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UNREASONABLE SEARCHES AND SEIZURES

HUGH E. WILLIS*

When do the people of the United States have immunity against searches and seizures? When, under the United States Constitution, is personal liberty protected against searches and seizures and when may social control delimit personal liberty by searches and seizures?

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, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The due process clause has not as yet been extended to include searches and seizures, and there is a New York decision (from which certiorari was denied by the United States Supreme Court)¹ holding that it cannot be so extended; but due process of law has been extended to include freedom of speech,² so that the possibility of its some day being extended to include searches and seizures cannot be regarded as foreclosed. However, though the Fourth Amendment applies only to the Federal government, similar provisions are found in the various state constitutions,³ so that people have the same immunity against their state as they have against their nation; and, although there is no provision in the Fourteenth Amendment to give the Supreme Court its opportunity to adopt a liberal method of interpretation and to apply its rule of reasonableness, the master adjective "unreasonable" is a magic word which contains similar possibilities. Hence the immediate answer to our question is, that the people have immunity against searches and seizures when they are unreasonable. So that our real question is, When are searches and seizures reasonable and when unreasonable? Our only other questions are, What is meant by searches and seizures, and What are the after-consequences of illegal searches and seizures?

* See p. 336 for biographical note.

¹ *People v. Defore*, 242 N. Y. 13; 46 Sup. Ct. 353 (1926).

² *Gitlow v. New York*, 268 U. S. 652 (1925); *Whitney v. California*, 274 U. S. 357 (1927); *Fiske v. Kansas*, 274 U. S. 380 (1927).

³ Wood, Scope of the Constitutional Immunity Against Searches and Seizures, 34 W. Va. Law Quar. 10.

In answering these questions we must look at the decisions of the courts, but to understand the decisions of the courts we must also understand colonial and English political and economic history prior to the adoption of our Constitutional provision, for it gives color to both the provision and the decisions. Looking at this history we find that one of the most obnoxious things in pre-Constitutional times and against which James Otis delivered his most masterful address was the writ of assistance, which was a blanket permit, issued to any one, authorizing him to prowl about at random and search any suspected place for goods on which duties had not been paid; and another, was the general warrant—first used to search for stolen goods and then extended by the crown as a device for ferreting out seditious matter—under which the houses of Coke, Wilkes and others were ransacked and papers of every description were seized and under which messengers were directed by unrestrained roving commissions to search any place where they knew or had reason to suspect any objectionable documents could be found, the issuance of which brought the names of Scroggs and Jefferies into such contumely and the judgment against which made *Entick v. Carrington*⁴ a landmark. There can be no doubt it was against these two things that the Fourth Amendment was principally aimed.

What is meant by searches and seizures? In general these words in the Constitution mean not what a dictionary permits them to mean but what they meant as applied to what was happening just before the adoption of the Constitution. The Fourth Amendment names four objects of search and seizure: Persons, houses, papers and effects. The Supreme Court has given a strict, or narrow, interpretation to these words. Hence it may be taken for granted that there is no search or seizure of a person unless it relates to his person, or his papers, or his tangible material effects, or an actual physical invasion of his house or curtilage.⁵ Consequently the Supreme Court has held that there is no search or seizure within the meaning of the Constitution when officials open letters written in a penitentiary,⁶ or carry out inspection laws,⁷ or use a searchlight,⁸ or conceal themselves in

⁴ 2 Wils. 274 (1765); Wood, Scope of Constitutional Immunity Against Searches and Seizures, 34 W. Va. Law Quar. 3-10.

⁵ *Olmstead v. United States*, 48 Sup. Ct. 564, 568 (1927).

⁶ *Stroud v. United States*, 251 U. S. 15 (1919).

⁷ *Shuman v. Ft. Wayne*, 127 Ind. 109 (1891); Freund, Police Power, 42.

⁸ *United States v. Lee*, 274 U. S. 559 (1927). It was held in *State v.*

an open field,⁹ or tap a telephone wire.¹⁰ But it has finally held, but only after a terrible strain, that a subpoena *duces tecum* may come within the constitutional provision,¹¹ if it requires access to all or an unreasonable part of papers and records, in spite of the fact that search implies a quest by an officer and seizure contemplates forcible dispossession.

