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based upon abrogation of constitutional rights may be permanently estopped;[36] this is true of criminal as well as civil actions.[37]

From this review of the operation of the doctrine of estoppel to assert unconstitutionality it is apparent that it is an equitable instrument, the importance of which can best be expressed by a realization that a constitutionally guaranteed right may be permanently lost through a failure to act or by imprudent action at a critical time.

DUNCAN IAN MACCALMAN.

## Constitutional Law—Rule of Exclusion—Federal Injunction against Federal Officer from Testifying in State Criminal Prosecution

In what will undoubtedly prove to be a landmark decision in the law of search and seizure, the United States Supreme Court in a recent case, *Rea v. United States*,[1] held by a five to four margin, that the equitable power of the federal courts should extend to give relief under the following circumstances: Petitioner had been indicted in a federal district court for the unlawful acquisition of marihuana in violation of federal law.[2] A federal agent had obtained the evidence under a search warrant invalid under Rule 41(c) of the Federal Rules of Criminal Procedure—this rule states the necessary requisites for a valid federal search warrant. Petitioner made a motion to suppress the evidence. The motion was granted and the indictment was dismissed. Thereafter, the agent instigated a state criminal action charging the petitioner with possesion of marihuana in violation of New Mexico law.[3] While awaiting trial in the state court the petitioner filed a motion in the same federal court to enjoin the federal agent from testifying in the state action with respect to the narcotics obtained by him as a result of the invalid search warrant. The district court denied the relief and the court of appeals affirmed.[4] On writ of certiorari the United States Supreme Court reversed.

[36] Yakus v. United States, 321 U. S. 414 (1944); Sanderlin v. Smyth, 138 F. 2d 729 (4th Cir. 1943).

The constitutional right to move for the return of property illegally seized and to object to evidence obtained may be impaired, if not lost, when not seasonably asserted. United States v. Napela, 28 F. 2d 898 (N. D. N. Y. 1928).

The court has discretionary power and authority over the waiver. United States *ex rel* Athanosopoulos v. Reid, 110 F. Supp. 200 (D. C. Cir. 1953).

In Cameron v. McDonald, 216 N. C. 712, 6 S. E. 497 (1940), the court said, "A defendant may waive a constitutional as well as a statutory right, and this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." State v. Dunn, 159 N. C. 470, 74 S. E. 1014 (1912).

[37] Carruthers v. Reed. 102 F. 2d 933 (8th Cir. 1939).

[1] 350 U. S. 214 (1956).

[2] Marihuana Tax Act, 50 STAT. 554 (1937), 26 U. S. C. § 2593(a) (1952).

[3] N. M. STAT. ANN. § 71-636 (1941).

[4] Rea v. United States, 218 F. 2d 237 (10th Cir., 1954), *cert. granted*, 348 U. S. 958 (1955).

The court of appeals held that the prohibition against the use of such evidence is limited to federal trials and is applicable there only when it was unlawfully obtained by federal officers. The court assumed, without deciding, that the district court under its general equity power had the authority to render the injunction, but as there was no abuse of discretion, it should refuse to intervene and disrupt the delicate relationship between the federal equitable power and the state judiciary in state criminal proceedings.

The Supreme Court, however, considered the problem from a different approach. The majority,[5] speaking through Douglas, J., stated that it was simply a case concerning "our supervisory powers over federal law enforcement agencies,"[6] and that the district court was "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law."[7] The Supreme Court stated further: "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. . . . The power of the federal courts extends to policing those requirements and making certain that they are observed. . . . To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them."[8]

Although the court stated that "we put all the constitutional questions to one side,"[9] reference to the constitutional background of the law of search and seizure will provide a setting into which to place the principal case.

The Fourth Amendment[10] to the Federal Constitution commands that the right of the people to be secure in their homes, houses, papers, and effects against unreasonable searches and seizures shall not be violated. However, as is true of most constitutional provisions on individual rights, there is no suggestion in the Constitution itself as to the method of enforcement of this abstract right.[11] So, although the Constitution prohibits unreasonable searches and seizures, it does not expressly bar the admissibility of such unlawfully obtained evidence in criminal proceedings.[12] Even though a search is unquestionably "unreasonable" and

