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# COMMENTS

## FEDERAL LAW OF SEARCH AND SEIZURE AS AN INCIDENT TO LAWFUL ARREST IN THE LIGHT OF THE CASE OF HARRIS v. UNITED STATES

The recent widely discussed case of *Harris v. United States*<sup>1</sup> further complicates that already complex phase of search and seizure which relates to the extent to which officers may search as an incident to a lawful arrest. The Fourth Amendment to the Constitution<sup>2</sup> provides: "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 upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It has long been recognized that the immunity afforded by this Amendment is only against *unreasonable* searches and seizures.<sup>3</sup> The right to search the person of one lawfully arrested and seize weapons and evidences of the crime was established in the early common law of England, and has never been questioned in this country. Courts have generally extended the scope of this authority to include the "immediate premises"; however, interpretations of what is meant by this phrase have been widely disparate.<sup>4</sup> The Supreme Court cases which have dealt with this matter have sanctioned a search of the entire premises wherein the arrest was effected, so long as these premises are within the control of the arrestee.

In *Agnello v. United States*<sup>5</sup> the defendants were lawfully arrested in the dwelling of one of them for violating the Narcotics Act.<sup>6</sup> Although the problem did not arise directly, the Court recognized the right in the following words: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing a 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

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1. *Harris v. United States*, 67 Sup. Ct. 1098 (1947).

2. U. S. CONST. AMEND. IV.

3. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931); *Carroll v. United States*, 267 U. S. 132 (1925); *Weeks v. United States*, 232 U. S. 383 (1914); *Boyd v. United States*, 116 U. S. 616 (1886).

4. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, 269 U. S. 20 (1925); *Weeks v. United States*, 232 U. S. 383 (1914); *Safarik v. United States*, 62 F. 2d 892 (C. C. A. 8th 1933); *Kelley v. United States*, 61 F. 2d 843 (C. C. A. 8th 1932); *Vecchio v. United States*, 53 F. 2d 628 (C. C. A. 8th 1931); *Lawson v. United States*, 9 F. 2d 746 (C. C. A. 7th 1925); *Sayers v. United States*, 2 F. 2d 146 (C. C. A. 9th 1924); *United States v. Strickland*, 62 F. Supp. 468 (W. D. S. C. 1945); *United States v. Antonelli Fireworks Co., Inc.*, 53 F. Supp. 870 (W. D. N. Y. 1943); *United States v. Coffman*, 50 F. Supp. 823 (S. D. Cal. 1943); *United States v. Di Corvo*, 37 F. 2d 124 (D. Conn. 1927).

5. 269 U. S. 20 (1925).

6. 38 Stat. 785 (1914), as amended, 26 U. S. C. A. § 1040 (1940).

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." <sup>7</sup> This case is illustrative of Supreme Court cases which have primarily dealt with this matter in dicta, except for the automobile cases such as *Carroll v. United States*,<sup>8</sup> *Husty v. United States*<sup>9</sup> and *Sher v. United States*.<sup>10</sup> In the *Carroll* case the Court allowed a search without a warrant of an automobile, upon lawful arrest of its occupants who were illegally transporting liquor.

The lower federal courts have more often been directly faced with this problem, particularly in the cases involving a violation of the Eighteenth Amendment,<sup>11</sup> and, by and large, they have conformed to the views expressed by the Supreme Court, if anything being more liberal. Of course, there are certain limitations attached to the right to search as an incident to lawful arrest without a search warrant, such as: the arrest must be lawful, this means based on an arrest warrant or on probable cause;<sup>12</sup> the probable cause may not be established by the results of the search;<sup>13</sup> the search must be contemporaneous with the arrest;<sup>14</sup> and cannot be merely for exploratory purposes based, on the arrest as a pretext.<sup>15</sup>

The case of *Harris v. United States* is the Supreme Court's most recent decision on search and seizure as an incident to lawful arrest. In that case the defendant was apprehended in his three room apartment by federal officers carrying warrant for his arrest in connection with a forgery charge. Contemporaneously with the arrest the officers made an exhaustive search, lasting about five hours and covering the entire apartment, in an effort to unearth "any means that might have been used to commit the crime." In the course of this search the officers discovered draft cards illegally possessed in violation of section 11 of the Selective Training and Service Act of 1940.<sup>16</sup> The area searched in this case does not appear to have been excessive in the light of previous authority. The principal points of controversy are: (1) The reasonableness of the search; (2) the intensiveness of the search; (3) the fact that the articles

7. *Agnello v. United States*, 269 U. S. 20, 30 (1925).

