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Search and Seizure by Private Parties: An Exception to the Exclusionary Rule

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SEARCH AND SEIZURE BY PRIVATE PARTIES: AN EXCEPTION TO THE EXCLUSIONARY RULE

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

The Supreme Court of the United States has enforced this amendment by denying the admission of evidence procured by representatives of the government in violation of it. Like the Commerce Clause,[2] the development of judicial interpretation of unreasonable searches and seizures has involved an evolutionary process. The search and seizure evolution has included an ever-widening spectrum of judicial pronouncements which point toward the increasing emphasis upon individual freedom from restraint.

This comment will examine the vitality of the rule established in *Burdeau v. McDowell,*[3] which held that evidence illegally seized by a private party is not within the realm of protection afforded to individuals by the Fourth Amendment. In that case, McDowell, an employee of the Farmer's Bank Building in Pittsburgh, had in his possession certain documents relating to mail usage. A private detective broke into McDowell's desk and stole these papers which were turned over to Burdeau, an agent of the Attorney General, and used in the prosecution of the defendant on the charge of mail fraud. The defendant's objection that the admission of such evidence was a violation of the Fourth Amendment was overruled by the court, on the ground that the Fourth Amendment only protects unlawful searches and seizures by governmental, not private, employees.

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1. U.S. CONST. amend. IV.
2. U.S. CONST. art. I, § 8.
3. Burdeau v. McDowell, 256 U.S. 465 (1921).

DEVELOPMENT OF THE EXCEPTION

In 1914 the Supreme Court held in *Weeks v. United States,*[4] that evidence procured as a result of an illegal search and seizure conducted by federal agents was inadmissible in federal courts. In that case federal and local officials had searched Weeks' home and had seized his personal papers. The court stated that

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.[5]

Although the *Weeks* case was the first Supreme Court decision to announce the federal exclusionary rule per se, the Court had established its attitude toward illegal search and seizure at least 28 years earlier in *Boyd v. United States,*[6] when the Court held that the Fifth Amendment requires the exclusion of testimonial evidence which was the product of an unreasonable search and seizure. The Court per Mr. Justice Bradley stated that the illegal search and seizure of an individual's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself under the Fifth Amendment. Both the Fourth and Fifth Amendments are extensively interrelated to the personal security and right to privacy of the citizens, and in this area they throw light on each other.[7]

Thus *Boyd* and *Weeks* set in motion the judicial cogs which focused a broad range of interpretation upon illegal search and seizure. However, in 1921 in *Burdeau v. McDowell,* our nation's highest court held that the Fourth Amendment gives protection against unlawful searches and seizures by governmental authorities, but the Amendment was not intended to be a limitation upon private individuals.[8] But

4. Weeks v. United States, 232 U.S. 383 (1914).
5. *Id.* at 393.
6. Boyd v. United States, 116 U.S. 616 (1886).
7. *Id.* at 633.
8. Burdeau v. McDowell, *supra* note 3.

Burdeau did not overrule *Boyd.* In fact *Boyd* is still cited with great reverance by the Supreme Court.[9] The justification behind this distinction between governmental and private searches and seizures has been that the Fourth Amendment, and indeed the entire Constitution, was created to limit illegal and unwarranted sovereign intervention without due process of law, and not to restrict individual action, regardless of its form. In *United States v. Carter,*[10] the Court said that the Constitution is merely a limitation on the powers of the government and does not proscribe individual actions; therefore the admission of evidence derived from an illegal private search did not violate the defendant's constitutional rights. Just recently *Burdeau* was reaffirmed by the Oregon Court of Appeals when marijuana accidentally found in the defendant's glove compartment by a parking lot attendant was held to be admissible evidence.[11]

EXCLUSIONARY TRENDS—WEEKS TO THE PRESENT

When the exclusionary rule in *Weeks* was handed down, this marked the first holding that in a federal prosecution the Fourth Amendment banned the use of evidence obtained through an illegal search and seizure. Thirty-five years later the Supreme Court in *Wolf v. Colorado,*[12] after announcing that it adhered to the *Weeks* decision, held that the exclusionary rule would not be imposed upon the States and "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[13] Fortunately, however, this setback upon the exclusionary rule was not permanent, for in 1960 the Court reversed *Wolf* and held in *Mapp v. Ohio,*[14] that the protection of the exclusionary rule should also be extended to the states.

