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Federal Search and Seizure Exclusionary Rule Its Origin, Development, Present Status and Trend, The

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THE FEDERAL SEARCH AND SEIZURE EXCLUSIONARY RULE

ITS ORIGIN, DEVELOPMENT, PRESENT STATUS AND TREND

While the concept of search and seizure has frequently been the object of scholarly inquiry,[1] the courts and legal writers have failed to afford the law enforcement officer and the private individual a predictable basis for the resolution of the troublesome conflict occasioned by the use of this detective device. The Federal law presently is in a state of confusion and flux as a result of the Supreme Court's tendency to treat each case upon its facts without supplying workable standards.[2] The situation is further complicated by the judicial reluctance to recognize that the right of search and seizure is not inherently abusive, but is primarily a device for the detection and punishment of crime. As such, it enables law officers to take into custody property either unlawfully obtained or retained, and to discover and seize articles which constitute or contain instrumentalities of crime. It is only the abuse of this right which creates problems and which is subject to the judicial and constitutional sanctions of the Fourth Amendment.[3]

[1] See Trimble, *Search and Seizure under the Fourth Amendment as Interpreted by the United States Supreme Court*, 41 KY. L. J. 196 (1953); Reynard, *Freedom From Unreasonable Search and Seizure*, 25 IND. L. J. 259 (1950).

[2] United States v. Rabinowitz, 339 U.S. 56 (1950); Go-Bart Co. v. United States, 282 U. S. 344 (1931).

[3] "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." U.S. CONST. AMEND. IV.

THE FOURTH AMENDMENT, SEARCH WARRANT, AND EXCLUSIONARY RULE

The Fourth Amendment secures every citizen in his person, premises, papers, and effects from search and seizure which is unreasonable because it is not authorized by law or in accordance with a proper search warrant. The Amendment contemplates that a person shall be secure until he is lawfully disturbed by a search warrant issued upon prayer to the judgment of a disinterested and impartial magistrate.[4] Consequently, while legality of the search and seizure depends upon its reasonableness this in turn frequently revolves around the presence or absence of a proper search warrant.[5] What

[4] Johnson v. United States, 333 U. S. 10 (1948); Weeks v. United States, 232 U. S. 383 (1914); Boyd v. United States 116 U. S. 616 (1886).

[5] However, the mere presence of a search warrant is not always determinative of legality. Thus, a search and seizure pursuant to a valid warrant may be rendered unreasonable by the conduct of the law officers. Further, the absence of a search warrant does not necessarily render a seizure illegal. Searches without a warrant when made contemporaneously with a valid arrest have been sustained; Harris v.

constitutes a valid search warrant is in itself a complex problem. The basic prerequisite is that a search warrant must conform strictly to the constitutional and statutory provisions for its issuance. A warrant is authorized where (a) there is a showing of probable cause supported by oath or affirmation, and (b) the place to be searched, and the persons or things to be seized are particularly described.[6]

The restrictions imposed upon the issuance of search warrants and the tendency of the courts to construe the Fourth Amendment liberally have operated to check the intruding law enforcement officer. However, this constitutional protection was not self-executing because at common law the admissibility of evidence was not affected by the illegality of the means by which it was obtained.[7] As a result federal courts would not permit collateral inquiry into the source of competent evidence.[8] In *Weeks v. United States*,[9] however, the Court created an exception by ruling that the subsequent use of this evidence was precluded upon defendant's seasonable application for the return of the things illegally seized or upon motion to suppress.[10] The efficacy of this exclusionary rule lies in the assumption that if evidence illegally seized cannot be used at trial the overly zealous law officer will be less prone to violate the suspect's constitutional rights. The relative success of this judicial protection of the constitutional right of privacy may vary with the individual view taken as to the Fourth Amendment's position in the struggle against modern crime.[11]

The exclusionary rule is limited in scope. First, within the federal sphere it operates to protect against encroachments upon privacy by the Government and neither the rule nor the Fourth Amendment is concerned with intrusions by private individuals.[12] Second, the Fourth

United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); or upon a showing of probable cause when it is not feasible to obtain a search warrant, Brinegar v. United States, 338 U.S. 160 (1949); Carrol v. United States, 267 U.S. 132 (1925). In Johnson v. United States, 333 U.S. 10 at 14 (1948) other "exceptional circumstances" recognized were: flight of a suspect, situations involving a moving vehicle, or where evidence or contraband is threatened with removal or destruction.

[6] U.S. CONST. AMEND. IV.; See also Grau v. United States, 287 U.S. 124 (1932); Byars v. United States, 273 U.S. 28 (1927). These requisites were said to prevent the issuance of warrants on loose, vague, or doubtful bases of fact, and to emphasize the purpose to protect against all general searches .... Go-Bart Co. v. United States, 282 U.S. 344 at 357 (1931).

