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Searches and seizures in federal criminal cases

Lester B. Orfield*

The fourth amendment to the Constitution of the United States provides: "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 fourth amendment was intended to protect the right to privacy; that is to say, the right of undisturbed enjoyment of one's property, the right to shut the doors to officers of the state.2 "The second, and intimately related protection, is self-protection; the right to resist unauthorized entry which has as its design the securing of information which may be used to effect a further deprivation of life or liberty or property."3

Four rationales4 have been said by the Supreme Court to underlie the exclusionary rule in search and seizure cases: (1) providing the victim with an effective remedy;5 preventing the

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government from profiting by its own wrong;\textsuperscript{6} preserving the integrity of the court;\textsuperscript{7} and deterring the police from similar future misconduct.\textsuperscript{8}

Recent studies reveal that the exclusionary rule is not applied in other countries, or if applied, only in a fragmentary sort of way.\textsuperscript{9}

The common law rule was that the admissibility of evidence is not affected by the illegality of the means through which the party has obtained the evidence.\textsuperscript{10} The federal doctrine excluding evidence seized in violation of search and seizure laws is a comparatively modern one. The federal doctrine goes back to \textit{Boyd v. United States},\textsuperscript{11} decided in 1886. The Supreme Court reversed a trial court ruling compelling a defendant to produce a self-incriminating invoice pursuant to a statute. The Court could have decided the case on the ground of self-incrimination in violation of the fifth amendment. But the Court stated that even though there was no search, "compulsory production of private books and papers . . . is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment."\textsuperscript{12} The Court also stated that the "admission in evidence" of the invoice was an "unconstitutional proceeding."\textsuperscript{13} In so stating, the Court seemed to imply that violation of the fourth amendment required the result, as did violation of the fifth.\textsuperscript{14}

\begin{itemize}
  \item \textsuperscript{6} Olmstead v. United States, 277 U.S. 438, 483-485 (1928) (dissenting opinion).
  \item \textsuperscript{7} \textit{Id.} at 469, 471 (dissenting opinion); Irvine v. California, 347 U.S. 128, 150 (1954) (dissenting opinion). Four Justices dissented in both these cases. See also Mapp v. Ohio, 367 U.S. 643, 659 (1961); Elkins v. United States, 364 U.S. 206, 222 (1960).
  \item \textsuperscript{8} Mapp v. Ohio, 367 U.S. 643, 656 (1961); Irvine v. California, 347 U.S. 128, 135, 137 (1954); Wolf v. Colorado, 338 U.S. 25, 31, 40 (1949); Henderson v. United States, 237 F.2d 169, 175 (5th Cir. 1956).
  \item \textsuperscript{10} 8 Wigmore, \textit{Evidence} § 2183 (McNaughton rev. ed. 1961).
  \item \textsuperscript{11} Boyd v. United States, 116 U.S. 616 (1886). For discussion of the law up to 1921, see Fraenkel, \textit{Concerning Searches and Seizures}, 34 HARV. L. REV. 361 (1921).
  \item \textsuperscript{12} 116 U.S. 635 (1885). A separate opinion by Justice Miller pointed out that there was no search or seizure. \textit{Id.} at 639.
  \item \textsuperscript{13} 116 U.S. 638 (1885).
  \item \textsuperscript{14} Arguing in favor of the interrelation, see Lopez v. United States, 373 U.S. 427, 446, 457 (1963) (dissenting opinion); ROTTSCHAEFER, CONSTITUTIONAL LAW 748-49 (1939); Fraenkel, \textit{Recent Developments in the Law of Search and Seizure}, 13 MINN. L. REV. 1, 19 (1928); Fraenkel, \textit{Concerning Searches and Sei-
The Supreme Court soon rejected in large part the application of the fourth amendment to an order to produce a document. But in 1950 the Court came back to this view. In 1904 the Court seemed to repudiate the view that evidence obtained in violation of the fourth amendment is inadmissible. The latter view was followed for ten years. In 1914 the Court returned to the doctrine of the Boyd case. The Court held that a constitutional principle was involved. But many subsequent cases speak in terms of a court-adopted rule of evidence. Thus it would seem at least arguable that Congress may change the rule and that the Court may also change it by judicial decisions or rule of Court.

The Weeks doctrine does not apply to all evidence illegally obtained. It applies where the fourth amendment is violated. What about federal statutes on search and seizure? Possibly it also applies here. In one case the Supreme Court applied the exclusionary rule where a federal statute was violated.

It should be noted that the fourth amendment does not prohibit all searches and seizures. What it prohibits is "unreasonable" searches and seizures.

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A corporation may invoke the exclusionary rule, although as to the privilege against self-incrimination it is without protection.

An illegal search and seizure by state or other local officers has the consequence of exclusion of the evidence so obtained in federal criminal proceedings. This is true even though no federal officers took part in the violation, and a fortiori if they did. The contrary doctrine of the Weeks case was rejected.

A federal court may enjoin a federal officer from producing in a state criminal proceeding evidence obtained by him in violation of the fourth amendment. An invalid federal warrant was involved. But later the Court held that where there had been an arrest and search by federal narcotic agents acting without a warrant no injunction should issue.

The "fruit of the poisonous tree" doctrine is applied to illegal search and seizure, that is to say, the federal courts will exclude evidence obtained as an indirect result of the illegal search. Justice Holmes stated that the protection afforded was not merely that "evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and


inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used in the way proposed. 28 The government could not use the original documents nor any knowledge obtained from the originals, the photostats, or the copies. It has been held that an officer may not testify to his observation, during illegal search, that a coat with a missing button was on the premises. 29 In 1963 the Supreme Court noted with approval the "independent source" doctrine. It expressly declined to make admissibility depend on whether the challenged evidence "would not have come to light but for the illegal actions of the police." 30 The Court looked at the degree of attenuation between the primary illegality and the acquisition of evidence. 31

Where officers investigating a minor auto accident came to the home of a person reasonably suspected, knocked but received no reply, entered without violence but without consent, and persuaded the owner to come down from upstairs, testimony against him by the officers as to incriminating statements which he voluntarily made after reaching the lower floor was held improperly admitted. 32 This is a debatable holding. 33 There could have been no objection if the officer, remaining outside, had called into the house and achieved the same result. Furthermore, the disclosure was in the realm of intangibles. The fourth amendment protects persons, houses, papers, and effects, but not conversation. The Supreme Court has held that the exclusionary rule does not make inadmissible evidence of oral statements secured surreptitiously or by means of modern detecting apparatus. 34 In one case the defendants contended that


31. See also Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963).

32. Nueslein v. District of Columbia, 115 F.2d 690 (1940), noted 9 GEO. WASH. L. REV. 480, 14 SO. CALIF. L. REV. 477. See also Work v. United States, 243 F.2d 660 (D.C. Cir. 1957); Bryant v. United States, 252 F.2d 746, 747 (5th Cir. 1958).


interruption of the freedom of movement was an illegal arrest and therefore statements made to the police thereafter were the fruits of illegal police activity and should be excluded. This contention was rejected by a federal district court.\textsuperscript{35}

In 1963 the Supreme Court for the first time extended the "fruits" doctrine to verbal statements obtained as a result of illegal police action by way of illegal arrest and search and seizure.\textsuperscript{36} The case does not directly or clearly hold that the result would be the same in the case of an illegal arrest unaccompanied by an illegal search.\textsuperscript{37}

\textbf{DOCUMENTS OR CHATTELS HAVING EVIDENTIAL VALUE}

Private documents or other chattels of the defendant wanted by the government only for their evidential value are not subject to seizure. It makes no difference that they are not contraband nor tools nor fruits of crime. In 1932 the Supreme Court stated by Justice Butler: "Respondent's papers were wanted by the officers solely for use as evidence of crime of which respondents were accused and suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were."\textsuperscript{38} Such searches are to be distinguished from "searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent commission of crime."\textsuperscript{39}

\textsuperscript{38} United States v. Lefkowitz, 285 U.S. 452, 464-65 (1932).
\textsuperscript{39} Id. at 465-66. It is concluded at 20 U. Chr. L. Rev. 319 (1963) that the rule originated in Gouled v. United States, 255 U.S. 293, 310 (1921). See also Maguire, \textit{Evidence of Guilt} 183 (1939); Annots., 129 A.L.R. 1291, 1296, 1300-01 (1940). It has been concluded that most writers are critical of the rule.
Fifteen years later Chief Justice Vinson stated: "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."\(^{40}\) A fortiori the same is true where there is no search warrant and no arrest.\(^ {41}\) There may be search where the documents are instruments for accomplishing an offense.\(^ {42}\) The grounds for the above rule seem obscure.\(^ {43}\) State courts have not accepted the limitation.\(^ {44}\)

