Federal Courts -- The "Silver Platter" Doctrine

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courts is still adverse to this decision. A party is not precluded from raising the diversity issue, either in the pleadings or otherwise, by any form of laches, waiver or estoppel. The minority position is well taken that there should be some point at which undisputed jurisdictional facts will be settled. However, when a party reasonably "suggests" to the court a lack of diversity, the action must be dismissed as the federal court is without power to act.

The dicta in the instant case indicated that the appellate court may make an inquiry into jurisdiction if the trial court has not made a determination of the jurisdictional facts. A trial court may make additional inquiries into jurisdiction if the parties can introduce evidence which was not available at the time of pleading. The decision appears equitable, since the statute of limitations on the claim had expired. However, it does not appear to conform with the Federal Rules of Civil Procedure nor with the current trend to reduce the work load of the federal courts. It is submitted that the result of the instant case is to give the trial judge discretion, under these facts, as to whether he will dismiss a diversity action, when in fact no such discretion formerly existed.

JOHN B. WHITE

FEDERAL COURTS—THE "SILVER PLATTER" DOCTRINE

The petitioners were convicted in a federal district court for intercepting and divulging telephone communications in violation of the Communications Act of 1934. The evidence which led to their conviction had been obtained originally by state officers with a search warrant issued "upon information and belief" that one of the petitioners possessed obscene


22. The Court of Appeals for the Third Circuit stated in an earlier decision: "It is axiomatic that jurisdiction may not be conferred or waived by the parties and that courts at every stage of the proceedings may and must examine into its existence." Hospoder v. United States, 209 F.2d 427, 429 (3d Cir. 1953).

23. See note 7 supra.


26. It is of interest to note that if the dismissal by the trial court had been affirmed, the plaintiff could have brought the action in Ohio, where the cause of action accrued. Ohio has a statutory savings provision which tolls the statute of limitations in that state to permit a party to bring a new action within one year after his earlier action has been dismissed other than on the merits. Ohio Rev. Code Ann. § 2305.19 (Baldwin 1958).

27. See note 7 supra.

pictures. The search had revealed instead paraphernalia believed to have been used in making wire taps. During the state proceedings\(^2\) federal officers, acting under a federal search warrant, obtained the wire tap paraphernalia from the state, and a federal indictment was returned on the basis of this evidence. Before trial the petitioners moved to suppress the evidence on the ground that the search and seizure by the state officers had been invalid. The federal district judge denied the motion because there was no evidence that any federal agent knew or suspected that the search was contemplated or was made by the state officers until an account appeared in the newspaper. The convictions were affirmed by the Court of Appeals.\(^3\) Held, reversed: evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable search and seizure under the fourth amendment is inadmissible over the defendant's timely objection in a federal criminal trial. *Elkins v. United States*, 364 U.S. 206 (1960).\(^4\)

This decision overturned a practice which has existed in federal criminal prosecutions since 1914. In *Weeks v. United States*,\(^5\) the Supreme Court set forth two rules of evidence. The first, the federal exclusionary rule, established the principle that evidence obtained by federal agents in violation of the defendant's fourth amendment rights will be rejected in a federal criminal prosecution. The second, known later as the "silver platter" doctrine,\(^6\) declared that an unlawful search, as set forth in the fourth amendment, was not a search by a federal agent if the evidence was secured by state authorities who delivered it to the federal officers.

In 1927 two Supreme Court decisions upheld, but somewhat limited, the applicability of the "silver platter" doctrine. In *Byars v. United States*,\(^7\) a federal prohibition agent was asked to and did accompany a local police officer in a search of defendant's room for intoxicating liquors. The search revealed internal revenue stamps, counterfeited in violation of a federal statute, under which the defendant was indicted. The Court held the evidence inadmissible because the search was a joint endeavor by federal and state authorities. In the second case,\(^8\) state officers arrested and searched defendants without probable cause. They seized intoxicating liquor, which was immediately turned over to federal authorities as evidence for prosecution of defendants under the National Prohibition Act. The

\(^2\) Two Oregon state courts held the search unlawful and granted petitioners' motion to suppress.
\(^3\) *Elkins v. United States*, 266 F.2d 588 (9th Cir. 1959).
\(^4\) 80 Sup. Ct. 1437 (1960). The Court vacated judgment on the same day in *Ríos v. United States*, 364 U.S. 253 (1960), for a redetermination by the district court of the validity of a search by municipal officers in order to decide the case by the rule established in *Elkins v. United States*.
\(^5\) 232 U.S. 383 (1914).
\(^6\) This label was first used in the majority opinion in *Lustig v. United States*, 338 U.S. 74, 79 (1949).
\(^7\) 273 U.S. 28 (1927).
\(^8\) *Gambino v. United States*, 275 U.S. 310 (1927).
Court found that the state police officers were performing their supposed duty solely for the purpose of aiding the federal government in its prosecution; the evidence obtained by the unlawful search was therefore inadmissible.