8. 267 U. S. 132 (1925).

9. 282 U. S. 694 (1931).

10. 305 U. S. 251 (1938).

11. U. S. CONST. AMEND. XVIII.

12. *Lawson v. United States*, 9 F. 2d 746 (C. C. A. 7th 1925); *United States v. Hotchkiss*, 60 F. Supp. 405 (D. Md. 1945); *United States v. Antonelli Fireworks Co., Inc.*, 53 F. Supp. 870 (W. D. N. Y. 1943); *United States v. Esposito*, 45 F. Supp. 39 (E. D. Pa. 1942); *United States v. Blich*, 45 F. 2d 627 (D. Wyo. 1930).

13. *Jones v. Securities and Exchange Commission*, 298 U. S. 1 (1935); *United States v. Lee*, 83 F. 2d 195 (C. C. A. 2d 1936); *United States v. Novero*, 58 F. Supp. 275 (S. D. Mo. 1944); *United States v. Blick*, 45 F. 2d 627 (D. Wyo. 1930).

14. *Agnello v. United States*, 269 U. S. 20 (1925); *Papani v. United States*, 84 F. 2d 160 (C. C. A. 9th 1936); *United States v. Lee*, 83 F. 2d 195 (C. C. A. 2d 1936).

15. *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1930); *United States v. 1013 Crates of Whiskey Bottles*, 52 F. 2d 49 (C. C. A. 2d 1931); *United States v. Hotchkiss*, 60 F. Supp. 405 (D. Md. 1945).

16. 54 STAT. 885, 894, 895, 50 U. S. C. APP. § 311.

seized were not connected with the crime for which the arrest was made; and (4) the fact that search without a warrant is broader than with a warrant.

The first disputed question is what constitutes a reasonable search. The dissent of Mr. Justice Frankfurter in the *Harris* case<sup>17</sup> approves the view expressed in *Carroll v. United States*,<sup>18</sup> that "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." This view is followed in several lower court decisions.<sup>19</sup> However, it is in apparent conflict with the weight of authority as expressed in the case of *Go-Bart Importing Company v. United States*<sup>20</sup> which states that, "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." These two views as to what determines the reasonableness of the search are, under closer analysis, not materially inconsistent; for even the minority view must, in practical application, rest finally on the facts of the individual case. The majority opinion in the *Harris* case<sup>21</sup> does not attempt any such reconciliation; going even further, it expressly repudiates the minority view with the statement: "The test of reasonableness cannot be stated in rigid and absolute terms."

Mr. Justice Frankfurter, in his dissenting opinion in the *Harris* case,<sup>22</sup> attacks the reasonableness of the search on the ground that it was an "exploratory search."<sup>23</sup> If this contention is correct then there is little question but that the decision in the *Harris* case would be out of line with the great weight of decisions of both the Supreme and lower federal courts. However, the courts in practically unanimously condemning "exploratory searches" have failed to define adequately this "catch-all" phrase. The Court held a search not exploratory in *Paper v. United States*,<sup>24</sup> where federal officers, having a bench warrant for the arrest of the defendant, searched his house in an effort to apprehend him and discovered whiskey, which discovery was admitted at the trial. However, in the case of *United States v. Lefkowitz*,<sup>25</sup> in which the defendants were arrested for illegal possession of whiskey, in a two room office by officers carrying an arrest warrant, the officers searched both rooms of the office for liquor,

17. See *Harris v. United States*, 67 Sup. Ct. 1098, 1104 (1947) (dissenting opinion).

18. 267 U. S. 132, 149 (1925).

19. *United States v. Duane*, 66 F. Supp. 459 (D. Neb. 1946); *United States v. Bell*, 48 F. Supp. 986 (S. D. Cal. 1943).

20. 282 U. S. 344, 357 (1931).

21. *Harris v. United States*, 67 Sup. Ct. 1098, 1101 (1947).

22. *Id.* at 1104.

23. Though extensively used by the courts, this phrase is obviously redundant, for by its very nature a "search" implies some exploratory investigation. Attention was called to this in the recent case of *United States v. Strickland*, 62 F. Supp. 468 (W. D. S. C. 1945).

24. 53 F. 2d 184 (C. C. A. 4th 1931).