**SUBPOENA DUCE TECUM**

A subpoena duces tecum which is too sweeping may violate the fourth amendment.\(^ {45}\) In determining whether a subpoena is so broad as to constitute unreasonable search and seizure, the purpose and scope of the investigation being carried on must be considered.\(^ {46}\) According to one court: "In extrinsic aspect, a subpoena duces tecum may be so broad in its scope as to go substantially beyond the bounds of apparent relevance in relation to an immediate pursuit and so be unreasonable. Or it may be so onerous in its burden as to be out of proportion to the end sought. . . . In intrinsic aspect, it may involve an improper intrusion into what is, in relation to the purpose of the investigation, purely private or privileged papers."\(^ {47}\) A subpoena has been held to violate a corporation's rights under the fourth

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43. Some cases attribute the limitation to the privilege against self-incrimination. See WIGMORE, Evidence § 2264, n.44 (McNaughton rev. ed. 1961).  
44. See MAGUIRE, Evidence of Guilt 183 (1959); WIGMORE, Evidence § 2184a, at 45-46 (McNaughton rev. ed. 1961).  
amendment where issued solely on the basis of information derived by the government through an invalid seizure of the documents directed to be produced.\textsuperscript{48} In other words a grand jury cannot use a subpoena to give illegal color to an illegal search. Where a subpoena was issued by a grand jury which was illegally constituted and the indictment was dismissed, the subpoena amounted to an unreasonable search and seizure, and the witnesses were entitled to have the objects produced in response to the subpoena returned. So a trial court held.\textsuperscript{49} But the Supreme Court rejected illegal composition of a grand jury as an adequate foundation for argument of improper constructive search.\textsuperscript{50} In one case the defendant obeyed a subpoena and produced material at the place and time set for trial. The trial was postponed and the material was impounded but with leave to inspect granted the government after opportunity given the defendant to present specific objections. The court held that there was no unlawful search and seizure.\textsuperscript{51}

**REQUIRED RECORDS**

Professor Rottschaefer has pointed out that a claim is frequently made that the fourth amendment “is violated by statutes that require those engaged in certain businesses to file reports and submit their books and records to inspection by public authorities. These requirements are held valid whenever reasonably proper for the public control and regulation of any business activities.”\textsuperscript{52} In most respects the fourth amendment problems are the same whether the records are required or non-required, as it is the method of obtaining the records, rather than their contents that is crucial.\textsuperscript{53} Where records are contained only in agency files the fourth amendment would seem not to apply.\textsuperscript{54} But agency examination on the record keepers’ premises under a subpoena duces tecum or an inspection order could conceivably be an unreasonable search.\textsuperscript{55} There should be

\textsuperscript{48} Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
\textsuperscript{49} In re Wallace & Tierman Co., 76 F. Supp. 215, 217 (D. R.I. 1948).
\textsuperscript{50} United States v. Wallace & Tierman Co., 336 U.S. 793 (1949). See MA-
\textsuperscript{GUIRE, EVIDENCE OF GUILT} pp 185-87 (1950).
\textsuperscript{51} American Tobacco Co. v. United States, 147 F.2d 93, 116 (6th Cir. 1944). The case was considered by the Supreme Court on other issues only. 328 U.S. 781 (1946).
\textsuperscript{53} Troy Laundry Co. v. Wirtz, 155 F.2d 53, 57 (9th Cir. 1946).
\textsuperscript{54} Isbrandtteen-Moller Co. v. United States, 300 U.S. 139, 145 (1937).
\textsuperscript{55} See Boyd v. United States, 116 U.S. 616 (1886).
a reasonably particularized statement of the records to be inspected. The particular records which are demanded must be relevant to the purpose for which the inquiry was made. Several cases have suggested that because records are required they may be searched without any legal process.

In recent years many cases have arisen as to the rights of a taxpayer to withhold records during a tax investigation. The question has arisen as to production of records of a labor union. A labor union may claim protection under the fourth amendment even though it may not under the fifth.

**Contraband Goods**

Rule 41(b) of the Federal Rules of Criminal Procedure expressly authorizes the seizure of stolen or embezzled property, and of weapons used to commit an offense. At one time it seems to have been the view that unlawful seizure of contraband goods was not within the exclusionary rule. The present view is that while the defendant has no right to the return of such goods he may demand their suppression. A motion to suppress was allowed as to stolen radios seized as an incident of an unlawful arrest.

**Pretrial Motion to Suppress**

A motion before trial to suppress evidence illegally seized was first made in 1908. The court approved the procedure, but denied the motion on the ground that there had been no un-

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lawful seizure. In 1911 a court granted such a motion. The Supreme Court stated that the lower court could grant such a motion not only because of the constitutional privilege, but because of the court's inherent power to correct abuses in the cases of its own officers.

The early cases protecting a defendant against illegal search and seizure stressed that the defendant had made a pretrial motion. Several cases held that objection at the trial came too late. But it was early held that objection before trial is not necessary if the defendant objects as soon as he knows of the illegal seizure. In this case a pilferer of papers surprised the defendant by appearing as a witness to the abstraction which had previously not been suspected. There need be no objection before trial when trial developments show the uncontested and clear illegality. The same is true if the defendant claims that he never possessed the property. In 1958 the Supreme Court upheld language of the trial judge that if defendants "have reason to believe that illegally obtained material is being used or may be used against them, they can object at that time."

Rule 41(e) of the Federal Rules of Criminal Procedure continues the right of the defendant to object at the trial. It 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."

The trial judge often is reluctant to exercise this discre-
tion. This is particularly true in those cases in which the government may appeal from the suppression order.

In one case the defendant was allowed to raise the question for the first time after trial and conviction. It would seem that this goes too far in protecting the defendant. The courts of appeals will not review the matter under the plain error rule, Rule 52(b) of the Federal Rules of Criminal Procedure, where the defendant offers no reason for his nonaction.

Where a judge denies a motion to suppress he may revise his decision. But transfer to another judge for such revision is probably not proper.

Where the defendant loses out on his motion to suppress, he need not reiterate his objection at the trial in order to preserve his rights on appeal. But conceivably this is not true if the defendant is able to make a stronger showing at the trial than he was earlier.

AREA OF SEARCH

The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

75. McCormick, Evidence 295 (1954). See Williams v. United States, 323 F.2d 90, 94 (10th Cir. 1963); United States v. Watts, 319 F.2d 659 (2d Cir. 1963); United States v. Di Donato, 301 F.2d 383, 384 (2d Cir. 1962), cert. denied, 82 Sup. Ct. 1554; Billeci v. United States, 290 F.2d 628 (9th Cir. 1961); Smith v. United States, 252 F.2d 120 (5th Cir. 1958); Az Din v. United States, 232 F.2d 283, 285 (9th Cir. 1956); United States v. Sferas, 210 F.2d 69, 74 (7th Cir. 1954), cert. denied, 74 Sup. Ct. 630; Cradle v. United States, 178 F.2d 962, 965 (D.C. Cir. 1949).
76. Gray v. United States, 311 F.2d 126, 127 (D.C. Cir. 1962); Gendron v. United States, 295 F.2d 897, 902 (8th Cir. 1961), Compare Sanchez v. United States, 311 F.2d 327, 329 (9th Cir. 1962).
81. See the discussion of this language in Maguire, Evidence of Guilt 187-89 (1959).
The search and seizure provision is designed to protect private areas. The protection "is not extended to the open fields," hence evidence seized without a warrant near a house is admissible. The search of a suitcase found on a sidewalk and disclaimed by the defendant is valid. But protection extends to a business office. It extends to evidence obtained in a search without a warrant of the defendant's desk in a government office. Evidence gotten by driving a spike microphone through the defendant's wall was excluded. The Supreme Court held for the first time that evidence gathered by electronic eavesdropping could violate the fourth amendment.

The fourth amendment extends protection to sealed letters and packages in the mails. These may be opened and examined only in response to a valid search warrant. Letters written by a prisoner may be opened by the warden under the disciplinary rules of a prison. As to a letter written to a prisoner by his lawyer no improper seizure was found because of the right of prison authorities to censor mail. But the court refused to allow the letter to be used in disciplinary proceedings against the lawyer who wrote it.