In the same term as *Wolf,* the Court announced its so called "silver platter doctrine" in *Lustig v. United States.*[15]

9. *See* Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring).
10. United States v. Carter, 35 C.M.R. 467 (1965).
11. State v. Bryan, 457 P.2d 661 (Ore. Ct. App. 1969).
12. Wolf v. Colorado, 338 U.S. 25 (1949).
13. *Id.* at 33.
14. Mapp v. Ohio, *supra* note 9, at 643.
15. Lustig v. United States, 338 U.S. 74, 78 (1949).

Under this doctrine evidence obtained through an illegal search and seizure by state officials without any cooperation of federal officials was admissible in a federal court. However, like *Wolf, Lustig* was not permanent. In *Elkins v. United States*[16] the Supreme Court overruled the "silver platter doctrine." At present any cooperation between federal and state officials renders the fruits of an unlawful search and seizure inadmissible in the courts of both sovereignties.

Considering the trends involving search and seizure from another viewpoint, in *Olmstead v. United States*[17] the Court had held by dictum that the admissibility of evidence is not affected by illegality of the means by which it was obtained. In a dissenting opinion by Justice Brandeis, in which Justice Holmes concurred, it is stated, "To declare that in the administration of the criminal law that the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely turn its face."[18] Thirty-nine years later *Katz v. United States*[19] overruled *Olmstead* in stating, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[20]

From the preceding it is rather obvious that a radical change has taken place in the law of search and seizure subsequent to *Burdeau.* Undoubtedly such a series of overrulings have undermined the basic philosophy behind *Burdeau.* In fact some federal appellate court judges have suggested that *Elkins* may have overruled *Burdeau.*[21] This comment suggests that the federal courts should reevaluate *Burdeau* in terms of contemporary judicial interpretation concerning the Fourth Amendment and illegal search and seizure. Since the *Burdeau* decision the Supreme Court has looked upon various illegal searches with growing disfavor,

16. Elkins v. United States, 364 U.S. 206 (1960).
17. Olmstead v. United States, 277 U.S. 438 (1928).
18. *Id.* at 485.
19. Katz v. United States, 389 U.S. 347 (1967).
20. *Id.* at 351.
21. *See* United States v. Williams, 314 F.2d 795 (6th Cir. 1963) (dictum).

and increasingly favors the protection of individuals and their property rights from unwarranted searches.

A number of state courts have within the last decade taken a significant step across the governmental v. private search and seizure gap. In *People v. Fieffo,*[22] a California court held that a request by a police detective to a hotel manager constituted sufficient government involvement to render seized narcotics inadmissible.[23]

FUNDAMENTAL INEQUITY—A TIME FOR CHANGE

When the rule in *Boyd* was set down, no distinction was made, either expressly or impliedly, between illegal searches by individuals or by governmental agents. Consequently many critics of *Burdeau* consider the differentiation later made to be an inherent inequity. The Supreme Court itself in *Miranda v. Arizona* pointed out that "to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors."[24]

The interrelationship between the Fourth and Fifth Amendments has been alluded to already. As early as 1921 a Harvard Law Review article[25] expressed the view that just as the Fifth Amendment protects an individual from self-incrimination, the Fourth Amendment was meant to protect the individual from unwarranted searches and seizures for possible evidence of a crime, thus forcing a defendant to give self-incriminating evidence. Many courts have indicated that the official status of the intermediary is irrelevant in determining whether the Fifth Amendment has been violated or not. A confession made under duress and with compulsion is not admissible, whether made to a police officer or to a private person.[26] But yet ironically under the *Fourth*

22. People v. Fieffo, 236 Cal. App. 2d 344, 46 Cal. Rptr. 132 (3d Dist. 1965).
23. *See also* State v. Scrotsky, 39 N.J. 410, 189 A.2d 23 (1963).
24. Miranda v. Arizona, 384 U.S. 436, 460 (1966).
25. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).
26. Schaumberg v. State, 432 P.2d 500 (Nev. 1967); *See also* Comment, 3 U. SAN FRAN. L. REV. 159, 167 (1968).

Amendment an individaul in a wrongful search may in effect force a person to give up evidence against himself while under the *Fifth* Amendment a confession wrongfully received by an individual is inadmissible.[27]

Under our adversary system it would seem that unwarranted and unlawful evidence should not be admissible without a search warrant or voluntary surrender, regardless of whether a government official or a private party is involved. The distinction between private parties and governmental parties is unwarranted.[28] If the distinction between governmental and private searches were abolished, it would appear that the exclusionary rule would have the same effect upon private as it does on governmental searches.

