March 15, 1954

MEMORANDUM FOR THE ATTORNEY GENERAL

Attached hereto for your information is a memorandum entitled "Searches and Seizures Under the Fourth Amendment."

J. Lee Rankin
Assistant Attorney General
Office of Legal Counsel

4 MEMORANDUM

4 Re: Searches and Seizures Under the Fourth Amendment

Restrictions Imposed by Law Upon Searches and Seizures

The question has been raised: What are the restrictions imposed by law upon searches and seizures?

This simple question has been the subject of a treatise by Cornelius in excess of a thousand pages. And the latter's work does not even include decisions rendered during the last twenty-five years. Within practical limitations, this memorandum will do no more than consider more important principles which have not been weakened by passage of time, the impact of the Federal Rules of Criminal Procedure, and several recent cases which indicate the trend that the law has taken.

The Fourth Amendment protects the people against "unreasonable searches and seizures."[1] As may be expected, reasonable men will reasonably differ as to what is unreasonable. For this reason, the cases construing the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure which codifies some of the existing judicial decisions furnish us numerous conflicting principles, some none too clear to guide us in the future.

44/ ##FN1

1/ The Fourth Amendment provides as follows: "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 only upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

These cases fall roughly into two groups:

I. Searches with a search warrant, under which will be discussed the following:

1. If the search warrant is not valid, the search is unreasonable.

(a) Probable cause

(b) Necessary procedural requirements for obtaining and executing warrant.

2. A search for evidence, even under a warrant is unreasonable.

3. Procedure for return of property and to suppress evidence.

II. Searches without a search warrant, under which will be discussed the following:

1. Seizure of goods and papers on a person validly arrested.

2. Seizure of goods on a place where person is validly arrested.

3. Property obtained through improper search admissible if federal officer did not participate in it.

4. Seizure upon probable cause, where moving vehicles and emergency is involved.

5. Border line cases as to whether search was made incidental to valid arrest.

6. Miscellaneous comments.

These cases will be considered in order.

1. <u>If the search warrant is not valid, the search is unreasonable.</u>

The Fourth Amendment prohibits the issuance of a search warrant except upon "probable cause" supported by sworn testimony and "particularly" describing both the place to be searched and the thing to be seized. Rule 41 [2] of the Federal Rules of Criminal Procedure, codifies existing law and practice, and elaborates on the Fourth Amendment. Rule 41 (a), (b), (c) and

FN2

[2] 18 U.S.C.A. Rule 41.

(d) specify the officials entitled to issue the warrant and list the steps necessary for obtaining and executing it.

A. Probable Cause

A frequent problem arising under Rule 41, is whether the facts show "probable cause" justifying the warrant.[3]

Mere belief or suspicion will not satisfy the test of "probable cause."[4] Statements on information and belief also will not suffice, unless the sources of information are disclosed.[5] The facts relating to the "probable cause" must appear in the affidavit, otherwise the warrant is worthless.[6]

Probable cause for the issuance of a search warrant exists where the circumstances before the officer are such as would justify a man of reasonable prudence in believing that an offense has been committed.[7]

3/ Rule 41(c) provides in part: "If the judge or commissioner is satisfied that grounds exist or 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."

4/ Dumbra v. United States, 268 U.S. 435 (1925); Steele v. United States, 267 U.S. 498 (1925); Simmons v. United States, (8 Cir. 1927) 16 F. 2d 85.

5/ Nathanson v. United States, 290 U.S. 41 (1933); Grau v. United States, 287 U.S. 124 (1932). Fraenkel, "Recent Developments in the Federal Law of Searches and Seizures", 33 Iowa L.R. 472, 474 (1948).

6/ Siden v. United States, (8 Cir. 1925) 9 F. 2d 241; Hagen v. United States, (9 Cir. 1925) 4 F. 2d 801.

7/ United States v. Celedonia, (D.C. Pa. 1951) 95 F. Supp. 228; United States v. Lepper, (D.C. N.Y. 1923) 288 F. 136 Aff'd 2 Cir., 295 F. 1017.

