."<sup>80</sup> And it was further emphasized that "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property" which lies at the root of the interest intended to be protected, so that "In this regard the Fourth and Fifth Amendments run almost into each other."<sup>81</sup> It is extremely important to note that the Court regarded the invoice in question as a "private paper" and as such immune from the constructive search although it was the instrument by which the importation of the dutiable goods was effected, and by means of which the property subject to forfeiture would be identified.

Here then, in the first important case arising under the Amendment, is a clear recognition of complete freedom from search for and seizure of papers which are sought for the sole purpose of being used as evidence to establish proof of the commission of an offense. Such a search and seizure, although merely *constructive*, is unreasonable and prohibited by the first clause of the Amendment. While no warrant was involved, the case holds that a federal court, even though authorized by a Congressional act, may not order the production of documents for the purpose involved in *Boyd* without infringing the freedom so protected. But was it to be expected that a search warrant, executed in accordance with the formalities of the Amendment's second clause, could accomplish what the order of the trial court in the *Boyd* case did not? When finally confronted with this precise question in the *Gouled* case<sup>82</sup> in 1921, the Court answered emphatically in the negative. *Gouled* was indicted and convicted of defrauding the government in connection with certain contracts to furnish clothing to the Army. A search warrant, properly executed, had issued prior to the indictment and in the course of the execution of it, federal officials had seized copies of contracts and a bill for attorney's fees alleged to have connection with the fraud. No question was raised concerning the sufficiency of the warrant to cover the search for and seizure of these papers. The following question was certified by the circuit court of appeals: "Are papers of no pecuniary value but possessing evidential value against

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80. 116 U. S. at 622.

81. *Id.* at 630.

82. *Gouled v. United States*, 255 U. S. 298 (1921).

persons presently suspected and subsequently indicted \* \* \* when taken under search warrants issued [under the Search Warrant Act of 1917] from the house or office of the person so suspected,—seized and taken in violation of the 4th Amendment?"<sup>83</sup> The Court stated that "the answer to the question must be in the affirmative."<sup>84</sup> The government had argued that the Congressional act expressly authorized search warrants for property which had been used in the commission of a felony. It was argued, and the Court acknowledged, that property such as counterfeit coin, burglars' tools and weapons, implements of gambling and the like might be seized under properly executed search warrants. However, the Court regarded the use of warrants in such cases to be limited to situations in which "a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd Case*, pp. 623, 624."<sup>85</sup> While denying the existence of such a situation in *Gouled*, the Court said: "we cannot doubt that contracts may be so used as instruments or agencies for perpetrating frauds upon the Government as to give the public an interest in them which would justify the search for and seizure of them, under a properly issued search warrant, *for the purpose of preventing further frauds.*"<sup>86</sup> (emphasis added) Indeed, had the government's theory concerning the nature of the papers in *Gouled* been sustained, it would have necessitated the overruling of the *Boyd* case, since the invoice in question there was just as much an instrument of the crime as the contracts and fee bill in *Gouled*. The importance of this point must not be overlooked, and it will be alluded to again momentarily.

A second issue in the *Gouled* case involved other papers taken without the sanction of a warrant at all, but by stealth on the part of a federal representative who was a business acquaintance of the defendant, sent to the defendant's place of business under instructions of his superior officers, pretending to make a friendly call. In the light of the history, purpose and language of the Amendment, the Court had little difficulty in concluding that its provisions run not only to searches and seizures accompanied by force and violence, but extend as well to those accomplished by stealth or compromise of friendship. In the *Amos*<sup>87</sup> and *Silverthorne*<sup>88</sup> cases, decided substantially contemporaneously with *Gouled*, and in the earlier case of *Weeks v. United States*,<sup>89</sup> the

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83. 255 U. S. at 309-310.

84. *Id.* at 311.

85. *Id.* at 309.

86. *Ibid.*

87. *Amos v. United States*, 255 U. S. 313 (1921).

88. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

89. *Weeks v. United States*, 232 U. S. 383 (1914).

Court reached similar conclusions respecting evidence obtained without warrants or orders of any kind. In the *Amos* case, federal officers had called at the defendant's home during his absence and upon identifying themselves, were admitted by "a woman who said she was his wife."<sup>90</sup> They thereupon proceeded to make a thorough search of the premises and found and seized a quantity of illicit liquor. Defendant's seasonable motion for the return of the liquor was denied, it was offered in evidence at the trial of his indictment for its possession, and he was convicted. The Court reversed the conviction with the statement that the search and seizure was "in plain violation of the Fourth and Fifth Amendments."<sup>91</sup> The *Silverthorne* case is only slightly more complicated. There a father and his son were arrested at their home, and while in custody, federal officials went to the office of a corporation, of which they were apparently officers, and without any warrants or authority whatsoever, took all books, papers and records to be found. A motion for the return of these documents was made, and was opposed by the Government; while the motion was pending, photographs and copies of all the papers were made and new indictment was prepared against the defendants on the basis of the information so obtained. The court subsequently ordered the return of all the papers, and thereafter issued a subpoena ordering the defendants to produce the originals in the course of the new prosecution. Upon their refusal to do so, they were punished for contempt. The Supreme Court reversed, admonishing the Government that it may not do indirectly what the Amendment forbids to be done directly:

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act. \* \* \* In our opinion such is not the law. It reduces the Fourth Amendment to a form of words.<sup>92</sup>

It was likewise acknowledged here as it has been in other cases both before and since, that corporations are, with some limitations not applicable to individuals, protected by the Fourth Amendment's search and seizure clause despite their inability to invoke the Fifth Amendment's guaranty against self-incrimination.<sup>93</sup>

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90. There is nothing further in the report to shed any light upon the intriguing possibilities suggested by this designation.

91. 255 U. S. at 315-316.

92. 251 U. S. at 391-392.

93. The history of corporate experience with the Fourth Amendment is a story complete in itself, and no attempt is made to treat it here. The following cases should be consulted. *Hale v. Henkel*, 201 U. S. 43, 75 (1906); *Wilson v. United States*, 221 U. S.

The *Weeks* case had presented a *Silverthorne* situation in reverse. There the defendant was arrested at his place of business on a charge of having used the mails for the transportation of lottery tickets and simultaneously another group of federal officers searched his home without a warrant seizing a large number of articles including both personal effects as well as certain lottery tickets, the subject of the offense charged. The Court held it was error for the trial court to deny the defendant's motion for the return of all these articles—including the contraband tickets since the search was conducted without a warrant.

One further case that must be considered at least in part here is *Marron v. United States*<sup>94</sup> although, involving as it does a seizure incidental to arrest, it will reappear in the discussion in the next section where it plays a more important role. In *Marron*, federal prohibition officers, armed with a valid warrant to search for and seize "intoxicating liquors and articles for their manufacture," went to the defendant's place of business for the purpose of executing the writ, and while there observed the defendant in the act of making illegal sales of liquor. The defendant was arrested, having committed a felony in the presence of the officers, and the search proceeded, resulting in the seizure, not merely of liquors, as described in the warrant, but of "a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers and other things relating to the business" as well as certain bills "for gas, electric light, water and telephone service furnished on the premises." A motion for the return of the ledger and bills was denied, they were offered in evidence at the trial and a conviction resulted. In reviewing the action of the trial court, Mr. Justice Butler, speaking for a unanimous Court, said:

The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. \* \* \* And it is clear that the seizure of the ledger and bills, in the case now under consideration, was not authorized by the warrant.<sup>95</sup>

If we halt our examination of the cases at this point and seek to formulate a rule, or rules from the five decisions just considered, for the purpose of appraising the recent activity of the Court, it would seem that we might conclude that: (1) Searches for and seizures of property of *any kind* (i.e., contraband articles such as illicit liquor and lottery tickets, as well as harmless

361 (1911); *Essgee Co. v. United States*, 262 U. S. 151 (1923); *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298 (1924); *Brown v. United States*, 276 U. S. 134 (1928); *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186 (1946).

94. 275 U. S. 192 (1927).

95. *Id.* at 196, 198. However, the Court did sustain the validity of the seizure as an incident to a lawful arrest. This aspect of the case is treated in the next section.

personal papers or chattels) are forbidden when undertaken without a warrant—*Weeks, Amos, Silverthorne and Gouled* (in part); (2) Searches for and seizures of goods of one description are prohibited under a valid warrant authorizing the seizure of goods of another description—*Marron*; and (3) Searches for and seizures of property which has evidential value only are prohibited, even though undertaken pursuant to (a) a court order based upon statute—*Boyd*, or (b) a valid warrant—*Gouled*. It is in the formulation and application of the first and third rules that principal difficulty is encountered when the recent decisions of the Court are considered.

The most difficult case to reconcile with the rules is the 1946 four to three decision in *Zap v. United States*.<sup>96</sup> Zap had been awarded a Navy contract to conduct test flights and perform other experimental aeronautical work. He hired a test pilot to do the actual flying, had him endorse a check in blank which Zap later filled in for \$4,000 and reported as an item of expense on his cost-plus-fixed-fee contract, although the test pilot was actually paid only \$2,500. While inspecting Zap's accounts agents of the Navy and the Federal Bureau of Investigation discovered this fraud, and the cancelled check was taken and later introduced in evidence at Zap's trial after he had unsuccessfully moved for its return. Both the conviction and the action of the trial court in refusing to order the return of the check were affirmed. Conceding the check was taken without a valid warrant,<sup>97</sup> the Court held that the search being legal (Zap is said to have consented to an inspection as a condition of the award of the contract), the officers might have testified concerning what they saw in the course thereof and, further, "Had the check been returned to petitioner on the motion to suppress, a warrant for it could have been immediately issued,"<sup>98</sup> citing the Search Warrant Act of 1917,<sup>99</sup> the very provision upon which the government had relied in its unsuccessful argument in the *Gouled* case. The two cases are so much alike on their facts it would be expected that *Gouled* would have been overruled or at least discussed, but it is not even cited—by majority or dissent. Certainly if the contract and fee bill in *Gouled*, seized under a properly executed warrant, could not be offered in evidence, it is hard to see why the cancelled check in *Zap*, seized without a warrant, could be so used. The majority's statement that it *could* have been seized under a proper warrant on the theory that it was property used "as the means of committing a felony" overlooks two very important facts, (1) that it was *not* seized in this fashion, and (2) that the

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96. 328 U. S. 624. (1946). Justices Black, Reed and Burton joined with Douglas who wrote the majority opinion. Justices Murphy and Rutledge concurred in Frankfurter's dissenting opinion. Justice Jackson did not participate and the vacancy created by the death of Chief Justice Stone had not been filled.