[5] Justices Douglas, Frankfurter, Black, Reed and Clark.
[6] Rea v. United States, 350 U. S. 214, 217 (1956).
[7] *Id.* at 216. [8] *Id.* at 217.
[9] *Id.* at 216.
[10] "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 warrant 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." U. S. CONST. Amend. IV.
[11] "Bills of Rights may be replete with promise of public beneficence, but they remain curiously silent about how such promises are to be fulfilled." ZURCHER, CONSTITUTIONAL TRENDS SINCE WORLD WAR II. 5 (1951).
[12] Shinyu Nero v. United States, 148 F. 2d 696, 699 (5th Cir., 1945), *cert. denied*, 326 U. S. 720 (1945) (dictum); WIGMORE, EVIDENCE § 2183 (3d ed. 1940).

therefore prohibited by the Constitution, nothing in the Constitution says what the consequences shall be. And just as the matter of what constitutes "unreasonable" search is left to judicial decision,[13] so the consequences of such search when it does occur are left to judicial decision, in the absence of legislative enactment.

In the federal courts, however, this evidence is excluded by virtue of the now famous "exclusionary rule" which had its birth in 1914 in the case of *Weeks v. United States.*[14] The essence of the rule is that evidence obtained by federal officers in contravention of the defendant's Fourth Amendment right is inadmissible in federal criminal proceedings. And Justice Black has said ". . . the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate. . . ."[15] The soundness of the position that the suppression of evidence obtained as a result of an illegal search and seizure is not a command of the Constitution is confirmed by the number of state courts which do not exclude the evidence despite the similarity of the state and federal constitutions.[16]

[13] "What is a reasonable search is not to be determined by any fixed formula . . . and, regrettably, in our discipline we have no ready lit mus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case." Minton, J., United States v. Rabinowitz, 339 U. S. 56, 63 (1950), citing Go-Bart Importing Co. v. United States, 282 U. S. 344, 357 (1930).

"The test of reasonableness cannot be stated in rigid and absolute terms." Harris v. United States, 331 U. S. 145, 160 (1947).

[14] 232 U. S. 383 (1941). However, in an earlier case, Boyd v. United States, 116 U. S. 616 (1886), the Supreme Court held that compulsory production of private books and papers is "compelling [the accused] to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—within the meaning of the Fourth Amendment." *Id.* at 634-635. Then eighteen years later, the Supreme Court returned to the old rule, when it held in Adams v. New York, 192 U. S. 585 (1904), that private papers were not rendered inadmissible though seized illegally. Ten years after the *Adams* decision came *Weeks* which reaffirmed the doctrine in *Boyd,* by holding, in a federal prosecution, where federal officers have obtained private documents by illegal search and seizure, that it is a violation of the constitutional rights of the defendants to introduce them into evidence.

Thus, it is more accurate to say that the rule of exclusion did not become finalized until the *Weeks* decision.

[15] Wolf v. Colorado, 338 U. S. 25, 39-40 (1949) (concurring opinion). This led the late Justice Rutledge to say in the dissenting opinion in the same case that the Amendment without the exclusionary mandate "reduces the Fourth Amendment to a form of words." He cites Justice Holmes in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392 (1920).

[16] Every state has in its constitution a provision similar to the Fourth Amendment. For a complete list of the states and their respective constitutional provisions, see, Note 35 CORNELL L. Q. 625, n. 9 (1950).

However, language similar to that found in People v. Defore, 242 N. Y. 13, 24, 150 N. E. 585, 588 (1926) can be found in decisions of many state courts: "We may not subject society to these dangers until the legislature has spoken with a clearer voice."

On the other hand, some state decisions do speak of the exclusion as though forced on them by their constitutions, *e.g.* People v. Stein, 265 Mich. 610, 251 N. W. 788 (1933).

Note that the rule is only applicable to federal officers as the recipients of the illegally seized evidence. Such evidence procured by state officers acting independently of federal authorities is admissible in federal courts.[17] Also, state courts have held that evidence unlawfully seized by federal officers may be admitted in state prosecutions if not contrary to state law.[18]

The constitutional provision is broad enough in terms to cover searches and seizures by any person whomsoever. Nevertheless, the Supreme Court has declined to apply its exclusionary rule to obviously unlawful searches by private persons.[19]

Furthermore, in *Wolf v. Colorado*,[20] a six to three decision, the exact holding was that in a prosecution in "a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[21] However, the Fourteenth Amendment[22] does subject the power of a state over life, liberty, and property to the requirements of due process of law. In 1937 Justice Cardoza, speaking for the United States Supreme Court in *Palko v. Connecticut*,[23] held that this requirement of due process made applicable to the states only such guarantees of the Bill of Rights as are "implicit in the concept of ordered liberty." And Justice Frankfurter concluded in the *Wolf* case that the freedom protected by the Fourth Amendment