It is clear that the search of an automobile may come within the protection of the fourth amendment. Where an automobile

containing liquor was searched without a search warrant it was held that contraband goods concealed and illegally transported as distinguished from a dwelling house may be searched for without a warrant if the officer has reasonable or probable cause for believing that the vehicle contains such contraband liquor.\textsuperscript{91} Arrest and search of the occupant of an automobile was held illegal as there was no probable cause.\textsuperscript{92} The search was not justified as incident to a lawful arrest nor as incident to the search of a vehicle reasonably believed to be carrying contraband. The doctrine favorable to the government of the liquor cases did not necessarily apply to other cases as there was congressional legislation for the liquor cases. In a case in which contraband radios were seized as an incident of an illegal arrest the Court stated: "The fact that the suspects were in an automobile is not enough. Carroll v. United States... liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause."\textsuperscript{93} The Carroll case is not applicable only in liquor cases.\textsuperscript{94}

\textbf{Standing to Suppress}

In general for the constitutional provision to apply it must

\textsuperscript{91} Carroll v. United States, 267 U.S. 132, 149 (1925). Two Justices dissented from affirmance of the conviction. In a dictum in United States v. Lee, 274 U.S. 559, 563 (1927), a motorboat on the high seas was assimilated to an automobile.


\textsuperscript{93} Henry v. United States, 361 U.S. 98, 104 (1959), noted 28 \textit{Ge. Wash. L. Rev.} 661 (1960). Two Justices dissented. There were reversals in the following cases: Eng Fung Jem v. United States, 281 F.2d 803, 805 (9th Cir. 1960) (ample time to obtain a search warrant); United States v. Stoffey, 279 F.2d 924, 929 (7th Cir. 1960) (automobile was not in movement nor occupied by the defendant); Cervantes v. United States, 263 F.2d 800, 803 (9th Cir. 1959) (narcotics). A motion to suppress was granted in Lucas v. Mayo, 222 F. Supp. 513 (S.D. Tex. 1963); United States v. Darby, 201 F. Supp. 317 (W.D. Pa. 1962). Convictions were upheld in United States v. Sutton, 321 F.2d 221 (4th Cir. 1963); United States v. Thomas, 319 F.2d 486 (6th Cir. 1963); United States v. Haley, 321 F.2d 956, 958 (6th Cir. 1963); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21, 25 (10th Cir. 1959) (yet was ample time to obtain a search warrant); Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959) (narcotics). A motion to suppress was denied in United States v. Copes, 191 F. Supp. 623 (D. Md. 1961); United States v. Mazzio, 162 F. Supp. 935, 937 (D. N.J. 1958).

\textsuperscript{94} Armada v. United States, 319 F.2d 793, 797 (5th Cir. 1963).
be the privacy of the defendant which is invaded. It follows that evidence gotten in violation of the rights of third persons only will not be excluded upon application of the defendant. The rule of exclusion does not apply to property not owned by the defendant. Protection has been given to a guest of a lodger. Protection was given where the defendant's property was the object of an illegal search of a hotel room rented by third persons, but the defendant had been given a key and permission to use the room. A search is valid where the defendant has abandoned the hotel room searched. In 1960 the Supreme Court stated broadly that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." A defendant might object even though he was only a guest in an apartment and even though he did not claim ownership of the drugs seized. The decision left open the question of the standing of an absentee owner of the premises, and of the owner of property seized from the possession of a third party. And it was not clear that the decision was based on constitutional grounds rather than supervisory power or on Rule 41(e). One who had gratuitously bailed his automobile to a friend for a short time has standing to challenge a search thereof.


96. Schenck v. United States, 249 U.S. 47, 50 (1910) (search warrant issues against socialist headquarters and not the defendant).


102. At 362 U.S. 257, 260, 264, the court seemed to rely on rule 41(e).

In 1963 the Supreme Court adhered to its view that the defendant must have standing to object. Justice Black ruled that one who is a mere custodian of records cannot invoke the fourth or fifth amendments to resist an order to produce such records.

SEARCH INCIDENT TO ARREST

Evidence obtained by search incidental to a lawful arrest may be a reasonable search although made without a search warrant. Dicta leading to the rule go back to the Weeks case in 1914 announcing the exclusionary rule itself. The Court stated: "What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases." The cases referred only to searches of the person. The only authorities cited were a single English decision and two text writers. In 1925 the Supreme Court stretched the rule to cover search of the house where the arrest is made. Two years later the Court applied the rule to a ledger and cer-
taint utility bills found in a closet on the premises. Later the Court seemed to restrict search and seizure to those things which were on the person or in plain view in the premises in which the arrest was made. In turn these cases were not followed. Then the Court swung to its more liberal position stressing the element of ample time to obtain a search warrant.

In 1950 the Court swung back to the more conservative approach. A search of the defendant's one-room office, including desk, safe, and file cabinets was held to be reasonable. The Court overruled the prior holding that a search warrant must be obtained if there is adequate opportunity to procure it. In 1959 the Court held that where an agent had probable cause for arresting the defendant for a narcotics violation, heroin found clutched in the defendant's hand in his raincoat pocket and a needle found in his valise were admissible. In 1960 the Supreme Court referred favorably to the earlier cases allowing search incident to a legal arrest. Search was of the hotel room in which the defendant was arrested and in the adjoining bathroom. Possibly this case indicates that the permissible scope of search incidental to arrest will return more nearly to that which is necessary for the safety of those who are arresting and the safekeeping of the arrested party. Professor Maguire concludes that an arresting officer "ought to be allowed to search his prisoner and the immediate vicinity for weapons and for devices which might aid escape; he ought probably to make some search for the purpose of guarding the proceeds of crime, contraband, and important material evidence..."
from loss, destruction or perversion." In 1963 the Supreme Court expressly disclaimed any opinion as to whether a search warrant should be obtained where the search is incidental to a lawful arrest.\textsuperscript{122}

Suppose a search incidental to arrest. May this include matters of evidential value? It may as to search of the person.\textsuperscript{123} A federal case seems to intimate otherwise.\textsuperscript{124} But the search was of the apartment of an absentee whose arrest was being attempted and not of his clothing or person.

The right of search incidental to arrest may supplement more limited authority for search embodied in a search warrant.\textsuperscript{125} In one case there was a search warrant for liquors and articles for their manufacture coupled with arrest of a person other than the defendant in charge of the premises. The search disclosed a ledger and bills not covered by the warrant but nevertheless seized. The search and seizure was upheld on various grounds, one being possession and control by the arrested person as to the ledger and possibly the bills.\textsuperscript{126} Contraband may be seized in a search incident to arrest even though the items had no relationship to the crime for which the arrest was made.\textsuperscript{127} In a recent case it was held that instrumentalities of crime may be seized although the warrant for the search does not list them.\textsuperscript{128}

It has been held that a search is invalid where officers with reasonable grounds for arrest searched before making an arrest.\textsuperscript{129} There are contrary holdings in Oregon,\textsuperscript{130} California,\textsuperscript{131} 121. \textit{Maguire, Evidence of Guilt} 193 (1959). See United States v. Rabino-witz, 339 U.S. 56, 61, 71-73 (1950).
and in the Ninth Circuit.  

Where there is an arrest for a misdemeanor based on a warrant of arrest, there may still be a valid arrest for a felony where the officer had reasonable grounds to believe that the defendant had committed a felony; and incidental to such arrest there may be a search.

If an arrest is merely a pretext for making a search, the search is invalid even though the arrest may be lawful.

The search incident to arrest must remain within proper limits. It must be incidental in fact. It was held excessive to seize the entire contents of a house and move the seized property over two hundred miles.

Several recent lower federal court decisions have permitted a wide range for searching. Officers were allowed to search a defendant's apartment after arresting the defendant in an automobile some distance away. After an arrest without a warrant on a narcotics charge the agents were permitted to search the entire upstairs and ground floor of the house. In one case the home was invaded although the arrest took place in the yard of the home.

It has been seen that there may be reasonable searches


132. Fernandez v. United States, 321 F.2d 283, 287 n.8 (9th Cir. 1963); Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961), cert. denied, 369 U.S. 876.


under a search warrant and without a warrant incidental to arrest. Are there other types of reasonable search? There may be search of automobiles without a search warrant or a ground for arrest where the automobile is believed to carry contraband.140 The Supreme Court has suggested that a search of premises without a search warrant might be upheld in "exceptional circumstances" as where evidence or contraband was threatened with destruction or removal.141 "Belief, however well founded, that an article is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."142 Consent of a landlord to entry does not justify a search without a search warrant.143 A state lease forfeiture statute made no difference.