On the other hand, the requirement of "probable cause" does not mean that the officers applying for the warrant must at that time possess legal evidence adequate to convict.[8]

B. Necessary Procedural Requirement for obtaining and executing warrant.

Another major source of controversy of searches and seizures is whether necessary procedural requirements have been satisfied for obtaining the warrant.

If for example a warrant to search for stolen merchandise was issued without affidavit or affirmation, the search is an unreasonable one.[9] The affidavit must be true at the time it is sworn to.[10]

It is not a defect, however, that the warrant did not specify by actual description the position of a two-family house, so long as it named the occupant.[11] Nor will a mere clerical error in an affidavit failing to change the year date printed on a blank form, vitiate a search warrant based thereon.[12]

To be a reasonable search and seizure, the warrant must be executed and returned within ten days after its date.[13] If the warrant is not executed at the end of ten days, it cannot be revived by redating it. There must be a new proceeding, and any new warrant issued must rest upon a proper finding that probable cause then exists.[14]

8/ Washington v. United States, (C.A. D.C. 1953) 202 F. 2d 214.

9/ Honeycutt v. United States, (4 Cir. 1921) 277 F. 939; United States v. Pollack, (D.C. N.J. 1946) 64 F. Supp. 554.

10/ Atlanta Enterprises v. Crawford, (D.C. Ga. 1927) 22 F. 2d 834.

11/ Kenney v. United States, (D.C. Cir. 1946) 157 F. 2d 442.

12/ Pera v. United States, (9 Cir. 1926) 11 F. 2d 772.

13/ Rule 41 (d), Federal Rules of Criminal Procedure.

14/ Sgro v. United States, 287 U.S. 206 (1932).

C. Procedure for return of property and to suppress evidence

Rule 41(e) provides the procedure by which a person aggrieved by an unlawful search and seizure may move the court to obtain his property and suppress its use as evidence.[15] The motion to suppress may be made either in the district in which the property was seized or where the trial is to be had.[16]

The motion to suppress must be made before trial or hearing unless opportunity therefor did not exist or defendant was unaware of the grounds for the motion, but the court in its discretion may entertain the motion at trial or hearing,[17] or even after verdict.[18]

2. A search for evidence even under a warrant is unreasonable.

The rule is firmly established that if the purpose of the warrant is to search for evidence upon which to prosecute, the search is unreasonable.[19]

##FN15

44 15/ Rule 41(e) sets forth five different grounds for this purpose: (1) the property was illegally seized without warrant; (2) the warrant was insufficient on its face; (3) property seized was not that described in the warrant; (4) probable cause lacking to believe existence of grounds on which warrant was issued; (5) warrant was illegally executed.

##FN16

44 16/ Rule 41(e).

##FN17

44 17/ Rule 41(e).

##FN18

44 18/ United States v. Asendio, 3 Cir. 1948, 171 F. 2d 122.

##FN19

44 19/ Lasson, "The History and Development of the Fourth Amendment to the United States Constitution", (1937) p. 121; Fraenkel, supra, note 5, pp. 487-488; Willis, Constitutional Law, (1936) pp. 537-538.

The leading case Boyd v. United States [20] which gives legal effect to the broad historic policy underlying the Fourth Amendment, did not involve an actual entry upon premises nor search for and seizure of property. By an act of Congress, in forfeiture proceedings under the revenue laws, the defendant was required by order of court to produce records desirable for prosecution of the case. Upon his failure to produce these records, he was deemed to have confessed to what the records contained. The court held that a compulsory production of a man's private papers to establish a criminal charge against him constituted an unreasonable search and seizure under the Fourth Amendment. [21] The Court reviewed the history that lay behind the Fourth and Fifth Amendments. Speaking of Lord Camden's judgment in Entick v. Carrington, the Court said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, - it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." [22]

In Gouled v. United States, [23] the government seized under search warrants, a number of contracts and bills belonging to defendants, who were

---

20/ 116 U.S. 616 (1886).

21/ Id. 623.

22/ Id. 630.

23/ 255 U.S. 298 (1921).

suspected of conspiring to defraud the government through the agency of certain clothing contracts. Following the Boyd decision, the court held that seizure of these papers was held to violate the Fourth Amendment. Search warrants, the Court said, cannot be employed to get into a house or office to search for evidence merely for the purpose of using it against the accused in a trial.