25. 285 U. S. 452 (1932).

opening desks, etc., and the court held this search to be exploratory and invalid, as being of greater intensiveness than the nature of the articles sought warranted. Here we are faced also with the question of the intensiveness to which a search may go before the courts condemn it as being exploratory. Although the decisions abound in a great deal of legal surplusage in an effort to establish some criterion on this point, in the final analysis, it would appear that the only satisfactory bases to be used in defining the limitations on a search are the nature of the articles sought and the good faith of the officers.<sup>26</sup> For an example of the first test: assume a defendant is arrested in his apartment for the theft of a grand piano and officers conduct a search of his desk, bureau, etc.; such a search would be obviously merely exploratory, but had the defendant been arrested for the theft of several rare stamps such a search would be entirely reasonable under the circumstances. Of course, these examples are somewhat exaggerated, but in the closer cases the good faith of the searching officers is often the determining factor in upholding or denying the search as being reasonable or only exploratory. Obviously such a test is difficult to apply and subject to great abuse at the hands of the courts; however, when taken in connection with the avowed policy of the federal courts to protect the individual from unreasonable search, it has in the past proved sufficient. In any event, an exact limit would be impossible of definition. The above brings out the reasoning of the majority opinion in the *Harris* case which held that because of the nature of the articles sought in that case (i.e. forged checks) and the further fact that the officers acted in complete good faith, the thoroughness of the search which ultimately uncovered the packet of draft cards was by no means so intensive as to be considered unreasonable.

On the question of the articles seized there has been wide dissension and it is on this point that the strongest opposition to the *Harris* decision has arisen. The real issue is whether officers making a reasonable search as an incident to a lawful arrest can seize instruments of *any* crime or only of *the* crime for which the arrest was made. A substantial number of federal courts expressly states that only fruits and evidences of the particular crime may be seized.<sup>27</sup> Others, though much smaller in number, seem to hold that instrumentalities or fruits (as distinguished from evidence) of any crime may be seized when discovered during the course of a lawful search.<sup>28</sup> Between these opposite

26. *United States v. Sebo*, 101 F. 2d 889 (C. C. A. 7th 1939); *Paper v. United States*, 53 F. 2d 184 (C. C. A. 4th 1931); *United States v. Hotchkiss*, 60 F. Supp. 405 (D. Md. 1945).

27. *Marron v. United States*, 275 U. S. 192 (1927); *Agnello v. United States*, 269 U. S. 20 (1925); *Takahashi v. United States*, 143 F. 2d 118 (C. C. A. 9th 1944); *United States v. Lindenfield*, 142 F. 2d 829 (C. C. A. 2d 1944); *Kelley v. United States*, 61 F. 2d 843 (C. C. A. 8th 1932); *Vecchio v. United States*, 53 F. 2d 628 (C. C. A. 8th 1931); *Vachina v. United States*, 283 Fed. 35 (C. C. A. 9th 1922).

28. *Gouled v. United States*, 255 U. S. 298 (1921); *Matthews v. Correa*, 135 F. 2d 534 (C. C. A. 2d 1943); *United States v. Strickland*, 62 F. Supp. 468 (W. D. S. C. 1945); *United States v. Rabicoff*, 55 F. Supp. 88 (W. D. Mo. 1944).

poles we find a surprising number of cases which confuse the issue due to carelessness of the authors of headnotes, who frequently in the cause of brevity, omit the words "the" or "a," giving a result which is likely to mislead a hasty reader.<sup>29</sup> A further cause of confusion are the cases in which the terms are used loosely or interchangeably when the particular question is not vital to the decision.<sup>30</sup> Although a substantial number of the state and federal courts have allowed a seizure of instrumentalities and fruits of a crime different from that for which the arrest was made,<sup>31</sup> a preponderance of federal courts discussing the point directly have held that only fruits and instrumentalities of *the* crime for which the arrest was made can be seized legally.<sup>32</sup> From this and from the further fact that carelessness in the wording of certain cases seems to set a precedent for the seizure of instrumentalities of any crime, it would appear that the heavy weight of federal authority supports the view of the case of *Takahashi v. United States*.<sup>33</sup> In this case, the defendant was arrested on probable cause for violating the Foreign Funds Control Act<sup>34</sup> and his brief case was searched. As a result of the search papers were seized and used to convict him of conspiracy, of a violation of an Executive order, and of causing false and fraudulent statements to be made in an application for an export license. In setting aside the conviction the court of appeals said:<sup>35</sup> "It may be laid down as a general principle that a reasonable seizure can only be made of instrumentalities of *the* crime itself and not of private papers which are mere evidence or indicia of the commission of a *crime*." [Italics ours] Here, as in most of the decisions denying the right to seize "articles" connected with a different crime than that for which the arrest was made, the court is dealing with mere evidence or indicia of the commission of another crime and not with its fruits and instrumentalities. Leaving aside the question of which crime the articles are connected with, courts have consistently been more liberal in allowing a seizure of loot and aids to crime than in permitting officers to take private property for use in evidence against its owner.<sup>36</sup> Similar to the former category is property the possession of which is in itself a crime.<sup>37</sup>