However difficult and unpredictable their application to concrete cases may have been, the controlling principles were clear. Evidence obtained by state officers entirely on their own account would not be excluded in a federal criminal prosecution even though obtained by a search which, if conducted by federal officers, would have violated the fourth amendment's prohibition of unreasonable searches and seizures, because the fourth amendment was not applicable to a search by state officers. Then in 1949, in *Wolf v. Colorado*, Mr. Justice Frankfurter stated:

> 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 States through the Due Process Clause.

In another case, decided the same day as *Wolf*, the Supreme Court carefully left open the question of the validity of the "silver platter" doctrine. By finding federal participation in an illegal search by municipal officers, the Court found it unnecessary to decide whether an illegal search by state authorities would bar evidence obtained from such a search in a federal trial. This question raised by the *Lustig* case remained unanswered by the Supreme Court for eleven years.

The prevailing opinion in the *Elkins* case uses the statement of Mr. Justice Frankfurter in *Wolf v. Colorado* as the foundation for overturning the "silver platter" doctrine. In supporting a rule which would exclude relevant evidence from the trial of a federal criminal case, the majority opinion justifies its position on three grounds. First, it is logically impossible to justify a flouting of the constitutional guaranties against unreasonable search and seizure under the fourteenth amendment and to disallow the same thing under the fourth. There is no distinction between evidence obtained in violation of either amendment. The purpose of the exclusionary rule is to "compel respect for the constitutional guaranty in

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9. For a complete account of decisions based on the "silver platter" doctrine, see Annot., 50 A.L.R. 2d 531 (1956).  
11. Id. at 27-8.  
13. Id. at 79.  
the only effectively available way—by removing the incentive to disregard it.”

The second consideration is the avoidance of needless conflict between state and federal courts for the continuance of a “healthy federalism.” In those states which have adopted the exclusionary rule, use of the “silver platter” doctrine by federal courts frustrates state policy. The state's efforts to assure obedience to the federal constitution are defeated when evidence that the state excludes as unreasonably obtained can be used by the federal court sitting within the state. Further, this doctrine will remove any subterfuge between federal and state law enforcement officers, for no longer will the former be able to remain aloof from an investigation while impliedly encouraging the latter in the disregard of a constitutionally protected freedom.

Finally, there is a compelling need for judicial integrity. By allowing unlawfully obtained evidence to be admitted into federal courts, the latter become accomplices in disobeying a constitution they are sworn to uphold.

Cloaked in the robe of stare decisis, Mr. Justice Frankfurter, speaking for the minority, assails the foundation and the rationale of the majority opinion. The following four considerations formed the basis for his dissent. First, in Wolf v. Colorado, the Court decided that the “core of the Fourth Amendment,” and not the amendment itself, was enforceable against the states through the fourteenth amendment due process clause. Some of the principles underlying the specific safeguards of the first eight amendments are implied limitations upon the states within the due process clause of the fourteenth, but to this extent only are individuals afforded federal protection against state authority. A

17. Id. at 1446.
20. Id. at 1447.
21. Mr. Justice Frankfurter appears unduly to emphasize in his dissent the long history of the “silver platter” doctrine, especially the fact that it was first pronounced and subsequently followed by Courts upon which sat Justices Holmes and Brandeis. Elkins v. United States, 364 U.S. 206, 80 Sup. Ct. 1437, 1453-4 (1960) (dissenting opinion).
22. It must be recalled that, ironically, it was Mr. Justice Frankfurter’s statement in Wolf v. Colorado, 338 U.S. 25, 27-8 (1949), upon which the majority’s foundation, now attacked, is based.
24. Id. at 27.
distinction must be made between the specifics of the first eight amendments and the generalities of the due process clause.\textsuperscript{25}

It is therefore a complete misconception of the \textit{Wolf} case to assume, as the Court does as the basis for its innovating rule, that every finding by this Court of a technical lack of a search warrant, thereby making a search unreasonable under the Fourth Amendment, constitutes an "arbitrary intrusion" of privacy so as to make the same conduct on the part of state officials a violation of the Fourteenth Amendment.\textsuperscript{28}