This does not mean that all papers are immune from search and seizure. The distinction has always been drawn between contraband or stolen or otherwise forbidden goods, which is a class of property to which the government is otherwise entitled or to which its possessor is not entitled. Such goods are properly seizable under a search warrant, while a person's private books and papers of an evidentiary character cannot be seized under a search warrant.[24]

Here too, Rule 41(b) constitutes a restatement of existing law.[25] It expressly declares that stolen goods, contraband material, or instrumentalities of crime may be seized under a search warrant. While Rule 41(b) is silent with regard to papers or things which are merely evidence of the commission of a crime, it is believed that the principles laid down in the Boyd case where the papers were obtained through court order, and the Gouled and related cases where search warrants were used, still protect these private papers from search and seizure even under a search warrant.[26]

24/ Boyd v. United States, 116 U.S. 616 (1886), where private papers were produced pursuant to court order; and see United States v. Lefkowitz, 285 U.S. 452 (1932), where private papers were taken during a search incidental to arrest. If seizure of such papers under a warrant is unreasonable, seizure without a warrant is a fortiori case for a similar conclusion.

25/ See Notes to Rules of Criminal Procedure for the District Courts of the United States (1945) p. 32.

26/ See United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951) holding private papers evidentiary in character free from seizure under a valid arrest.

There may of course be cases where the subject of the seizure is not easily susceptible to classification either as evidence which may not be seized or as other property which may properly be seized. For example in Zap v. United States, four justices of the Supreme Court sustaining a conviction felt certain enough to hold that a seized check was admissible as an instrumentality to defraud the government while three justices were convinced the check was only a piece of evidence, which should have been suppressed.

In his dissent, Mr. Justice Frankfurter conceded that the government had authority to inspect Zap's books and records and therefore the search was legal. But Mr. Justice Frankfurter questioned the seizure of the check for evidentiary purposes. He said "The constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. The legality of a search does not automatically legalize every accompanying seizure. * * * If in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized * * *. But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of another color./27/"

##FN27

/27/ Zap v. United States, 328 U.S. 624 (1946). Zap had a contract with the Navy to conduct experimental work on airplane wings and to conduct test flights. He arranged with a pilot for such test flights for $2500, but had him sign a blank check in which he filled in $4000 and which he later included in his statement of costs to the Navy.

13

II.

10 Searches without a Search Warrant

At one time it could be said that with minor and severly defined exceptions, every search and seizure was unreasonable when made without a court's authority expressed through a validly issued warrant. It was recognized that the search warrant granted under close judicial scrutiny constituted an essential safeguard against overzealous police officers and was indispensable to a free and democractic society. As shall be seen, inroads have been made on this view in cases where the search without a warrant is treated as a proper incident of a lawful arrest. In these cases, many of them decided by a narrow squeak of one or two votes, the dissents have been eloquent and quite persuasive that the rights to personal security and personal liberty have been severely impaired contrary to the Fourth Amendment.

1. Search of person without warrant incidental to lawful arrest and seizure of goods connected with crime as its fruits or its means, proper.

In Agnello v. United States,[28] the court in an unanimous decision laid down the rule which controls searches of persons without warrant and seizure of goods on the person where incidental to a lawful arrest.[29]

44 ## FN28

28/ 269 U.S. 20, 30 (1925). When seized, one of the defendants was found to have cocaine in his pockets; see too, United States v. Rabinowitz, 339 U.S. 56, 60 (1950).

44/29/1 ## FN29 Generally, a person may be "validly" arrested in the following cases: (1) under a warrant; (2) while committing a misdemeanor in the presence of a peace officer or a felony in the presence of anyone; (3) while threatening a breach of the peace, or (4) when an officer has probable cause to think a felony has been committed. See Willis, Constitutional Law (1936) p. 534.

See too, 18 U.S.C. Sections 3041, 3052, 3053, 3056, which apply to arrest by the FBI, marshals, deputies and the Secret Service.