[17] In Burdeau v. McDowell, 256 U. S. 465, 475 (1921), it was stated that "The Fourth Amendment's origin and history . . . show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies. . . ." So, it follows that (state) police officers became mere private individuals under the Burdeau v. McDowell notion and evidence they seized illegally became usable in federal courts. "The restrictions of the Fourth and Fifth Amendments of the Federal Constitution apply only to Federal officers. The like restrictions in the State Constitutions apply only to State officers." State v. Rebasti, 306 Mo. 336, 347, 267 S. W. 858, 861 (1924). However, in Gambino v. United States, 275 U. S. 310 (1927) it was held that evidence obtained through wrongful search and seizure by state officers who are co-operating with federal officials must be excluded in prosecutions before the federal courts. Hence, there arose the necessity of proving lack of co-operation among the state and federal officials before such evidence could be introduced in federal courts.

[18] Commonwealth v. Colpo (1930), 98 Pa. Super 460, *cert. denied*, 282 U. S. 863 (1930).

[19] See, Note, Admissibility in Federal Courts of Evidence Obtained Illegally by State Authorities, 51 COL. L. REV. 128 (1951). Also, for a complete collection of state and federal cases, see 8 WIGMORE, EVIDENCE §§ 2183 and 2184 (3d ed. 1940).

[20] 338 U. S. 25 (1949). Defendant, a doctor, was convicted of conspiring with others to commit abortions. Police officers illegally searched defendant's office and procured appointment books. Interrogation of patients followed and objection was made to the introduction of the evidence as in violation of defendant's rights under the Fourteenth Amendment. Upon writ of certiorari to the state court, the United States Supreme Court affirmed the state court's conviction.

[21] *Id.* at 33.

[22] ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U. S. CONST. Amend. XIV § I.

[23] 302 U. S. 319, 324 (1937).

falls within the above definition of Justice Cardoza. He states that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the state through the Due Process Clause."[24] Thus, the Fourth Amendment is a limitation on state as well as federal action.

However, the decision in the *Wolf* case was not implemented by the rule of exclusion as enunciated in the *Weeks* case and employed by the federal courts. On the other hand, Justice Frankfurter stated that excluding the evidence is not the *only* means of protecting the right embodied in the Fourth Amendment, and that the "ways of enforcing such a basic right raised questions of a different order."[25] Exclusion of illegally obtained evidence is only one of several means of protecting the right.[26] By the *Wolf* case the Supreme Court demonstrated its unwillingness to condemn states' reliance on *other* means as falling below minimal standards of "due process of law" in order to protect the right. Therefore, Justice Frankfurter concluded that "due process of law" does not command the court or the states to exclude illegally obtained evidence in state prosecutions for state crimes.

Justice Frankfurter seemed to imply in the *Wolf* case that legislation by Congress might possibly negate the *Weeks* doctrine. Congress has not as yet undertaken such legislation. Until this is done, or until the *Weeks* case is overruled, neither of which appears to be likely, the exclusionary rule will continue to be what some writers refer to as "judicial legislation" because the question as to whether the Fourth Amendment is a command to the courts to exclude the illegally seized evidence will never be directly in issue.

In the appendix to the *Wolf* case, sixteen states are listed as following the federal rule of exclusion. In a recent law review article it is stated that subsequent to the *Wolf* decision two more states have adopted the rule.[27] North Carolina is one of a few states which has made the rule statutory.[28]

[24] Wolf v. Colorado, 338 U. S. 25, 27-28 (1949).

[25] *Id.* at 28.

[26] For example, the state may dismiss the offending officer or prosecute him in a criminal proceeding, and the federal government may prosecute the offending officer under the Civil Rights Section of the United States Criminal Code. The victim of an illegal search may, also, have an action for damages in tort against the searching officer. Recently, a large verdict was sustained in a suit based in part on illegal searches by state officers in Bucher v. Krause, 200 F. 2d 576 (7th Cir. 1952), *cert. denied,* 345 U. S. 997 (1953) (Jurisdiction based on diversity of citizenship).

See in this connection, Wolf v. Colorado, 338 U. S. 25, 30-32, n. 1 (1949), 18 U. S. C. §§ 241 and 242 (1952).