When are and when are not searches and seizures reasonable? Is it reasonable to search without a warrant? Yes. Those who framed and adopted the Fourth Amendment must be presumed to have intended what they said, and they said merely that searches and seizures must not be unreasonable: they did not say that they must be by a search warrant, but they also put a limitation upon the use of warrants. Is it always reasonable to search without a warrant? No. The answer to the question when a warrant must be employed is found in the general warrants, writs of assistance, the common law of crimes and arrests and the purpose of the adoption of the Fourth Amendment. Consequently the courts have held reasonable, 1. without warrant, a. Search of and seizure of goods on a person where a person has been validly arrested (1) under a warrant,¹² or (2) while committing a misdemeanor in the presence of a peace officer or a felony in the presence of any one,¹³ or (3) while threatening a breach of the peace,¹⁴ or (4) when an officer has probable cause to think a felony has been committed;¹⁵ b. Search of and seizure of goods on the place where a person has been validly arrested,¹⁶ and though an officer cannot search other places he may seize other goods than those for whose possession he has made an arrest¹⁷ (hence though he may not search a house without a war-

Quinn, 111 S. C. 174, that inspection through the windows of an automobile does not constitute a search; but in *Mattingly v. Commonwealth*, 197 Ky. 583 (1923), it was held that scrutiny through windows is a search.

⁹ *Hester v. United States*, 265 U. S. 57 (1924).

¹⁰ *Olmstead v. United States*, 48 Sup. Ct. 564 (1927).

¹¹ *Hale v. Henkel*, 201 U. S. 43 (1906); *Silverthorne Lbr. Co. v. United States*, 251 U. S. 385 (1920); *Essgee Co. v. United States*, 262 U. S. 151 (1923).

¹² 5 C. J. 389.

¹³ *Agnello v. United States*, 269 U. S. 20 (1926). A crime is committed in the presence of an officer when he has sense knowledge of it during its commission (without the intervention of hearsay), 27 Col. Law Rev. 302.

¹⁴ *Regina v. Leslie*, 8 Cox. C. C. 269.

¹⁵ *United States v. Rembert*, 284 Fed. 996 (1922); 15 Va. Law Rev. 77.

¹⁶ *State v. McKindel*, 268 Pac. (Wash.) 593 (1928).

¹⁷ *State v. McKindel*, 268 Pac. (Wash.) 593 (1928); 3 Wash. Law Rev.

rant he may enter a house to arrest a felon and then seize other goods illegally possessed); and c. Search of automobiles and other moving vehicles, and seizures of goods therein on reasonable suspicion without any previous arrest;¹⁸ and 2. with a warrant, a. search of a dwelling house and seizure of goods therein;¹⁹ b. search of mails and seizure of matter in the mails,²⁰ and c. search of other places and seizures of other matter (whether or not search and seizure without warrant is legal),²¹ provided in all cases (1) the warrant is issued for the prevention of crimes, rather than private wrongs,²² (2) on an affidavit alleging facts instead of information and belief and for probable cause which must be determined by the magistrate (though perhaps on the showing made by the affidavit),²³ (3) the property seized is stolen or contraband and is not sought merely for evidence,²⁴ and (4) the statutory requirements as to procedure are followed.²⁵ The proper officer to issue a warrant is a justice of the peace, a judge, or a United States commissioner.²⁶ It may be executed by any civil officer whose duty it is to enforce or assist to enforce the law.²⁷ It must designate the place to be

194; 27 Mich. Law Rev. 107; 27 Col. Law Rev. 302; but see 15 Va. Law Rev. 76.

¹⁸ *Carroll v. United States*, 267 U. S. 132, 150 (1925); *Schroeder v. United States*, 14 Fed. (2nd) 500 (1926).

¹⁹ *Agnello v. United States*, 269 U. S. 20 (1926). An officer may not enter a dwelling without a warrant to search, but he may enter to prevent a felony or to suppress a breach of the peace, and once in he may seize illegal goods. *Wilgus, Arrest Without Warrant*, 22 Mich. Law Rev. 800, 802-3; *United States v. Rembert*, 284 Fed. 996 (1922). This rule is not changed by the National Prohibition Act, § 25, which prohibits the issuance of a search warrant to search a private dwelling unless it is used for the unlawful sale of intoxicating liquor or is in part used for business purposes, and the cases of *Schroeder v. United States*, 14 Fed. (2nd) 500 (1926), and *Temperani v. United States*, 299 Fed. 365 (1924), would seem to be erroneous decisions. 27 Col. Law Rev. 304-7. Cf. *State v. Thomas*, 143 S. E. 88.

²⁰ *Hoover v. McChesney*, 81 Fed. 472 (1897).

²¹ 27 Col. Law Rev. 300.

²² *Lippman v. People*, 175 Ill. 101 (1898).

²³ *Wallace v. State*, 157 N. E. (2nd) 657 (1927); *Veeder v. United States*, 252 Fed. 414 (1918).

