University of Miami Law Review

Volume 31 | Number 3 Article 10

5-1-1977

Exclusionary Rule Does Not Extend to State Seized Evidence Used in Federal Civil Tax Proceedings

Ellen Catsman Freidin

the opinion provides some clues that a more flexible three-tiered analysis will be employed in the future,[48] it also indicates that the court prefers to continue its case-by-case analysis of equal protection challenges, thereby preserving an uncertain status quo.

DAVID GOLD

Exclusionary Rule Does Not Extend to State Seized Evidence Used in Federal Civil Tax Proceedings

In a recent decision the United States Supreme Court refused to exclude from admission in a federal civil tax proceeding evidence seized illegally, but in good faith, by state law enforcement officers. This note indicates that this decision reflects the Court's growing disillusionment with the fourth amendment exclusionary rule. It is argued that the opinion fails to recognize potential law enforcement abuses which may flow from such a limitation of the rule, and that the Court did not expound upon the relevance of the good faith character of the seizures to the holding.

In 1968, pursuant to a search warrant based partly on their observations of alleged gambling activity, Los Angeles police seized certain wagering records and $4,940.00 in cash from Max Janis and arrested him for illegal gambling. As was customary in such cases, the police informed the Internal Revenue Service (IRS) of their observations, the seizures, and the arrest. On the basis of this infor-

---

would allow the ordinance to pass constitutional muster in furtherance of any arguably valid state objective. Such a standard seems to afford too little protection when one considers the treatment historically afforded first amendment freedoms. On the other hand, a classical application of the strict scrutiny test, which would almost surely result in declaring the ordinance unconstitutional, gives too little deference to the traditionally and necessarily broad zoning power.

48. The analysis employed in *Mini Theatres* requires minimum governmental concern for individual rights and a substantial basis, rather than a compelling state interest, to justify their restriction. Thus the flexible intermediate tier analysis is arguably a mere rational basis test with "bite." *See* Gunther, *supra* note 8, at 21. However, the Supreme Court did not formally introduce the test. The Court must decide if the flexible test will be added to create a tertiary formula of equal protection or whether the two-tiered formula will remain intact.

mation, the IRS assessed a wagering tax on Janis[1] and levied upon the seized cash in partial satisfaction of the assessment.[2] Subsequently, at a hearing on the gambling charges, the municipal court judge granted a motion to suppress the seized evidence relying on a case which had been decided after the warrant had been issued.[3] Relieved of criminal charges, Janis then initiated civil proceedings in the United States District Court for the Central District of California to obtain a refund of the cash upon which the IRS had levied. The IRS counterclaimed for the balance of the assessment. It was stipulated that the sole basis for the assessment was the observation by the local police together with the seized records and cash. Therefore, enforcement of the assessment depended upon the determination of whether the improperly seized evidence was admissible in civil court. The district court granted Janis' motion to suppress, quashed the assessment, and granted judgment for Janis. The United States Court of Appeals for the Ninth Circuit affirmed without opinion. On certiorari review, the United States Supreme Court *held*, reversed and remanded: The exclusionary rule shall not be applied in federal civil tax proceedings to evidence seized illegally, but in good faith, by state law enforcement officers.[4] *United States v. Janis*, 96 S. Ct. 3021 (1976).

The question of whether evidence illegally obtained by a state law enforcement officer is admissible in a federal civil proceeding was one of first impression in the United States Supreme Court. The rule which requires that courts exclude evidence taken in violation of an individual's fourth amendment rights[5] was born in 1914 in *Weeks v. United States*.[6] Basing its ruling on a general notion that fourth amendment rights must be enforced, the Supreme Court excluded evidence improperly obtained by *federal* agents from use in *federal* criminal prosecutions. However it did allow evidence ille-

1. The assessment was made under I.R.C. § 4401. For a detailed discussion of how such assessments are used by the IRS to enforce criminal laws, see Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A.L. REV. 1191 (1975).

2. Authority to levy comes from 26 U.S.C. § 6331 (1970).

3. The case relied on was Spinelli v. United States, 393 U.S. 410 (1969).

4. As discussed *infra*, the exact scope of this holding is not clear. This statement presents the narrowest possible interpretation.

5. U.S. CONST. amend. IV. The amendment states: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated . . . ."

6. 232 U.S. 383 (1914).

gally siezed by state officials to be admitted at federal trials.

