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CONSTITUTIONAL LAW-SEARCH AND SEIZURE

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COMMENTS

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—Although general warrants and writs of assistance are not expressly mentioned among the grievances set out in the Declaration of Independence, unquestionably they served to fan the flames of incipient revolution.[1] Indeed, none other than John Adams said of James Otis' argument against writs of assistance: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child

[1] LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); Wood, "The Scope of the Constitutional Immunity Against Searches and Seizures," 34 W. VA. L. Q. 1 (1927).

Independence was born."[2] With English tyranny fresh in their minds, the members of the first Congress of the United States manifested their antipathy to governmental invasions of privacy by drafting for ratification the Fourth Amendment to the Constitution:

> "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."

The most important step in the development of this constitutional provision came in 1886 in the famous case of *Boyd v. United States.*[3] There the Court gave life to the Fourth Amendment by recognizing its intimate relation to the Fifth Amendment;[4] thus laying the foundation for the federal rule that the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment.[5] With the exception of a temporary setback in 1903,[6] this rule, as restated in the Weeks case,[7] has effectively weathered a barrage of criticism. But recent decisions indicate a modified interpretation of the right to be free from unreasonable searches and seizures. The cases of *Davis v. United States*[8] and *Zap v. United States,*[9] which arose out of governmental regulation during World War II, deserve scrutiny, for they evidence a trend in judicial thought inconsistent with established precedent.

I

Davis was suspected of running a black market in gasoline. Government agents drove their cars into his station[10] and succeeded in purchasing gas without ration stamps from an employee by paying twenty

[2] 10 WORKS OF JOHN ADAMS 248 (1856).

[3] 116 U. S. 616, 6 S. Ct. 524 (1886).

[4] The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

[5] The Court relied on the landmark case of Entick v. Carrington, 19 HOWELL'S STATE TRIALS 1029 (1765), where Lord Camden emphasized the connection between the privilege against unreasonable searches and that against self incrimination.

[6] Adams v. New York, 192 U. S. 585, 24 S. Ct. 372 (1904).

[7] Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341 (1914). There the Court held that evidence procured by federal agents was inadmissable because the taking was in violation of the Fourth Amendment.

[8] (U. S. 1946) 66 S. Ct. 1256.

[9] (U. S. 1946) 66 S. Ct. 1277.

[10] The station was owned by Davis under a corporate form. A corporation is protected against unlawful search and seizure by the Fourth Amendment. Silverthorne Lumber Co., Inc. v. United States, 251 U. S. 385, 40 S. Ct. 182 (1920); Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370 (1906).

cents a gallon above the ceiling price. Subsequently the employee was arrested, and Davis, upon his arrival at the station, was also arrested on the same charge: selling gasoline without coupons and in excess of the ceiling price—a misdemeanor.[11] The officers demanded and received from Davis the keys for the locked boxes on the pumps intended for the deposit of gasoline ration coupons, and a discrepancy in the amount by which the storage tanks had been diminished by sales and the coupons in the boxes soon became apparent. Davis went with two of the agents to the waiting room of his office, which was on the premises, and, when questioned, informed them that he had in his private office sufficient coupons to make up the deficiencies. The door to the private office was locked and Davis persistently refused to unlock it. However, upon observing that another agent was shining a flashlight through an outside window of the private office and was apparently trying to raise the window, Davis unlocked the door. He took some envelopes from a filing cabinet in the private office and handed them to the agents. The contents of these envelopes formed the basis for the charge of illegal possession of gasoline ration coupons.[12] It was upon this charge, also a misdemeanor, that he was later prosecuted and convicted. No search warrant or warrant of arrest was ever issued. The district court, having refused the petitioner's timely motions for exclusion of the evidence, found that Davis had voluntarily consented to the search and seizure. The circuit court of appeals questioned this finding, yet preferred to sustain the conviction on the ground that the search and seizure were reasonable as incident to the arrest.[13] Certiorari was granted by the Supreme Court, and in a 4-3 decision,[14] the judgment was affirmed.