²⁴ *Gouled v. United States*, 255 U. S. 298 (1921); *United States v. Kirschenblatt*, 16 Fed. (2nd) 202.

²⁵ 34 W. Va. Law Quar. 24.

²⁶ 34 W. Va. Law Quar. 25.

²⁷ 34 W. Va. Law Quar. 25.

searched and specify the goods and they must be reasonable in amount.²⁸ The Interstate Commerce Commission and the Federal Trade Commission may issue subpoenas *duces tecum*.²⁹

Are all other searches and seizures unreasonable? Presumptively, yes, at least at the present time. Of course the Supreme Court is free to enlarge the category of searches and seizures which are reasonable, and thereby to diminish the category of those which are unreasonable, but otherwise the boundary between reasonable and unreasonable searches and seizures has been indicated with a fair degree of accuracy. If an arrest is unlawful, searches and seizures thereafter are unlawful.³⁰ If a search for certain goods is lawful, other goods may be seized.³¹ Writs of assistance, general warrants, fishing expeditions and exploratory enterprizes are always unreasonable.³² The protection of the immunity against unreasonable searches and seizures extends to corporations³³ as well as to natural persons, and to aliens³⁴ as well as to citizens.

Can evidence obtained pursuant to an unreasonable search and seizure be used against a defendant in spite of the illegality of the method by which it was obtained? The answer to this question depends upon whether the Fourth Amendment and the Fifth Amendment are read together, so as to make the use of evidence thus obtained a violation of the privilege against self-crimination. Dean Wigmore has shown how the historical bases of the two amendments are quite distinct, and has vigorously championed the view that such evidence should be admissible, because to admit it would be in accord with well established rules of evidence.³⁵ The position of the United States Supreme Court upon the subject has been anomalous, to say the least.

²⁸ 34 W. Va. Law Rev. 27.

²⁹ 28 Col. Law Rev. 916.

³⁰ *Weeks v. United States*, 232 U. S. 383 (1914); *Youman v. Commonwealth*, 189 Ky. 152.

³¹ 3 Wash. Law Rev. 194; 27 Mich. Law Rev. 107; 27 Col. Law Rev. 303.

³² *Boyd v. United States*, 116 U. S. 616 (1886); 27 Col. Law Rev. 300.

³³ *Hale v. Henkel*, 201 U. S. 43 (1906); *Silverthorne Lbr. Co. v. United States*, 251 U. S. 385 (1920).

³⁴ *United States v. Wong*, 94 Fed. 832 (1899); *Ex parte Jackson*, 263 Fed. 110 (1920).

³⁵ Wigmore, Evidence, vol. IV, § 2183, § 2184, § 2250 et seq.; 36 Yale Law Jour. 988; 35 Harv. Law Rev. 673, 694; 74 U. of Pa. Law Rev. 139; 7 Minn. Law Rev. 152; 26 Mich. Law Rev. 86, 117; 3 Ore. Law Rev. 323; 19 Ill. Law Rev. 303.

In the case of *Boyd v. United States*,³⁶ the Supreme Court adopted the view that such evidence was not admissible. This remained the rule in the federal courts for eighteen years. Then the Supreme Court in the case of *Adams v. New York*³⁷ reversed itself and held that such evidence was admissible. This rule continued for ten years, when in the case of *Weeks v. United States*³⁸ the Supreme Court held the evidence inadmissible if its return was seasonably demanded (before trial, so as not to present a collateral issue), and thereby practically reverted to the rule of the Boyd case. The qualification required in the Weeks case was gradually abandoned in the cases of *Silverthorne v. United States*,³⁹ *Gouled v. United States*,⁴⁰ *Amos v. United States*⁴¹ and *Agnello v. United States*,⁴² until now even that is no longer required and there has been a complete return to the Boyd case, unless the recent case of *Olmstead v. United States*⁴³ has re-instated the Adams case. This is the celebrated "wire tapping" case, where officers obtained most of their evidence by tapping the telephone wires of the defendants and listening to their conversations, but without trespass upon any property of the defendants. The Supreme Court held that the evidence was admissible because there was no "search or seizure" within the meaning of the Fourth Amendment. The case, therefore, does not overrule the Agnello case.

The Court had a choice of three alternatives: It could have held, as it did, that there was no search or seizure; or that there was a search and seizure but that it was reasonable, making another class of valid searches and seizures without a warrant comparable with automobiles and moving vehicles; or that there was an unreasonable search and seizure but that the evidence thereby obtained was admissible. It would have obtained the same result, no matter which choice it should have made, but it preferred the first because it thought the immunity given to a person by the Fourth Amendment applies only to his person,

³⁶ 116 U. S. 616 (1886). Before the Boyd case such evidence had been admissible.