IMPEACHMENT OF DEFENDANT

In some situations evidence gotten by illegal search and seizure may be used by the government to impeach a defendant. In a narcotics case the defendant was asked by his counsel on direct examination whether he had sold narcotics to anyone. He answered: "I have never sold narcotics to anyone in my life." It was held that the government could impeach him by asking about heroin which had been unlawfully seized from him in a prior proceeding.144 The defendant had opened himself by sweeping assertions of righteousness during the direct examination. If he had not done this the government would have been blocked.145

CONSENT

If the defendant consents to the search he cannot complain later about its illegality.146 Consent given by the wife of the

146. United States v. Eldridge, 302 F.2d 463, 465 (4th Cir. 1962), noted 23 MD. L. REV. 95, 36 TEMPLE L.Q. 95; Fuentes v. United States, 283 F.2d 537, 539 (9th Cir. 1960); United States v. Bianco, 96 F.2d 97 (2d Cir. 1938) (trial
defendant by virtue of her marital status to search the defendant's apartment is not necessarily binding.\textsuperscript{147} Consent obtained by misrepresentation may not be binding.\textsuperscript{148} There is a binding consent when the taxpayer voluntarily turned over to the government tax records containing incriminating evidence.\textsuperscript{149} Consent obtained by mistake may be binding.\textsuperscript{150} The tenant of an apartment seems to be more fully protected than a guest or roomer in a family home.\textsuperscript{151} Whether there is valid consent may hinge on the personal qualities of the person giving the consent.\textsuperscript{152} A mere failure to resist does not constitute a waiver.\textsuperscript{153} Whether there was consent is a question of fact to be determined by the trial court.\textsuperscript{154} Where an internal revenue agent entered the defendant's office with the defendant's consent, there was no unlawful invasion of the office simply because of the agent's apparent but not real willingness to accept a bribe, and a recording of the conversation between the defendant and the agent on an electronic device which was carried in and out of the office by the agent did not violate the fourth amendment.\textsuperscript{155}

If consent is obtained through yielding to threatened violence, it would seem that there is no binding consent,\textsuperscript{156} although where the object of the search is public property the result is different.\textsuperscript{157} A number of cases appear to leave only slight

\begin{footnotesize}
\begin{enumerate}
\item[(147)] United States v. Derman, 66 F. Supp. 511, 512 (S.D.N.Y. 1946); see Annot., 31 A.L.R.2d 1097-1102 (1953); Amos v. United States, 255 U.S. 313, 317 (1921).
\item[(149)] Grant v. United States, 282 F.2d 165, 170 (2d Cir. 1960).
\item[(150)] United States v. Dornblut, 261 F.2d 949 (2d Cir. 1958).
\item[(151)] Woodard v. United States, 254 F.2d 312 (D.C. Cir. 1958), cert. denied, 357 U.S. 930.
\item[(152)] Canida v. United States, 250 F.2d 822, 825 (5th Cir. 1958) (timid, ignorant person); Waldron v. United States, 219 F.2d 37, 39 (D.C. Cir. 1955) (young pregnant wife); United States v. Lantrip, 74 F. Supp. 946, 949 (E.D. Ark. 1948) (ignorant person).
\item[(153)] United States v. Gross, 137 F. Supp. 244, 248 (S.D.N.Y. 1956); United States v. Page, 302 F.2d 81, 82 (9th Cir. 1962).
\item[(154)] Lopez v. United States, 373 U.S. 427 (1963), noted 77 HARV. L. REV. 111. Three Justices dissented.
room for peaceful persuasion when officers having no search warrant but manifesting their official character express determination or desire to make a search. When the government relies on waiver to validate a search, it has the burden of proof.

SEARCH BY PRIVATE PERSON

A search and seizure without a warrant by a private person not acting in collusion with federal officers does not have the consequence of exclusion of the evidence discovered in this manner. Where private individuals had stolen incriminating documents and turned them over to the government, such documents were admissible in evidence. The majority asserted lack of constitutional violation in the original taking. Justices Brandeis and Holmes stated that the government representatives were no more entitled to retain the stolen material than the thieves from whom they received it. Notwithstanding an illegal search and seizure the testimony of a stranger entering premises during the search at the invitation of the occupant is admissible. The same rule applies where an estranged wife turns over her husband’s business records to the Internal Revenue Service. It also applies as to voluntary statements by a wife as to joint income tax returns, the spouses being separated. In 1961 a federal court ruled that evidence procured...
by a non-governmental third-party still is inadmissible.\textsuperscript{165} In 1960 a court in dictum thought that the rule now covered search by private parties.\textsuperscript{166}

**DISMISSAL OF INDICTMENT**

Indictments will probably not be dismissed on motion under rule 12 of the Federal Rules of Criminal Procedure on the ground that there has been an illegal search or seizure.\textsuperscript{167} When part of the evidence presented to the grand jury was privileged, the indictment was upheld.\textsuperscript{168} Several cases held that when all the evidence was privileged, the indictment should be quashed.\textsuperscript{169} If there is a failure by the defendant to prove that all the evidence is privileged, a plea in abatement is denied.\textsuperscript{170} In 1956 the Supreme Court in upholding the admission of hearsay evidence used language broad enough to cover illegal search and seizure if the language of the court is given literal application.\textsuperscript{171} Two years later the Court upheld an indictment against a claim that evidence was obtained in violation of the privilege against self-incrimination.\textsuperscript{172} In a recent case a court refused to dismiss an indictment based on an illegal search.\textsuperscript{173} The


\textsuperscript{170} Marr v. United States, 8 F.2d 231, 234 (8th Cir. 1925), cert. denied, 270 U.S. 644.
\textsuperscript{172} Lawn v. United States, 355 U.S. 333, 349 (1958).
\textsuperscript{173} United States v. Block, 292 F. Supp. 705, 707 (S.D.N.Y. 1962). Compare Hoffritz v. United States, 240 F.2d 109, 111 n.2 (9th Cir. 1956); Larides v. United States, 215 F.2d 253, 262 (2d Cir. 1954) suggesting that if a motion to suppress is granted, an indictment based thereon may be quashed. The question was left open in United States v. Ashby, 245 F.2d 684, 686 (5th Cir. 1957).
court refused to speculate on the nature and quality of the evidence presented. The defendant failed to prove his contention that the indictment was based solely on evidence obtained from the illegal search.

CIVIL LITIGATION

The exclusionary rule probably does not extend to civil litigation to which the government is not a party. But if a governmental civil proceeding is involved conceivably the rule may be different. The exclusionary rule was not applied as to search and seizure connected with administrative proceedings to revoke a permit. It does not apply to a civil suit to restrain collection of income taxes. A court has stated that while the fourth amendment does not apply to "particular situations in civil cases," its "protective principle is not limited to pending criminal proceedings." There is a dictum in one case that the principle of exclusion has been extended to civil proceedings. In an action to enforce a payment of liquor duties the exclusionary rule was applied. A marijuana tax penalty assessed against the plaintiff without a hearing pursuant to evidence obtained by illegal search and seizure was enjoined. The criminal proceeding had been dismissed. A forfeiture judgment was reversed because based on illegal search and seizure. The Supreme Court in a case involving a subpoena assumed the applicability of the exclusionary rule in a civil proceeding under the Sherman Act. Under certain circumstances, the fourth amendment apparently may also be utilized to render invalid a civil tax assessment. In a much annotated case the New York


175. Camden County Beverage Co. v. Blair, 46 F.2d 648, 650 (D.N.J. 1930). But the bill to suppress was retained because of the possibility of criminal punishment, penalties, forfeiture.


179. Rogers v. United States, 97 F.2d 691 (1st Cir. 1938).


state court adhered to the traditional view that the search and seizure doctrine does not apply to civil litigation between private parties, reversing a contrary lower court holding. A husband suing for divorce had obtained evidence by unlawful search and seizure.