[27] Waite, *Judges and the Crime Burden,* 54 MICH. L. REV. 169 (1955)—Delaware, see Richards v. Delaware, 45 Del. 573, 77 A. 2d 199 (1950), and California, see People v. Cahan, 44 Cal. 2d 434, 282 P. 2d 905 (1955).

[28] Prior to 1937 North Carolina was not a proponent of the exclusionary rule.

The next case to be considered in this complicated and confused area of the law is *Stefenelli v. Minard*.[29] This case was decided in 1951. The plaintiffs, who were about to be convicted of bookmaking with the aid of certain incriminating evidence which the state of New Jersey had admittedly obtained through unlawful search and seizure, relied on the dictum of Justice Frankfurter in the *Wolf* case to the effect that were a state affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. They petitioned the federal district court in equity for suppression of this evidence under the Civil Rights Act.[30] By New Jersey law such evidence is admissible.[31] The petition was dismissed, the court of appeals affirmed, and the Supreme Court granted certiorari and rendered an opinion without deciding whether the complaint stated a cause of action.[32] The Supreme Court, Justice Frankfurter delivering the opinion, stated that federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence when claimed to have been secured by unlawful search and seizure. And, although the Court adhered to the dictum

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An unsuccessful attempt in that year to change the then existing law was made by the legislature. That statute had to do with the method of issuing search warrants and had a clause to the effect that no facts obtained by reason of a search warrant failing to meet the statutory standard could be used as evidence in a trial of any action. The court in State v. McGee, 214 N. C. 184, 198 S. E. 616 (1938), ruled that the statute did not mention evidence seized with no warrant at all. Therefore, such evidence was admissible. However, in 1951 an amendment was passed which states that no facts discovered as evidence obtained without a legal search warrant in the course of any search under conditions requiring the issuance of such warrant shall be competent as evidence. N. C. GEN. STAT. § 15-27 (1953). For a discussion of this provision see, Note, 32 N. C. L. REV. 114 (1953); Note, 30 N. C. L. REV. 421 (1952); *A Survey of Statutory Changes in North Carolina in 1951*, 29 N. C. L. REV. 396 (1951). It should be noted that in the Appendix to Wolf v. Colorado, note 22 *supra*, North Carolina is listed as rejecting the rule. That was, however, prior to the above mentioned amendment.

Two other states have *legislation* excluding evidence obtained by illegal search and seizure. MD. ANN. CODE art. 35, §§ 5, 5A (1951); TEX. CODE CRIM. PROC. art. 727a (1941).

[29] 342 U. S. 117 (1951).

[30] "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress." R. S. § 1979 (1875), 42 U. S. C. § 1983 (1948).

[31] State v. Black, 5 N. J. Misc. 48, 135 A. 685 (1926).

[32] "This act has given rise to differences of application here. Such differences inhere in the attempt to construe the remaining fragments of a comprehensive enactment, dismembered by partial repeal and invalidity, loosely and blindly drafted in the first instance, and drawing on the whole Constitution itself for its scope and meaning . . . however, the Court's 'lodestar of adjudication has been that the statute' should be construed so as to respect the proper balance between the States and the federal government in law enforcement. . . . Discretionary refusal to exercise equitable power under the Act to interfere with State criminial proscution is one of the devices we have sanctioned for preserving this balance." Stefenelli v. Minard, 342 U. S. 117, 121-122 (1951).

of the *Wolf* case, upon which the petitioners based their case, they again refused to extend the remedy of exclusion to the states. "At worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey Courts. Such a conviction, we have held would not deprive them of due process of law." (Citing the *Wolf* case.)[33]

So stood the law until the *Rea* decision. The constitutional necessity of excluding unreasonably seized evidence from the trial of one whose Fourth Amendment rights have been violated continues to be one of the major areas of dispute in this important segment of the law. The arguments upholding the rule and those attacking it have become clearly defined. A chief reason usually set forth in favor of excluding illegally obtained evidence is that such an exclusion, by removing the effect of the evidence in court, deters the law enforcement officers from future illegal searches and seizures.[34] The proponents of the rule also assert that any other method of upholding the constitutional right is inadequate.[35] Still another reason used in support of the rule is that to use the product of the illegally seized evidence would be to lower the dignity of the courts which are sworn to uphold the law.[36]