[7] Olmstead v. United States, 277 U.S. 438 (1928); Adams v. New York, 192 U.S. 585 (1904).

[8] In Adams v. New York, *supra* note 8, the refusal to consider the source of illegally seized evidence was held not violative of the Fourth Amendment. The case of Boyd v. United States, 116 U.S. 616 (1886) was distinguished for there the defendants raised objections to the unreasonable seizure at the very time it was proposed to be attempted—viz., when the Government moved for a court order compelling the production of the incriminating evidence.

[9] 232 U.S. 383 (1914).

[10] For various procedural justifications of this rule see 37 MINN. L. REV. 188 (1953); also see Mr. Justice Black's concurrence in Wolf v. Colorado, 338 U.S. 25 at 39 (1949) in which he indicated that the federal exclusionary rule was not a constitutional command but a judicially created rule of evidence.

[11] Another alternate remedy available is the private tort action against the offending officer. The reluctance of innocent victims to bring suit and the usual financial irresponsibility of police officers render this a remedy of doubtful value. Further, the remedy of criminal prosecution of the offending officer appears even less effective. For a famous criticism of the exclusionary rule itself see Judge Cardozo's opinion in People v. Defoe, 242 N.Y. 13, 150 N. E. 585 (1926). The exclusionary rule has never been a completely acceptable remedy, and it might be wiser to give less attention to evaluation and place more emphasis upon the education and training of competent and moral law enforcement officers.

[12] Burdeau v. McDowell, 256 U.S. 465 (1921) Evidence illegally seized by state officials is admissible in federal courts so long as the unreasonable search and seizure was not participated in by federal officers. United States v. Haywood, 208 F. 2d 156 (1953); Byars v. United States, 273 U.S. 28 (1927); *but cf.* Lustig v. United States, 338 U.S. 74 (1949).

Amendment, while enforceable against the states through the Due Process Clause,[13] does not necessarily command that the exclusionary rule be adopted by the states in vindication of that constitutional right.[14] Third, before the rule can be invoked there must be seasonable assertion by a defendant who can show that his constitutional rights have been invaded by the unreasonable seizure; i.e., the immunity is said to be personal.[15]

UNREASONABLE FEDERAL SEARCH AND SEIZURE

Since, in the absence of "exceptional circumstances" or "necessity,[16] a search is basically unreasonable without a warrant, the pertinent questions which arise are: (1) whether a search and seizure pursuant to a search warrant can ever be unreasonable; and (2) whether it can ever be reasonable without a search warrant.

Seizure of Articles having evidentiary value only—In *Boyd v. United States*[17] a statutory subpoena duces tecum would not issue to compel production of certain private papers incriminative to the defendant in a forfeiture trial. Such a process was declared to be an unreasonable search and seizure violative of the Fourth Amendment and a legal compulsion inconsistent with the self-crimination protection of the Fifth Amendment.[18] This decision clearly indicated that a peaceful seizure through statutory subpoena of private papers may be as unreasonable as a violent and forceful search and seizure. However, would those private papers have been subject to seizure under a valid search warrant. In *Gouled v. United States*[19] this question was answered in the negative! A search warrant could not issue solely for the purpose of securing evidence to establish proof of the commission of an offense.

Because the Court in both *Boyd* and *Gouled* necessarily was forced to acknowledge that there were certain things subject to seizure under a search warrant there arose a distinction which indicates the standard presently in consideration: *i.e.*, seizure of property which has evidentiary value only is prohibited by the Fourth Amendment whereas seizure would be proper if for some reason the Government or public has a paramount interest in the desired articles. A seizure of private articles or papers such as contracts, memoranda, letters, invoices etc., solely for their use as evidence in a subsequent criminal trial would fall within the former prohibited classification. Articles generally classified as public would include stolen goods, contraband, instrumentalities of crime, and articles seized to prevent further frauds.[20] The distinction applies whether or not there is a warrant.

This standard indicates that illegality of a seizure, with or without a warrant, usually is dependent on the nature of the article seized. However, if each case is to be decided on its particular facts the courts would experience

[13] U.S. CONST. AMEND. XIV; Wolf v. Colorado, 338 U.S. 25 (1949); *cf.* Palko v. Connecticut, 302 U.S. 319 (1937); Irvine v. People, 47 Sup. Ct. 381 (1954); People v. Rochin, 342 U.S. 165 (1951)

[14] An appendix to Wolf v. Colorado, *supra* note 13 at 33 includes a listing of the states accepting and rejecting the exclusionary rule.

[15] Kelley v. United States, 61 F.2d 843 (8th Cir., 1932) These procedural limitations upon the exclusionary rule will be treated in a subsequent section.