As a consequence thereof a decrease in illegal private searches and an increase in personal privacy should result.[29] It is significant that the Supreme Court now recognizes that the Fourth Amendment creates a "right to privacy, no less important than any other right carefully and particularly reserved to the people."[30]

Critics of the proposed change point out that to hold privately obtained evidence inadmissible would hinder the apprehension and conviction of numerous guilty suspects. Such a ruling would leave store merchants highly vulnerable to shoplifters since at present they are usually searched and detained by private store detectives.[31]

However, the Fourth Amendment prohibits only *unreasonable* searches and seizures. If the Supreme Court were to extend the perimeter of the exclusionary rule to private searches, a standard of reasonableness would have to be adopted. Such a test could be based upon similar standards used concerning official searches, and by integrating the "probable cause" limitation into the test.

Because the principles of *stare decisis* are so thoroughly

27. Malloy v. Hogan, 378 U.S. 1 (1964).
28. Comment, 3 U. SAN. FRAN. L. REV. 159, 167 (1966).
29. Comment, 1966 UTAH L. REV. 271, 276 (1966).
30. Mapp v. Ohio, *supra* note 9, at 656.
31. People v. Rondazzo, 220 Cal. App. 2d 768, 34 Cal. Rptr. 65 (2d Dist. 1963).

and completely engrained in the American judicial system, courts are quite reluctant to overrule well established rules of law. However, if a separate but related rule can be intertwined with the rule in question, thus giving the Court certain legal justification through reinterpretation, the pain of overruling can be anestheticized in favor of more equitable doctrine.

To reinforce the overruling of *Burdeau, Shelley v. Kraemer*[32] can give valuable assistance. In that case the Supreme Court considered the question whether certain private restrictive covenants whose purpose was the exclusion of racial minority groups from property ownership in the area, were constitutionally enforceable. The Court held that the enforcement in the courts of the agreements was a violation of the equal protection clause of the Fourteenth Amendment. The Court said that the judicial enforcement of a restrictive covenant between private litigants has been sufficient governmental action to bring constitutional limitations into effect.

This can be related to the issue of private searches and seizures. If the rule in *Shelley* were applied to this area, the actions of the judiciary could be interpreted as sufficient government intervention to deny admission in a court the illegally and unreasonably procured evidence seized by a private person. As early as 1908 the Supreme Court recognized that the judicial act of the Court was the act of the State.[33] In *Shelley* Mr. Chief Justice Vinson speaking for the majority stated, "That the action of the state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."[34] Thus state action refers to the exercise of state power in a variety of forms, whether the power is legislative, executive, or judicial. When the effect of that state action is to deny an inherent constitutional right, then

32. Shelley v. Kraemer, 334 U.S. 1 (1947).
33. Twinning v. New Jersey, 211 U.S. 78 (1908).
34. Shelley v. Kraemer, *supra* note 32, at 14.

it is unenforcable regardless of the form of that exercise. Thus but for the active intervention of the judiciary, the petitioner in *Shelley* would have been free to take possession and ownership of the property without restraint.[35]

CONCLUSION

From the foregoing discussion it is obvious that the distinction between illegal acts of the government and similar acts by private individuals has become rather indistinct in the area of civil rights. Since the decision of *Burdeau v. McDowell* in 1921, an entirely new judicial atmosphere surrounding illegal search and seizure has evolved, to the extent that our federal court system has become increasingly aware of the inherent rights of property and privacy of the individual. Consequently, the justification behind allowing evidence of illegal searches by private parties to be admissible in criminal suits is presently of very questionable validity.

One is bound to agree that the efforts of the Court to punish guilty individuals, although obviously a praiseworthy and justifiable objective, must not be aided by the sacrifice of the principles which are the foundation upon which the law of our land is embodied. Constitutional guarantees under the Bill of Rights cannot be set aside in favor of the unrestricted actions of individuals. "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."[36] The Bill of Rights is just what the phrase implies—a body of legislation establishing the inherent personal *rights* of individual citizens. If our Founding Fathers had wished these ten amendments not primarily to protect individuals, but rather merely to restrict unreasonable governmental interference and no more, the amendments might just as well have been referred to as the Bill of Restrictions. Constitutional protection should be afforded to any citizen of the United States whose property has been illegally searched and seized, regardless of whether the person performing the unwarranted

35. *Id.* at 19.

36. Burdeau v. McDowell, *supra* note 3, at 477 (dissenting opinion).

act was acting as a governmental agent or acting on in individual basis. As far as the citizen is concerned, the distinction is inequitable and absurd.

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