Some opponents of the exclusionary rule refer to it as "judicial suppression of the truth."[37] They point to the fact that its effect is to suppress incriminating evidence, which allows the guilty to go free. Taking issue with the proponents of the rule, they argue that there are other effective sanctions to protect the right of those illegally searched.[38] It is often asserted that it is the function of the legislature, rather than the courts, to provide sanctions against illegal seizure.[39]

Thus far, the United States Supreme Court has refused to force the exclusionary rule upon the states by interpreting the Fourteenth Amendment to require the exclusion of evidence seized in contravention of the Fourth Amendment. This is true although there seem to be implications

[33] *Id.* at 122.
[34] 58 YALE L. J. 144, 152 (1948).
[35] For example, in considering a tort action against the offending official as one means of enforcing the right, Mr. Justice Murphy in a dissenting opinion in Wolf v. Colorado, *supra* note 22 at 43, said: "A trespass action for damages is a venerable means of securing reparation for unauthorized invasion of the home . . . the measure of damages is simply the extent of the injury to physical property. If the officer searches with care, he can avoid all but nominal damages—a penny, or a dollar."
[36] See Olmstead v. United States, 277 U. S. 438, 470 (1928).
[37] See generally: Waite, *Judges and the Crime Burden,* 54 MICH. L. REV. 169 (1955). The author is a strong opponent of the rule of exclusion. He places the blame in part on the judges. "They deliberately restrict police efficiency in the discovery of criminals. They exempt from punishment many criminals who are discovered and whose guilt is evident." *Id.* at 169.
[38] See People v. Defore, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926); Wolf v. Colorado, 338 U. S. 25, 30 (1949).
[39] Roberts v. People, 78 Colo. 555, 559-560, 243 Pac. 544, 545 (1926).

to the contrary in the recent case of *Irvine v. California*.[40] But, whatever its implications, that case still leaves the adoption of the rule to the discretion of the states as does the principal case under consideration.

The problem which disturbs the dissent in the principal case, however, is the majority's proposition that the court has "supervisory powers over federal law enforcement agencies"[41] and that it rests its holding upon that basis. At first blush this seems to be a dangerous encroachment by the judiciary upon the executive branch of the government, which violates our traditional concepts of a division of power among the three governmental branches. Justice Harlan, writing the dissenting opinion,[42] sees no abuse of discretion in withholding the relief requested, and feels that, in accommodating state and federal interests in criminal law enforcement, the Supreme Court's past policy of allowing the state to be left free to follow the federal exclusionary rule should not be disturbed. The dissent found no basis on which to reconcile the *Wolf* and *Stefenelli* decisions with the majority holding.

It is submitted, however, that there is both a sound legal and logical basis for the majority decision. There is more fact than illusion to the holding that the court is not disturbing the "delicate balance between federal and state judicial systems" in this particular case. Although the effect of the injunction, as the dissent notes,[43] is to stultify the proceedings in the state court, there is, in fact, no injunction against either the state officials or the state proceedings. If the state is able to procure other evidence it is still left free to make its case out against the petitioner by means of its own process. It is still free to invoke its rule which permits the introduction of its evidence obtained in contravention of the petitioner's Fourth Amendment rights.[44] The *Wolf* case allows this. To withhold the injunction in the principal case would be to hark back to the quaint little game played between state and federal officials during the prohibition days, wherein federal officers got their convictions in

[40] 347 U. S. 128 (1954). This case was decided by a divided court, also. The majority, Justices Jackson, Warren, Reed and Minton, state that now that the *Wolf* doctrine is known to the states, they may wish to reconsider their rules of evidence, but, that it would be an unwarranted use of federal power to upset state convictions before the states have had adequate opportunity to adopt or reject the exclusionary rule. Then Justice Clark, in a concurring opinion in the *Irvine* case states that had he been on the court when the *Wolf* case was decided, he would have applied the federal exclusionary rule; but he concurs simply because the *Wolf* case is now the law. He also states: "Perhaps strict adherence to the tenor of that decision [Wolf v. Colorado] may produce needed converts for its extinction." *Id.* at 138.

[41] Rea v. United States, 350 U. S. 214, 217 (1956).

[42] Concurred in by Justices Reed, Burton, and Minton.

[43] ". . . the state's case against petitioner appears to depend wholly on the evidence in question; the injunction will operate quite as effectively, albeit indirectly, to stultify the state prosecution as if it had been issued directly against New Mexico or its officials." Rea v. United States at 219.