[16] See note 5 *supra*.

[17] 116 U.S. 616 (1886).

[18] U.S. CONST. AMEND. V. The Self-Crimination protection of the Fifth Amendment is not available to corporations. Hale v. Henkel, 201 U.S. 43 (1906). But for corporate experience with the Fourth Amendment see Oklahoma Press Publishing Company v. Walling, 327 U.S. 186 (1946); Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)

[19] 225 U.S. 298 (1921). This was also a holding that search and seizure by stealth and subterfuge is unreasonable; *cf.* Amos v. United States, 255 U.S. 313 (1921).

[20] See United States v. Lefkowitz, 285 U.S. 452 (1932); Gouled v. United States, 255 U.S. 298 (1921); Boyd v. United States, 116 U.S. 616 (1886). However, seizure of these articles without a search warrant is still unreasonable unless other justifications are present. Amos v. United States, *supra*, Note 19; Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920). Compare these cases with Shapiro v. United States, 335 U.S. 1 (1947) where a subpoena would properly issue to compel production of public records.

little difficulty in avoiding this standard by characterizing otherwise private papers as "public", or by finding that the seized articles are includible in the aforementioned classification of things subject to seizure. A pertinent example of this reasoning can be found in *Zap v. United States*[21] where federal agents, while legally inspecting the accounts of a government contractor (defendant), discovered and seized a cancelled check which exposed a fraud upon the Government. Zap's subsequent conviction was upheld notwithstanding the absence of a search warrant and despite the private nature of the check. Seizure was justified because (1) the search being legal the agents might have testified as to what they saw,[22] and (2) a valid warrant could have issued for the seizure of this check.[23]

If a valid search warrant could not authorize seizure of a contract and fee bill in *Gouled* it is difficult to discern why in *Zap* seizure of a cancelled check without a warrant can be more justifiable merely by designating it an instrument used in the commission of a crime, or by stating its seizure was necessary to prevent further frauds. The Court in *Zap* did not consider the applicability of *Gouled,* nevertheless that decision must be viewed as severely restricted by the *Zap* case unless the special circumstances afford a basis for distinction.

Thus, while the "nature of the article" test has lost much of its earlier force, the Supreme Court frequently relies upon it to buttress a doubtful holding. This is true particularly, as will be indicated subsequently, where search and seizure is justifiable as incident to a lawful arrest.[24]

General Exploratory Search: Seizure of Goods Not Described in the Warrant—The constitution requirement that a search warrant particularly describe the things to be seized enables the courts to test the reasonableness of a search and seizure by two further standards: first, if a search is general and exploratory in nature there is a tendency to invalidate the seizure; second, a seizure of goods of one description cannot be justified under a search warrant authorizing the seizure of goods of another description.

With respect to the first point the Fourth Amendment is liberally construed to protect against the ransacking or general rummaging of personal and business effects. This would be true whether or not a search warrant is present. In both *United States v. Lefkowitz*[25] and *Go-Bart Co. v. United States*[26] a search and seizure pursuant to a lawful arrest was condemned as unreasonable because of the general and exploratory nature of the search. These decisions were a result of the failure of the arresting officers to be specific in their search, and because any and all articles were seized which would have incriminating evidentiary value at a future criminal trial. Accordingly, the constitutional limitation of definiteness applies with equal force in search and seizure incidental to a valid arrest.

This problem of definiteness is accentuated in cases where goods of one description are seized under a search warrant authorizing seizure of goods of another description. In the execution of search warrants, law officers are authorized to

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[21] 328 U.S. 624 (1946)

[22] See notes 36 and 38, *infra* dealing with wiretapping.

[23] Zap v. United States, 328 U.S. 624 at 629 (1946).

[24] Recent cases in the "incidental arrest" field bear upon the problem of the nature of the articles seized. In all the recent Supreme Court cases where seizure was held valid the articles were such as to invest the Government or the public with a paramount right to possession. Frequently, it was stated that the mere possession of certain articles constituted a "continuing offense" committed in the presence of the arresting officers, or emphasis was placed upon the "public" character of the articles seized. See Rabinowitz v. United States, 339 U.S. 56, (1950) (forged overprints of stamps); Davis v. United States, 328 U.S. 582 (1946) (unlawful possession of gasoline ration coupons); Harris v. United States, 331 U.S. 145 (1947) (illegal possession of draft cards); *but cf.* McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U. S. 10 (1948).

[25] United States v. Lefkowitz, 285 U.S. 452 (1932).