97. *Id.* at 628, n. 5.

98. *Id.* at 629.

99. 40 STAT. 228; 18 U. S. C. § 612.



Court had considered this very argument in *Gouled* where similar documents had been seized under a valid warrant and had rejected it. Two questions beg to be answered: (1) where was the "properly issued warrant," and (2) what further frauds could Zap have perpetrated with his cancelled check?

In the light of the decision in *Zap*, let us briefly re-examine the cases upon which the rules were formulated in order to determine the extent to which inroads have been made upon them. Rule one forbids the search and seizure of property of any kind without a valid warrant, whether it be private papers of the most personal sort; corporate or individual papers having some relation to the commission of an offense, as in *Silverthorne* and *Gouled*; or actual contraband items, such as the illicit liquor in *Amos*, or the lottery tickets in *Weeks*, possession of which is itself a crime, or which, in the public interest may be searched for and seized under a valid warrant issued in accordance with the safeguards imposed by the Fourth Amendment. The Court in *Zap* expressed no affirmative purpose to overrule these long-standing authorities interpreting and applying the Amendment's terms, but it is submitted that to condone failure to resort to warrant procedure simply because the officers were lawfully aware of the existence of Zap's check, is tantamount to the same thing. The officers in *Weeks*, *Amos*, *Gouled* and *Silverthorne* lawfully knew (or at least had sufficient information for obtaining warrants) of the existence of the property seized in those cases, but their failure to secure warrants resulted in the exclusion of the property seized as evidence in those cases. The significance of the Court's departure from the principles of the Amendment as construed by these earlier cases was forcefully called to its attention by Mr. Justice Frankfurter in his dissenting opinion in the *Davis* case, decided the same day, when he cautioned that:

It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. See Mr. Justice Miller, in *Boyd v. United States*, 116 U.S. 616, 638, 641. Thus it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. E.g. *Gouled v. United States*, 255 U.S. 298. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure, e.g. *Amos v. United States*, 255 U.S. 313, *Byars v. United States*, 273 U.S. 28, *Taylor v. United States*, 286 U.S. 1. And a search may be improper because of the object it seeks to uncover, e.g. *Weeks v. United States*, 232 U.S. 383, 393-394, or because its scope extends beyond constitutional bounds, e.g. *Agnello v. United States*, 269 U. S. 20.<sup>100</sup>

The Court has indeed blurred the distinctions to which Mr. Justice Frankfurter refers, and by so doing, has substantially restricted the scope of operation of rule one. The extent of this restriction depends largely upon the nature of the limitations which *Zap* imposes on rule three.

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100. 328 U. S. at 612.

Rule three prohibits searches for and seizures of property which has evidential value only, even though undertaken pursuant to either a court order based on a statute, as in *Boyd*, or under a valid warrant, as in *Gouled* (as to the contracts and the fee-bill). Accordingly, as to this phase of our examination of *Zap* we may assume the validity of the Court's premise that the search was properly authorized, and limit our inquiry to the single issue whether the seizure of the cancelled check was lawful. The constructive search in *Boyd* as well as the physical search and seizure in *Gouled* were likewise properly authorized, but in both cases the objects of the search were held to be within the Fourth Amendment's protection and hence immune from seizure.

In *Boyd*, it will be recalled, the court regarded the invoice as a "private paper," and concluded that it could not be seized, while acknowledging that other types of property might be, in the following language:

The principal question, however, remains to be considered. Is a search and seizure, or what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding? It is contended by the counsel for the government, that it is a legitimate proceeding, sanctioned by long usage, and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage. . . . But we do not find any long usage, or any contemporary construction of the Constitution, which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued did not go as far as this, but only authorized the examination of ships and vessels, and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses; for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited

for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.<sup>101</sup>

The Court seemingly overlooked the fact, noted by Mr. Justice Frankfurter in his dissenting opinion in *Shapiro v. United States*,<sup>102</sup> that the invoice was a record required by law to be kept, and was, to that extent at least, a record in which the public had an interest. Thirty-five years later in the *Gouled* case, the Court referring to the *Boyd* passage quoted above, had intimated that papers or records in which the public had such an interest might be seized in the course of a properly safeguarded search "for the purpose of preventing further frauds." While, as previously stated, it is difficult to envision just what further frauds Zap could have perpetrated with his cancelled check, it must be conceded that it was a paper or record in which the public had an interest, and to that extent had significance beyond its mere evidential value to the prosecution. Certainly, it more nearly fits the description of an "instrument used for the commission of a felony," than the invoice in *Boyd*. More doubt arises concerning its closer approximation of that phrase than the papers seized in *Gouled*, but even there the metaphor was more strained.

Rule three, therefore, upon close examination would seem to have survived Zap with only slight, if any, damage. Books, papers or documents, which are used as the means of committing a felony, take their place along side of contraband, and may be seized because in addition to their value as evidence, there is a coexisting public interest in them, *provided* the extortion is authorized by law. Was there such authorization in Zap? The majority pointed to the statutes authorizing the inspection and audit of government contractors' books<sup>103</sup>—but the provisions of these acts simply authorize a "search" and make no provision respecting seizure. It was at this point, of course, that rule one prohibiting *any* seizure without a warrant was violated, as previously discussed. However, a modification of rule two, or a variation of it, also occurred at this juncture.

Rule two, it will be recalled, forbids searches for and seizures of property of one description under valid warrants authorizing the seizure of another. Here we were confronted with a valid search, authorized by law, rather than a specific warrant which conferred no power of seizure whatsoever. Certainly, it must be admitted that, "If . . . a search instituted under the legal process of a warrant, which also authorizes seizure, does not permit

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101. 116 U. S. at 622.

102. 335 U. S. 1, 67 (1948).

103. Act of July 2, 1926; 44 STAT. 787, § 10(b), U. S. C. § 310(1). Title XIII, § 1301, Second War Powers Act of March 27, 1942, 56 STAT. 185, 50 U. S. C. App. Supp. IV, § 643.

seizure of articles other than those specified (as in *Marron*, then) statutory and contractual authority merely to search cannot be sufficient to grant that power."<sup>104</sup>

Summarizing the discussion of this section, it may be said that the principles established by the non-arrest cases in the period between 1886 and 1927 were, in 1946, being subjected to serious limitations, primarily as a result of the decision in *Zap*. Rule three had been modified to place what had theretofore been regarded as personal papers, on the same footing as contraband articles, and to the extent of that modification, rules one and two were being ignored.

### *Cases Involving Corporations*

Of the fourteen post-1945 cases arising under the Fourth Amendment, three involved corporations which were required to submit corporate data in response to governmental demands—warrants were not involved in any of the cases. All three of the cases raise a question concerning the application of the third rule just set forth, since they compelled the production of corporate records to be used as evidence in proceedings directed toward the enforcement of federal laws.

In *Oklahoma Press Publishing Co. v. Walling*,<sup>105</sup> the Administrator of the Wage and Hour Division of the Department of Labor had issued his administrative subpoena to the defendant, ordering it to produce certain records required by the Wage-Hour Law to be kept by all employers subject to its provisions. Following the defendant's refusal to produce the records, the Administrator, in accordance with statutory prescription, had applied to a federal district court for an order compelling obedience to the subpoena. The Court affirmed the action of the lower courts in granting the application over the defendant's objections based, inter alia, on the Fourth Amendment's search and seizure provisions. Said Mr. Justice Rutledge:

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which could invalidate them.<sup>106</sup>

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104. Mr. Justice Frankfurter dissenting in *Zap v. United States*, 328 U. S. at 632 (1945).

105. 327 U. S. 186 (1946).

106. *Id.* at 195.

Of course, such a "short answer" might have been given in the *Boyd* case, but was not as we have already seen—and this was realized by Mr. Justice Rutledge who then proceeded with his treatment of the case in detail—a treatment which fills twenty-two pages of the reports. The *Boyd* case, of course, was distinguishable since it involved the Fifth Amendment's self-incrimination clause, not applicable to the corporate defendants here. There was, however, language as well as express rulings in the cases to the effect that the Fourth Amendment's freedoms were not wholly unavailable to corporations, and it was with respect to the limits of this doctrine that Mr. Justice Rutledge addressed himself, ultimately concluding that in such cases its protection "if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant."<sup>107</sup> The requirement of "probable cause" he held to be satisfied "in that of an order for production by the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."<sup>108</sup>

In *United States v. Wallace & Tiernan Co.*,<sup>109</sup> corporate records had been subpoenaed and presented before a grand jury which thereafter returned an indictment against the corporation for violations of the anti-trust laws. The indictment was subsequently dismissed because women had been systematically excluded from the grand jury panel. Upon the dismissal, the Court granted the corporation's motion for the return of the records which had, in the interim, been copied and photostated by the government. Thereafter the government instituted the present case, a civil proceeding to restrain violations of the anti-trust laws, and sought by a subpoena to compel the production of the records for use as evidence in the case. A motion to quash the subpoena on the theory that it was forbidden by the decision in the *Silverthorne* case was sustained by the trial court but reversed by the Supreme Court on appeal. The cases are clearly distinguishable, as the Court remarked—the government in this case having had valid and legal possession of the records at the time the copies were made, whereas the *Silverthorne* records were obtained without shadow of legal right. On the broader question—whether the judicial process by which the records were obtained in the first place violates the third rule set out above—the Court, acknowledging that the Fourth Amendment affords some protection to corporations, alluded to the restrictions which have been placed upon that protection by its decision in *Oklahoma Press*, none of which were alleged to have been infringed here. In *United States v. Morton Salt*

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107. 327 U. S. at 208.