INVASION OF THE HUMAN BODY

In recent years a number of cases have involved the search and seizure problem raised by the invasion of the human body. Where there was a forcible extraction of a cache of narcotics from the defendant's rectum, the evidence was not excluded on self-incrimination or due process grounds under the fifth amendment. The fourth amendment was not violated. A federal district court held that removal of narcotics from the defendant's stomach by means of a stomach pump violated the fourth amendment. Where a fluoroscopic examination to which no objection was made disclosed foreign objects in the abdomen of a suspected smuggler, and castor oil and epsom salts were administered and narcotics were then disgorged, there was no violation of the fourth amendment nor of due process under the fifth. The defendants had after full explanation consented to all that was done. It was held as lately as 1963 that administering emetics to cause vomiting in order to recover narcotics is not an unreasonable search of the person in violation of the fourth amendment; nor does it violate due process of law under the fifth amendment. This is particu-

L. REV. 710 (1963); MAGUIRE, EVIDENCE OF GUILT 193-94 (1959); De Breuil, Applicability of the Fourth Amendment in Civil Cases, 1963 DUKE L.J. 472, 487.
186. MAGUIRE, EVIDENCE OF GUILT 195-98 (1959); 8 WIGMORE, EVIDENCE § 2184a, at 45-51 (McNaughton rev. ed. 1961).
188. 247 F.2d at 750.
191. Lane v. United States, 321 F.2d 573, 576 (5th Cir. 1963).
larly so if no force is used. Searches are unreasonable when there is force and a series of unreasonable acts to the person and property of the defendant.192

When blood was found on the defendant's body in an examination to which he submitted under military order, the evidence was held admissible without discussion of search and seizure.193 On a prosecution for taking indecent liberties compulsory examination of the defendant's penis for a blood sample was held to violate the privilege against self-incrimination.194 The court also suggested that there might have been an unreasonable search and seizure. In a case holding that fingerprints taken after an illegal arrest were not admissible in evidence, the court invoked the fourth amendment and the McNabb-Mallory rule as analogies.195

**STATUTES**

Statutes were passed by Congress in 1789,196 1790,197 1791,198 and 1799199 authorizing search warrants on oath before justices of the peace for day time searches for various types of contraband, such as tax-unpaid liquors. Subsequent statutes permitted search warrants for books and papers relating to customs fraud,200 obscene literature,201 and counterfeit money.202 Only as late as 1917203 was there enacted a general search warrant provision allowing search for stolen grounds or property used in the commission of a felony.204

Under an act of Congress passed in 1948 federal officers who

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196. 1 Stat. 43.

197. 1 Stat. 170.

198. 1 Stat. 207.

199. 1 Stat. 677.


201. 28 Stat. 549 (1904).


203. 4 CYCLOPEDIA OF FEDERAL PROCEDURE 397 (1929); Fraenkel, Concerning Searches and Seizures, 34 HARV. L. REV. 361, 380 (1921).

participate in an unlawful search and seizure are guilty of a misdemeanor.\textsuperscript{205}

For almost a century there were no decisions of the Supreme Court on the fourth amendment. Only in 1886 was there a decision containing comprehensive and searching discussion.\textsuperscript{206} During a period from 1920 to 1927 there were 490 cases in the federal courts on the admissibility of illegally obtained evidence in liquor cases.\textsuperscript{207} World War I and the eighteenth amendment focussed increasing attention on search and seizure. When the Federal Rules of Criminal Procedure were drafted the law was sufficiently developed that rule 41 on search and seizure was largely a restatement of existing law. The rule provides as follows:

"Rule 14. Search and Seizure"

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located. As amended Apr. 9, 1956, eff. July 8, 1956.

"(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

"(1) Stolen or embezzled in violation of the laws of the United States; or

"(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

"(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., § 957.

"(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the


\textsuperscript{206} Boyd v. United States, 116 U.S. 616 (1886). The history of the adoption of the fourth amendment is discussed by Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361-66 (1921); Reynard, Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right, 25 Ind. L. J. 259, 262-77 (1950).

\textsuperscript{207} Note, 36 Yale L.J. 536, 537 n.2 (1927). See also Annot., 39 A.L.R. 811 (1925).
judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

“(d) Execution and Return with Inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

“(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on
the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. 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 which special provision is made. The term "property" is the motion at the trial or hearing.

"(f) Return of Papers to Clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

"(g) Scope and Definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects. As amended Dec. 27, 1948, eff. Oct. 20, 1949."

**History of Drafting Rule 41**

The first draft of the Federal Rules of Criminal Procedure contained no provisions on search and seizure. The second draft, dated January 12, 1942, in its rule 105 covered search warrants. Subsection (a) covered authority to issue warrants, and was based on 18 U.S.C. sections 611 and 612. Subsection (b) covered manner of issuance and was based on 18 U.S.C. sections 613-616, 620, 621, 623, and 624. While 18 U.S.C. section 613 required that the warrant shall "particularly describe" the property and the place to be searched, this draft substituted the word "identify," since an error in description which nevertheless does
not present identification of the place should not nullify the search warrant. Rule 106 covered motion to quash search warrants and to suppress evidence. It was based largely on 18 U.S.C. sections 625 and 626. In addition it sought to clarify the procedure relating to the suppression of evidence. Rule 85 of the third draft, dated March 1942, was based on rule 105 of the second draft. The rule was revised to permit issuance of a search warrant for property used as a means of committing a "crime" instead of a felony. Several existing statutes covered cases where the property involved was used in the commission of a misdemeanor. Rule 86 was based on rule 106 of the second draft. In the fourth draft, dated May 18, 1942, the rules were combined into a single rule, rule 34, entitled "Search Warrants."

Rule 34 of a draft, known as "Preliminary Draft," dated May 1942, made no important changes. It was submitted to the Supreme Court for comment. The Court suggested that the annotation indicate how far the rule follows and how far it departs from the present statute. The Court thought the word "positive" when read in its context to be of dubious meaning in the following sentence: "The warrant shall direct that it be served in the daytime, unless the affidavits or depositions are positive that the property is on the person or in the place to be searched, in which event it may direct that it be served at any time of the day or night." The Court made a similar criticism of the word "publicly" in the following sentence: "The inventory shall be made publicly or in the presence of the person from whose possession or premises the property was taken and shall be verified by the affidavit of an officer." Finally the Court queried whether there should not be discretionary power in the Court to permit a defendant to make a motion to suppress evidence at the trial or hearing.

The fifth draft dated June 1942 in its rule 34 made no substantial changes. The committee annotation pointed out that the rule is designed to incorporate the substance of existing law, except that provision is made for review by the district court of a decision by a commissioner or issuing judge on a motion for return or suppression of evidence.

The sixth draft, dated Winter 1942, in its rule 33 now contained a subdivision (b) on grounds for issue of a search warrant. Subdivision (c) now covered issue and contents. Subdivision (d) now covered execution and return with inventory.
Subdivision (e) now covered motion for return of seized property and to suppress evidence. Subdivision (f) covered scope of the rule. While the Court had criticized the word "positive" search for a better word was unsuccessful. But the rule adopted the Court's suggestion that the court have discretionary power to suppress evidence on motion made as late as the trial or hearing. The Reporter preferred the following rule: A motion to suppress evidence shall be made at the arraignment of the defendant upon a charge clearly involving such evidence or at such other time as the court or these rules may provide.

Rule 33 of the First Preliminary Draft, dated May 1943, had a new title which became the final title of the rule: "Search and Seizure." The prior title had been "Search Warrant." Otherwise the rule was substantially the same as the sixth draft. Many comments were received by the Committee on the proposed rule. William Scott Stewart of Chicago contended that the rule limited the right of a person to be secure only as against seizure of property claimed by him. Provision should be made for the suppression of all evidence illegally seized, as well as information obtained in such illegal manner.

With respect to subdivision (a) Thomas J. Morrissey, United States Attorney for the District of Colorado, stated that search warrants should not be issued by state or territorial courts; and application therefor should require the approval of the United States Attorney or one of his assistants.

With respect to subdivision (b) M. Neil Andrews, United States Attorney for the Northern District of Georgia, suggested that if constitutional provisions do not preclude it, language should be added to the rule providing that books, records and documents containing evidence of commission of a criminal offense may be seized by search warrant. The word "property" as used in the rule does not expand the present law. Judge Harry J. Lemley of Arkansas suggests that the language "designed or intended for use or which is or has been used as the means of committing a criminal offense" might be construed to empower the courts to issue a warrant even when a crime is merely intended to be committed in the future. In such a case

208. 1 COMMENTS, RECOMMENDATIONS AND SUGGESTIONS RECEIVED CONCERNING THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE 206 (1943).
209. 2 id. 488.
210. 2 id. 487.
211. 2 id. 486.
there would be no probable cause, although the Constitution re-
quires probable cause. Stuart H. Steinbrink of New York as-
serted that either the title, grounds for issuance, or the phrase-
ology is erroneous since the text describes the property which
may be searched rather than the conditions under which a
search warrant may be issued.

With respect to subdivision (c) Judge Leslie R. Darr of Ten-
nessee pointed out that often criminals use automobiles and
other methods of fast transportation, hence there should be a
provision permitting search for property that is in transit when
the warrant issues upon probable cause, that is, search in the
night time. Sterling Hutcheson, United States Attorney for
the Eastern District of Virginia, would leave search at night in
the discretion of the court. Robert M. Hitchcock of Dunkirk,
New York, would allow search at night upon affidavit or deposi-
tion showing good cause therefor. Judge Albert L. Reeves of
the Western District of Missouri pointed out that the rule re-
quires the judge or commissioner both to examine the applicant
for search warrant on oath and to require affidavits. Only
one of the two should be required.