The Court said:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

2. Search of place without warrant and seizure of goods thereon where incidental to valid arrest of person

If incidental to a valid arrest, officers may also without a warrant search the place where the arrest is made, not only to seize things connected with the crime or its fruits but also to search for other proofs of guilt within the control of the accused found under arrest. This was the rule enunciated in the recent case of United States v. Rabinowitz./30/ The defendant had sold four forged postage stamps to a government agent and it appeared that he possessed more in his one-room place of business. Officers obtained a warrant for his arrest but not a search warrant. They arrested him in his place of business, searched the desk, safe and file cabinets and seized 573 forged stamps. These stamps were admitted in evidence over his objection and he was convicted for possessing and concealing the stamps so seized and for selling the four that had been purchased. Conviction was upheld in the face of the contention that the search was unreasonable in that the officers had ample time to obtain a search warrant.

The Court in an opinion by Mr. Justice Minton overruled Trupiano v. United States,/31/ decided only two years before, to the extent that the latter decision required a search warrant whenever it was practicable to procure one. It declared that the relevant test is "not whether it is reasonable to procure a search warrant but whether the search was reasonable"/32/ and this "in turn depends upon all the facts and circumstances

---

30/ 339 U.S. 56, 61 (1950).

31/ 334 U.S. 690 (1948).

32/ 339 U.S. at 66.

of each case." As the Court observed, "whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours"; [33] it was a matter for the judgment of the officers "as to when to close the trap on a criminal committing a crime in their presence"; and "some flexibility will be accorded law officers in daily battle with criminals for whose restraint criminal laws are essential." [34]

Three judges, Black, Jackson and Frankfurter dissented, while Douglas took no part in the consideration or decision of the case. The decision has been subject to considerable fire by the text book writers, [35] and by Mr. Justice Frankfurter's strong dissent that search of the entire premies without a warrant incidental to arrest was wholly unjustified since the officers had at least seven, and possibly even fifteen days to obtain a search warrant.

It is to be noted that Mr. Justice Frankfurter's dissent stressed that there should be some continuity in law in this field of civil rights and that the court's prior decisions should not be overruled unless some manifest mischief flowed from them. "Especially ought the Court not reenforce the instabilities of our day by giving fair ground for the belief that Law is the expression of chance - for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." [36]

FN33

---

[33] Id. 65.

FN34

[34] Id. 65.

FN35

[35] Note, 36 Cornell L.R. 125 (1950); Matherne, "Search and Seizure" - United States v. Rabinowitz, 21 Tenn. L. Rev. 611, 620 (1951); Reynard, "Freedom from Unreasonable Search and Seizure - A Second Class Constitutional Right?", 25 Ind. L.Rev. 259, 302-305 (1950).

FN36

[36] 339 U.S. at 86. When the Trupiano case was decided, Mr. Justice Murphy and Mr. Justice Rutledge were on the court.

It has also been held that a lawful arrest does not, however, justify, as incidental thereto, the search of the house where the person arrested lives, when the arrest has taken place elsewhere.[37]

3. Property obtained through improper search admissible if Federal officers did not participate in it

Evidence seized by a private person[38] or state officer is admissible in a federal criminal prosecution[39] even though seized wrongfully according to standards applicable to federal officers. But such evidence will not be received where there was actual participation by a federal officer,[40] or where the state officer acted on behalf of the federal government.[41] Thus, it is not an unreasonable search if the evidence obtained by state officers or private persons is handed over to federal authorities on a "silver platter".

FN37

37/ Weeks v. United States, 232 U.S. 383 (1914); See too, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) where the arrest was made at home, and the papers and records seized at defendant's office.

FN38

38/ Burdeau v. McDowell, 256 U.S. 465 (1921), papers stolen from defendant's office by private detectives and delivered to federal authorities.

FN39

39/ Weeks v. United States, 232 U.S. 383 (1914).

FN40

40/ Lustig v. United States, 338 U.S. 74 (1949); Byars v. United States, 273 U.S. 28 (1926).

FN41

41/ Gambino v. United States, 275 U.S. 310 (1927); Note, Searches and Seizures, 1948, 15 U. of Chi. L.R. 950, 953-954.