[26] Go-Bart Co. v. United States, 282 U.S. 344 (1931).

seize only the articles therein described. In *Marron v. United States*,[27] a seizure of a ledger and certain bills was improper because not particularly described in a valid warrant authorizing seizure of illicit liquor and equipment. Although this seizure was not authorized by a warrant, it was nevertheless justified as incidental to the lawful arrest. By such justification the Court opened an avenue for avoiding the very limitation it sought to impose upon the seizure power. *Harris v. United States*[28] illustrates this point. Defendant was validly arrested in his apartment for mail fraud. Pursuant to a search for forged checks and certain equipment federal officers discovered and seized draft cards illegally possessed by defendant. The seizure was upheld because of the valid arrest and because possession of the draft cards was a continuing crime committed in the presence of the officers. The apparent question which arises is whether if a search warrant had issued for seizure of the forged checks could the draft cards have been legally seized? The *Marron* decision indicates a negative answer; yet illegality is avoided by the valid arrest. But is it solely the valid arrest which determines the outcome or did the Court in the *Harris* case also buttress its decision upon the nature of the articles seized? That is, the *Harris* case emphasized the character of the documents as government property, the possession of which constituted a continuing offense. Similarly, in *Marron*, the articles seized were deemed instruments of crime and were part of a continuous offense against the Government.[29] The dissenters in *Harris* argue that because of such decision the legality of a search is now to be determined on what is turned up, and as a consequence the way is open for a revival of the general search warrant.[30] However, this danger may be over-emphasized; if one believes that the constitutional protection is satisfied once the officers are legally upon the premises and are conducting a specific search pursuant to a warrant or valid arrest. Should the law officer be required to ignore contraband or instrumentalities and fruits of crime which may come into sight? The Court intimates that the answer must depend upon the peculiar facts of each seizure.

Indirect and Derivative Use of Illegally Seized Evidence—The trend of Supreme Court decisions is to amplify the exclusionary rule by precluding any indirect or derivative use of evidence clearly unreasonably seized. In *Silverthorne Lumber Co. v. United States*[31] offices of a corporation were entered without a search warrant and all records were seized. A motion to return the property was granted. Thereafter the Government had subpoenas issued requiring the corporation to produce the originals of the returned documents for use at the trial. In reversing a contempt conviction for refusal to comply, the Supreme Court held that the Government could not make indirect use of this evidence originally illegally obtained. The constitutional protection demanded not merely that evidence so acquired shall not be used directly before the court, but also that it could not be brought before the court by only indirect means.[32] However, facts once illegally gained could still be proved by other independent sources.[33]

[27] 275 U.S. 192 (1927)

[28] 331 U.S. 145 (1947)

[29] See also United States v. Rabinowitz, 339 U.S. 56 (1950); Davis v. United States, 328 U.S. 582 (1946). There is some authority for the seizure of articles of contraband not specified in a search warrant if they are of the same general nature as those specifically described. See United States v. Old Dominion Warehouse, 10 F.2d 736, 739 (2d Cir. 1926); *cf.* Paper v. United States, 53 F.2d. 184 (4th Cir. 1931); United States v. Camarota, 278 F. 388 (S.D.Cal. 1922).

[30] Harris v. United States, 331 U.S. 145 at 155 (1947); *cf.* United States v. DiRe, 332 U.S. 581 (1948).

[31] 251 U.S. 385 (1920).

[32] *Id.* at 392; In United States v. Wallace & Tiernan Co., 336 U.S. 793, 796 (1949) this holding was explicitly approved.

[33] This dictum was followed in United States v. Krulewitch, 167 F.2d 943 (2d Cir. 1948); rev'd *on other grounds*, 336 U.S. 440 (1949) (Discretionary with trial judge to accept prosecutor's assurances that certain evidence could have been procured wholly by investigation unconnected with the illegal search); Warren v. Territory of Hawaii, 119 F.2d 936 (9th Cir. 1941) (Knowledge of facts gained

The most logical extension of the *Silverthorne* rule precluded the use of illegal evidence to obtain other evidence derivatively. In the *Gouled* case the Court refused to admit into evidence a duplicate of a contract, the original of which had been illegally seized. *Silverthorne* was strong authority for the Court's recognition of defendant's reasoning that illegal possession of the original must have suggested the existence and obtaining of the counterpart.[34]

This same reasoning was apparent in *Nardone v. United States*[35] which involved use of evidence obtained through wire-tapping.[36] The Federal Communications Act[37] rendered wire-tapping illegal and on this basis evidence obtained by such illegal means was held inadmissible. In addition, the Court struck down any derivative use of such illegal evidence, stating that the defendant should be given opportunity to prove that a substantial portion of the case against him was "a fruit of a poisonous tree".[38]

Another branch of the *Silverthorne* rule is that witnesses may not testify as to what they saw during an illegal search.[39]

Problems which remain under the *Silverthorne* rule can only be alluded to at this point. They are: (1) whether a subsequent search warrant could reach articles which were previously illegally obtained;[40] (2) whether illegally seized evidence can be the basis of a subsequent arrest.[41]

Search and Seizure Incidence to an Arrest— The most patent example of a reasonable search and seizure without a search warrant is seen in the "incidental arrest" cases.[42] It is in

by a proper independent source may be used though it also may be obtained from an illegal act).