[44] State v. Dillon, 34 N. M. 366, 281 P. 474 (1929).

state courts for state crimes because the evidence they had seized illegally was inadmissible in the federal courts by reason of the exclusionary rule.

To deny the injunction in the principal case and allow the federal officer to testify as to the illegally seized evidence would be to hold that the act of an officer is lawful, not on account of the character of the act, but on account of the particular court in which it is called in question. Should the federal officer be able to bring his defendant to a state court, and there have his lawless disregard of his official duty appraised as a meritorious performance? The United States Supreme Court answers this question in the negative.

The rationale of *McNabb v. United States*[45] can support the court's alleged "supervisory powers over federal law enforcement agencies."[46] Although that decision was based on a prosecution in the federal courts, the gravamen of the holding was that the federal court should not condone any flagrant disregard of Acts of Congress which set forth the duties of the federal law enforcement officers. The obligation of the federal agent is to obey the rule. And in the words of the majority in the principal case: "That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."[47]

This interesting question presents itself. What would be the result if the Supreme Court granted certiorari to a case similar in all respects to the principal one—except that no action is brought to enjoin the federal officer from testifying in a state court as to evidence procured as a result of an unreasonable search and seizure? Upon authority of the *Wolf* decision it seems that there could be an affirmance, since in the *Wolf* case the narrow holding was that in a "state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[48] No distinction is made there between state or federal officers. Yet, according to the result of the case under consideration the federal court will enjoin a federal officer from testifying in a state prosecution as to evidence obtained in contravention of the Fourth Amendment. In other words, the outcome of future litigation concerning the admission in a state criminal proceeding of evidence illegally obtained by federal officers would seem to depend upon whether the state criminal prosecution was concluded before

[45] 318 U. S. 332 (1943). Here, conviction of the defendants for the murder of a federal internal revenue officer, upheld by the court of appeals, was reversed by the Supreme Court. The basis for reversal was that evidence was obtained by subjecting defendants to questioning while being held in custody without a hearing before a United States Commissioner or judicial officer, as required by law. No constitutional question was involved.

[46] See note 6 *supra*.

[47] Rea v. United States, 350 U. S. 214, 218 (1956).

[48] Wolf v. Colorado, 338 U. S. 25, 33 (1949).

the federal injunction could be issued. The dissent in the principal case questions the wisdom of a decision which might present such a dilemma. There appears to be merit to this argument.

On the other hand, the Supreme Court could conceivably depart from its holding in the *Wolf* and *Stefenelli* cases and say that the requirements of due process under the Fourteenth Amendment can only be met by *excluding* the illegally seized evidence in a state prosecution. Of course, in order to do so, the Supreme Court must first decide that excluding the evidence is not simply a federal rule of evidence, but a *command* of the Fourth Amendment to be enforced through the Fourteenth Amendment.

Essentially, of course, the problem in the case under consideration remains the same. It is the exclusionary rule. The United States Supreme Court contrived the rule. By way of dictum, the majority of the court consider it simply a federal rule of evidence.[49] The minority, on the other hand, deem it to be a command of the Fourth Amendment.[50] However, the court is unanimous in its desire to exclude the illegally seized evidence in federal prosecutions. By enjoining the federal agent in the principal case from testifying, they were able in an indirect manner to force the rule upon the state of New Mexico as it appears that the state's case cannot be made out without the evidence and testimony enjoined. Therefore, the rule of exclusion lies in the background in the principal case just as conspicuously as it lay in the foreground in the *Wolf* and *Stefenelli* decisions. The dissent conceded the power of the court to issue the injunction. Undoubtedly they possessed it.

Those who think it more important that criminals be convicted than that persons be secure in their privacy will look with disapproval upon the principal decision; those who think that already we suffer too much invasion of privacy will look with favor upon the granting of this injunction. It is hoped that the influence of the latter group will prevail.

JULIUS J. WADE, JR.

[49] "And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own." Wolf v. Colorado, 338 U. S. 25, 33 (1949).

[50] "I also reject any intimation that Congress could validly enact legislation permitting the introduction in federal courts of evidence seized in violation of the Fourth Amendment . . . Congress and this Court are, in my judgment, powerless to permit the admission in federal courts of evidence seized in defiance of the Fourth Amendment. . . ." Dissenting opinion in Wolf v. Colorado, 338 U. S. 25, 48 (1949).