108. *Id.* at 209.

109. 336 U. S. 793 (1949).

*Co.*,<sup>110</sup> a corporate defendant in a civil suit was compelled by injunction to furnish the Federal Trade Commission with reports of its business showing that it was complying with a cease and desist order previously issued by that agency. Again the Court referred to the limited nature of the protection afforded corporations by the Fourth Amendment, and concluded on this point, that "Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."<sup>111</sup>

If it be conceded that corporations may invoke the protection of the Amendment, then these cases on their faces seem to do some violence to the third rule which was extracted from the early case. However, it is submitted that the results of these cases is wholly consistent with what was *said* if not with what was *done* in *Gouled*. It will be recalled that the Court there, in rejecting the government's argument that the papers should be regarded as property used in the commission of a felony, had expressly reserved judgment with respect to papers which might be a potential means of continuing fraud. As such, it was intimated, papers might fall into the general category of contraband articles, the continuing possession of which is a threat to law and order, and seizure of which is therefore proper in the public interest. It would appear that in each of the three corporate cases just discussed, a similar consideration is present. All three of the cases involved the enforcement of Congressional acts regulating interstate commerce; *Oklahoma Press* involved records which were required to be maintained by law, and which, also by law, were to be made available in the manner ultimately compelled; *Wallace & Tiernan* involved records which were allegedly being used for the continuing purpose of violating the provisions of the anti-trust laws; and similar records were involved in *Morton Salt* (Federal Trade Commission Act). In each case, therefore, we were confronted with a legislative enactment, which, in the public interest declared certain acts to be unlawful, and the records in these cases were the means for the continuing frustration of that policy—hence subject to seizure in appropriate manner—whether by properly executed warrant, order of court on application of the enforcement officials, or by injunction following a hearing. In any case, the hand of a magistrate was interposed between the law enforcement officer and the defendant's property. Finally, it is extremely important to detect the note of doubt in the opinions in all recent cases involving corporations, respecting the broader issue whether the Amendment was ever in fact intended to apply to corporations. To date the principle has not been overturned, but restrictions have mounted until, in contrast with application to individuals, the Amendment truly may be said

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110. — U. S. —, 70 Sup. Ct. 357 (1950).

111. *Id.* at —, 70 Sup. Ct. at 369.

to pose a dual standard. To the extent to which this principle of limitation as applied to corporations may inadvertently or subconsciously influence the Court in its handling of cases involving individuals, it is perhaps desirable to renounce the principle that the Amendment has any corporate application.

For further evidence of the extent to which the Fourth Amendment's freedoms have been relegated to second-class constitutional rights, let us turn now to the cases involving searches and seizures incidental to arrest.

#### *Cases Involving Searches and Seizures Incidental to Arrest*

In approaching a consideration of the cases in this section, it should be recalled that in two of the cases discussed in the first section, searches and seizures were made chronologically, though not physically, coincidental with arrests. In *Weeks* and *Silverthorne*, defendants were lawfully arrested at their places of business and their homes, respectively, and in each instance the homes and offices, again respectively, were simultaneously searched and articles seized, which, for lack of proper warrants in the hands of the officers, were required to be returned to their owners. The clear basis of decision in each case was that the defendant's freedom from unreasonable search and seizure had been violated by non-compliance with Fourth Amendment requirements—regardless of the character of the property seized. In the process of coming to its decision in the *Weeks* case, the opinion of the Court contains the following passage:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases.<sup>112</sup>

Three important facts should be emphasized concerning this dictum, first, notwithstanding the reference to "many cases" sustaining the proposition asserted, the Court cited only two texts and one English decision but no previous decisions of its own for the good reason that there were none at this time; second, the suggestion extends only to the search of the *person* as an incident of arrest; and third, the Court was clearly stating what the *Weeks* issue *was not*, rather than what it *was*. When it turned to that issue, "the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence [as well as the lottery tickets] of the accused, seized in his house in his absence and without authority," its decision was unqualified that "not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal to thus invade the house and privacy of the accused."<sup>113</sup>

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112. 232 U. S. at 392.

113. *Id.* at 393-394.

The *Agnello* decision<sup>114</sup> in 1925 added not one whit to the law of the cases expounding the Fourth Amendment's principles, but did contribute further, equally irrelevant, dicta to that first announced in the *Weeks* case. For our purposes the greatest significance of the *Agnello* incident is the faith with which the prosecution not only relied upon the *Weeks* dictum but sought to extend it, all to no avail. The facts of the case were these: government agents, suspecting the defendants of unlawfully selling drugs, employed two persons to arrange to make a purchase from them, and stood outside the premises at the appointed time to observe the transaction. Defendant C left the premises, (for the purpose of obtaining the drug) and was followed by government agents who observed him enter his own home several blocks away, emerge therefrom, cross the street and enter defendant A's home. Both defendants C and A (with others) then emerged from A's home and returned to and entered the appointed premises, where the officers, looking through the window, observed defendant A hand small packages over to the government's stooges who paid money to another defendant. The officers broke and entered the premises, seized the packages which were found to contain drugs, arrested all defendants and indicted them for conspiring to sell unregistered and untaxed drugs in violation of federal law. In the course of the trial the government was permitted, over objection, to introduce into evidence a quantity of the drug which had been searched for and seized without warrants of any kind in defendant A's bedroom at the conclusion of the episode just described. It was the government's theory that "An officer who arrests a person for felony committed in his presence may search not merely the person, but also the place where he is discovered, and other places in the immediate vicinity which are clearly indicated as having formed part of the scene of the crime."<sup>115</sup>

In this fashion the government sought at the first opportunity<sup>116</sup> to turn a loosely phrased dictum into an even broader legal principle. The Court at this time, however, was in no mood to make such inroads upon the Amendment's clear language, and rejected the contention, saying:

Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. [citing three federal lower court and four state court cases] The search of

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114. *Agnello v. United States*, 269 U. S. 20 (1925).

115. *Id.* at 24.

116. The only cases intervening between the decisions in the *Weeks* and *Agnello* cases were *Gouled*, *Amos* and *Silverthorne*. The first two did not involve arrests. In *Silverthorne* where the search was only chronologically incidental, the government's argument was addressed to the support of the second seizure by urging the validity of the subpoena and the inability of the corporation to claim immunity under the Fifth Amendment's self-incrimination clause.



Frank Agnello's house and the seizure of the can of cocaine violated the Fourth Amendment.<sup>117</sup>

But once again, dicta, which were later to be invoked by government prosecutors, found their way into the Court's opinion, when it said:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. [citing *Weeks* and *Carroll*] \* \* \* When [Agnello's house] was entered and searched, the conspiracy was ended and the defendants were under arrest and in custody elsewhere. \* \* \* While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, *except as an incident to a lawful arrest therein.* (emphasis added) [citing *Boyd*, *Weeks*, *Silverthorne* and *Gouled*] \* \* \* Save in certain cases as an incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant.<sup>118</sup>

Here was the suggestion for the first time, that a *house* might be searched without a warrant as an incident to a lawful arrest—a clear dictum and so regarded by the Court in acknowledging that the point had never been directly decided—plus the further suggestion that the contemporaneous commission of an offense might have some bearing on the question.

With the gradual accumulation of such dicta and the government's pressing them in subsequent cases, it is not too surprising that in the course of time one of them should rise to a principle of decision. It does, indeed, "prove how a hint becomes a suggestion, is loosely turned into a dictum and finally elevated to a decision."<sup>119</sup> The decision came in the *Marron* case in 1927, discussed in the previous section. There, it will be remembered, the officers had a valid warrant to search for and seize liquor and equipment for its manufacture, and while in the course of executing it, observed the defendant selling liquor in violation of law. He was arrested for a felony committed in the presence of the officers and in the course of a search some liquor as well as certain bills and a ledger, found in a closet on the premises, were seized. Although the court held the ledger and bills to have been improperly seized under the warrant, not being particularly described, the seizure was nevertheless upheld because made as an incident to the lawful arrest. In its single paragraph opinion on this point of the

117. 269 U. S. at 33.

118. *Id.* at 30, 31, 32, and 33.

119. Mr. Justice Frankfurter dissenting in *United States v. Rabinowitz*, — U. S. at —, 70 Sup. Ct. at 439.

case,<sup>120</sup> the Court took note of the fact that the defendant was engaged in a conspiracy to maintain a nuisance at the very time of arrest, thereby, conferring a right on the officers to search "the place," without a warrant, for things used to commit the offense, and the ledger and bills were regarded as falling within that category, citing *Agnello* and *Weeks*.<sup>121</sup> It is clear that neither *Agnello* nor *Weeks* authorized the result reached, for the square holding in each of them is that one house may not be searched without a warrant when an arrest takes place at another house or place of business. Nor can the result in *Marron* be sustained on the basis of the dictum in *Weeks* which referred only to the permissible scope of search and seizure of articles on the *person* at the time of arrest. But the *Weeks* dictum had become further embellished in *Agnello* to the point that the Court in *Marron* could at last refer to a specific passage in that case which *talked* about the right to search "the place" as an incident to arrest. So in a one paragraph opinion the law of search and seizure had been extended, not only beyond the facts of any decision theretofore rendered by the tribunal, but beyond even the dicta in all but one of them—*Agnello*. What is even more important is that the Court not only forbore discussing the extension, but did not even acknowledge it!