[34] Gouled v. United States, 255 U.S. 298, 307 (1920).

[35] 308 U.S. 338 (1939).

[36] In Olmstead v. United States, 277 U.S. 438 (1928) it was held that the Fourth Amendment was not violated by the mere tapping of telephone wires of the premises of an accused. The theory was that there was neither a search nor a seizure when the sense of hearing was involved, and where there was no entry of the houses or offices of defendant.

[37] 48 STAT.1103 (1934) 47 U.S.C. §605 (1946).

[38] Nardone v. United States, 308 U.S. 338 at 341 (1939). Subsequent wire-tapping cases dealing with the derivative evidence problem are Weiss v. United States, 308 U.S. 321 (1939) (Evidence obtained from wire taps could not be used to induce some of the defendants to testify against other defendants who were the senders of the communication); and Goldstein v. United States, 316 U.S. 114 (1942) (approving the *Silverthorne* rule but permitting indirect use of illegal evidence because the intercepted telephone communications were not communications to which the defendant was a party).

[39] Amos v. United States, 255 U.S. 313 (1921) (Testimony of officers unlawfully upon the premises inadmissible); Nueslein v. District of Columbia, 115 F.2d 690 (D. C. Cir. 1940); *but cf.* Zap v. United States, 328 U.S. 624 (1946) where officers were lawfully upon the premises and consequently could testify to what they saw.

[40] See Parts Mfg. Corporation v. Lynch, 129 F. 2d 841 (2d Cir. 1942), *cert denied*, 317 U.S. 674 (1942) where a valid search warrant did issue for the seizure of machinery once illegally obtained. However, the affidavits supporting the warrant revealed that the Government had subsequently received its information legally and independently. *But cf.* Fraternal Order of Eagles, No. 778 v. United States, 57 F.2d 93 (3rd Cir. 1932); United States v. Plisco, 22 F. Supp. 242 (D.D.C. 1938); United States v. Mitchneck, 2 F. Supp. 225 (N.D. Pa. 1933)

[41] For an exhaustive analysis of this particular problem and the *Silverthorne* rule see Heald and Tyler Jr., *The Legal Principles Behind the Amerasia Case*, 39 GEO. L. J. 181 (1951). Johnson v. United States, 333 U.S. 10 (1948); and Taylor v. United States, 286 U.S. 1 (1932) are authority for the principle that probable cause for an arrest immediately after an illegal search cannot be based on evidence discovered during that search. Also, an arrest based on evidence illegally seized cannot make that evidence admissible as a seizure incident to arrest. *See also* Somers v. United States, 138 F. 2d 790 (2d Cir. 1943)

[42] See Note 5 *supra*. Another reasonable limitation on the necessity of a warrant pertains to searches of vehicles and other means of transportation. Where the search is for contraband and other illegal articles, and there is probable cause to believe that the vehicle which is stopped contains such goods, seizure is justified because of the impracticality of obtaining a warrant before the vehicle leaves the jurisdiction. Brinegar v. United States, 338 U.S. 16 (1949); Carroll v. United States, 267 U.S. 132 (1924). As to what constitutes probable cause see

this field that the flux in the law is most apparent. Although it is true that a search and seizure without a warrant contemporaneous with a valid arrest may be reasonable, the applicability of this exception and the extent to which it may be carried are constant problems. Accordingly, an historical approach is proper to portray the shifting trends in the Supreme Court decisions and to describe the nature of this exception and its relation to the standards previously indicated.

The reasonableness of search and seizure incidental to arrest depends upon the nature of the crime, the physical area and extent of search, and the character of articles seized. Aside from the essential fact that the arrest be lawful, the consequent search and seizure must be physically, and not merely chronologically, coincidental with the arrest. Thus, in the *Weeks* case a search and seizure of defendant's home could not be justified by a simultaneous lawful arrest of defendant in his business offices. In *Agnello v. United States*[43] and *Silverthorne* a lack of physical proximity was also determinative of illegality. However, the *Weeks* and *Agnello* opinions indicated in dicta that in a proper arrest case not only the person but also the home was subject to search and seizure without a warrant.

This dicta became a clear holding in the 1927 *Marron* decision where a search of premises and seizure of certain bills and a ledger found in a closet were held proper as an incident to a lawful arrest. The Court emphasized that a crime was being committed at the time of arrest, and that the articles seized were things used to commit the offense.