With respect to subdivision (d) Stuart H. Steinbrink thought
that the requirement of execution and return within ten days
unduly limited the officers. The return might well come later.

With respect to subdivision (e) several thought that a mo-
tion to suppress should not be heard by a commissioner. One
sentence provided: "If the motion is granted, the property shall
be restored unless subject to confiscation and it shall not be ad-
missible in evidence at any hearing or trial of the proceeding
in connection with which the seizure occurred." To this sen-
tence Stuart H. Steinbrink would add: "or in connection with
the crime or crimes described in the application for the war-
rant." Robert M. Hitchcock would make it clear that the mo-
tion should be made only on affidavit of a person against whom
a warrant or subpoena has been issued, which affidavit must
state unequivocally that he is either (a) the owner of the prop-
erty or (b) the possessor thereof at the time of the search or

212. 2 id. 490.
213. 1 id. 207.
214. 1 id. 206.
215. 2 id. 491.
216. 2 id. 492-93.
seizure. Judge Edwin R. Holmes of the Court of Appeals of the Fifth Circuit would substitute the word "was" for "is" in the phraseology "There is not probable cause for believing the existence of the grounds, on which the warrant was issued." F. B. McConaughy of Cincinnati would have the rule include the written confession or statement covered by rule 5(b) of the Federal Rules of Criminal Procedure. The rule should also cover the return and suppression of copies of and memoranda made from evidence illegally procured and the matter of injunctive relief concerning the use of the same. There are numerous decisions by the Supreme Court and by lower federal courts on these matters. As to the language "the property seized is not that described in the warrant," Robert M. Hitchcock thought it too rigid. The property seized should be of the same character described in the warrant, and not necessarily precisely that so described.

With respect to subdivision (f) on scope and definition the proposed rule provides it "does not modify or impair any other Act, inconsistent with this rule." Judge Edwin B. Holmes would substitute: "It shall not modify or impair."

Rule 41 of the Second Preliminary Draft, dated February 1944, made some changes. Subdivision (a) attained its final form, as did subdivision (c). Subdivision (d) had attained its final form in the First Preliminary Draft. Subdivision (e) used the language "there was not probable cause," whereas the prior draft used the word "is" instead of "was." The subdivision on scope and definition attained its final form. There were a number of comments by the Advisory Committee on the draft.

With respect to subdivision (b) the Special Committee of the Oregon State Bar thought to be unclear the language "constituting the fruits of a violation of a law of the United States." Possibly this could be interpreted to mean that if an individual were charged with income tax evasion, a search warrant could be issued and his money seized or even any property he purchased with the money. Possibly the property could be seized even though it were in the hands of an innocent third person.

217. 1 id. 208.
219. 1 id. 209.
221. 3 id. 170 (1944).
Various federal agencies have very wide powers. The present statute should be substituted for the proposed rule.

With respect to subdivision (d) the language requiring return within ten days was thought to be too strict by the Committee for the Eastern District of Tennessee. Execution should be within ten days after the date of the warrant, but not return. It is easy to forget to make the return. There is rarely prejudice to the defendant because of a late return.

With respect to subdivision (d) Judge Charles E. Clark suggested that the hearing be held before a district judge and not before a commissioner. With respect to the sentence providing that the judge “take testimony” Judge Jerome Frank proposed to substitute “receive evidence.” This suggestion was incorporated in the Final Report of the Advisory Committee. Judge Swan would provide that the judge may hear the motion upon affidavit or upon testimony. The New York County Lawyers Association Committees on Federal Courts and Criminal Courts opposed review by the district court of the ruling of the judge. If the same judge were involved, the decision would rarely be overruled. If a different judge were involved, the rule that the decision of a judge of coordinate jurisdiction will not be reviewed in the same court should apply. A similar criticism was made by the Committee on Criminal Courts, Law and Procedure of the Association of the Bar of the City of New York. Ralph F. Lesemann of the Bar Committee of the Seventh Circuit would have the hearing only before the district court. The questions of law involved are usually close, important and vital. Allowing hearing before a commissioner would result only in delay. A similar view was taken at the Conference of United States Attorneys at Saint Louis, Missouri.

The Final Report of the Advisory Committee, dated June 1944, made some changes. The rule was now numbered 43. A new subdivision (f) entitled “Return of Papers to Clerk” was added in final form; and the subdivision on scope and definition, “f,” became “g.” Subdivision (e) now used the language “A person aggrieved by an unlawful search and seizure” instead of “A person whose property has been seized under a warrant.”

222. 3 id. 172. The committee cited Bragg v. State, 155 Tenn. 20, 290 S.W. 1 (1927).
223. 3 id. 173.
224. 3 id. 174.
225. 4 id. 84.
The Commissioner could no longer conduct the hearing. The provision for review of ruling on the motion in the district court was deleted. The Supreme Court adopted this draft without any important changes. The Supreme Court substituted for (b) (1) the language "stolen or embezzled in violation of the laws of the United States" instead of "constituting the fruits of a violation of a law of the United States." As two rules suggested by the Committee were rejected by the Court the rule became rule 41.

Rule 41 (b) (3) and rule 41 (g) were amended in 1948 to substitute proper reference to Title 18 in place of the repealed acts and to eliminate reference to sections of the Act of June 15, 1917, c. 30, which have been repealed by the Act of June 25, 1948, c. 645, which enacted Title 18. Rule 41 (a) was amended in 1956 to allow issuance of search warrants by judges of commonwealth courts.

**Rule 41 As Construed in the Cases**

By this time there are a large number of cases construing rule 41. The balance of this paper will be devoted to a survey of such cases.226

*Authority to Issue Warrant*

A justice of the peace has no authority to issue a search warrant under rule 41 (a).227 A federal search is governed by rule 41 and not by state law.228

Where a search warrant is issued by a state judge whether such a warrant is valid beyond the judicial circuit of its issuance depends on the language of the State Constitution or statutes.229 One court has held that the word "district" in rule 41 (a) refers to the state jurisdictional limitation.230

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Grounds For Issuance

A corporation's papers could be found to be the "means for committing a criminal offense" though some of the papers were legitimate records and were not per se harmful or dangerous, and though some had not been exhibited to the government.\(^2\)

Where the affidavit proceeds on the theory that the crime was committed apart from obscene pictures and books and did not show that they were the means of committing the crime of conspiracy, the search warrant is not valid.\(^2\)

Number slips, tip sheets, tapes, and money are gambling paraphernalia and as such are instrumentalities used in wagering.\(^2\)

Issuance and Contents

In general rule 41 (c) is merely a codification of the prior law.\(^2\)

A search warrant closely following form 15 of the Federal Rules of Criminal Procedure is valid.\(^2\)

The validity of a search warrant is tested by federal standards, not state.\(^2\)

A court has stated that the "oath or affirmation is required to be in the form of an affidavit or oath in writing."\(^2\)

The affidavit need not be typed up by the commissioner.\(^2\)

It may be prepared by the government officer. Rule 41 (c) does not require that a copy of the affidavit be annexed to or inserted in the warrant.\(^2\)

The affidavit must set forth facts showing probable cause, and not merely the conclusions of the affiant.\(^2\)

The owner of the premises to be searched need not be specified in the affidavit where the search is of the premises and not the person.\(^2\)


\(^{238}\) United States v. Doe, 19 F.R.D. 1, 3 (E.D. Tenn. 1956).


The affidavit mentioned in rule 41(c) is required only to establish the grounds for issuing the warrant and to show probable cause therefor.\textsuperscript{242} But it need not particularly describe the place to be searched or the things to be seized. Sole reliance on the affidavit must be had as to the existence of probable cause.\textsuperscript{243} That is to say probable cause must be shown in the affidavit.\textsuperscript{244} According to one case the commissioner or judge may take the affidavit as it is presented, and need not investigate whether its statements are true.\textsuperscript{245}

In a much quoted definition of probable cause the Supreme Court stated that it was facts and circumstances within the police officer's knowledge "and of which they had reasonably trustworthy information . . . sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense had been or was being committed.\textsuperscript{246} In a dissenting opinion Justice Jackson suggested that a lower degree of probable cause\textsuperscript{247} should be necessary in searches involving more serious offenses.\textsuperscript{248} In a case in which the court found no entrapment it suggested in dictum that a search warrant could be based on evidence gained by entrapment.\textsuperscript{249} Where the evidence is undisputed the question whether probable cause exists for the issuance of a search warrant is for the court, and not a jury issue.\textsuperscript{250}

A search warrant should not issue on affidavit of a govern-
ment officer merely showing that he has possession of information which gives him cause to believe that the defendant is in possession of property in violation of the criminal law without revealing the sources of his information or the grounds of his belief. In 1960 the sufficiency of a search warrant was attacked on the ground that its issuance was based on hearsay evidence. The Supreme Court upheld the warrant and held specifically that "hearsay may be the basis for a warrant." But the affiant must still have personal knowledge; and the affidavit must include some factual information independently corroborative of the hearsay report.