The decision of the Court written by Justice Douglas commences with a recognition of the interplay of the Fourth and Fifth Amendments in the law of search and seizure, and of the theories behind these constitutional provisions. Nevertheless the opinion proceeds to do violence to the very theories which it professes to recognize. While the decision rests on consent to a search and seizure incident to an arrest, suggestions of far reaching import are proposed, all of which are attacked in an exhaustive dissent by Justice Frankfurter.

Congressional legislation enacted under the war power, author-

[11] 56 Stat. L. 176 at 179, § 301 (1942), 50 U.S.C. Appy. (Supp. v 1946) §§ 633, 2 (a) (5). Presidential power under this statute was delegated to the Administrator of the Office of Price Administration, who promulgated ration orders for gasoline.

[12] 56 Stat. L. 196 at 179, § 301 (1942), 50 U.S.C. (Supp v, 1946) Appx. §§ 633, 2 (a) (5). Such offense was contrary to the provisions of Amendment 87 to Ration Order No. 5C, § 1934.8177 (c), 8 FED. REG. 16420 at 16423 (Dec. 7, 1943), issued by the Office of Price Administration.

[13] United States v. Davis, (C.C.A. 2d, 1945) 151 F. (2d) 140.

[14] Justice Frankfurter wrote a dissenting opinion in which Justice Murphy concurred. Justice Rutledge dissented in a separate opinion.

ized the inspection of gasoline coupons by law enforcement officials.[15] But the right to inspect is not questioned in the present case. The validity of the search and seizure by the government agents is the point of inquiry. In examining the opinion of the court, it is perhaps best first to consider the distinct bases for the decision and then to point out frailities in the reasoning. The Court in the final analysis seeks to justify its opinion on the basis of consent to a search and seizure incident to the arrest.[16] Thus it has merged the findings of the district court and the circuit court of appeals, the former finding consent and the latter holding the search and seizure sustainable as incident to the arrest. It is well to note that either of these grounds will ordinarily suffice alone; that is, a search and seizure with consent *or* incident to a lawful arrest is "reasonable" under the Fourth Amendment. Be that as it may, careful consideration of both theories brings to light their misapplication in the principal case.

a. *Consent.* Where individual liberties are concerned, it is a cardinal principle that constitutional provisions should be construed strongly in favor of the individual.[17] It has been said that there is a presumption against the waiver of constitutional rights.[18] If so, no such presumption was invoked by the court in the present case. The opinion sets forth a pro forma acceptance of the dubious findings of the district court.[19] This was not the first time that the Supreme Court had to deal with the question of consent. In *Amos v. United States*,[20] the defendant's wife allowed government agents to enter his home without a warrant upon their demand for admission. Due to the presence of "implied coercion," it was held that the wife's conduct would not suffice as a waiver of defendant's constitutional privilege against unreasonable search and seizure. The court appears to have come a long way since the *Amos* case, and one wonders how far it will go in finding consent. The present

[15] 56 Stat. L. 176 at 179, § 301 (1942), 50 U.S.C. (Supp. v, 1946) Appx. § 633, 2 (a) (3) (1946). See Ration Order No. 5C, § 1394.8235 (b).

[16] "We accordingly affirm the judgment below without reaching the question whether but for that consent the search and seizure incidental to the arrest were reasonable." Principal case at 1262.

[17] Boyd v. United States, 116 U.S. 616 at 635, 6 S. Ct. 524 (1886): "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." See also, Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261 (1921).

[18] Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938).

[19] Said Justice Learned Hand, for the circuit court of appeals: ". . . we must own to some doubt whether a consent obtained under such circumstances should properly be regarded as 'voluntary.' Davis must have known, under arrest as he was, that the officers were not likely to stand very long upon ceremony, but in one way or another, would enter the office." United States v. Davis, (C.C.A. 2d, 1945) 151 F. (2d) 140 at 142. See Justice Frankfurter's dissent, Principal case at 1264.