4. Search without warrant "upon probable cause" of moving vehicles and other emergency cases.

It is lawful to make a search without a warrant, where there is probable cause to believe that a crime is being committed, and where it is not feasible under the circumstances to procure a warrant in time to effect a search. The typical case involves liquor or other contraband which is the subject of illicit traffic in automobiles or other moving vehicles.[42] The same principle has been applied to a parked automobile where the officer could not know when the defendant was going to move it, and consequently did not know whether or not there was time to get a warrant.[43] More recently the fruits of a search without a warrant were held to be properly excluded from evidence, where the search was not incidental to a valid arrest and where the circumstances were not exceptional. In United States v. Jeffers,[44] a seizure of narcotics in a hotel room was held to violate the Fourth Amendment, where the officers obtained entrance during the absence of the defendant, and where they could easily have prevented a destruction or removal of the evidence by merely guarding the door.

In the Jeffers case, the Government contended that no property rights within the Fourth Amendment existed in the narcotics seized because they were "contraband" goods in which Congress had declared that "no property rights shall exist". The Court rejected the contention and held it was proper to suppress this evidence even though, as contraband, it would be forfeited to the government.

Speaking through Judge Clark, the Court emphasized again that the mandate of the Fourth Amendment requires adherence to judicial processes;

##FN42

42/ Carroll v. United States, 267 U.S. 132 (1925); Brinegar v. United States, 338 U.S. 160 (1949).

##FN43

43/ Husty v. United States, 282 U.S. 694 (1931).

44/ 342 U.S. 48 (1951).

##FN44

that only where incident to a valid arrest or in exceptional circumstances may exemption from the general rule apply; that in this respect the law does not place an unduly oppressive burden on law enforcement officers but merely an orderly procedure under judicial impartiality essential for attaining the salutary purposes of the Fourth Amendment. Finally, the court declared "that officers instead of obeying this mandate have too often, as shown by the numerous cases in this Court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure."[45]

5. Border line cases where seardh without warrant is made incidental to valid arrest

There are border line cases worth mentioning which involve seizure made without a warrant. One of these was Harris v. United States,[46] a five to four decision. There, arrest warrants had issued against the defendant on two charges concerning forged checks transported into interstate commerce. Government officers, arresting the defendant in his four-room apartment proceeded to conduct an intensive five-hour search without a warrant of his entire apartment allegedly for the two cancelled checks and other instrumentalities of his crimes. Instead they found and seized draft cards which were wholly unrelated to the reason for his arrest. Harris was convicted of violating the Selective Service Act.

Upholding the conviction, Chief Justice Vinson speaking for the Court declared that the search was incidental to the arrest and therefore could extend beyond the actual place where the accused was apprehended. The Court also held that possession of the draft cards was a continuing offense against federal law. Therefore, a crime was being committed

FN45

44/ 45/ Id. 51. See Note, "Judicial Control of Illegal Search and Seizure", 58 Yale L.J. 144 (1948) where a good case is made for drastic judicial control against unreasonable searches. And see, Note, "Searches and Seizures: 1948", 15 U. of Chi. L.Rev. 950 (1948).

44/ 46/ 331 U.S. 145 (1947). See Farrelly, "Searches and Seizures During the Truman Era", 25 So. Cal. L.R. 1, 3 (1951); Rudd, Present Significance of Constitutional Guarantees Against Unreasonable Searches and Seizures, 18 U. of Cinn. L.R. 387, 412 (1949).

FN46

in the presence of federal agents conducting a valid search. The Court concluded that nothing in the Fourth Amendment prohibits seizure of property, the possession of which is a crime, even though the enforcement officers were not aware of it upon the initiation of the search.

This decision was criticized because it appeared to hold that the search was justified by what was found.[47]

Another closely divided decision was Trupiano v. United States,[48] mentioned before as being partly overruled by the Rabinowitz case. Federal agents conducted a raid without arrest or search warrant, although they had known for three weeks that a farm building was being used for illicit distilling. The arrest was upheld upon the ground that a felony had been committed in the presence of the law officers. But seizure of the contraband was not justified as an incident to the arrest because the officers had taken no steps to procure a search warrant despite abundant opportunity to do so. This was the rule, the Court declared, even though the Federal officers had seized the contraband articles in open view as an incident to a valid arrest.[49]

Still another five to four decision was Johnson v. United States.[50] Federal agents, with local police, went to defendant's hotel room. In the hall outside the room the officers could detect the odor of burning opium. Without a warrant of any kind and without knowing who was there, the officers entered, arrested the only occupant, searched the room and found

FN47

47/ Farrelly, id., p. 4; cf. Johnson v. United States, 333 U.S. 10 (1948).