³⁷ 192 U. S. 585 (1904); *People v. Defore*, 242 N. Y. 13 (1926).

³⁸ 232 U. S. 383 (1914).

³⁹ 251 U. S. 385 (1920); 4 Minn. Law Rev. 447.

⁴⁰ 255 U. S. 298 (1921).

⁴¹ 255 U. S. 313 (1921); 5 Minn. Law Rev. 465.

⁴² 269 U. S. 20 (1925).

⁴³ 48 Sup. Ct. 564 (1928); *State v. Minn. Milk Co.*, 124 Minn. 34 (1913), *Kosciuski v. State*, 158 N. E. (Ind.) 902 (1902) Acc.

or his papers, or his tangible effects, or the physical invasion of his house.⁴⁴ Yet the wire tapping was both a violation of the right of privacy and a crime.^{44a} The effect of the decision is to whittle down the rule as to exclusion of evidence. The decision has been much criticised⁴⁵ and four justices dissented. The writer is inclined to approve of the decision, but he wishes it had been rested upon one of the other two grounds suggested. Wire tapping is not like invading the privacy of the home on general exploratory expeditions. Criminals are making use of the telephone for their criminal purposes much as they use pistols, and officers should be allowed to use the same means, and the situation is such search warrants cannot be used. Of course, if the Court had adopted the position that there had been an unreasonable search and seizure but that the evidence, nevertheless, was admissible, it would again have re-instated the Adams case; but the writer is one of those who could be easily reconciled to such a consummation. The reason for the immunity against unreasonable searches and seizures in the bill of rights is to protect the right of privacy, not evidence. The right of privacy is violated by the act of search and seizure, not by the use of the evidence. The result of the rule of the Supreme Court is not to protect the right of privacy either of criminals or innocent people, because unreasonable searches and seizures do not seem to be affected by the rule, but to protect criminals against conviction and to fail to protect society against criminals. The right of privacy is violated by others than officers and when no evidence is being sought. Then civil remedies only are available. If the present civil remedies are not adequate protection for the wrongful searches and seizures of the persons and property of either innocent or criminal people, the remedies should be strengthened, especially the remedy against the government which employs the guilty officers, but evidence sufficient to convict law violators should not be excluded and criminals turned loose to prey on the community.

But, even the federal rule as to the exclusion of evidence does not apply, 1. where the evidence was obtained by a reasonable search and seizure, or by what is classified as no search and

⁴⁴ 48 Sup. Ct. 568.

^{44a} 2 U. of Cin. Law Rev. 410-11.

⁴⁵ 28 Col. Law Rev. 669; 2 Cin. Law Rev. 409; 41 Harv. Law Rev. 258; 27 Mich. Law Rev. 78, 107; 77 U. of Pa. Law Rev. 139; 38 Yale Law Jour. 77; 15 Va. Law Rev. 76.

seizure;⁴⁶ 2. where the evidence was obtained by state officers instead of federal officers (since state officers are not bound by the Fourth Amendment), unless a. there has been active participation in a search instigated by the federal officers,⁴⁷ or b. the state officers have acted under a general plan of agreement between federal and state officers,⁴⁸ or c. where there has been no plan but only the presence of a federal officer but he participates not as a private person but as a federal officer,⁴⁹ or d. where there is neither plan nor participation by a federal officer but the only offense is a federal offense;⁵⁰ and 3. where the evidence was obtained by a private individual or by government officials in a private lawsuit.⁵¹ The immunity is an immunity only against searches and seizures by the federal government, so that in case of searches and seizures by private individuals the orthodox rule of evidence applies;⁵² and for historical reasons the immunity applies only in criminal proceedings.⁵³ 4. The rule does not protect a corporation, because while it is protected against searches and seizures it is not protected against self-incrimination.⁵⁴

What, besides using it as evidence, can the government do with objects lawfully seized? The rule is forfeiture. It has been suggested that this is based on the theory that the property itself is an offender (deodand) and should be proceeded against by a proceeding in rem,⁵⁵ but on this theory the innocence of the owner or mortgagee ought to be irrelevant. Since these parties are more or less protected, it seems better to base forfeiture on the theory of a penalty. The extent of the forfeiture under this theory will depend upon the meaning of the statute. The statutes in the United States fall into three general classes:⁵⁶ (1) those which protect the innocent owner or mortgagee; (2)

⁴⁶ 1 So. Cal. Law Rev. 287.