[20] 255 U.S. 313, 41 S. Ct. 266 (1921).

opinion indicates that the agent who flashed his light through the outside window of the private office was "apparently trying to raise the window."[21] One agent testified: "I didn't try to convince him. I told him that he would have to open that door."[22] "According to the District Court, the officers 'persuaded him that it would be a better thing for him to permit them to examine' the coupons; 'they talked him into it'."[23] Need there be physical violence to constitute coercion?[24] The fundamental nature of constitutional protections should make the court wary in finding consent, especially where the circumstances, as in the *Davis* case, are clouded with doubt. To do otherwise is to frustrate the purpose of the Amendment.

b. *Incident to the Arrest.* The decision turns in part on the theory of a search and seizure incident to the arrest, but the Court devotes little time to this aspect of the case. This unquestioned adoption of the theory of the circuit court of appeals is indeed open to question. An analysis of the situation involves the application of the prime criterion of reasonableness, for if the search is "reasonable," it does not violate the Fourth Amendment. As the court once said: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances."[25] Precedent is, however, valuable in ascertaining what constitutes a reasonable search. Perhaps at one time in its history it might have been argued that the Supreme Court would sustain general explanatory searches and seizures as incident to a lawful arrest where the crime was committed in the presence of the officer.[26] But such contention was dispelled by the Court in subsequent cases,[27] and prior to the *Davis* case, the view had developed that such a search and seizure could extend only to the person of the offender and to that property on the premises in plain view and under his immediate control.[28] This was not the situation in the instant case. Here the coupons concealed in Davis' office were not in plain view. But even if this miss-

[21] Principal case at 1258.

[22] Ibid.

[23] Id. at 1261.

[24] Justice Frank, in his concurring opinion in United States v. Davis, (C.C.A. 2d, 1945) 151 F. (2d) 140 at 144, expressly rejected the contention of the Assistant United States Attorney that observation of the right of officers to inspect the records of a government regulated business constituted, in effec, he legal equivalen of consent to enter.

[25] Go-Bart Importing Co. v. United States, 282 U.S. 344 at 357, 51 S. Ct. 153 (1931).

[26] Marron v. United States, 275 U.S. 192, 48 S. Ct. 74 (1927).

[27] Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S. Ct. 153 (1931); United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420 (1932).

[28] See note 27, supra. Also, LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 128 (1937).

ing element were present, the search and seizure would not be reasonable within the meaning of the Fourth Amendment. Justice Rutledge emphasizes this in his dissent:

> "Moreover, whatever may be the scope of search incident to lawful arrest for a misdemeanor, I know of no decision which goes so far as to rule that this right of search extends to breaking and entering locked premises by force. That was not done here. But the search followed on consent given in the reasonable belief that it was necessary to avoid the breaking and entry. I think it was therefore in no better case legally than if in fact the breaking and forceable entry had occurred."[29]

Furthermore, since the arrest was for sale of gasoline without coupons and in excess of the ceiling price, the coupons were not "things used to carry on the criminal enterprise,"[30] but constituted the corpus delicti of another crime, the illegal possession of coupons. The confines of the doctrine of search incident to an arrest will not enclose a search for "articles necessary to the commission of a crime other than that for which the arrest was made."[31]

c. *Public Character of Documents.* In an attempt to muster support for its ruling, the court places great reliance on the basic distinction under the Fourth Amendment between private papers and public property.[32] Incriminating documents of a private nature are not subject to compulsory production because of the privilege against self incrimination guaranteed by the Fifth Amendment. Those papers in which the public has an interest may be claimed by legal process, i.e., by a search warrant or subpoena duces tecum. But the decision in the *Davis* case would lead one to believe that public documents may be seized *without a warrant.* In this respect the court has misinterpreted the language of earlier cases.[33] Adherence to such heresy would undermine the very thing the Fourth Amendment was formulated to prevent. It would, for example, justify the warrantless search of every business possessing documents required to be kept under federal authority.

d. *Search of place of business.* The opinion emphasizes the fact that the coupons were at a place of business, as distinct from a private resi-

[29] Principal case at 1276.

[30] Marron v. United States, 275 U.S. 192 at 199, 48 S. Ct. 74 (1927).

[31] Principal case at 1271.

[32] Id. at 1258, 1259.

[33] The Court quotes from Wilson v. United States, 221 U.S. 361, 31 S. Ct. 538 (1911), where it held that an officer of a corporation cannot refuse to surrender the corporate records on the ground that he will thereby incriminate himself. That decision, however, did not dispense with the requirement of legal process for the production of the records, for there the Government sought to obtain the documents by subpoena duces tecum.

dence.[34] This is a strange ground for differentiation inasmuch as the court has in previous cases held offices to be within the protection of the Fourth Amendment.[35] Certainly an office, set-off from the public at large, falls within the intent and purpose of this Amendment.