A search warrant is not invalid merely because the United States Attorney gave his approval to the complainants to secure the warrant.

The affiant's name must be stated in the search warrant. Someone must take the responsibility for the facts alleged showing probable cause. The defendant must be given an opportunity to probe and challenge the warrant. The search warrant must particularly describe the things to be seized to satisfy the fourth amendment. All that is required as a description of the premises to be searched is that the description suffice to enable officers to ascertain and identify the place intended by reasonable effort. A warrant describing an entire building when cause is shown for searching only one room or apartment is void as violating the fourth amendment.


Where the warrant is not directed to an authorized civil officer of the United States, it may be quashed. Revenue agents have authority to execute search warrants.

The language as to search "forthwith" in rule 41(c) is subject to the provision for execution and return within ten days in rule 41(d).

The search warrant is not invalid because it does not contain a direction that it be executed within ten days after its issuance.

Under rule 41(c) of the Federal Rules of Criminal Procedure warrants may be issued on "probable cause" for searches during the daytime but searches after dark require "positive" information. In 1956 Congress passed a statute as to search for narcotics under which "probable cause" is sufficient for nighttime searches. But if such search is to be at nighttime the warrant must so provide. If it does not, the warrant cannot be served at night.

The word "positive" as to nighttime searches requires nothing more than an explicit statement, supported by positive evidence, as distinguished from negative evidence, that the property is in the place to be searched, and requires averments of fact sufficiently persuasive to support a reasonable inference that the property is on the premises to be searched. The rule on nighttime search "is hardly compatible with a principle that a search without a warrant can be based merely on probable cause."

Even though the return seems to indicate nighttime search, it may be shown that the search began in the daytime. The entry could mean the time at which the search and inventory

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259. United States v. Troop, 235 F.2d 123, 124 (7th Cir. 1956).
was completed, or the time when search began. A search beginning in the daytime and extending into the night is valid.\textsuperscript{268}

**Execution and Return With Inventory**

Rule 41 (d) provides that the warrant "may be executed and returned only within 10 days after its date."\textsuperscript{269} But the unavailability of the search warrant and affidavit at the trial did not require the granting of a new trial on the ground that one defendant was thereby deprived of his right to cross-examine the treasury agent who, with another, executed the affidavit when the variance between the affidavit, which was found after trial, and the testimony by such agent at the trial, was trivial.\textsuperscript{270}

Where the defendants although present when the premises were searched under a warrant made no claim to the property and disavowed any interest in the premises, they had no right to be served with a copy of the warrant and could not claim that the copy left on the premises was defective.\textsuperscript{271}

A mere failure to leave a copy of the warrant and receipt for the property taken does not make the warrant invalid.\textsuperscript{272} But the defendant's motion to suppress may be granted unless the government complies within a ten-day period.\textsuperscript{273}

The return of a search warrant should not include a bribe offered an officer when he went on the premises to execute a warrant.\textsuperscript{274} Hence, when such a warrant is quashed the government need not return the bribe. The return and inventory need not list items which were not seized under the search warrant.\textsuperscript{275} The return of a search warrant is a ministerial act and any failure therein does not void the warrant.\textsuperscript{276}


\textsuperscript{270} United States v. Giallo, 206 F.2d 207, 211 (2d Cir. 1953). See also Peckham v. United States, 210 F.2d 693, 697 (D.C. Cir. 1953).

\textsuperscript{271} Shaw v. United States, 209 F.2d 298 (D.C. Cir. 1953), cert. denied, 74 Sup. Ct. 430.


\textsuperscript{274} United States v. Troop, 235 F.2d 123, 124 (7th Cir. 1956).


Motion for Return of Property and To Suppress Evidence

Rule 41(e) "codifies existing law and practice." "The one change the rule makes is that it abolishes the existing authority of the United States Commissioners to hear motions to suppress evidence."277

In general a defendant should proceed by motion to suppress under rule 41(e) rather than by preindictment equitable proceedings.279

Proceedings under rule 41(e) are governed by the Federal Rules of Civil Procedure when no prosecution has yet begun.280

An impounding order does not necessarily involve a search or seizure, hence a motion to suppress does not always lie.281

The early cases were reluctant to grant motions to suppress involuntary confessions.282 In one case the court entertained a motion before trial, but denied the motion as the confession was found voluntary.283 There have been cases suppressing a statement obtained from the defendant in the course of an illegal search and seizure.284

In 1947 the Second Circuit held by a two to one vote that confessions resulting from violation of constitutional right may be suppressed in advance of trial and of indictment.285 A court

278. Judge Holtzoff in 6 FEDERAL RULES OF CRIMINAL PROCEDURE, NEW YORK UNIVERSITY SCHOOL OF LAW, INSTITUTE PROCEEDINGS 130 (1946). See the Advisory Committee note.
282. United States v. Lydecker, 275 Fed. 976, 978 (W.D.N.Y. 1921). But the motion was made after indictment.
283. Ah Fook Chang v. United States, 91 F.2d 805, 807, 809 (9th Cir. 1937).
denied suppression of a confession after an indictment had been returned;\textsuperscript{286} and expressed objection to the practice even before indictment.\textsuperscript{287} In 1954 a district court held that a defendant may move under rule 41(e) to suppress a statement on the ground that it was obtained while he was illegally detained in violation of the McNabb doctrine and that it was involuntary.\textsuperscript{288} In 1956 the Second Circuit upheld\textsuperscript{289} suppression of confession obtained in violation of the McNabb rule on the basis of a decision of the Supreme Court,\textsuperscript{290} and not on the basis of rule 41(e). On a motion to dismiss an indictment for perjury on the ground that false testimony had been obtained in violation of the privilege against self-incrimination the court of appeals remarked that the trial court might properly conduct a pretrial hearing to determine a collateral issue as to suppression of evidence for any reason.\textsuperscript{291} On analogy to rule 41(e) a federal court has suppressed information gathered by internal revenue agents as to certain years in violation of a statute restricting examination of taxpayers.\textsuperscript{292} "The distinction which isolates for special treatment fourth amendment violations has no basis in reason; instead it seems rooted in the fortuities of historical growth."\textsuperscript{293} Considerable expansion of the motion to suppress may be anticipated.

Only the district court may pass on a motion to suppress and on the admissibility at trial of evidence obtained by illegal

\textsuperscript{287} See also Biggs v. United States, 246 F.2d 140, 142 (6th Cir. 1957); Benes v. Canary, 224 F.2d 470, 472 (6th Cir. 1955), cert. denied, 350 U.S. 913; Chieltain Pontiac Corp. v. Julian, 209 F.2d 657, 659 (1st Cir. 1954); Centracchio v. Garitty, 198 F.2d 382, 387 (1st Cir. 1952); Eastus v. Bradshaw, 94 F.2d 788, 789 (5th Cir. 1938); Rodgers v. United States, 158 F. Supp. 670, 682 (S.D. Cal. 1958); United States v. Marshall, 24 F.R.D. 505 (D.D.C. 1960).
\textsuperscript{290} Rea v. United States, 350 U.S. 214 (1956).
\textsuperscript{292} Application of Leonardo, 208 F. Supp. 124, 126 (N.D. Calif. 1962).
\textsuperscript{293} Note, 72 YALE L.J. 550, 553 (1963).
search and seizure.\textsuperscript{294} This is the most important change made by rule 41(e) in the prior law.\textsuperscript{295}

The motion to suppress must be made in the district in which the property was seized. It may not be made in a district in which there merely was a search.\textsuperscript{296} The court of the district of seizure may deny a motion to suppress where trial is to be in a district in another state.\textsuperscript{297} A suppression order rendered in the district of seizure is not necessarily binding in the district of trial.\textsuperscript{298}

Rule 41(e) does not change the rule that a sole stockholder may not take on the privilege of the corporation against unlawful searches and seizures according to an early case.\textsuperscript{299} But a later case seems to apply a contrary rule.\textsuperscript{300} A defendant has no standing to complain of his wife’s arrest, or of seizure of evidence in the form of certain money taken from her purse, where the defendant did not claim ownership of the money.\textsuperscript{301}

A motion to suppress should be in writing,\textsuperscript{302} but need not be verified.