⁴⁷ 1 So. Cal. Law Rev. 288.

⁴⁸ 1 So. Cal. Law Rev. 288.

⁴⁹ *Byars v. United States*, 4 Fed. (2nd) 502 (1925).

⁵⁰ *Flagg v. United States*, 233 Fed. 481 (1916); *Gambino v. United States*, 48 Sup. Ct. 137 (1927).

⁵¹ *Burdeau v. McDowell*, 41 Sup. Ct. 574 (1921); 6 Minn. Law Rev. 70.

⁵² *Murray v. Hoboken Land Co.*, 18 Howard 274 (1855).

⁵³ *People v. Kempner*, 208 N. Y. 16 (1913).

⁵⁴ *Hale v. Henkel*, 201 U. S. 43 (1906).

⁵⁵ 25 Mich. Law Rev. 659.

⁵⁶ 25 Mich. Law Rev. 659; 15 Va. Law Rev. 54.

those which protect the innocent mortgagee; and (3) those which merely provide for forfeiture of all cars, etc., used for illegal purposes. States having statutes of the first class are Alabama, California, Florida, Georgia, Kentucky, Minnesota, Mississippi, Montana, North Carolina, Ohio and West Virginia, and in all these states innocent owners or mortgagees are protected against forfeiture. The National Prohibition Act seems to be the only one which protects merely the mortgagee, but the United States Supreme Court has in some way read into it protection for an innocent owner as well. Under statutes of the third class, it is held in Colorado, Delaware, Maine, Oklahoma, South Carolina and Utah that innocent parties are protected, and in Arkansas, Kansas, Nebraska, and Virginia that they are not protected.⁵⁷

What legal redress, aside from exclusion as evidence, is afforded by law for a violation of the immunity against unreasonable searches and seizures? First, there is civil liability of all wrong-doers.⁵⁸ Where a search warrant is illegal on its face, both the magistrate who issued it and the officer who executed it are liable in damages;⁵⁹ and for an unreasonable search without a warrant the officer is liable in damages.⁶⁰ Private persons are liable for wrongful searches if they are volunteers,⁶¹ and a person who acts in bad faith in procuring a warrant is liable for malicious prosecution.⁶² In general, neither the states nor the federal government is liable for the wrongs of its officers in making illegal searches and seizures, because they have not consented to be sued;⁶³ but there are indications that this may not always be the rule and it would seem as though the time for the abandonment of the rule had come.⁶⁴ Sometimes an

⁵⁷ *Grant Co. v. United States*, 254 U. S. 505 (1921); *United States v. One Ford Coupe Auto*, 272 U. S. 321 (1926); 25 Mich. Law Rev. 659; 15 Va. Law Rev. 57; *United States v. Brockley*, 266 Fed. 1001. Under a South Dakota statute which excepted the innocent owner from forfeiture, but did not name an innocent mortgagee, it was held that the innocent mortgagee was not protected. *State v. Studebaker Auto*, 210 N. W. 194 (1926).

⁵⁸ 30 Yale Law Jour. 784; 35 Cyc. 1274.

⁵⁹ *Dwinnels v. Boynton*, 3 Allen (Mass.) 310 (1862).

⁶⁰ *Caffinni v. Hermann*, 112 Me. 282 (1914).

⁶¹ *Reed v. Rice*, 2 J. J. Marsh, (Ky.) 44 (1829).

⁶² *Olsen v. Tvete*, 46 Minn. 225 (1891).

⁶³ *Cummings v. United States*, 130 U. S. 459 (1888).

⁶⁴ Borchard, *Government Liability in Tort*, 28 Col. Law Rev., 577, 734, 773; 34 Yale Law Jour. 1, 129, 229.

injunction is available against a proposed wrongful search, or against a wrongful destruction of property seized,⁶⁵ and sometimes replevin,⁶⁶ but not trover,⁶⁷ because there has been no conversion. The immunity is one which may be waived, or which by consent can make a search and seizure reasonable.⁶⁸ The right of privacy which it protects has up to this time been dependent upon ownership.⁶⁹

⁶⁵ *Devlin v. McAdoo*, 96 N. Y. S. 425 (1905), *Owens v. Way*, 141 Ga. 796 (1914).

⁶⁶ *Lawton v. Steele*, 153 U. S. 133 (1893).

⁶⁷ Buller, *Nisi Prius*, p. 45.

⁶⁸ 34 W. Va. Law Quar. 146-7.

⁶⁹ Cornelius, *Search and Seizure*, § 12.