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120. For purposes of reference the entire opinion discussing this point is set out here:

When arrested, Birdsall was actually engaged in a conspiracy to maintain, and was actually in charge of, the premises where intoxicating liquors were being unlawfully sold. Every such place is by the National Prohibition Act declared to be a common nuisance, the maintenance of which is punishable by fine, imprisonment or both. § 21, Tit. II, Act of October 28, 1919, c. 85, 41 STAT. 305, 314 (U. S. C., Tit. 27, § 33). The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. *Agnello v. United States*, *supra*, 30; *Carroll v. United States*, 267 U. S. 132, 158; *Weeks v. United States*, *supra*, 392. The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose. Cf. *Sayers v. United States*, 2 F.2d 146; *Kirvin v. United States*, *supra*; *United States v. Kirschenblatt*, *supra*. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.

*Judgment affirmed.*

121. Also cited was *Carroll v. United States*, which is discussed *infra* note 151, and there shown to be inoperative.

If the course of decision had halted at this point, there would be little reason for appraising Mr. Justice Jackson's 1949 concern for the second-class character of Fourth Amendment freedoms because the *Marron* decision of 1927 seems to have authorized much of what he apparently deplors. But the course of decision was not so halted, and there is every reason to believe that "the sting of the *Marron* case was taken by two later cases, *Go-Bart Co. v. United States*, \* \* \* and *United States v. Lefkowitz*,"<sup>122</sup> both decided by unanimous Courts in 1931 and 1932 respectively.

In *Go-Bart*<sup>123</sup> federal officers arrested the defendants under a warrant at their place of business for engaging in the illegal sale of liquor. At the time of arrest the officers falsely claimed to have a warrant to search the premises, and forced one defendant to open a desk and safe, proceeded to ransack the office consisting of a suite of three rooms, and seized a quantity of liquor, memoranda, books, records, filing cases and other papers. Though the warrant of arrest was void, the Court regarded the arrest itself as valid because the officers possessed sufficient information to apprehend the defendants without a warrant. Nevertheless the search of the premises and seizure of the articles mentioned was condemned and the order of the trial court denying defendants' motion for their return [presumably based upon the Court's opinion in *Marron*] was reversed. In the opinion there is a return to first principles, including the quotation of the Fourth Amendment, a reminder that its provisions prohibit general searches, the citation of such respectable early cases as *Boyd* and *Gouled* as well as *Weeks* and *Agnello*, and the statement that "The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of rights for the protection of which it was adopted."<sup>124</sup> But what of the *Marron* case? The prosecution had confidently relied on that decision, indicating that the sole distinction between the two cases was that here the defendants had simply required more books and papers for the recording of their illegal activities whereas *Marron* had managed to keep his entirely within the covers of one ledger along with a few bills. And it is highly questionable from the opinions in the two cases that there actually was any greater difference between them. However, *Marron*, rather than being overruled, was distinguished in the following language: "These things [the bills and the ledger] were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place." It was also said in *Go-Bart*: "It is not, and could not be, claimed that the officers saw conspiracy being committed. And there is no suggestion that Gowen or Bartels was committing crime when arrested."

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122. Mr. Justice Frankfurter dissenting in *Davis v. United States*, 328 U. S. at 609 (1946).

123. 282 U. S. 344 (1931).

124. *Id.* at 357.

In *Lefkowitz*<sup>125</sup> the defendants were arrested at their place of business by federal prohibition agents under a valid arrest warrant issued under a complaint charging them with a conspiracy to violate the prohibition laws. Coincident with the arrest the officers, who had no search warrants, searched the person of one of the defendants, taking certain papers. They then proceeded thoroughly to search the office itself, including several desks, a cabinet and a wastebasket. There was no force exhibited, but a large number of records, papers, bills and memoranda were seized. A motion for the return of the articles was denied by the trial court [again presumably relying on the *Marron* decision]. The court of appeals reversed on the authority of *Go-Bart*, and on certiorari the Government, seeking to distinguish *Go-Bart*, argued that the search and seizure here was proper because at the time of arrest the defendants were engaged in the commission of the offense charged in the complaint. In affirming the action of the court of appeals, the Supreme Court said: "It cannot be claimed that they saw conspiracy being committed or that any understanding, agreement or combination was being had, made or formed in their presence. *Go-Bart Co. v. United States*, supra, 357."<sup>126</sup>

In distinguishing *Marron* the court of appeals had said that "Such a search and seizure as these officers indulged themselves in is not like that in *Marron v. United States*, . . . where things openly displayed to view were picked up by the officers and taken away at the time the arrest was made." This language was quoted approvingly by the Court which added on its own, "The ledger and bills being in plain view were picked up by the officers as an incident of the arrest."<sup>127</sup>

What was the remaining authority of *Marron*? Practically none! In the first place, the statements in the two later cases to the effect that the *Marron* records "were visible and accessible," "openly displayed to view," and "in plain view" simply do not accord with the recital in the brief *Marron* opinion that "The closet in which liquor and the ledger were found was used as a part of the saloon." It is true, of course, that the utility bills were found in "plain view" being situated aside the cash register at the bar, but it was the ledger's fatal recital of the facts of the business that was so damaging to *Marron*—and this, so far from being in "plain view," was actually located in a closet which had to be searched and rummaged. Secondly, the reliance by the Court in *Marron* upon the fact that the defendant, when arrested, "was actually engaged in a conspiracy," was first thrown in doubt by the denial in *Go-Bart* that the officers "saw conspiracy being committed" (although it was not a conspiracy case), and was finally exploded in *Lefkowitz*, which was a conspiracy case, where the Court asserted that "It cannot be claimed that they

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125. 285 U. S. 452 (1932).

126. *Id.* at 463.

127. *Id.* at 465.

saw conspiracy being committed or that any understanding, agreement or combination was being had, made or formed in their presence." Finally, it should be noted that the opinions in all three cases were written by Mr. Justice Butler for a substantially similarly constituted Court,<sup>128</sup> and that the decisions in the two later cases evoked no dissenting opinions to challenge departures from principles established by *Marron*. Why, then, was *Marron* not overruled rather than distinguished? Part of the answer is that there still remained the principle that records in plain view or in the immediate custody of the arrested defendant—the utility bills—might still be seized without a warrant. The remainder of the answer is to be found in the Court's reluctance expressly to overrule a decision, particularly of recent vintage, when it may be distinguished, even though the process of the distinction may, subsequently, sap its vitality to a point that nothing remains but the hollow shell of a once-flourishing legal principle. Many cases have fallen victim to this process of judicial erosion. In any event, it may be said that by 1932 whatever serious damage had been inflicted upon Fourth Amendment freedoms by the decision in *Marron* had been wholly repaired and the Court had returned to the principle of liberally construing the Amendment's provisions, so clearly established in the early decisions in *Boyd*, *Goulded*, *Weeks* and *Silverthorne*.

Where, then, are the indications to support Mr. Justice Jackson's assertion, so vocally shared by Mr. Justice Frankfurter, that Fourth Amendment freedoms are again in danger? The answer to this question is to be found in the Court's post-1945 decisions, notably, *Davis*,<sup>129</sup> *Harris*<sup>130</sup> and *Rabinowitz*.<sup>131</sup> In each of these cases the Court has returned to the cryptic opinion of *Marron* to find authority for the approval of general searches of the place of arrest with total disregard for the clearly qualifying language of the *Go-Bart* and *Lefkowitz* cases which had at least restricted the right of search and seizure in such cases to the taking of articles which were on the person, in *plain view* or in the *immediate custody* of the defendant at the time of arrest.

*Davis*, decided in 1946, involved the conviction of a black market gasoline dealer under the rationing provisions of the war-time legislation administered by the Office of Price Administration. Federal officers, who had been observing the defendant's place of business with suspicion of violation for some time, purchased some gasoline there. When asked for coupons by one of the defendant's employee-attendants, they replied that they had none, but were allowed to keep the gasoline upon paying a substantially increased price.

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128. At the time of *Go-Bart*, Chief Justice Hughes and Justice Roberts had replaced Chief Justice Taft and Justice Sanford, respectively, of the *Marron* Court. Justice Cardozo did not participate.

129. *Davis v. United States*, 328 U. S. 582 (1946).

130. *Harris v. United States*, 331 U. S. 145 (1947).

131. *United States v. Rabinowitz*, — U. S. —, 70 Sup. Ct. 430 (1950).

The attendant was thereupon placed under arrest, as was the defendant when he appeared soon thereafter. A check of the coupon box on the gasoline pump disclosed a discrepancy which the defendant, when questioned in the station waiting room, stated was covered by coupons which he had in a locked inner office. He was asked to unlock the office, and following persistent refusals, finally yielded and admitted the officers who searched the place and seized a quantity of coupons for the possession of which the defendant was then tried and convicted following the denial of his motion for their return.

