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Constitutional Law--Criminal Law--Evidence--Searches and Seizures--Silver Platter Doctrine Abolished

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CASE COMMENTS

Constitutional Law—Criminal Law—Evidence—Searches and Seizures—Silver Platter Doctrine Abolished

Before trial in the United States District Court in Oregon, *Ds* made a motion to suppress evidence obtained through unlawful search and seizure by state officers. The district judge denied the motion to suppress since there was no evidence that any agent of the United States had participated in the search or had any knowledge or suspicion that such search had been contemplated or made by state officers. The evidence was admitted. *Ds* were convicted of intercepting and recording wire communications and divulging such communications in violation of the Communications Act. *Held,* in vacating and remanding the lower court's holding, evidence obtained by state officers during a search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the fourth amendment is inadmissible over defendant's timely objection in a federal criminal trial. *Elkins v. United States,* 80 Sup. Ct. 1437 (1960).

With this landmark decision, the Supreme Court has closed a chapter on the controversial "silver platter" doctrine which permitted illegally seized evidence by state officers to be used in federal courts. The purpose of this comment is to review the progression of significant decisions leading up to the *Elkins* case showing the various inroads its progenitors have made in the interest of personal liberties.

Four search and seizure situations have arisen under the federal rule which excludes evidence obtained in violation of the fourth and fifth amendments: (1) illegal seizure by federal officers, with use of this evidence in federal courts; (2) illegal seizure by state officers, with use of this evidence in state courts; (3) illegal seizure by federal officers, with use of this evidence in state courts; and (4) illegal seizure by state officers, with use of this evidence in federal courts. Until the *Elkins* decision, only the first three problems had been answered. Comment, 46 VA. L. REV. 587 (1960).

To show the full impact of the *Elkins* case, the proper starting point for this historical development is a description of the influence that an illegal search and seizure had on a trial at common law. The judicial philosophy of and practice under the common law manifested

little attention to the manner by which evidence was obtained in criminal proceedings. The position was that the defendant had an adequate civil remedy independent from the trial. DONIGAN & FISHER, THE EVIDENCE HANDBOOK 185 (1958).

This had been the universal practice in the United States until the decision in *Boyd v. United States,* 116 U. S. 616 (1885), wherein the Court held inadmissible the compulsory production of incriminating papers on constitutional grounds, encompassing the fourth and fifth amendments. See HALL & GLUECK, CRIMINAL LAW AND ITS ENFORCEMENT 501 (2d ed. 1958). Thus a new trend had begun — the manner of obtaining evidence would be an integral part of criminal trial procedures.

However, it was not until 1914 that the Supreme Court put forth the exclusionary rule that evidence gained illegally by a federal officer could not be admitted over the defendant's timely objection. *Weeks v. United States,* 232 U.S. 383 (1914). This was a judicial interpretation of the fourth amendment and not a principle explicitly stated by that amendment.

The *Weeks* decision solved one of the four basic search and seizure problems noted in the federal procedures but thereby unobtrusively created a problem by holding that the fourth amendment applied only to federal agents and did not extend to state and local officers. Consequently, this was construed to mean that evidence illegally seized by state officers could be admitted in the federal courts.

Subsequent decisions did not obviate this interpretation. Instead, they encouraged it. In *Byards v. United States,* 273 U.S. 28 (1926), the Court held that whenever a federal officer even participated with state officers in searching for and seizing evidence illegally, such evidence would be inadmissible in the federal courts. This decision implied that the evidence would have been admitted if the state officers had performed the questioned acts by themselves.

Again, in *Gambino v. United States,* 275 U.S. 310 (1927), the Supreme Court, while expanding the federal exclusionary rule by refusing to admit evidence illegally seized by state officers solely on behalf of the federal government, implicitly gave additional support to the doctrine, which in time became known as the "silver platter" doctrine. *Lustig v. United States,* 338 U.S. 74 (1949).

