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CONSTITUTIONAL LAW-DUE PROCESS OF LAW-FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE-THE ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE—THE ADMISSIBILITY OF ILLEGALLY SEIZED EVIDENCE—Local police officers entered the private office of petitioner, a practising physician, without a warrant and seized his private books and records. As a result of the information thus obtained, petitioner was convicted of conspiracy to perform an abortion. Petitioner claimed that his constitutional rights were invaded contending that due process of law under the Fourteenth Amendment includes freedom from unreasonable search and seizure and prevents the admission of illegally seized evidence, but this was denied by the Supreme Court of Colorado and the conviction was affirmed.[1] On certiorari to the Supreme Court of the United States, *held*, affirmed, three justices dissenting. The due process clause of the Fourteenth Amendment guarantees freedom from unreasonable search and seizure by state officials, but does not forbid the admission of evidence obtained in such illegal fashion. *Wolf v. Colorado* (U.S. 1949) 69 S.Ct. 1359.

Four questions were raised by the principal case. The first was whether or not the Fourth Amendment of the Bill of Rights is included in the due process clause of the Fourteenth Amendment. The contention that the due process clause extends to all the guarantees of the Bill of Rights was once again rejected by five members of the Supreme Court.[2] Although this result has persistently been reached,[3] the Court, using the gradual process of inclusion and exclusion,[4] has ruled that such fundamental rights as freedom of speech, press, religion and assembly are essential to due process.[5] Protection accorded citizens against state action is further broadened by the Court's holding in the principal case that the substantive right guaranteed by the Fourth Amendment—freedom from unreasonable search and seizure—is now a part of the due process clause.[6] The majority opinion, written by Justice Frankfurter, stated that the security of one's privacy against arbitrary intrusion by the local police is basic to a free society and is implicit in the concept of ordered liberty.[7] The Court was not faced with

[1] Wolf v. People of the State of Colorado, 117 Col. 279, 187 P. (2d) 926 (1947) and 117 Col. 321, 187 P. (2d) 928 (1947).

[2] Chief Justice Vinson, Justices Frankfurter, Jackson, Reed and Burton.

[3] See Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111 (1884); Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937); Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947).

[4] Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

[5] Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625 (1925) (speech); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625 (1931) (press); Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504 (1947) (religion); DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255 (1937) (assembly).

[6] This is the first time that the Court has ever ruled directly on this question for it declined in previous cases to pass upon the question, either because is was unnecessary for immediate purposes, Consolidated Rendering Co. v. Vermont, 207 U.S. 541, 28 S.Ct. 178 (1908) or because there was no federal issue created, National Safe Deposit Co. v. Stead, 232 U.S. 58, 34 S.Ct. 209 (1914).

[7] Principal case at 1361.

the question of what is an unreasonable search and seizure by a local officer, since the search for petitioner's books and records for evidentiary purposes was clearly illegal,[8] but the Court will eventually have to decide whether uniform standards of interpretation of search and seizure cases will be applied to both federal and state action.[9] The remaining three questions involved the problem of enforcing the prohibitions of the Fourth Amendment under the due process clause. The federal courts have consistently applied the rule that evidence secured by federal officials through illegal search and seizure is inadmissible against the person whose rights have been invaded.[10] The second question before the Court was whether this exclusionary rule is an intrinsic part of the Fourth Amendment, or merely a judicial rule of evidence. There are no express words in the amendment to classify the rule as a part thereof.[11] Justification for the rule has been sought either under the Fifth Amendment of the Bill of Rights, which has been said to protect every person from incrimination by the use of illegally seized evidence,[12] or because exclusion is the only satisfactory means of enforcing the safeguards of the Fourth Amendment.[13] Furthermore, the rule has not been restricted to questions of unreasonable search and seizure, but it has been applied to illegal detention,[14] wiretapping[15] and to a variety of other fields.[16] Thus the majority of the Court logically held that the rule was not derived from the explicit requirements of the amendment, but that it was a

[8] Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261 (1921); Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946).

[9] The question of what is an unreasonable search and seizure under the Fourth Amendment has caused the Court much difficulty. See Davis v. United States, supra, note 8; Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277 (1946); McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191 (1948); Lustig v. United States, (U.S. 1949) 69 S.Ct. 1372; 45 MICH. L. REV. 605 (1947). Conceivably a search by local officials could be valid under local law but invalid under the due process clause.

[10] Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886); Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914); Trupiano v. United States, 334 U.S. 699, 68 S.Ct. 1229 (1948). For a complete analysis of the rule see 58 YALE L. J. 144 (1948). This federal rule of exclusion is contra to the common law rule that the illegal or irregular means of procuring evidence is not cause for its rejection at trial. See 8 WIGMORE, EVIDENCE, 3rd ed., §2183 (1940).

[11] See Harno, "Evidence Obtained by Illegal Search and Seizure," 19 Ill. L. REV. 303 (1925) and 42 MICH. L. REV. 681 (1944).

[12] Boyd v. United States, supra, note 10. The Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself. ..."

[13] Weeks v. United States, supra, note 10. See 45 MICH. L. REV. 605, 614 (1947); Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 (1925); 58 Yale L. J. 144 (1948).