Here were articles the mere possession of which, under the circumstances, was illegal. Hence, under rule three, they might be seized *in the course of a proper search*. But was the search proper? Certainly it was improper under the decisions in *Go-Bart* and *Lefkowitz*, leaving aside the question of the use of force, the coupons being so far from "plain view" that entry into another part of the premises had to be demanded before their existence was discovered. Unlike the utility bills which lay in plain sight in *Marron*, these coupons were situated more like the ledger in that case, or the records taken from the desks, filing cabinets and wastebaskets in *Go-Bart* and *Lefkowitz*. The majority opinion refused to review all decisions defining the scope of "reasonable" searches and seizures, declaring:

. . . they have largely developed out of cases involving the search and seizure of *private* papers. We are dealing here not with *private* papers or documents, but with gasoline ration coupons which never became the private property of the holder but remained at all times the property of the government and subject to inspection and recall by it.<sup>132</sup>

Here was a new principle, not previously considered by the cases, (because it had never been encountered) and one which was to lead to further extension of the law of search and seizure in the *Harris* case the following year. It is difficult, in principle, to see why the government should have any greater right to seize this property than to seize the contraband liquor in *Amos* or the lottery tickets in *Weeks*, possession of which was likewise unlawful and to which the government was also entitled—but *only* when taken in a properly safeguard search. At a further point in the opinion, in distinguishing *Amos*, it was said that the search there involved a "private residence," whereas "The filling station [in *Davis*] was a place of business."<sup>133</sup> If this was to be made the basis for authorizing what are otherwise unlawful searches, then *Silverthorne*, *Go-Bart* and *Lefkowitz*, all of which involved searches of offices, were being overruled, yet the Court failed to mention or discuss them. The truth of the matter is, of course, that the searches in *Silverthorne*, *Go-Bart*

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132. 328 U. S. at 587-588.

133. *Id.* at 592.

and *Lefkowitz* were unlawful because made without warrants, regardless of the character of the place or the articles seized! Two further points of criticism with respect to the *Davis* case are first, that the officers, having had the defendant's place of business under suspicion and surveillance for a considerable period of time, had no excuse for their failure to apply for warrants to make the search, and second, had they made application, it would have been denied because *Davis*' offense was merely a misdemeanor,<sup>134</sup> and the Search Warrant Act authorizes the issuance of warrants only in cases involving a felony.<sup>135</sup> We are thus faced with the incongruous result, noted in Mr. Justice Frankfurter's dissent, "that a search which could not be justified under a search warrant is lawful without it."<sup>136</sup>

It was to be hoped that *Davis*, like *Marron*, was simply a temporary aberration from the otherwise well defined path which the Court has followed in the development of Fourth Amendment principles, particularly since it had been decided by less than a majority of the full Court.<sup>137</sup> These hopes were dashed by the 1947 decision in *Harris* which further extended the departure. There, five agents of the Federal Bureau of Investigation went to the defendant's home and arrested him under the authority of two arrest warrants charging him with using the mails to defraud and having caused a forged check to be shipped in interstate commerce. The arrest occurred in the living-room of the defendant's four room apartment and an agent was then assigned to search each room in an effort to discover "any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type."<sup>138</sup> Certainly this was fair sport under *Marron* as recently resurrected by the *Davis* decision. The search was a thorough one, consuming five hours, and while it did not disclose any of the objects for which it was undertaken, there was found in a bureau drawer an envelope marked "George Harris, personal papers," which contained a number of forms issued by draft boards under the Selective Service Act. It was for the possession of these documents that the present

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134. The proceedings were based upon the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by § 301 of the Second War Powers Act of March 27, 1942. Sec. 2 (a) (5) provides:

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

135. 40 STAT. 217, 228, 18 U. S. C. § 612.

136. 328 U. S. at 595.

137. Justice Douglas wrote the opinion which was concurred in by Justices Black, Reed and Burton. Justices Frankfurter, Murphy and Rutledge dissented. Justice Jackson did not participate and the Chief Justiceship was vacant by virtue of the recent death of Chief Justice Stone.

138. 331 U. S. at 148-149.

proceeding was instituted. Harris' motion to suppress the forms as evidence was denied and he was convicted. Admittedly something more than the previous year's decision was necessary if the Supreme Court was to affirm this action, for the majority in *Davis* had carefully noted that "there was no general exploratory search. Only the contraband coupons were demanded; only coupons were taken."<sup>139</sup> What was this "something more" that the Court was able to muster in order to affirm? It was the old saw of an "offense in the course of commission," which had been one of the principal grounds of decision in *Marron*, but so clearly discredited in *Go-Bart* and finally rejected in *Lefkowitz*. Chief Justice Vinson reasoned that here was a valid search under *Davis*, in the course of which government agents discovered property to which the government was entitled to possession, and "In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. [Hence] A crime was thus being committed in the very presence of the agents conducting the search."<sup>140</sup> This theory, so clearly discredited in *Go-Bart* and *Lefkowitz*, had not even been invoked in support of the decision in *Davis*, and yet it was here advanced as the principal basis for extending the broadened Fourth Amendment principle announced by that case. Again, the result was reached only by a closely divided Court—five to four this time, with all nine justices participating. Mr. Justice Frankfurter wrote eloquent dissents in both *Davis* and *Harris* seeking to call the majority's attention to the facts of history, the purpose of the Amendment and the actual rules of decision in the earlier cases which were being so obviously disregarded. He best epitomized the thesis of this article when, in *Harris*, he said:

. . . one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.<sup>141</sup>

Before *Rabinowitz*, the third in the trio of recent cases mentioned as marking the relegation of Fourth Amendment freedoms to second class constitutional rights, four cases arising in 1948 indicated a return by the Court to the principle of liberal construction, just as *Go-Bart* and *Lefkowitz* had neutralized the *Marron* decision.

The first of these cases was *Johnson v. United States*,<sup>142</sup> where federal agents, armed with no warrants of any kind, at the call of and in company with the police of the City of Seattle, went to the defendant's hotel, pursuant

139. 328 U. S. at 592.

140. 331 U. S. at 155.

141. *Id.* at 157.

142. 333 U. S. 10 (1948).



to a tip received from an informer that the defendant was in her room smoking opium. The officers stood in the hall outside defendant's room where they could detect the odor of burning opium, knocked on the door, demanded entry and were admitted by the defendant following a slight delay. The officers told the defendant to "consider yourself under arrest because we are going to search this room," and in the search that followed, they found and seized a quantity of opium and smoking apparatus. A motion to suppress the evidence prior to trial was overruled and Johnson was convicted. In reversing the conviction the Court pointed out that the entry to the defendant's room had been made under the color of and in submission to authority without a waiver of any kind on the part of the defendant, hence was a clear violation of the Fourth Amendment as construed in *Amos*, when accomplished without a search warrant. A true appreciation of the Amendment's purposes is reflected in the following language of Mr. Justice Jackson's opinion:

Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or governmental enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience of the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight.<sup>143</sup>

The attempt of the government to sustain the search as incident to a lawful arrest, despite the lack of a warrant, failed when the Court concluded that the arrest itself was invalid. Arrest may be made without a warrant only when a crime is committed in the presence of the officer, or for a felony if the officer has reasonable cause to believe the defendant guilty of such an offense. Here, it was pointed out, the officers had no reasonable ground for believing that the defendant had been smoking the opium until they had made their unlawful entry and found that she was alone in the room. The decision was once again five to four with Mr. Justice Douglas switching over and joining the four man minority of *Harris* (Frankfurter, Murphy, Douglas and Rutledge). Chief Justice Vinson and Justices Black, Reed and Burton

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143. *Id.* at 14-15.

dissented without an opinion. A substantially similar result had been reached a month earlier in *United States v. Di Re*.<sup>144</sup>

∴ The decision in *Trupiano v. United States*<sup>145</sup> is even more encouraging to those who hold in high regard the Fourth Amendment's freedoms. In that case federal agents had known for a period of three weeks that the defendants were illegally manufacturing liquor. One of the agents had been actually employed by the defendants to assist them in their illegal enterprise, and was thus enabled to pass along information to his colleagues. On the basis of his advice that a particular shipment would be removed from the building on a designated date, other agents surrounded the place at night prepared to make arrests. No warrants of any kind had been obtained. One agent peeked through a hole in the wall of the building and observed one of the defendants operating the still. A felony having been committed in his presence, he immediately entered and placed the defendant under arrest and seized the still. Other agents later seized other equipment and a quantity of the liquor. Here was a legal arrest, notwithstanding the lack of a warrant, but what of the seizure? *Davis* would seem to require the affirmance of the action of the trial court which had denied a motion for the suppression of the evidence, since the arrest, being valid, would seem to justify the search and seizure of the fruits and the means by which the crime had been committed, and *Harris* would seemingly have permitted the seizure of even more than was actually taken. Once again, however, the shifting vote of Mr. Justice Douglas brought forth the "judicial miracle of the four becoming five," and the trial court's action was reversed. The seizure was declared to have been invalid without a warrant on much the same theory as in *Johnson* (which was cited and reaffirmed), namely that "there was an abundance of time during which such a warrant could have been secured."<sup>146</sup> Far from being unanimous, however, the decision precipitated a biting dissent from the pen of Mr. Chief Justice Vinson, who was joined by Justices Black, Reed and Burton. Viewed in the light of his opinion for the majority in *Harris*, it is not too difficult to understand the Chief Justice's inability to go along with the new majority. Defending the government's action, he said: "The seizure was not preceded by an exploratory search. The objects seized were in plain sight. To insist upon the use of a search warrant in situations where the issuance of such warrants can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the

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144. 332 U. S. 581 (1948).

145. 334 U. S. 699 (1948).

146. *Id.* at 706.

existence of all civil liberties."<sup>147</sup> What this statement overlooks, of course, is that the Amendment was intended to protect the innocent and the guilty alike. There can be no dual standard in its application. To insist upon the issuance of warrants in *all* cases where the Amendment demands them is the *only* way to preserve the rights secured.