The motion to suppress should be accompanied by affidavit, but possibly this is not true when the motion is on the ground that the warrant is insufficient on its face.\textsuperscript{303} But in general affidavits should not be filed either by the defendants or by the government.\textsuperscript{304} Rule 41 is silent as to affidavit; hence no affidavit should be required although they may be permitted.\textsuperscript{305}

Usually the pretrial motion is decided on affidavits alone.\textsuperscript{306} The point can, and on occasion must be, renewed at trial to preserve it for ultimate appeal.

\begin{thebibliography}{306}
\bibitem{294} Giordenello v. United States, 357 U.S. 480, 484 (1958).
\bibitem{295} See note 278 supra.
\bibitem{296} United States v. Oliver, 140 F. Supp. 808, 815 (W.D. Mo. 1956).
\bibitem{298} United States v. Koenig, 290 F.2d 126, 127 (5th Cir. 1961).
\bibitem{299} Lagow v. United States, 159 F.2d 245 (2d Cir. 1946).
\bibitem{301} Ramirez v. United States, 294 F.2d 277, 280 (9th Cir. 1961).
\bibitem{302} United States v. Warrington, 17 F.R.D. 25, 30 (N.D. Calif. 1955).
\bibitem{303} United States v. Vomero, 6 F.R.D. 275 (E.D.N.Y. 1956). See also United States v. Privinzini, 6 F.R.D. 207 (S.D.N.Y. 1946), holding that under rule 47 of the Federal Rules of Criminal Procedure the filing of an affidavit is optional, but the court may in its discretion require an affidavit.
\bibitem{304} United States v. Warrington, 17 F.R.D. 25, 30 (N.D. Calif. 1955).
\end{thebibliography}
The government need not file any formal answer, return or reply to a motion to suppress.\textsuperscript{307}

A motion to suppress may not be used by either the defendant or the government as a "fishing expedition to peer into the files of the opponent."\textsuperscript{308}

The government can cross-examine the defendant only if he should voluntarily submit himself as a witness.\textsuperscript{309}

Questions arising under rule 41(e), especially competency of evidence are for the court and not the jury.\textsuperscript{310} The right to trial by jury is not violated by having the court pass on the issue.\textsuperscript{311}

The burden of proof is on a defendant who seeks to suppress evidence obtained under a regularly issued warrant to show the want of probable cause.\textsuperscript{312} The defendant must support his motion to suppress "by a prima facie showing" that his motion has merit.\textsuperscript{313}

Pending a hearing on the motion to suppress the district court does not have unlimited discretion to stay the government from presenting evidence to a grand jury.\textsuperscript{314} There should be no hearing on the motion to suppress except when the petition alleges facts which if proved would require relief. The hearing when held should be held at an early date especially when the statute of limitations might otherwise run. If the court abuses its discretion by ordering a hearing or a stay the court of ap-


\textsuperscript{308} United States v. Warrington, 17 F.R.D. 25, 30 (N.D. Calif. 1955).

\textsuperscript{309} Ibid. Likewise on a motion to dismiss an information court should not call the defendant to the stand and ask him inquiring questions. Buenaventura v. United States, 291 F.2d 86 (9th Cir. 1961). See Orfield, Competency of Witnesses in Federal Criminal Cases, 46 MARQ. L. REV. 324, 334-35 (1963).


\textsuperscript{312} Chin Kay v. United States, 311 F.2d 317, 321 (9th Cir. 1962); Batten v. United States, 188 F.2d 75, 77 (5th Cir. 1951); United States v. Nagle, 34 F.2d 952, 954 (N.D.N.Y. 1929); United States v. Lipschitz, 132 F. Supp. 519, 522 (E.D.N.Y. 1955); United States v. Napela, 28 F.2d 808, 904 (N.D.N.Y. 1928); People v. DuBois, 221 N.Y.S.2d 21, 27 (Queens County Ct. 1961); People v. Manasek, 225 N.Y.S.2d 678, 680 (Westchester County Ct. 1961).


\textsuperscript{314} Grant v. United States, 282 F.2d 165, 170 (2d Cir. 1960), noted 29 GEO. WASH. L. REV. 941 (1961). One judge dissented. See also Greene v. United States, 296 F.2d 841, 843 (2d Cir. 1961).
peals may grant mandamus.315 The problem seems to arise in cases involving tax records.

Where a federal narcotics agent obtained evidence for a federal prosecution in the course of an illegal search and seizure and the evidence was suppressed in federal court, an injunction will be granted against the agent to prevent him from testifying concerning the evidence in a state court prosecution.316

In one case the court ordered return to the owner within sixty days after the order to suppress unless the government appealed.317 A defendant corporation has no right to return of its books and records by the United States Attorney to whom they were voluntarily turned over in a pending grand jury proceeding.318 There is no duty to return materials which might be considered admissible in other prosecutions which might grow out of the offense.319 The government need not return property illegally seized where such property is being used in gambling activity in violation of the wagering tax law and is subject to forfeiture.320 A court may after suppressing evidence direct that the money seized be retained in custody subject to a federal tax lien and a final disposition thereof.321 There need be no return of property when, subsequent to the suppression order but prior to its return, the property is levied upon by the United States for collection of assessed taxes.322

The last sentence of rule 41(e) is merely a restatement of the existing law which gave the defendant much protection.323 Failure to make the motion to suppress before trial does not show that the defendant had inadequate representation of counsel.324

315. Mandamus was denied on the facts in United States v. Foley, 283 F.2d 582 (2d Cir. 1960).
322. Field v. United States, 263 F.2d 758, 762 (5th Cir. 1959). See also Carlo v. United States, 286 F.2d 841, 848 (2d Cir. 1961).
The motion to suppress may be made prior to indictment, or after indictment. The rule is silent as to the exact time for making the motion. The motion may not be made subsequent to the trial. When defendant's counsel had been aware of the seizure of the article two years before his motion to suppress, a motion made on the first day of trial may be denied. The court will not assist a defendant who delays his motion for strategic reasons. The defendant cannot secure return of the property seized after trial under Rule 41(e).

The defendant has no absolute right to have the motion to suppress determined before trial. This is particularly true where allowance of the motion would result in dismissal of the entire proceedings.

The phrase "was not aware of the grounds of the motion" does not pertain to an awareness of the law, but rather refers to a knowledge of the factual circumstances surrounding the seizure.

Return of Papers to Clerk

One commissioner may issue a warrant and the warrant may be returned to another commissioner when both commissioners are appointed for the same district and may properly act in any division of the district. The return of a warrant is a ministerial act and any failure therein does not void the warrant.

Appeal

Except by special legislation or under exceptional circum-

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332. Isaacs v. United States, 283 F.2d 587, 589 (10th Cir. 1960). This case arose after rejection of the "silver platter" doctrine.
333. Evans v. United States, 242 F.2d 534, 536 (6th Cir. 1957). The court failed to make reference to the last sentence of rule 41(c) providing that the warrant "shall designate the district judge or the commissioner to whom it shall be returned."
stances not fully defined, a motion under rule 41(e) lacks the independence of standing which would allow the party aggrieved by the ruling upon it an immediate appeal. A post-indictment order suppressing evidence may not be appealed by the Government even though the order results in dismissal of the indictment for lack of evidence. A defendant could not appeal at this stage as the denial of his motion is interlocutory. Chief Justice Warren stated: "Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, or in a different district from that in which the trial will occur, or after dismissal of the case, or perhaps where the emphasis is on the return of property rather than its suppression as evidence. In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision." 334

In 1962 the Supreme Court held that no appeal lay as to an order granting or denying a pre-indictment motion to suppress. 335 It made no difference that the order was rendered in a different district from that of trial.

A statute grants the government a right of appeal in narcotics cases. 336 In one case the court considered a government appeal in a bootlegging case. 337 No one appears to have noticed the defect.

Motion to Vacate Sentence

Illegal search and seizure may not be raised for the first time on motion to vacate under 28 U.S.C. section 2255. 338 There is recent contrary authority. 339

Writ of Error Coram Nobis

The writ of error coram nobis was denied in a recent case.\textsuperscript{340} Prior cases on coram nobis had not discussed the point.\textsuperscript{341}

\textsuperscript{340} Peters, Collateral Attack by Habeas Corpus Upon Federal Judgments in Criminal Cases, 23 WASH. L. REV. 87, 100 (1948).
\textsuperscript{341} Jones v. United States, 258 F.2d 420, 422 (D.C. Cir. 1958).