[14] McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943); Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170 (1948).

[15] Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939); Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1927).

[16] See 58 YALE L. J. 144, 149 (1948).

matter of judicial implication—a rule of evidence laid down by the Supreme Court which Congress could change if it so desired.[17]

The third question raised by the case was whether or not the admission of illegally seized evidence, apart from its relationship to the Fourth Amendment, was in itself a violation of due process of law. Traditionally the Supreme Court has held that procedural due process of law requires that the accused receive a fair trial in all respects and in all stages.[18] Accordingly, at times a state cannot deprive the accused of assistance of counsel,[19] nor can it secure a conviction based on perjured evidence[20] or on a confession obtained by coercion.[21] But a common law jury[22] and a grand jury indictment[23] are not required, nor is there a prohibition against self-incrimination[24] or double jeopardy.[25] Thus there is no basis for saying that the admission of illegally seized evidence, which is relevant and reliable, is a departure from the fair trial concepts of due process as developed by the Court.[26] Petitioner's argument that due process was violated by the admission of the illegally seized evidence because the exclusionary rule was vital to the protection of the right to be free from unreasonable search and seizure presented the fourth question raised by the principal case. Such an extension of procedural due process beyond the area of fair trial requirements to include the disciplining of lawless state officials was denied by the Court. Justice Frankfurter held that it was not for the Court to condemn, as falling below the minimal standards assured by due process, a state's reliance on what he characterized as other "equally effective" methods of protecting the right of privacy.[27] A rule rejected by thirty states, ten countries in the British Common-

[17] Principal case at 1361. Justice Black, in his concurring opinion, states that McNabb v. United States, supra, note 14, is authority for holding it is a judicial rule of evidence. But see Justice Rutledge's dissent in the principal case on p. 1368.

[18] ROTTSCHAEFER, CONSTITUTIONAL LAW, §327 (1939); Palko v. Connecticut, supra, note 3.

[19] Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932). See 47 MICH. L. REV. 705 (1949).

[20] Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340 (1935).

[21] Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936). See 46 MICH. L. REV. 1108 (1948).

[22] Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448 (1900).

[23] Hurtado v. California, supra, note 3.

[24] Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14 (1908); Adamson v. California, supra, note 3. See 46 MICH. L. REV. 372 (1948).

[25] Palko v. Connecticut, supra, note 3.

[26] State courts had previously held that it was not a denial of due process to admit such evidence. Commonwealth v. Donnelly, 246 Mass. 507, 141 N.E. 500 (1923); Johnson v. State, 152 Ga. 271, 109 S.E. 662 (1921).

[27] Principal case at 1363. Possibly another reason for not incorporating the exclusionary rule into due process would be the invalidation of laws of thirty states on the subject and the nullification of the proceedings under these laws. See Adamson v. California, supra, note 3, and 46 MICH. L. REV. 372, 377 (1948).

wealth,[28] and criticized so strongly by legal writers,[29] does not appear to be so fundamental as to be implicit in the concept of ordered liberty and justice. In a strong dissent Justice Murphy argued that without the exclusionary rule, the protection to be accorded a citizen by the Fourteenth Amendment from unreasonable search and seizure is meaningless.[30] Self help, civil liability of the officer in state courts, or penal sanctions against the offending agent do not appear to be equally as effective as the exclusionary rule.[31] With the incorporation of the Fourth Amendment into the Fourteenth, the way is open for Congress to increase the effectiveness of the remedies available to the aggrieved party by passing federal criminal statutes aimed at state officers, or by permitting civil actions against the local officials in the federal courts.[32] If Congress passed legislation expressly forbidding the admission of the illegal evidence in a state court, it would raise a serious constitutional question as to whether Congress could go this far in exercising its authority to enforce the rights judicially recognized under the Fourteenth Amendment. Clearly the holding by the Court in the principal case is sound from a constitutional point of view, but the practical effect of the decision seems to be that the inclusion of the Fourth Amendment in the Fourteenth does not increase the protection a citizen previously had from lawless searches and seizures by local officials.

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[28] See charts in principal case at 1364 et seq.

[29] Opposed to the rule: 8 WIGMORE, EVIDENCE, 3rd ed., §§2183-4 (1940); Harno, "Evidence Obtained by Illegal Search and Seizure," supra, note 11. Arguments in favor of the rule: Atkinson, "Admissibility of Evidence Obtained by Illegal Searches and Seizures," supra, note 13; Corwin, "The Supreme Court's Construction of the Self Incrimination Clause," 29 MICH. L. REV. 1, 191 (1930); 45 MICH. L. REV. 605 (1947).

[30] Principal case at 1369. He was joined by Justice Rutledge, who also dissented separately. Justice Douglas wrote a separate dissent.

[31] Principal case at 1369, 1370. See Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," supra, note 13; CORNELIUS, SEARCH AND SEIZURES, 2d ed., 44 (1930); 45 MICH. L. REV. 605 (1947); 58 Yale L. J. 144 (1948).

[32] Art. 14, §5, states, "The Congress shall have power to enforce by appropriate legislation the provisions of this article." See ROTTSCHAEFER, CONSTITUTIONAL LAW, §232 (1939).