Further assurance that the Court was becoming increasingly alert to the Fourth Amendment's protection of privacy was furnished in the *McDonald* case<sup>148</sup> which involved the arrest and conviction of a numbers racketeer in the District of Columbia. For several months District police had kept McDonald under surveillance and on the day of the arrest they were outside his rooming house where they heard the sound of an adding machine being operated. Suspecting that it was being used in the computation of the receipts and having no warrants of any kind, the police forced their entry into the house through a window which led into the landlady's room. They identified themselves and then proceeded into the hall where, by standing on a chair and looking over the transom, they were able to observe the defendant in the course of the activity they had suspected, surrounded by numbers slips and money. They demanded entry and placed him under arrest, seizing the adding machines, slips and money. A motion to suppress the evidence was denied and, following his conviction, McDonald applied for certiorari which was granted. Once again, the prosecution sought to sustain the search and seizure on the lawful arrest. Though the legality of the arrest is doubtful the court proceeded to treat it as valid, but nevertheless declared the search and seizure to be without authority since, as in *Johnson and Trupiano*, ample time existed for the procurement of warrants. This time the decision was six to three, with Mr. Justice Black concurring only in the result. Mr. Justice Burton dissented, contending that the arrest was doubtless lawful (defendant, as a roomer, had no protectable interest in keeping the police from the hall), and a crime having been committed in the presence of the officers, they could seize all that was in plain view.

These cases were indeed encouraging signs vouching for the integrity of the Fourth Amendment's freedoms, and by the end of 1948 it could reasonably be hoped that *Davis* and *Harris* would follow in the wake of *Marron* as the gradual process of judicial erosion was at work. Throughout the year 1949 no search-incident-to-arrest cases came to the Court, but two other events occurred which were destined to affect the question—the untimely deaths of Mr. Justice Murphy and Mr. Justice Rutledge, both of whom had been consistently identified with the effort to return the Court to first principles in these cases. *Davis*, *Harris*, *Johnson* and *Trupiano* had all been decided by the narrow margin of one vote, and the result in all five cases

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147. *Id.* at 714-715.

148. 335 U. S. 451 (1948).

had been resolved by the shifting position taken by Mr. Justice Douglas, the remaining eight Justices being firmly committed to their respective positions. Unquestionably therefore the positions to be taken by the new appointees to the Court could either prolong and maintain the uncertainty pending the clarification of Mr. Justice Douglas' views, or could throw it conclusively either way.

With startling suddenness in 1950, the Court in the *Rabinowitz* case not only returned to the *Marron* case as the basis of appraising the validity of searches and seizures, but expressly overruled *Trupiano* and cast serious doubt on *Johnson* and *McDonald*. Rabinowitz was a stamp dealer who was suspected of making forged overprints on otherwise valid postage stamps, thereby increasing their value, and selling them as genuine. A government agent was sent to his place of business to purchase some of the stamps, and an examination of them confirmed suspicions. Ten days after the purchase, and a full week after the receipt showing the overprints to be forgeries, an arrest warrant was obtained and served on the defendant at his place of business, a one-room office. Although the arresting officers had no search warrant, they devoted an hour and a half to a complete search of his office desk, filing cabinets and safe, and seized a quantity of stamps which were found inside these pieces of furniture. This is precisely what had been done in *Go-Bart* and *Lefkowitz*, and which the Court had declared to be in violation of the Amendment. Nevertheless, Mr. Justice Minton uses *Marron* as his principal authority (although he also relies on *Harris*, as an *a fortiori* source) declaring that he does not consider it to have been drained of "contemporary vitality" by *Go-Bart* and *Lefkowitz* and continuing:

Those cases condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant. In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here.<sup>149</sup>

But is this truly a distinguishing feature of the cases? It is submitted that it is not. Rabinowitz was charged with "selling, possessing and concealing" forged stamps. Officers in search of evidence to support that charge need only find and seize stamps. In *Go-Bart* and *Lefkowitz* the charges were that the defendants had been selling liquor illegally, with the additional charge in the latter that there was also a conspiracy to do so. Evidence of a crime of that sort may be established only by the collection of the type of data contained in the varied books, records and papers which were seized. Hence the searches in those two cases were more general than that in *Rabinowitz* only in the sense that more generalized data constituted the evidence which constituted proof of the offense charged. Also resurrected from *Marron* as

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149. — U. S. at —, 70 Sup. Ct. at 433-434.

well as *Harris* was the notion that the search might be sustained on the added ground that the officers had reasonable cause to believe that a felony was being committed in their very presence—the act of possessing the forged stamps. This concept, it will be recalled, had been completely rejected by the Court in *Lefkowitz*. When he came to consider the fact that the officers in *Rabinowitz* had had more than ample time and information to make application for a warrant, however, Mr. Justice Minton encountered the square and recently created obstacle of the *Trupiano* case, which is cavalierly dismissed as “A rule of thumb requiring that a search warrant always be procured whenever practicable,”<sup>150</sup> and hence, overruled. The following language in his opinion proposes a different view of “ample time”:

Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing crime in their presence or who they have reasonable cause to believe is committing a felony is not determined solely upon whether there was time to procure a search warrant.

The conclusive answer to this proposition is that the period of a week to ten days involved in *Rabinowitz* is not a matter of “minutes or hours.” It will be time enough to deal with the matters of “minutes and hours” when cases presenting facts of that nature arise, and in the meantime the Court should observe the Fourth Amendment’s requirement that the impartial hand of a magistrate be interposed between the privacy of an individual and the impetuous action of police officers, whose rank, promotion and salaries are too often determined on the basis of their accomplishments. But there is a further solution to the problem which concerns Mr. Justice Minton. The Court in the past has always been ready to recognize that if matters of “minutes or hours” are indispensably involved in the administration of justice, the Fourth Amendment does not demand the impossible, but permits reasonable exceptions where the facts of the case truly warrant exceptional treatment. General statements to this effect are to be found throughout the opinions, as well as in some of the excerpts quoted in this article, but the principal application of the doctrine is to be found in the cases involving searches of automobiles, vessels and other movable vehicles. Here the same considerations of practicality and necessity are presented which justify the search of the person without a warrant as an incident to arrest. The exception was recognized as early as 1925 in *Carroll v. United States*,<sup>151</sup> where prohibition agents halted the defendant on the highway, searched his automobile and, finding a quantity of liquor, seized it and placed the defendant under arrest, having no warrants of any kind. The Court sustained the

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150. *Id.* at —, 70 Sup. Ct. at 413.

151. 267 U. S. 132 (1925).

search when it was shown that the officers had had previous information that the defendant was engaged in running illicit liquor from Detroit (where it was imported from Canada) to Grand Rapids, Michigan; that they had previously talked with the defendant in Grand Rapids and arranged to purchase liquor from him [the sale having failed to materialize as a result of the defendant's suspicions concerning the officers' identity being aroused]; that the officers had unsuccessfully given chase to the defendant on the road between Detroit and Grand Rapids on a previous occasion; and finally, that they were able clearly to identify him and his car on the day of the seizure. All of these facts combined to afford reasonable cause for the initial apprehension of the defendant, and the search without warrant was then justified in view of the practicalities of the situation—the liquor being in a moving vehicle which might be driven away if the officers were required at this point to halt their activities and obtain a search warrant. Here, certainly, is a case of "minutes or hours," as well as the prospect of a fleeing suspect to which Mr. Justice Jackson refers in his opinion in the *Johnson* case. And the Court responded to the situation. Here is an exception which is acknowledged by all the members of the Court, Mr. Justice Frankfurter having referred to it as recently as in his dissenting opinion in the *Rabinowitz* case, but calling attention to the fact that it has limited application, and was certainly inapplicable there. The exception was applied as recently as 1949 in *Brinegar v. United States*,<sup>152</sup> although three of the Justices, while acknowledging the controlling authority of *Carroll*, nevertheless dissented from its application to the particular facts of that case.

In summarizing the cases in this section, what can be said to be the present state of the law respecting searches and seizures occurring as incidents of arrest? With what degree of certainty may we predict the results of future cases? In answer to the first question it is to be said, regrettably, that *Marron*, once sapped of all but the very dregs of its life blood by the decisions in *Go-Bart* and *Lefkowitz*, has been restored to full flower, and that the flow of the cases in the meanderings of the judicial process have directed the current to the other bank of the stream where, perhaps, *Go-Bart* and *Lefkowitz* will, if they have not already done so, crumble and fall victim to the gradual process of erosion. To be sure, Mr. Justice Minton's opinion speaks of the particular facts of *Rabinowitz* and cautions that cases in this field must each be decided on their own peculiar facts—a kind of *ad hoc* administration of the Fourth Amendment—but the truly discouraging passage of the decision is the statement that *Marron* is not to be taken to have been disowned by the Court in *Go-Bart* and *Lefkowitz*. Any remaining doubt which had been cast upon the authority of *Harris* by the intervening decisions in *Johnson*,

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152. 338 U. S. 160 (1949).

*Trupiano* and *McDonald* is likewise dispelled. The principles of *Marron*, thus revived and restored, can, and possibly will, lead to serious encroachments upon Fourth Amendment freedoms. Thus, if the notion of "constructive possession," relied upon in *Harris* to justify the search of the entire apartment when the defendant was arrested in the living room, be extended, it is not too far fetched to say that the principles of *Weeks*, *Silverthorne* and *Agnello* may go by the board. For in each of those cases, where defendants were arrested at one place and their homes or offices located elsewhere were searched contemporaneously, it might be said with equal force that they were nonetheless "in possession" of these places. Certainly the defendants in those cases were neither more nor less "in possession" of the places searched than *Harris* was "in possession" of his bedroom at the time of the discovery of the draft cards. Obviously the principle of cases like *Davis*, *Harris* and *Rabinowitz* puts too much of a premium on the sheer coincidence that valid arrests take place in the home or office; for had these arrests occurred elsewhere, as in *Weeks*, *Silverthorne* and *Agnello*, there is no doubt that the controlling authority of those earlier cases would have prohibited the searches and seizures approved in the later cases.