But an even greater objection is disclosed by Justice Frankfurter in his dissent.[36] Not only should the evidence have been excluded because it was acquired by unreasonable search and seizure in violation of the constitutional rights of the defendant, but also because such evidence was unprocurable even under a search warrant. The Espionage Act[37] limits the issuance of search warrants to situations in which the property sought was stolen or embezzled, used as a means of committing a felony, or used to aid illegally a foreign nation. Davis was charged with and convicted of the illegal possession of gasoline ration coupons, a misdemeanor, which does not fall within the enumerated categories. Hence we have the extraordinary situation that evidence unobtainable even with a warrant was held admissible when obtained in a search and seizure of doubtful lawfulness.[38] There is merit in the contention of Justice Frankfurter that "The Court's opinion has only its own reasoning to support it."[39]

2

In *Zap v. United States*,[40] the petitioner had entered into a contract with the Navy on a cost plus fixed fee basis. He arranged with a pilot to make certain test flights for $2,500, and had him endorse a blank check which he (Zap) later filled in with the pilot's name and the sum of $4,000. This check was the basis for a certified claim to the Navy department. Government agents audited his books and records pursuant to an Act of Congress[41] and a provision to this effect in the con-

[34] Principal case at 1261.

[35] Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S. Ct. 153 (1931); Gouled v. United States, 255 U.S. 298, 41 S. Ct. 261 (1921); Silverthorne Lumber Co. Inc. v. United States, 251 U.S. 385, 40 S. Ct. 182 (1920).

[36] Principal case at 1262.

[37] 40 Stat. L. 217 at 228 (1917), 18 U.S.C. (1940) § 612. Congress has granted specific authority whenever it wished to permit searches and seizures, thus manifesting its reluctance to extend the scope of a search under judicial process. Appendix, Principal case at 1273.

[38] Although a search warrant cannot be utilized to obtain the coupons, the Administrator of the Office of Price Administration has the power to subpoena them. 56 Stat. L. 23 at 30, § 202 (c) (1942), 50 U.S.C. (Supp. V, 1946) Appx. § 922 (c).

[39] Principal case at 1266.

[40] (U.S. 1946) 66 S. Ct. 1277.

[41] The Second War Powers Act, 56 Stat. L. 176 at 185, § 1301 (1942), 50 U.S.C. (Supp. V, 1946) Appx. § 643 provides: "The provisions of section 10 (1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U.S.C. 310 (1)) (giving the Government the right to inspect the plant and audit the books of certain Contractors),

tract. Without a warrant, they obtained the $4,000 check which was utilized in the prosecution of the petitioner. A preliminary motion to suppress the check as evidence was denied, and Zap was convicted of presenting false claims against the United States—a felony. The case came to the Supreme Court from the circuit court of appeals on certiorari, and the Justices lined up, as in the *Davis* case, 4-3 in favor of the decision of the lower court.

"To require reversal here," said Justice Douglas, "would be to exalt a technicality to constitutional levels."[42] The Court recognized that consent to the inspection did not include consent to the taking of the check, yet found "no wrongdoing in the method by which the incriminating evidence was obtained."[43] As Justice Frankfurter points out,[44] the fact that the inspection was legal did not make the subsequent seizure ipso facto legal. The right to search does not necessarily include the authority to seize. Procedural regularity would seem to justify the exclusion of the evidence though it might have been secured by a lawful warrant.

3

The meaning of the Fourth Amendment is uncertain in light of these recent cases. Although the Court appears to pay lip-service to traditional doctrines, the tendency is so to enlarge the scope of "reasonable search and seizure" as to minimize the safeguards of the Fourth Amendment. One can only hazard a guess as to the implications which may follow from any given decision, but the present cases seem to indicate a change in approach on the part of the Court in the judicial construction of the Fourth Amendment. These cases suggest the beginning of an adandonment of preexisting philosophy, which, in some degree was shaped by Holmes[45] and Brandeis,[46] in favor of Wigmorean logic[47] which maintains that evidence illegally procured should

shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war. . . ." ,

[42] Principal case at 1280.