The *Marron* holding was somewhat shaken by the subsequent *Go-Bart* and *Lefkowitz* decisions where valid arrests could not justify improperly conducted searches and seizures. It was clear that the Court shifted toward a liberal application of the constitutional protection by condemning the respective searches as general and rummaging. *Marron* was distinguished because there the "things were visible and accessible and in the offender's immediate custody".[44]

With *Marron*, *Go-Bart*, and *Lefkowitz* as working precedent in the field of incidental arrest, the Court entered the post-World War II period with the following propositions: (1) a search and seizure incident to a valid arrest was a limited exception and would not be proper if general, exploratory or rummaging; (2) a seizure would be more justifiable if the articles were in plain view, or in the immediate custody of the arrestee; and (3) the risk of unreasonableness would be less if the articles seized were instrumentalities of crime, or of such a nature that the mere possession of such would constitute a crime or continuing offense.

Davis v. United States,[45] decided in 1946, was the first major case to test these propositions. Federal agents received gasoline from defendant without presenting the requisite ration coupons. Defendant was arrested and after repeated demands he consented[46] to unlocking his offices, whereupon the agents entered and seized certain gasoline coupons pursuant to a search. Mere possession of these coupons was illegal and the subsequent decision in favor of the law officers was consistent with proposition three. The Court went even further and pointed out that the ration coupons were not private but public in the sense that they remained at all times the property of the Government subject to inspection and recall. This extended the test

Grau v. United States, 287 U.S. 124 (1932); Husty v. United States, 282 U.S. 694 (1931). *See also*, Gambino v. United States, 275 U.S. 310 (1927) on the issue of good faith. For search on the high seas see United States v. Lee, 274 U.S. 559 (1927) and Maul v. United States, 274 U.S. 501 (1927). That a search and seizure may be made without a warrant in open fields and woods see Hester v. United States, 265 U.S. 57 (1924)

[43] 269 U.S. 20 (1925).

[44] Go-Bart Co. v. United States, 282 U.S. 344, 358 (1931). The ledger and bills in the *Marron* case were found in a closet. Were they really "visible and accessible"?

[45] 328 U.S. 582 (1946)

[46] The mere fact that defendant assented to a search was not a waiver of his constitutional protection. See Amos v. United States, 255 U.S. 313 (1921); *cf.* Johnson v. United States, 333 U.S. 10 (1948)

based upon the nature of the articles seized. Since the agents knew specifically what they were searching for the Court avoided any contention that the search was exploratory. Clearly, this decision liberalized the "visible and accessible" test since it was necessary for the agents to demand entrance into defendant's offices. The coupons were in defendant's immediate custody but whether this is a possible justification is doubtful. Objectively, the case had to be regarded as a set-back to the constitutional protection.

The reasoning in *Davis* was reflected again in the *Harris* decision and *Rabinowitz v. United States*.[47] In *Harris*, defendant was lawfully arrested in his rooms. Pursuant to a search for certain forged checks a sealed envelope was seized containing draft cards the possession of which was illegal. The search and seizure was held reasonable as incident to a lawful arrest. The result was aided by the reasoning that possession of the draft cards was a continuing crime committed in the presence of the officers. This was the theory rejected in *Go-Bart* and *Lefkowitz* and which basically was analogous to the *Davis* reasoning. The decision was a strong holding in favor of law enforcement for clearly evidence seized in a sealed envelope was not "in plain view".[48] But in *Harris*, as in the *David* and *Marron* cases, the character of the seized articles was the controlling factor.

The *Rabinowitz* decision in 1950 was the apex of the *Marron* doctrine which had found new life in *David* and *Harris*. Nevertheless, between this decision and the *Harris* case the Court had backtracked to its previous liberal view. In *Johnson v. United States*,[49] *Trupiano v. United States*,[50] and *McDonald v. United States*,[51] despite clear violations of law the Court slapped the hands of the law enforcement officials by holding illegal the respective searches and seizures because the law officers had sufficient time, opportunity, and information to procure a search warrant before the arrest was made.

This so-called "opportunity" theory was rendered comparatively unimportant by its clear rejection in *Rabinowitz*. There, after weeks of federal surveillance, defendant was arrested at his place of business. Without a warrant, desks, cabinets, and a safe was searched, and a quantity of forged cancelled stamps were seized. This search and seizure was held reasonable as incidental to a valid arrest. The Court emphasized that the officers were searching for specific objects so as to avoid any objection that the search was exploratory. In support of their holdings, the Court also pointed out that defendant's office was a public place to which the public, including the agents, were invited, that the office was small and within the immediate and complete control of the defendant, that the search did not extend beyond the room used for unlawful purposes, and finally that possession of the forged overprints was a crime.