Recognizing that the *Weeks* ruling encouraged federal instigation, planning, and participation in illegal searches by state officers, the Court initiated the "silver platter doctrine" in *Lustig v. United States.*[7] This doctrine provided that evidence illegally seized by a state officer was not admissible in federal court if federal agents took any part in the search and seizure. Conversely, if evidence was turned over to federal officials untouched by federal agents (on a silver platter) it was admissible.[8] However, that same year, in *Wolf v. Colorado,*[9] while applying the fourth amendment to the states through the due process clause of the fourteenth amendment, the Court declined to require the states to enforce the exclusionary rule if they could find other ways of safeguarding the constitutional rights involved. In that opinion the Court noted that the rule might be a deterrent, but the main purpose of the rule was to assist those whose rights had been violated.[10] Deterrence gained in importance when the Court, reaffirming *Wolf*, questioned whether the exclusionary rule had any deterrent effect at all and showed concern that it "deprives society of its remedy against one lawbreaker because he has been pursued by another."[11]

Far reaching extension of the rule began in 1960 with *Elkins v. United States.*[12] The Court held that no evidence could be admitted in federal criminal prosecutions if it had been seized illegally—by either federal *or* state agents. Establishing that the main purpose

7. 338 U.S. 74 (1949).

8. *Id.* Justice Frankfurter in a concurring opinion indicated that the exclusionary rule should be expanded to exclude (from federal criminal trials) *any* evidence illegally seized by state *or* federal officials. In considering the rule's purpose to be general protection of fourth amendment rights, he reasoned: "Whether state or federal officials did the searching is of no consequence to the [individual whose Fourth Amendment rights have been violated] and it should make no difference to us." *Id.* at 81.

9. 338 U.S. 25 (1949).

10. The reader should note that at this early stage, the Justices who favored restriction of the rule did see it as a possible deterrent. On the other hand, the dissenters in *Wolf*, who favored extension of the rule were convinced that the rule was an effective deterrent and that deterrence was the prime reason for requiring the states to use the rule. *Id.* at 40-47. Today it is the majority who oppose extension who cite deterrence as the only purpose of the rule.

11. Irvine v. California, 347 U.S. 127, 136 (1954). In a heated dissent to this opinion, Justice Douglas opined that the exclusionary rule was the only way to keep prosecutors and law enforcement officers from violating citizens' rights at will. The debate on the merits of the exclusionary rule was in full swing.

12. 364 U.S. 206 (1960). The Court here adopted Justice Frankfurter's reasoning in *Lustig. See* note 8 *supra.*

of the rule is deterrence,[13] the Court recognized that there was no reliable way to test its effectiveness, but based its extension of the rule on three factors: (1) lack of available alternatives; (2) potential "subterfuge and evasion" with respect to federal and state cooperation in criminal investigations;[14] and (3) the imperative of judicial integrity which requires that courts not be a party to any illegal activity.[15]

Suspicion of "working arrangements" between cooperating federal and state agents was a recurrent theme when the Court in *Mapp v. Ohio*[16] finally overruled *Wolf* and required the states to observe the exclusionary rule in their own criminal proceedings. Recognizing that the rule sets many criminals free, the Court nevertheless indicated that without the rule, the fourth amendment was just an empty promise.

In 1965 the Court extended the exclusionary rule one last time by applying it to forfeiture proceedings, deemed to be merely quasi-criminal in nature.[17] By 1969, as the composition of the Supreme Court began to change, extension of the rule halted. Placing increasing emphasis on deterrence as the justification for the rule, the Court refused to apply the rule where its deterrent purpose would not be served.[18]

In 1971, Chief Justice Burger in a scalding dissent proposed that the exclusionary rule had failed, that Congress should find a workable alternative to it, and that the rule was too broadly applied and in fact should be limited to serious violations by government

13. "[The rule's] purpose is to deter—to compel respect for the Constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." 364 U.S. at 217.

14. *Id.* at 222. It is a fine but important distinction here that the Court looked upon the rule as an incentive to obey the fourth amendment command rather than as merely a punishment for wrongdoing.

15. In a government of laws . . . existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. . . . [T]o declare that the government may commit crimes in order to secure the conviction of a private criminal would bring terrible retribution.

Id. at 223, *quoting* Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (1927).

16. 367 U.S. 643 (1961).

17. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

18. Desist v. United States, 394 U.S. 244 (1969). In this case the Court considered the question of retroactivity of rules changing admissibility of evidence.

agents.[19] He charged that the hope of deterrence by the rule "was hardly more than a wistful dream."[20] This represented the view of a growing minority.[21]

In *United States v. Calandra*,[22] the idea of the exclusionary rule as an enforcement of the fourth amendment promise of individual rights disappeared when a majority of the Court held that the *sole* purpose for the rule was deterrence. This laid the groundwork for future decisions (like *Janis)* where the Court could reason that if there is no proof of deterrence, the exclusionary rule should not be applied.[23]

Accordingly, the Court ruled in *Michigan v. Tucker*[24] that the testimony of a witness need not be excluded where the police learn his identity by a good faith violation of the fifth amendment. In such a case, the exclusionary rule loses its force as a deterrent and should not be applied. Then, in *United States v. Peltier*,[25] the Court ruled that when a motion to suppress is based on a case decided after the evidence was seized, the exclusionary rule should not be observed. The rationale was that neither deterrence nor the imperative of judicial integrity would be served by such a suppression. Finally, on the same day that *Janis* was decided, Chief Justice Burger again called for a complete overruling of the exclusionary rule. Concurring in *Stone v. Powell*,[26] he reasoned that until the rule is abolished no practical alternatives will be developed.