[43] Ibid.

[44] Id. at 1281.

[45] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182 (1920).

". . . I think it less evil that some criminals should escape than that the Government should play an ignoble part." Holmes, J., dissenting in Olmstead v. United States, 277 U.S. 438 at 470, 48 S. Ct. 564 (1928).

[46] Gambino v. United States, 275 U.S. 310, 48 S. Ct. 137 (1927). See dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438 at 471, 48 S. Ct. 564 (1928).

[47] 8 WIGMORE, EVIDENCE, § 2183 et seq. (1940). Professor Wigmore is quite outspoken in his condemnation of the doctrine of the Weeks case.

not be excluded. Perhaps the Court now feels that the precedent established by the dicta in the *Boyd* case was not worth following, and is adopting the view of many state courts which admit evidence obtained by unreasonable search and seizure.[48] This possible interpretation of these cases merits an examination into the justification for excluding the evidence.

No doctrine of the common law excluded evidence obtained by unreasonable search and seizure.[49] In view of this, the hue and cry raised by Wigmore and others in opposition to the federal rule is understandable. Yet an inquiry into the basis of the common law rule discloses that it is not totally inconsistent with federal procedure. A very strong argument for receiving the evidence at common law was that an inquiry into the nature of the illegality of the search would raise collateral issues.[50] With this objection in mind, Justice Day in the *Weeks* case[51] qualified the decision of the *Boyd* case by requiring that the petition for suppression of the evidence be made before trial, so as to eliminate these subsidiary inquiries. While this rule has been modified to some extent by ensuing decisions,[52] the collateral issue argument is at its best questionable, for even at common law it contained exceptions.[53]

As the critics point out, there is nothing in the Fourth Amendment to classify it as a rule of evidence. When the Supreme Court in the *Boyd* case established the proposition that evidence obtained in violation of the constitutional rights of an individual under the Fourth Amendment cannot be utilized because of the Fifth Amendment, its

For a criticism of Wigmore's arguments, see 8 A.B.A.J. 646 (1922).

[48] The leading decision in support of the common law rule is People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

[49] ". . . the *admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. . . .*" 8 WIGMORE, EVIDENCE 5 (1940).

[50] Commonwealth v. Dana, 2 Metc. (43 Mass.) 329 (1841); People v. Mayen, 188 Cal. 237, 205 P. 435 (1922).

[51] 232 U.S. 383, 34 S. Ct. 341 (1914).

[52] "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Gouled v. United States, 255 U.S. 298 at 313, 41 S. Ct. 261 (1921). Also, Amos v. United States, 255 U.S. 313, 41 S. Ct. 266 (1921); Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4 (1925).

FEDERAL RULES OF CRIMINAL PROCEDURE, § 41 (e) (Motion for Return of Property and to Suppress Evidence) provides:

". . . 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."

[53] E.g. A court will always stop the trial of an action to determine whether a confession was obtained by threat or promise of reward. Commonwealth v. Culver, 126 Mass. 464 (1879).

intent was to effectuate the common purpose of both Amendments to preserve individual privacy.[54] The Court found that ". . . the 'unreasonable searches and seizures' condemned in the Fourth Amendment are always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment. . . ."[55] For that reason it decided to exclude such evidence.

Self-help, civil liability of the officer, or penal sanctions for the offending agent have been urged as proper methods for the vindication of the rights of the aggrieved person.[56] However, these means will not adequately protect the guarantees of the Fourth Amendment. Individuals are reluctant to exercise the ancient common law remedy of self-help, for this would place the burden on the individual to determine whether or not the search is justified. It is difficult to imagine a jury awarding more than nominal damages in a civil action against the investigator. Professor Wigmore urges the imposition of a thirty-day imprisonment on the over-zealous marshal for his contempt of the Constitution.[57] But this suggestion overlooks the obvious hesitance of prosecutors to punish their own agents. Strict criminal punishment would in the end merely accomplish the same results as are now reached by excluding the evidence. Officers would be unwilling to embark on an unreasonable search and seizure if imprisonment were staring them in the face, and little if any evidence would be seized in violation of constitutional rights. A possible consequence might be the failure to conduct even reasonable searches. The exclusion of the evidence is the only effective, though indirect, means of enforcing the intent of the constitutional framers. No rule of formal logic should stand in its way.