The enumeration of these special circumstances was an implied indication that search and seizure incident to a valid arrest was basically a limited right. Since the reasonableness of every search and seizure is now to rest upon ad hoc determinations, the *Rabinowitz* case offers a convenient stopping point for an objective view of the arrest cases and their relation to the general law.[52] Despite shifts in opinion and personnel of the Court the following tendencies remained from the original post-war propositions:

[47] 339 U.S. 56 (1950)

[48] If a search warrant had issued for the forged checks there is doubt whether seizure of the draft cards would have been authorized. See Marron v. United States, 275 U.S. 192 (1927).

[49] 333 U.S. 10 (1948)

[50] 334 U.S. 699 (1948)

[51] 335 U.S. 451 (1948). For a similar liberal holding see United States v. Dire, 332 U.S. 581 (1948).

[52] A case subsequent to *Rabinowitz* is McKnight v. United States, 183 F. 2d 977 (D. C. Cir. 1950) where without a warrant federal agents broke down a door to a private dwelling and arrested defendant and incidentally seized certain incriminating equipment. In rejecting a prior convenient opportunity to arrest defendant and by breaking down the door the action of the officers was declared unreasonable. This decision illustrates that the liberality of the *Rabinowitz* holding may be avoided where the particular circumstances are such as to enable the court to brand the seizure as unreasonable.

(1) Search and seizure contemporaneously with an arrest is an exception to the constitutional requirement of a warrant and is strictly a limited right. The basic purposes are (a) to protect the arresting officer and to deprive the prisioner of means of escape, (b) to avoid destruction of evidence by the arrestee, and (c) to gather instruments of the crime.

(2) The search and seizure must be proximate to the arrest in time and physical area. The seized articles must either be in plain view, in the immediate custody of the arrestee, or reasonably accessible without exploring, rummaging or ransacking. Thus, the conduct of the arresting officers is frequently very important. Where they proceed orderly, and where specificity is the mark of the search the risk of impropriety is lessened. However, the limits of permissible search have never been fully defined although there is a working test of reasonableness for each situation.

(3) The nature of the crime and the character of the seized articles usually controls the disposition of a particular case. Consequently, where the crime is of a continuing nature which is aggravated by possession of contraband or articles the mere possession of which is an offense, there is a tendency to uphold the seizure. Further, seizure of papers or articles, which are public in nature or which are invested with a paramount public interest, is more likely to be justifiable than seizure of private papers. In this connection it will be remembered that there is judicial antipathy towards seizure of articles solely for their evidentiary value.

(4) Finally, although constitutional protection extends to both private and public premises, there is a tendency to protect a private dwelling more than a business or public place.[53]

Procedural Limitations Upon the Federal Exclusionary Rule

The scope of the exclusionary rule has been sharply constricted by the procedural limitations imposed upon its invocation.[54] The victim of a violation of the constitutional immunity is personally aggrieved and only he has a right to complain.[55] Consequently, requisite standing to raise the constitutional issue of unreasonably seized evidence is the first main limitation. The second is that constitutional issues must be asserted seasonably or they will not be considered at trial or upon appellate review.[56]

Interest in Property Searched and/or Property Seized—Where the defendant does not claim ownership either of the premises searched or the property seized he is in no position to resist the admissibility of seized evidence.[57] There is conflict, however, as to whether interests in both the premises (property) searched and the property seized are necessary requisites for standing. Although there are indications that both interests are necessary,[58] there is a tendency to sustain a standing if either interest is present.[59]

Where interest is the premises searched is the basis for standing the federal courts have

[53] *Compare* Rabinowitz v. United States, 339 U.S. 56 (1950) with McDonald v. United States, 335 U.S. 451 (1948) and Johnson v. United States, 333 U.S. 10 (1948).

[54] This topic is too broad to be exhaustively treated in this comment. For collateral reading see Edwards, *Seasonable Protests Against Unreasonable Searches and Seizures*, 37 Minn L. Rev. 188 (1953); Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. L. Rev. 471 (1952).

[55] Kelley v. United States, 61 F.2d 843 (8th Circ. 1932).

[56] The federal exclusionary rule does not bar evidence illegally sized by persons other than federal law enforcement agencies. This is not basically a procedural limitation but actually a substantive limitation. Cases are cited at note 12 *supra*.

[57] Casey v. United States, 191 F. 2d 1 (9th Cir. 1951); *Rev'd on other grounds*, 343 U.S. 808 (1952); Lewis v. United States, 92 F.2d 952 (10th Cir. 1937).