When *United States v. Janis* came to the Supreme Court, it was met by two justices who favored complete abolition of the exclusionary rule, Justices Burger and Blackmun,[27] four who favored

19. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 412 (1971).

20. *Id.* at 416.

21. Of the current Supreme Court Justices, Justice Blackmun had joined Chief Justice Burger in his call for complete abolition of the rule. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

22. 414 U.S. 338 (1974).

23. Now it was the dissenting minority who believed that deterrence was not the sole desirable effect of the rule. The dissenters pointed out that there was no mention of deterrence as a purpose for the rule by the 1914 Court which authored it. They recognized the imperative of judicial integrity and argued that simply because the rule cannot be proved to be a successful deterrent is no reason to abandon it. *Id.* at 355.

24. 417 U.S. 433 (1974). Although *Tucker* deals with the fifth amendment exclusionary rule, the reasoning is applicable to the fourth amendment.

25. 422 U.S. 531 (1975).

26. 96 S. Ct. 3037, 3052 (1976). For a more complete discussion of *Stone v. Powell*, see 31 U. MIAMI L. REV. 735 (1976).

27. *See* text accompanying notes 19, 21, & 26 *supra*.

limitation of the rule at least in good faith situations, Justices Powell, Rehnquist, Stewart and White,[28] and two steadfast defenders of the rule, Justices Brennan and Marshall.[29] The majority was convinced that there was no way to test the effectiveness of the rule and that there was no available alternative to it.

The significance of the *Janis* decision lies not in its conclusion, but in the grounds upon which it was based and in its uncertain scope. The Court could easily have decided this case on the same good faith grounds as *Peltier*,[30] but clearly it saw the *Janis* case as an opportunity to further express its displeasure with the exclusionary rule and to propound a broader limitation of the rule than that required by the facts of the case before it.

Having recently stated that the principle justification for the exclusionary rule is deterrence,[31] the *Janis* Court stated that since there is no accurate way to judge the rule's effectiveness as a deterrent, it should not be extended. In support of this contention, the Court cited a variety of studies that failed to prove its deterrent value.[32] However, the Court neglected to look to law enforcement experience before the rule was uniformly applied in federal and state courts. For example, in 1949, states observing the exclusionary rule warned their law enforcement officers that illegally obtained evidence would not result in the prevention and solution of crime.[33] In comparison, New York City police (where the rule was not in effect) were advised by their superiors that illegally obtained evidence might be admissible.[34] Moreover, in Baltimore, an official "Digest of Laws" informed officers that "evidence illegally obtained may still be admissible at trial."[35] Although not empirical in nature, this historical perspective might have helped to enlighten the Court on the rule's deterrent potential.

Furthermore, the Court notes that its lack of data is similar to that of the Court in *Elkins*. But the *Elkins* opinion also quotes praises of the rule's deterrent effects by the chief law enforcement

28. *See* text accompanying note 24 *supra*.

29. *See* note 23 *supra*.

30. In *Janis* as in *Peltier*, the seizure of evidence was in good faith and the case which made the evidence inadmissible was decided after the seizure.

31. United States v. Calandra, 414 U.S. 338 (1974).

32. 96 S. Ct. at 3030 n.22.

33. *See* Wolf v. Colorado, 338 U.S. 25, 41-46 (1949).

34. *Id.*

35. *Id.*

officer of California.[36] These praises were voiced after that state had observed the rule for two years and were based on a before and after comparison. The *Janis* court failed to note this part of the *Elkins* reasoning. It also failed to recognize the other two justifications for the rule in *Elkins*: the imperative of judicial integrity and the guarantee of fourth amendment rights.

The Court further reasoned that even if the exclusionary rule is an effective deterrent, there is no need to extend it to federal civil tax proceedings since local police are sufficiently "punished" by exclusion of evidence from state and federal criminal trials.[37] However, it is not the number of convictions lost which will deter an illegal search. The lack of incentive to search illegally is the only true deterrent. The Court assumes that a civil tax case falls outside a state policeman's "zone of primary interest"[38] and that the policeman's illegal endeavors are entirely frustrated by the rule's effect on criminal prosecutions. It admittedly bases this reasoning on "its own assumptions of human nature and the interrelationship of the various components of the law enforcement system."[39] In so assuming, it ignores the reality of state-IRS cooperation in criminal and tax investigations.[40] The Court also fails to consider the threat of "working arrangements" or "subterfuge and evasion" between federal and state agents which led earlier courts to extend the exclusionary rule.[41] Nor does the Supreme Court consider its own holding in *Marchetti v. United States*,[42] that federal wagering taxes are meant not only to raise revenue but also to assist the efforts of state

36. 364 U.S. at 220.