Thus one finds the rule of exclusion justifiable on two grounds: (1) as within the policy of the Fifth Amendment; (2) as the only satisfactory means of enforcing the safeguards of the Fourth Amendment.[58] The test, however, lies in the practical consequences of the

[54] See Boyd v. United States, 116 U.S. 616 at 630, 6 S. Ct. 524 (1886), where the Court speaks with approval of Lord Camden's decision in Entick v. Carrington, 19 HOWELL'S STATE TRIALS 1029 (1765).

". . . Privacy is just as much and as unreasonably infringed by the seizure of a document or a chattel as by compelling a person to produce the same or to testify concerning them in such manner as to incriminate himself; and the practical result is the same." Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 at 17 (1925).

[55] Boyd v. United States, 116 U.S. 616 at 633, 6 S. Ct. 524 (1886).

[56] See criticisms of such suggestions; Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 COL. L. REV. 11 (1925); CORNELIUS, SEARCH AND SEIZURE, 2d ed., 44 (1930).

[57] 8 WIGMORE, EVIDENCE 40 (1940).

[58] See generally, Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 28 COL. L. REV. 11 (1925).

doctrine. Does it in fact or should it hamper law enforcement? In the language of Justice Cardozo, "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society." [59] The writer can only theorize, for no statistics are available. It is his contention that in practically every case the federal rule with its exceptions does not materially impede government agents in the performance of their duties. In those situations where the insistence on a warrant would enable evidence to be removed or destroyed before a warrant could be obtained, the courts have eliminated this requirement. For example, a warrantless search of the person and immediate premises of an offender as an incident to a lawful arrest is reasonable within the Fourth Amendment.[60] Open fields likewise fall in the same category.[61] Automobiles and vessels may be searched without warrants on "probable cause." [62] This constitutional right may be waived; [63] and federal investigators are provided with a form for this purpose. In all other instances, it should be possible for government officers to procure warrants so that the evidence is not lost. That investigation often extends over a considerable period of time corroborates this conclusion. The law should not be framed for inefficient agents.

It has been argued that the many exceptions indicate flaws in the rule. This proposition, however, fails to recognize that certain classifications do not fall within the Fourth Amendment, which prohibits only "unreasonable searches and seizures." [64]

What is to be the future of this federal doctrine? Certainly the *Davis* case, and to a lesser degree the *Zap* case also, mark a retrogression in legal reasoning tantamount to judicial ratification of the supposition that the end justifies the means. This result, inconsistent with the tendency of the court to extend the protection of individual freedoms under the due process clause of the Fourteenth Amendment,[65] has far reaching implications. Government agents may seize upon these

[59] People v. Defore, 242 N.Y. 13 at 24, 150 N.E. 585 (1926).

[60] Marron v. United States, 275 U.S. 192, 48 S. Ct. 74 (1927).

[61] Hester v. United States, 265 U.S. 57, 44 S. Ct. 445 (1924).

[62] Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280 (1925); United States v. Lee, 274 U.S. 559, 47 S. Ct. 746 (1927).

[63] Perlman v. United States, 247 U.S. 7, 38 S. Ct. 417 (1918); CORNELIUS, SEARCH AND SEIZURE, 2d ed., § 17 (1930).

[64] Fourth Amendment to the Constitution of the United States. It will suffice to remind those who point to the fact that evidence illegally procured by private individuals is admissible in Federal courts [Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1921)], that the Fourth Amendment inhibits only Federal action.

[65] E.g. Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276 (1946). In general, see Dowling, "Constitutional Developments in Five War Years," 32 VA. L. REV. 461 (1946).

cases to sanction practices that might cast opprobrium on the law itself. The innocent as well as the guilty would be affected.[66] If the Fourth Amendment is to stand as a barrier against governmental encroachment on personal privacy, the court must heed the warning of Justice Sutherland:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."[67]

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[66] "It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." Frankfurter, J., in his dissent, Davis v. United States, (U.S. 1946) 66 S. Ct. 1256 at 1263.

[67] Byars v. United States, 273 U.S. 28 at 33, 47 S. Ct. 248 (1927).