29. *Kelley v. United States*, 61 F. 2d 843 (C. C. A. 8th 1932); *Vecchio v. United States*, 53 F. 2d 628 (C. C. A. 8th 1931); *United States v. Poller*, 43 F. 2d 911 (C. C. A. 2d 1930).

30. *Sayers v. United States*, 2 F. 2d 146 (C. C. A. 9th 1924).

31. *North v. People*, 139 Ill. 81, 28 N. E. 966 (1891); *Closson v. Morrison*, 47 N. H. 482 (1867) (both of which cases involve dangerous weapons); *Smith v. State*, 4 P. 2d 1076 (Okla. Cr. App. 1931); *State v. Duffy*, 295 Pac. 953 (Ore. 1931).

32. See note 27 *supra*.

33. 143 F. 2d 118 (C. C. A. 9th 1944).

34. 40 STAT. 415 (1917), as amended, 12 U. S. C. A. § 95 (a) (1940).

35. *Takahashi v. United States*, 143 F. 2d 118, 123 (C. C. A. 9th 1944).

36. *Boyd v. United States*, 116 U. S. 616 (1886); *Takahashi v. United States*, 143 F. 2d 118 (C. C. A. 9th 1944); *United States v. Thomson*, 113 F. 2d 643 (C. C. A. 7th 1940); *Camden County Beverage Co. v. Blair*, 46 F. 2d 648 (D. N. J. 1930).

37. *Boyd v. United States*, 116 U. S. 616 (1886); *Weeks v. United States*, 232 U. S. 383 (1914).

This was the situation in the case of *Harris v. United States*, where the possession of the draft cards by the defendant was clearly a crime, and in the majority opinion Chief Justice Vinson<sup>38</sup> points this out as distinguishing the case from those cited above as propounding the weight of authority. A trend which has been recently illustrated by the so-called "OPA cases,"<sup>39</sup> particularly in *Davis v. United States*,<sup>40</sup> gives further support to the opinion in the *Harris* case by bringing out the distinction between seizure of purely private documents and of those which are considered property of the government and merely in the custody of the individual.

The last main point of controversy in the *Harris* case is the fact that under this decision a search incident to a lawful arrest may in many instances be broader in its scope than a search limited by a warrant. Several statements may be found in the federal cases to the effect that a search incident to an arrest cannot be broader than with a warrant.<sup>41</sup> However, in many cases the result of the decision is to permit a broader search as incident to a lawful arrest.<sup>42</sup> This is an almost necessary logical conclusion from the rule allowing any evidences or fruits of the crime to be seized, as a search warrant is by its nature confined to articles known to be on the premises at the time of its issuance. It is difficult to see how a search incident to a lawful arrest can be limited in the same manner as one with a warrant. What would be considered as comparable to the articles described in the warrant? Would the agents be deemed to hold a warrant for all articles connected with the crime? For one specific article? If for one article, what article? These questions have not been satisfactorily answered by the cases limiting search incidental to lawful arrest to the same strictness as that with a warrant. The court in *United States v. Strickland*<sup>43</sup> has followed this reasoning, saying: "A search implies some exploratory investigation. To observe that which is open and patent in either sunlight or artificial light is not a search." This quotation brings out the further point that the courts have generally recognized that no search is necessary to discover articles in the plain view of the officers and, even when the right to search is denied, the officer is not required to close his eyes to obvious violations of the law.<sup>44</sup>

38. *Harris v. United States*, 67 Sup. Ct. 1098, 1101 (1947).

39. *Bowles v. Insel*, 148 F. 2d 91 (C. C. A. 3d 1945); *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566 (C. C. A. 9th 1945); *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774 (C. C. A. 10th 1944); *Bowles v. Stitzinger*, 59 F. Supp. 94 (W. D. Pa. 1945).

40. 328 U. S. 582 (1946).

41. *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Papani v. United States*, 84 F. 2d 160 (C. C. A. 9th 1936); *United States v. Antonelli Fireworks Co.*, 53 F. Supp. 870 (W. D. N. Y. 1943).