What of predictability? It is clear from the position taken by Mr. Justice Minton, and shared by Mr. Justice Clark, who concurred with him in *Rabinowitz*, that the votes of Justices Murphy and Rutledge have been effectively displaced, leaving only Justices Frankfurter and Jackson of the former group which consistently opposed the principle of general search of the place upon arrest. It is possible that Mr. Justice Douglas, had he participated in *Rabinowitz*, would have joined with the latter group as he did in *Johnson*, *Trupiano* and *McDonald*. Mr. Justice Black dissented in *Rabinowitz*, not on constitutional grounds, but upon considerations of policy in sound judicial administration. Hence it appears that, with respect to the constitutional issue, a clear working majority of at least six Justices (Vinson, Black, Reed, Burton, Clark and Minton) is now committed to the principle of *Rabinowitz*, permitting search of the premises at large without a warrant when a lawful arrest occurs there. Two of the Justices (Frankfurter and Jackson) would insist that any such search is in violation of the Fourth Amendment when conducted without a warrant, and would restrict the unwarranted search and seizure to that which is necessary to make the arrest effective, an admitted exception based upon necessity but limited to the person and the area in his immediate custody. Mr. Justice Douglas might be expected to join them, at least in cases where time permits resort to the warrant process. This poses a bleak outlook for those who share the Frankfurter-Jackson view that Fourth Amendment freedoms have been relegated to second class constitutional rights. However, history gives at least one cause for hope. What was once done by a *unanimous* Court in *Marron* was soon thereafter undone by equally

unanimous Courts in *Go-Bart* and *Lefkowitz*. Certainly the prospect is not so bleak today as it was in 1927. We have the persuasive and painstaking dissenting opinions of Mr. Justice Frankfurter in *Davis*, *Harris* and *Rabinowitz* to call the Court's attention to its disregard for the teachings of history, the purpose of the framers of the Amendment and the early cases.<sup>153</sup>

### *The Remedial Problem*

The cases reviewed in the two preceding sections have abundantly demonstrated that the Fourth Amendment is no less vulnerable to infringement than other provisions of the Bill of Rights. Over-zealous law enforcement officers are not apt to pause in the course of their duties to evaluate carefully, or even consider the individual's freedoms sought to be secured by that article, unless some powerfully restrictive inhibition is imposed upon them to do so. What form of remedy should be made available to the victims of unreasonable searches and seizures? We know from the *Entick* case that one so offended may seek redress in a civil action for damages against the transgressor. Since 1921 the Criminal Code has imposed criminal sanctions in the form of a fine not to exceed \$1,000 for the first such offense and a similar fine or imprisonment for not more than one year for subsequent offenses when committed by federal officers.<sup>154</sup> But the mere handful of reported cases recording resort to these remedies bears mute testimonial to their inadequacy.

To serve as an effective deterrent upon the activities of law enforcement officers, thereby achieving the constitutional protection intended, the inhibiting influence must be a remedy that more directly affects them in the accomplishment of their tasks. The remedy most effectively designed to accomplish this end is that of permitting the victim of an unreasonable search and seizure to petition the court before whom the criminal enforcement proceedings will be heard for the return or suppression of the evidence so obtained. This device penalizes the law enforcement officer in a manner which is most meaningful to him, and the mere availability of the remedy should serve to instill in him a wholesome respect for the Amendment's requirements. This is not unreasonably to obstruct the administration of justice, nor to convert the Amendment into a shield for the protection of crime, but is simply to assure respect for its most salutary mandate, and the fulfillment of its purpose.

The remedy of excluding the evidence seized in the course of unreasonable searches and seizures has been applied in the federal courts since 1914 when it was first adopted in the *Weeks* case, following an earlier and seem-

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153. It is not to be overlooked, of course, that this may be an ill rather than a good omen. No one on the Court in *Marron* called these facts forcefully to its attention, and its subsequent action in *Go-Bart* and *Lefkowitz* may indicate that *Marron* would have gone the other way if someone had done so.

154. 18 U. S. C. § 2236, formerly 18 U. S. C. § 53.



ingly inconsistent start. It had previously been held in *Adams v. New York*,<sup>155</sup> that upon the basis of common law principles of evidence, where the claim of Fourth Amendment infringement came in the form of an objection to evidence in the course of a trial, the court was not required to halt the proceedings to make collateral inquiry into the issue concerning the manner in which evidence, otherwise admissible, had been obtained. The *Boyd* case, which had been previously decided, was distinguished on the ground that the defendants there had made their objection to the "unreasonable search" at the very time it was proposed to be made—when the government moved for a court order demanding the production of the incriminating documents. For some time following *Adams* there was doubt whether the *Boyd* rule would be of any practical significance, since an individual would seldom have a court at hand at the time an unreasonable search and seizure was proposed or undertaken, and could hardly be expected to halt it in that fashion. If, at the same time, he was to be foreclosed by the *Adams* rule from seeking redress at the time of the trial of the substantive offense, what interim remedy was available? The answer to this question proved to be the device utilized in *Weeks*, a motion prior to trial for the return of the articles wrongfully seized. It was thereafter held in *Amos* that such a motion did not come too late when it was made after the jury had been impanelled and sworn but before the taking of testimony had begun. On the same day the Court held in *Gouled* that the defendant would be excused from petitioning for the return of paper which the government agent had taken by stealth and might object to its introduction in evidence at the trial since that was the first intimation he had had of its illegal seizure. The Court remarked that "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."<sup>156</sup> In *Agnello*, the defendant objected at the trial to the introduction in evidence of the can of cocaine which had been taken from his bedroom without his knowledge. His objection was sustained and the Court's statement concerning the necessity for pre-trial motion is even more sweeping:

Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized.<sup>157</sup>

We have already seen that the *Agnello* Court was considerably given to the utterance of dicta, and the statement just quoted seems to fall into that category, since under the *Gouled* decision, *Agnello's* ignorance of the seizure

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155. 192 U. S. 585 (1903).

156. 255 U. S. 298, 313 (1921).

157. 269 U. S. 20, 34 (1925).

prior to the time of the drug was offered in evidence was a sufficient basis for sustaining his objection. The issue reappeared two years later in *Segurola v. United States*<sup>158</sup> when the Court seemingly reaffirmed the requirement of a pre-trial motion, citing *Adams*, and defining the rule as follows:

This principle is that, except where there has been no opportunity to present the matter in advance of trial, (citing *Gouled, Amos, and Agnello*), a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal case permit a collateral issue to be raised as to the source of competent evidence.<sup>159</sup>

But the defendants in *Segurola* made no objection to the evidence at the time of its introduction,<sup>160</sup> and only after the liquor had been admitted in evidence, and at the close of the government's case, did they move to strike it from the evidence.

There have been no cases subsequent to *Segurola* involving the precise issue of the necessity for making a pre-trial motion for return or suppression of evidence. In all the later cases defense counsel have made seasonable motions, and this practice has now been codified by Rule 41(e) of the new Federal Rules of Criminal Procedure.<sup>161</sup> The provisions of that section, so far as they bear upon the question, provide that "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Thus the courts are left free to determine whether the individual must sacrifice freedoms under the Fourth (and usually also the Fifth) Amendment to the dictates of a rule of procedure. Clearly a rule of procedure cannot prevail over the rule of exclusion if the latter is a mandate of the Amendment itself. But does the Amendment so mandate? The Court has never had occasion to pass on this last question,<sup>162</sup> but the clear intimation of *Wolf v. Colorado* is that the answer would be in the negative.

The *Wolf* case involved a state prosecution of a state crime in which evidence, seized by state officers in the course of an invalid search, was introduced over the objection of the defendant. Following his conviction in the state courts the defendant was granted certiorari and argued before the Supreme Court that his conviction under these circumstances was a denial of

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158. 275 U. S. 106 (1927).

159. *Id.* at 111-112.

160. There was no objection, irrelevant for our purposes, that the evidence had not been properly identified.

161. 18 U. S. C. following § 687.

162. The *Segurola* case is not considered to have raised the issue since no objection was made to the introduction of the evidence.

due process of law guaranteed by the Fourteenth Amendment. His theory, of course, proceeded upon the premise that the Fourth Amendment's freedoms are embraced within the term "liberty" found in the Due Process Clause of the later Amendment, a proposition which the Court had not previously decided. Having only recently rejected the notion that the Due Process Clause of the Fourteenth was intended to incorporate the entire first eight amendments in *Adamson v. California*,<sup>163</sup> the Court was required to determine whether the interest secured by the Fourth is so fundamental as to be "implicit in the concept of ordered liberty" within the doctrine of *Palko v. Connecticut*.<sup>164</sup> Because of the widespread interest engendered by the *Adamson* decision, the Court's opinion in *Wolf* was expectantly awaited. When announced in 1949, it expressed the unanimous conclusion of the Court that the Fourteenth did incorporate the Fourth Amendment freedoms, but the Justices divided five to four over the question of the effect of this conclusion, with the result that *Wolf's* conviction was affirmed. Mr. Justice Frankfurter, writing for the majority (including Chief Justice Vinson, and Justices Reed, Jackson and Burton) reasoned that while the conclusion reached would certainly disable "a State affirmatively to sanction such police incursion into privacy (as to) run counter to the guaranty of the Fourteenth Amendment, \* \* \* (at the same time) the ways of enforcing such a basic right raise questions of a different order,"<sup>165</sup> and decided that the states need not adopt the federal rule of excluding the evidence as an enforcement device; civil or criminal sanctions against the offending officers will seemingly suffice. The fact, observed in the opinions, that thirty states have rejected the *Weeks* rule while only 17 adhere to it must have been a strong consideration in the case.