FN48

48/ 334 U.S. 699 (1948).

FN49

49/ See, Note, "The Scope of Permissible Search under the Fourth Amendment", 24 Temple L. Rev. 226 (1950), indicates that this was the first time the Court had so ruled.

FN50

50/ 333 U.S. 10 (1948).

opium and smoking apparatus. Conviction based upon evidence so obtained was set aside. In an opinion for the Court, Mr. Justice Jackson recognized the necessity of striking a proper balance between the rights of society and the right of the individual to security and freedom. But "when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[51]

The Court then took up the government's contention that the search without a warrant was valid because incident to an arrest. It was the opinion of the Court that the government in effect had conceded that the arresting officer did not have probable cause to arrest the defendant until he had entered the room and found her to be the sole occupant. Thus, as the Court held, the government was seeking "to justify the arrest by the search and at the same time to justify the search by the arrest; which it could not do."[52] The Court ended its opinion in these words:[53]

> "* * * An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers, and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

44 ## FN51

51/ Id. 14.

44 ## FN52

52/ Id. 16-17.

44 53/ Id. 17. ## FN53

6. Miscellaneous comments on search and seizures

Other important principles enumciated by the courts involving searches and seizures require only brief comment.

10 (1) Wire tapping is not prohibited by the Fourth Amendment.[54] Since this matter has been fully discussed elsewhere, no further comment is required here.

10 (2) In a federal prosecution the State law determines the validity of arrests without a warrant.[55]

10 (3) The Fourth Amendment does not prevent the use of illegally seized materials in a state prosecution.[56]

10 (4) A person charged with a crime in a State Court may not get a federal injunction to prevent the use of illegally obtained evidence.[57]

44 ###FN54

54/ Olmstead v. United States, 277 U.S. 438 (1928).

44 ###FN55

55/ United States v. Di Re, 332 U.S. 581 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948).

44 ###FN56

56/ Wolf v. Colorado, 338 U.S. 25 (1949). In Schwartz v. Texas, 344 U.S. 199 (1952) the court held that Section 605 of the Communications Act did not bar the admissibility of wire tapped evidence in a criminal prosecution in the State Court.

44 ###FN57

57/ Stefanelli v. Minard, 342 U.S. 117 (1951); Ramsey, Acquisition of Evidence by Search and Seizure, 47 Mich. L.R. 1137 (1949).

10(5) The Fourth Amendment is a protection against seizure by subpoenas if these are unreasonable in scope, unauthorized by law or irrelevant.[58]

10(6) Although evidence is unlawfully seized, it is admissible in a criminal proceeding to establish that the defendant lied.[59]

10 (7) Consent may justify a search and seizure, which in the absence of consent would otherwise be illegal.[60]

13 CONCLUSION

While the decisions on search and seizure have been somewhat uneven and unpredictable, the courts as a whole have been mindful of the

##FN58

44/58/ Hale v. Henkel, 201 U.S. 43 (1906); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); Ramsey, Acquisition of Evidence by Search and Seizure, 47 Mich. L. R. 1137 (1949).

##FN59

44/59/ Walder v. United States, No. 121, Oct. Term 1953, February 1, 1954.

##FN60

44/60/ See, Davis v. United States, 328 U.S. 582 (1946); Amos v. United States, 255 U.S. 313 (1921); Zap v. United States, 328 U.S. 624 (1946); vacated on other grounds, 330 U.S. 800 (1947).

distinction "between a government where officers are under the law, and the police-state where they are the law."[61]

##FN61

[61] United States v. Johnson, 333 U.S. 10, 17 (1948). In McDonald v. United States, 335 U.S. 451, 455-456 (1948), the Court speaking through Mr. Justice Douglas said:

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."