42. *Marron v. United States*, 275 U. S. 192 (1927) (In this case the court expressly stated that papers, the seizure of which was not authorized by a search warrant for liquor, could be seized as incident to lawful arrest); *United States v. Strickland*, 62 F. Supp. 468 (W. D. S. C. 1945); *United States v. Brunett*, 53 F. 2d 219 (W. D. Mo. 1931).

43. 62 F. Supp. 468, 471 (W. D. S. C. 1945).

44. Mr. Justice Jackson in his dissenting opinion in the *Harris* case (p. 1120) brings

## II

In any discussion involving the question of searches and seizures the fundamental policies behind the Fourth Amendment and behind the limitations of its application must be clearly defined and understood. The problem is succinctly stated by Judge Learned Hand of the Circuit Court of Appeals, Second Circuit, in the case of *United States v. Poller*,<sup>45</sup> as follows: "In conclusion it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, limitations upon the fruit to be gathered tend to limit the quest itself, and in any case it is something to be assured that only that can be taken which has been directly used in perpetrating a crime. The remedy may not be very extensive, but it is something, and it is all that can be given, as we understand the present decision. A man is certainly subject to some search of his premises upon his arrest; if it would have been better to allow nothing without warrant but a search of his person, it is too late to hold so now." In deciding cases involving search and seizure, courts must constantly keep before them two goals, both of which cannot always be attained. One is the interest of the people, as a community, in the suppression of crime, and the other is the interest of the people in protecting the privacy of the individual. The Fourth Amendment was placed in our Constitution to protect the latter interest and courts have consistently maintained the privacy of the individual as paramount to the apprehension of criminals. This policy was eloquently expressed by Mr. Justice Holmes in a dissent in the case of *Olmstead v. United States*<sup>46</sup> where he said, "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained . . . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." While courts are extremely jealous of the rights of the individual, in search and seizure cases they have nevertheless found it necessary to distinguish between reasonable searches

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out this point in the following language: "It is said this search went beyond what was in plain sight. It would seem a little capricious to say that a gun on top of a newspaper could be taken but a newspaper on top of a gun insulated it from seizure. If it were wrong to open a sealed envelope in this case, would it have been right if the mucilage failed to stick? The short of the thing is that we cannot say that a search is illegal because of what it ends in. It is illegal because of the conditions in which it starts."

45. 43 F. 2d 911, 914 (C. C. A. 2d 1930).

46. 277 U. S. 438 (1928).



and the unreasonable search referred to by the Fourth Amendment—and a reasonable search as incident to a lawful arrest is a well established phase of our law.

## III

Let us now examine the *Harris* case in the light of the precedents and policies discussed above. There seems to be little question but what the officers had a right to conduct *some* search of the defendant, Harris, and of the premises under his control, inasmuch as the arrest was lawful, being under the authority of a warrant; and as has been pointed out, a reasonable search incident to a lawful arrest is permissible although not under the sanction of a search warrant. Further, the search was originally initiated by the officers in good faith for the purpose of discovering instrumentalities or evidence of the crime for which the arrest was made. Considering the nature of the articles sought, a search of this intensiveness would appear to be reasonable. The crucial question of the case is whether, in a search for instrumentalities of a particular crime, instrumentalities of another crime may be seized upon discovery and used in a subsequent prosecution of the defendant. In taking the affirmative view on this controverted question, the Supreme Court in the *Harris* decision apparently adopts, for the first time, the view of a substantial minority of federal courts.<sup>47</sup> As further support for the adoption of this view, Chief Justice Vinson's opinion stresses the point that the articles seized were not only instrumentalities of a crime but were in addition public documents belonging to the United States and in the illegal custody of the defendant.

It is difficult to see how this decision will produce any radical change in the field of search and seizure other than to allow seizure of instrumentalities or fruits of any crime when discovered during the course of a legal search. The sacred immunity guaranteed by the Fourth Amendment of the Constitution is still surrounded by as adequate safeguards as before. The search incident to a lawful arrest is still narrowly contained and protected by the stringent requirements of reasonableness, good faith and the strict limitations placed thereon by the courts. It has always been, in the final analysis, a question for the discretion of the court to be determined on the facts of the individual case, and so long as the high standards of our judicial system are maintained the power to make this limited search will not be abused.

Although the protection of the individual's liberty is of primary importance, the immunity of the Fourth Amendment was never intended as a means of protection for known criminals.

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47. See note 28 *supra*.