[58] Ingram v. United States, 113 F.2d 966 (9th Cir. 1940); Brown v. United States, 61 F.2d 363 (8th Cir. 1932); Occinto v. United States, 54 F.2d 351 (8th Cir. 1931).

[59] United States v. Jeffers, 342 U.S. 48 (1951); Gibson v. United States, 149 F.2d 381 (D.C. Cir. 1945); Matthews v. Correa, 135 F.2d 534 (2d Cir. 1943); Pielow v. United States, 8 F.2d 492 (9th Cir. 1925). See cases collected in notes 285 and 287 to U.S.C.A. Const. amend. IV.

either demanded ownership or possession, the latter being necessary in cases involving lessors,[60] the former being requisite where an employee[61] seeks standing. Thus, the anomaly is that both the lessor who has title, but no possession and the employee who has no title, but who may be in possession are denied standing.[62] If security and privacy in one's premises or property is the major constitutional objective it would appear that possession should be controlling.

In view of the numerous cases in which the courts attempt to distinguish between ownership and possession when concerned with the premises *searched*, it is difficult to reconcile holdings where standing is recognized solely upon an interest in the property *seized*. In *United States v. Jeffers*,[63] the Supreme Court negated the distinction between elements of search and elements of seizure and clearly held that, notwithstanding a lack of possession or ownership interest in the premises unlawfully searched, the defendant's mere defeasible property right in the contraband seized was sufficient to give him standing. This was a liberal holding and must be viewed as a deviation from the earlier strict insistence on a personal violation of defendant's privacy and security. Consequently, when the Supreme Court allows standing in a situation where an illegal search as to one person is combined with an illegal seizure as to another a wedge in this procedural limitation on the exclusionary rule is now present.

Seasonable Objection to Unreasonably Seized Evidence—A motion to suppress evidence obtained by unreasonable search and seizure must be timely asserted.[64] This requirement is an outgrowth of the common law rule which precludes collateral inquiry into the source of competent evidence and from the judicial reluctance to consider a constitutional issue unless seasonably raised. A timely assertion is interpreted to mean pre-trial.[65]

Exceptions to this basic rule frequently arise when a motion to suppress is made during the trial because the defendant is unaware of the illegal seizure. In such case the violation of the constitutional immunity must be clear and undoubted.[66] Also, where the unconstitutionality of the seizure becomes apparent during the offending officer's testimony a subsequent suppressing motion is upheld.[67] Absent exceptional circumstances, most federal courts narrowly

[60] Schnitzer v. United States, 77 F.2d. 333 (8th Cir. 1935); United States v. Muscarelle, 63 F.2d 806 (2d Cir. 1933) (cases where standing has been denied to lessors out of possession.) The lessee, however, can challenge the legality of a search and seizure conducted upon the leased premises. United States v. DeVasto, 52 F.2d 26 (2d Cir. 1931); *cf.* Coon v. United States, 36 F.2d 164 (10th Cir. 1929) (lessee can object only as to that part of the premises over which his lease extends).

[61] An employee cannot complain of an illegal search and seizure of the employer's property. Often the employee is convicted by incriminating evidence in his possession without ever having the opportunity to challenge their illegal seizure. United States v. Conoscente, 63 F.2d. 811 (2d Cir. 1933); Kelley v. United States, 61 F.2d 843 (8th Cir. 1932); *but cf.* Alvau v. United States, 33 F.2d 467 (9th Cir. 1929).

[62] As to standing of corporations and corporate officers see United States v. Antonelli Fireworks Co., 155 F.2d 631 (2d Cir. 1946); In Re Dovley, 48 F.2d 121(2d Cir. 1931); Guckenheimer v. United States, 3 F.2d 786 (3rd Cir. 1925) *cert. denied*, 268 U.S. 688 (1925) For standing of conspirators see United States v. DeVasto, 52 F.2d 26 (2d Cir. 1931) and for co-defendants Ingram v. United States, 113 F.2d 966 (9th Cir. 1940); *but cf.* United States v. Thompson, 113 F.2d 643 (7th Cir. 1940).

[63] 342 U.S. 48 (1941); for a similar holding see Pielow v. United States, 8 F.2d 942 (9th Cir. 1925).

[64] Weeks v. United States, 232 U.S. 383 (1914); see FED. R. CRIM. P. 41(e).

[65] Segurola v. United States, 275 U.S. 106 (1947); United States v. Wernecke, 138 F.2d 561 (7th Cir. 1943); *cert. denied*, 321 U.S. 771 (1944).

[66] Agnello v. United States, 269 U.S. 20 (1925); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921).

[67] Amos v. United States, *supra* note 66; These exceptions are recognized in FED. R. CRIM. P. 41 (e), 18 U.S.C. §687 *et. seq.* (1947), 57 STAT·767 (1943).