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

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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-
mation, the IRS assessed a wagering tax on Janis and levied upon
the seized cash in partial satisfaction of the assessment. Subse-
sequently, 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. Relieved of criminal charges, Janis then initiated civil proceedings
in the United States District Court for the Central District of Cali-
ifornia 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 determina-
tion 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. United States

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 was born in 1914 in
Weeks v. United States. 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
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 . . . ."
gally seized 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.* 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. However, that same year, in *Wolf v. Colorado,* 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. 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."

Far reaching extension of the rule began in 1960 with *Elkins v. United States.* 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

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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.
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.
of the rule is deterrence, 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; and (3) the imperative of judicial integrity which requires that courts not be a party to any illegal activity.

Suspicion of "working arrangements" between cooperating federal and state agents was a recurrent theme when the Court in *Mapp v. Ohio* 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. 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.

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).


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. He charged that the hope of deterrence by the rule “was hardly more than a wistful dream.” This represented the view of a growing minority.

In United States v. Calandra, 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.

Accordingly, the Court ruled in Michigan v. Tucker 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, 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, 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, four who favored

20. Id. at 416.
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.
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.
32. 96 S. Ct. at 3030 n.22.
34. Id.
35. Id.
OFFICER OF CALIFORNIA. 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. 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" 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." In so assuming, it ignores the reality of state-IRS cooperation in criminal and tax investigations. 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. Nor does the Supreme Court consider its own holding in Marchetti v. United States, 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]eny[ing] 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."\(^4\) 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.\(^4\) 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.\(^5\)

This statement does not confine the rule to the facts of the case.\(^5\) 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-

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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.
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 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