37. 96 S. Ct. at 3029.

38. *Id.* at 3034.

39. *Id.*

40. As pointed out by Justice Stewart in his *Janis* dissent, the Court ignored the testimony of the arresting officer in *Janis*, that notification of IRS officials regarding gambling arrests was the usual practice. 96 S. Ct. at 3036.

41. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960). The Court in *Mapp* clearly feared that "[d]enying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed . . . working arrangements" whereby state police will seize evidence illegally for the purpose of turning it over to federal authorities. 367 U.S. at 658.

42. 390 U.S. 39 (1968). *Marchetti* noted that it is common for law enforcement agents to cooperate fully with the IRS when cash is seized pursuant to a gambling arrest. *Id.* at 48. In order to do their part, the IRS manual actually instructs officers to "disrupt [crime] through enforcement of all available tax statutes." Tarlow, *supra* note 1, at 1192 n.3, *quoting* Silver, *Terminating the Taxpayer's Taxable Year: How IRS Uses It Against Narcotics Suspects*, 40 J. Tax. 110 (1974).

and federal authorities to enforce gambling laws. Contrary to its theory, the Court admits that "police often view trial and conviction as a lesser aspect of law enforcement."[43] While it fails to dispose of this nagging reality, the Court does, however, summarily dispose of Janis' attempt to use intrasovereign cases to prove that the exclusionary rule had been previously used in civil court. It resorts to its "common sense" syllogism and reasons that deterrence in an intersovereign situation is far more attenuated than in the intrasovereign cases, and therefore extension of the rule is pointless.

In sum, the Court reasons that since the deterrent effect of the rule cannot be measured, and there can be little additional deterrence in extending the rule to civil federal tax cases, the cost to society of the extension of the rule outweighs the negligible potential benefits.

Although the facts of the instant case include a seizure made in good faith, the Court does not indicate how much (if any) bearing good faith had on its decision. The *Janis* seizures were purely in good faith—not becoming illegal until after the fact. The Court gives no inkling of whether the decision applies only to pure good faith situations, nor does it tell what degree of good faith is necessary to invoke its holding.

Surely, the exact scope of the *Janis* holding remains unclear. In stating the issue presented, the Court relates to specific facts of the case.[44] However, in concluding its opinion the Court says:

> We therefore hold that the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.[45]

This statement does not confine the rule to the facts of the case.[46] The Court's failure to limit its holding might reflect the desire of some members of the court to limit severely the use of the exclusionary rule.

United States v. Janis provides a good example of the philoso-

43. 96 S. Ct. at 3029 n.20.

44. *Id.* at 3029.

45. *Id.* at 3035.

46. The vague holding does not mention good faith nor does it limit the rule to tax proceedings. Moreover, it does not indicate what the ruling would be on a question of admissibility of federally seized evidence in state civil court.

phy of the Burger Court—if it makes good sense, it makes good law. Since the Court bases its holding primarily on personal assumptions about human nature (sense rather than fact or stare decisis), the observer finds himself wondering what cases and data the Court might have considered. The only comfort to be found is in the fact that there really was not much new in *Janis* since the erosion of the exclusionary rule had begun several years earlier. The limited effect of this ruling is yet to be seen vis-a-vis law enforcement and the IRS. However it certainly exemplifies the apparent willingness of the present Court to tamper with Constitutional safeguards without giving the potential effect of its ruling a full and fair hearing.

ELLEN CATSMAN FREIDIN

Proprietary Powers: A New Policy Tool for the States?

The Supreme Court of the United States held that a state plan under which a bounty was paid to scrap metal processors for the processing of automobile hulks was an exercise of the state's proprietary power and not subject to the restrictions of the commerce clause. By so holding the Court avoided the need to balance state interests against the burden placed by the plan upon interstate commerce. This article discusses the effect of the Court's decision not to apply the balancing test and argues that state actions of this type should not be shielded from commerce clause scrutiny.

Alexandria Scrap Corporation, a Virginia scrap processor, brought an action challenging the constitutionality of a statutory scheme[1] through which Maryland, in an effort to protect its environment, sought to accelerate the rate at which old automobile hulks were destroyed. By offering a bounty for the destruction of such hulks, Maryland hoped to bring about an increase in the destruction rate. Under an amended version of the plan, domestic scrap processors were allowed to recover the bounty upon filing of proof that the

1. The law, as amended, is set forth at 6 MD. ANN. CODE art. 66 1/2, § 5-201 to 210. (Cum. Supp. 1976).