Second, the only justification for an exclusionary rule is that it exerts a controlling, and perhaps civilizing, pressure upon law-enforcement officers. But if state courts may, on the grounds of the \textit{Wolf} decision, admit illegally obtained evidence, there is no reason to assume that police in states which do not follow an exclusionary rule will be influenced by the fact that this evidence may be excluded from a federal prosecution. Even if this federal exclusion did have an inhibiting influence, however, the federal courts cannot exercise supervisory control over state officials as they can and do over federal officers. It follows, then, that the rule is without justification.\textsuperscript{27}

Third, the abolition of the "silver platter" doctrine, purportedly to avoid conflict between state and federal courts, will produce just the opposite result. If a federal court must make an independent inquiry into the reasonableness of a search and seizure by state officers, it is easily foreseeable that a federal court may find a state officer to have been at fault in his method of search after he has been exonerated by the state, or conversely, the federal court may absolve what the state has condemned. While the Court speaks of the need for "judicial integrity," it would refuse to accept the ruling of a state court that evidence had been illegally obtained by state officers.\textsuperscript{28}

Finally, the majority has shown no instance in which a federal court has expressed great difficulty in determining whether a search was carried on by state or federal officers. The "silver platter" doctrine has been a workable rule, and to discard a rule which has the history, experience and authority of this one should require more than the unsubstantiated assumption that federal officers will engage in "subterfuge" to evade the sanctioned command of the Supreme Court.\textsuperscript{29}

At first glance, the decision in \textit{Elkins} appears to be a "giant step" toward incorporating the fourth amendment into the due process clause of the fourteenth. Closer examination, however, reveals a result that is

\begin{itemize}
\item \textsuperscript{25} Elkins \textit{v.} United States, 364 U.S. 206, 80 Sup. Ct. 1437, 1456 (1960) (dissenting opinion).
\item \textsuperscript{26} Ibid.
\item \textsuperscript{27} Id. at 1457.
\item \textsuperscript{28} Id. at 1461.
\item \textsuperscript{29} Id. at 1458.
\end{itemize}
consequential indeed, but not nearly so far-reaching. Mr. Justice Stewart seems to begin his opinion correctly by stating that "what is here invoked is the Court's supervisory power over the administration of criminal justice in the federal courts." Then, apparently losing sight of this invocation, he indulges in a constitutional argument unnecessary to the result reached. He attempts to show that as a result of Mr. Justice Frankfurter's statement in *Wolf v. Colorado*, the majority is justified in overthrowing the "silver platter" doctrine. This rationale could be expected were the Court excluding illegally-obtained evidence from a state prosecution. This the Court was not called upon to do. Instead, it has extended its undisputed supervisory power over the federal courts to exclude all unlawfully-obtained evidence from federal prosecutions, no matter what the source. But while the Court has reached a logical and necessary result, it appears to have compromised itself by rebutting the unjustified reasoning of the "silver platter" doctrine first set forth in *Weeks v. United States*, rather than merely reaffirming its inherent power over the federal courts.

PHILIP N. SMITH

**DUE PROCESS—RIGHT TO SELECT COUNSEL**

Petitioner was found guilty of burglary and sentenced to the state prison. The trial judge allowed defense counsel to withdraw five days before the trial, and refused to appoint counsel or grant petitioner's request for a continuance so that he could obtain his own counsel. By habeas corpus proceedings the petitioner challenged the legality of his conviction. Held: conviction set aside since the denial of a reasonable opportunity to employ counsel violated the due process clause of the Fourteenth Amendment to the Federal Constitution and the Florida Constitution. *Cash v. Culver*, 122 So.2d 179 (Fla. 1960).

31. "The security of one's privacy against arbitrary intrusion by the police... is... implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).
32. 232 U.S. 383 (1914).

1. After Cash's conviction in 1955 he was sent to Raiford prison to serve a 15-year sentence. No appeal was taken. While in prison he drew up a petition for a writ of habeas corpus which he sent to the Florida Supreme Court. This petition alleged: (1) that he had requested the court to appoint counsel and this request was refused, and (2) that the court refused to grant a continuance, after his attorney had withdrawn five days before the trial began, so that he could obtain counsel. He contended both of these actions of the trial judge violated due process of law. The Florida Supreme Court denied the petition without hearing or opinion.

Thereafter, having obtained an attorney, he petitioned the United States Supreme Court for a writ of habeas corpus, alleging the same facts he had brought before the