Mr. Justice Frankfurter reviewed the history of the federal rule as first announced in *Weeks*, and said of it:

It was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication.

If Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine (we) would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own.<sup>166</sup>

Mr. Justice Black, in his concurring opinion, went even further and crossed the unreached bridge, saying, "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a

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163. 332 U. S. 46 (1947).

164. 302 U. S. 319, 325 (1937).

165. 338 U. S. at —, 69 Sup. Ct. at 1361.

166. *Id.* at —, 69 Sup. Ct. at 1364.

command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate,"<sup>167</sup> a statement which he reiterated in his dissenting opinion in the recent *Rabinowitz* case.

Justices Murphy, Douglas and Rutledge dissented, each writing opinions. Mr. Justice Murphy's opinion opens with the statement "It is disheartening to find so much that is right in an opinion which seems to me so fundamentally wrong."<sup>168</sup> To this, the writer would add his own opinion that it is also disheartening to find the majority opinion written by Mr. Justice Frankfurter whose dissenting opinions in *Davis*, *Harris* and *Rabinowitz* have reflected such fundamental convictions respecting the Amendment's freedoms, as well as a full appreciation of its history and purposes.

Each of the dissenters agreed in full with the majority (as did Mr. Justice Black) that the Fourteenth Amendment prohibits unreasonable searches and seizures barred by the Fourth; and they agreed among themselves, contrary to the view adopted by the majority and Mr. Justice Black, that the federal exclusionary rule is a mandate of the Amendment itself, not simply a judicially created rule of evidence. Mr. Justice Murphy's opinion in particular emphasizes the ineffectiveness of the civil and criminal remedies to which the individual must now turn if he is to seek redress for the action of state officials who invade his constitutional right of privacy, and points to the glaring dearth of cases in this field in support of his position. It is highly unlikely, as he says, that the prosecuting attorney who has participated in or directed the execution of unreasonable searches and seizures, will then undertake to prosecute himself or his subordinates for having done so. The civil remedy of a damage action is even less calculated to achieve appropriate redress or constitutional law enforcement in this area for the reasons which Mr. Justice Murphy so clearly sets forth. Only by adopting the rule of exclusion will the courts make Fourth Amendment freedoms as meaningful as it is within their power to do so. But the question persists, is the adoption of the exclusionary rule an implied mandate of the Amendment itself?

It is true, as Mr. Justice Frankfurter says, that the Amendment does not explicitly require its adoption. But certainly it is a permissible device to be utilized in its administration—one which the Amendment, reasonably construed, permits. The Court shows no disposition to abandon it, for as Mr. Justice Frankfurter says, "we stoutly adhere to it."<sup>169</sup> And Congress, so far from negating it, has not only acquiesced in it for more than thirty-five years, but has recently codified it in the new Federal Rules of Criminal Procedure. It is, therefore, a principle which has been reasonably implied from the Amendment's language, based upon its history and purpose, and designed to

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167. *Id.* at —, 69 Sup. Ct. at 1367.

168. 338 U. S. at —, 69 Sup. Ct. at 1369.

169. *Id.* at —, 69 Sup. Ct. at 1362.

achieve that purpose. Yet we know from the review of the cases in the preceding sections that notwithstanding its adoption and application by the federal courts, instances continue to arise in which federal officers, not fully restrained by it, violate freedoms the Amendment was intended to protect. These cases are ample evidence upon which to sustain a judgment not merely to retain the federal rule, but to regard it as an implied mandate of the Amendment itself, to be applied for the purpose of at least promoting its objectives. The adoption of the rule would certainly seem to be necessary if we are to give the Amendment a "place second to none in the Bill of Rights," to borrow a Frankfurter phrase from *Harris*, and at the same time prohibit activity which "reduces the Fourth Amendment to a form of words," to use the language of Mr. Justice Holmes in *Silverthorne*. The Court's earlier statements in *Gouled* and *Agnello* to the effect that a technical rule of procedure should not be permitted to prevail over constitutional rights, while dicta, were nevertheless considered judgments of the issue and permitted the Court in each of those cases to make an exception to the rule's requirement that the motion for return or suppression of the evidence be made prior to trial.

What, by way of summary, may be said to be the implications of the *Wolf* case upon the remedial problem? First, it may be said with considerable assurance that the Court has supplied us with the answer to the question previously raised in connection with the language in *Segurolo* which was seemingly in conflict with the dicta in *Gouled* and *Agnello* concerning the necessity for raising the search and seizure issue prior to trial. If the federal rule of exclusion is not an implied mandate of the Amendment, it may continue to be applied, even in federal cases to deprive the defendant of his right to raise that defense in the course of trial if he has failed seasonably to seek redress by other methods. Second, and of more far reaching consequence, is the fact that individuals will not be accorded the most effective means of redress for deprivation of Fourth Amendment freedoms at the hands of state officers—an area in which potential harm through invasion is probably far more apt to occur than in the federal field of law enforcement.<sup>170</sup> Finally, the *Wolf* decision throws much doubt on the issue of admissibility of evidence in a federal case which has been seized in the course of an illegal search conducted by state officers. It had been generally assumed since the decision in *Byars v. United States*<sup>171</sup> that such evidence would be admissible, although the point actually decided there was that where federal officials actually participate in a state search, the evidence was federally-obtained to a degree calling for the application of the general federal rule of exclusion. The doctrine as well as its limitations have been acknowledged

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170. See particularly the dissenting opinion of Mr. Justice Murphy on this point in *Wolf*.

171. 273 U. S. 28 (1927).

in subsequent cases,<sup>172</sup> and a clear decision on the point was avoided in *Lustig v. United States*,<sup>173</sup> decided simultaneously with *Wolf*. The Court there, in a split decision, held in a judgment announced by Mr. Justice Frankfurter, that where a federal officer came to the place of the illegal search as it was being concluded by state officers and selected evidence from among the articles seized he had participated in the search to a point that required the evidence to be returned to the defendant pursuant to his seasonably filed motion. In his opinion Mr. Justice Frankfurter refused to consider the admissibility of such evidence when "secured by state authorities [and] turned over to the federal authorities on a silver platter."<sup>174</sup> Mr. Justice Black concurred only in the result. Mr. Justice Murphy, in an opinion in which Justices Douglas and Rutledge concurred, also approved of the result, but stated that he would go further and on the basis of his dissenting views in *Wolf*, would answer the question which Mr. Justice Frankfurter reserved—by holding such evidence to be inadmissible even in the absence of official federal participation. The Chief Justice and Justices Reed, Burton and Jackson dissented, contending that the activities of the federal officer in *Lustig* did not constitute participation, and hence, they would admit the evidence so obtained.

#### CONCLUSIONS

There is, indeed, ample evidence upon which to sustain the assertion that Fourth Amendment freedoms have become, or are at least in danger of becoming, second class constitutional rights. Beginning with the 1946 decision in *Zap*, we have seen a series of cases which have made substantial inroads upon the Amendment when it is viewed in the light of history, purpose and the earlier cases interpreting its provisions. Papers of a character which render their amenability to seizure doubtful even under a proper search, have not only been seized, but have been taken without warrants at all, and the Court has approved. The search-incidental-to-arrest cases have demonstrated an alarming tendency to return to the wholly discredited principles of *Marron*, permitting search at large of the place of arrest, and the seizure of any incriminating evidence found, whether relating to the subject of the arrest as in *Davis* and *Rabinowitz*, or some wholly unexpected windfall as in *Harris*. And finally, there is the discouraging note of *Wolf* advising us that violations of whatever remaining rights we may have are not to be redressed by the very remedy which is best adapted to the accomplishment of the Amendment's objectives.

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172. *McNabb v. United States*, 318 U. S. 332 (1943); *Fodman v. United States*, 322 U. S. 487 (1944).

173. 338 U. S. 74, 69 Sup. Ct. 1372 (1949).

174. *Id.* at —, 69 Sup. Ct. at 1374.

It is to be acknowledged, of course, that in its handling of these cases the Court is confronted with the competing demands of two policies, extremely difficult if, indeed, possible to reconcile. On the one hand there is the interest in privacy which history tells us was the principal concern of the Amendment's framers. On the other is society's interest in the suppression of crime—an interest which is obtaining its fair share of public concern as measured by today's headlines.<sup>175</sup> But, "any community must choose between the impairment of its power to punish crime and such evils as arise from its uncontrolled prosecution,"<sup>176</sup> in other words, "we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose."<sup>177</sup> In the proposal and adoption of the Fourth Amendment, that choice was made for us, and if it is found that it has been a poor one, we should resort to constitutional means to correct it.

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175. See *New York Times* of Thursday, February 16, 1950, page 1, cols. 2 and 3 reporting the speech of President Truman to a Washington meeting of federal, state and municipal law enforcement officers, bearing the headline "Truman Pledges Aid to Campaign Against Forces of 'Vice and Greed.'" Significantly, the story reports that the President "warned, however, that there must be no weakening of the Bill of Rights."

176. Judge Learned Hand in *United States v. Kaplan*, 89 F.2d 869, 871 (2d Cir. 1937).

177. Mr. Justice Holmes in *Olmstead v. United States*, 277 U. S. 438, 470 (1928).