The next case of import to this lineal perspective is *Wolf v. Colorado,* 338 U. S. 25 (1949), which presented the question: Does

the due process clause of the fourteenth amendment make unconstitutional state court use of evidence illegally seized by state officers in any case wherein such evidence, if obtained illegally by federal officers, would have been inadmissible in a federal court under the *Weeks* rule? The Court answered in no uncertain terms that the due process of law guaranteed by the fourteenth amendment was not shorthand for the first eight amendments. The Court refused to allow the due process clause to absorb the federal exclusionary rule by way of the fourth amendment, which would have obliged the states to follow it. This case answered another of the four basic problems —that illegally seized evidence by state officers could be admitted in the state courts and not be in conflict with the Constitution. See DAUPER, CONSTITUTIONAL LAW 936 (2d ed. 1960).

In *Rea v. United States,* 350 U.S. 214 (1956), the answer to another fundamental question was rather clearly indicated. Here, the petitioner sought to enjoin the federal agent who had seized the evidence under an invalid warrant from testifying in a state court or from permitting the evidence to be used therein. In granting relief, the Court held that if the federal agent could flout the federal rules by using the fruits of his unlawful act in a federal or state proceeding, the principles and policies developed would be defeated. See DOWLING, CONSTITUTIONAL LAW 659 (6th ed. 1959).

Throughout the preceding decisions, the Supreme Court carefully preserved the problem of allowing evidence illegally seized by state officers to be used in federal trials. But finally in the *Elkins* case the last of the four basic questions in this area has been answered.

Mr. Justice Stewart, in the majority opinion, ably discusses the factors motivating the Court in expounding the new rule. He said that the rule will compel respect for the constitutional guaranty by removing the incentive to disregard it. Also, conflict between state and federal courts will be reduced, since illegally seized evidence by state officers will no longer be admitted in federal courts from exclusionary states. Furthermore, he believes the new rule will add to judicial integrity. No longer would the Supreme Court be an accomplice to a disregard of the constitutional provision.

It is significant that four justices dissented. Mr. Justice Frankfurter, in delivering the dissenting opinion in *Rios v. United States,* 80 Sup. Ct. 1453 (1960), directed very sharp criticisms toward the new rule. He takes the position that the criteria of an independent

federal inquiry upon grounds of unconstitutionality would be uncertain and troublesome, to say nothing of the refusal of the federal courts to extend comity to the states' determinations of what constituted illegally seized evidence. Therefore, he does not believe that conflict between the federal courts and the state courts following the exclusionary rule will be reduced.

Nevertheless, by the *Elkins* decision, the pendulum has made a further movement away from the common law practice and in the direction of more civil rights for citizens under a constitutional government.

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Constitutional Law—Navigable Waters—

Extension of the Federal Prerogative

A state agency built and operated a hydroelectric power project in Oklahoma on the nonnavigable Grand River, a tributary of the Arkansas. Subsequently, the federal government, as part of a comprehensive plan for power production, flood control, and regulation of navigation on the navigable Arkansas River, constructed another project on the nonnavigable tributary at a location for which the state agency held a franchise. The agency demanded compensation for the "taking" of its water power rights and its franchise to develop electric power at that site. The Court of Claims held the government liable. On certiorari, the Supreme Court reversed the judgment, *holding* that, when the United States asserts its superior authority under the commerce clause to regulate the water flow of a navigable stream, there is no "taking" of "property" in the meaning of the fifth amendment, and, further, that under the commerce power Congress can treat watersheds as a key to flood control on navigable streams and their tributaries, and the power of flood control extends to the nonnavigable tributaries of navigable streams. *United States v. Grand River Dam Authority,* 80 S. Ct. 1134 (1960).

The expansion of the navigable stream concept, considered a progressive liberalization of the commerce clause by many legal scholars and a malignancy by others, has achieved a growth rate comparable to that of the expanding power of the federal government itself. A simple statement of the original rule, although outmoded, is that federal control of interstate commerce and admiralty extends to