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Federal Power To Seize and Search Without Warrant

*Philip M. Carden**

Mr. Carden here explores the history and development of the power of federal officers to seize and search without warrant. The study is divided into the power to search persons, places, vehicles, and to seize things. The author concludes that, with a limited exception, no federal power of search or seizure of persons or property without prior special warrant can be derived from the federal constitution. Finally, the author suggests that the Supreme Court may refuse to follow its dicta upholding the federal power to search and seize without warrant if the proper case is brought before it.

INTRODUCTION

Federal law enforcement officers have power¹ to seize persons;² to search them,³ their body orifices,⁴ blood vessels,⁵ pockets,⁶ pocket-books,⁷ brief cases,⁸ automobiles,⁹ fields,¹⁰ dwellings,¹¹ offices,¹² hotel

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1. Some judges and text writers refer blithely to an officer's "right" to search and seize. For present purposes, however, the word "right" will be reserved for reference to those rights of the individual that are protected by the Constitution against infringement by government. On the other hand, the word "power" will be used in the sense of governmental power having some legal sanction and not to the naked power an individual police officer can exert merely because he has weapons.

2. *Draper v. United States*, 358 U.S. 307 (1959).

3. *Ibid.*

4. *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

5. *Breithaupt v. Abram*, 352 U.S. 432 (1957). Although this case involved state officers, the state and federal standards are now said to be the same. *Ker v. California*, 374 U.S. 23 (1963).

6. *Charles v. United States*, 278 F.2d 386 (9th Cir.), *cert. denied*, 364 U.S. 831 (1960).

7. *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

8. *Draper v. United States*, *supra* note 2.

9. *Brinegar v. United States*, 338 U.S. 160 (1949).

10. *Hester v. United States*, 265 U.S. 57 (1924).

11. *Harris v. United States*, 331 U.S. 145 (1947).

12. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

rooms,¹³ closets,¹⁴ beds,¹⁵ safes and filing cabinets,¹⁶ nooks and crannies;¹⁷ and to seize their papers and effects, all without special warrants.

“Such is the power, and, therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.”¹⁸

As the first seventeen footnotes indicate, the law is now to be found in the books, but the questions are: (1) Who put it there? (2) What books did *he* find it in? (3) Is it clear in proportion as the power is exorbitant?

For purposes of seeking the answers to those questions, it may be well to subdivide the power into its different applications as follows:

- A. The power to seize persons (arrest)
- B. The power to search persons
- C. The power to search places
 - (1) Dwelling houses
 - (2) Other houses
 - (3) Open fields
- D. The power to search vehicles
- E. The power to seize things

The sources of these powers will be sought, first, by reference to the decisions of the Supreme Court of the United States, second, by reference to federal statutes, and, third, from the Constitution and its history.

I. SUPREME COURT CASES

A. *Seizure of Persons*

The last case, as of this writing,¹⁹ in which the Supreme Court of the United States upheld an arrest by a federal officer without a warrant was *Draper v. United States*.²⁰ The Court's discussion of this power in its entirety follows:

13. *Abel v. United States*, 362 U.S. 217 (1960).

14. *Marron v. United States*, 275 U.S. 192 (1927).

15. *Harris v. United States*, *supra* note 11.

16. *United States v. Rabinowitz*, *supra* note 12.

17. *Harris v. United States*, *supra* note 11.

18. *Boyd v. United States*, 116 U.S. 616, 627 (1886), quoting from Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765).

19. Memorandum cases have not been surveyed.

20. *Supra* note 2.

26 U.S.C. (Supp. V) § 7607, added by § 104(a) of the Narcotic Control Act of 1956, 70 Stat. 570, provides, in pertinent part:

"The Commissioner . . . and agents, of the Bureau of Narcotics . . . may . . .

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" within the meaning of § 104(a), *supra*, to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, though without a warrant, was lawful . . .

Petitioner does not dispute this analysis of the question for decision.²¹

The only case citations included in the text were clearly, by the specificity of page references, given in support of the incidental search rule which was omitted from the above quotation and will be discussed under Part B of this article. Two cases are cited in a footnote in support of the proposition that "probable cause" and "reasonable grounds" mean the same thing.²² No suggestion appears why the asserted equivalence between the constitutional standard for issuing a warrant and the statutory standard for dispensing with the necessity of a warrant has any relevance. The implication seems to be that officers are governed by the same standard as magistrates—a proposition the Court has subsequently had some difficulty with.²³

In any event, both the Court and the litigants obviously assumed in the *Draper* case that Congress had power to delegate the magisterial and police functions to a single officer. Thus the point under inquiry was assumed without citation of prior authority in *Draper*.

In *United States v. Rabinowitz*,²⁴ the officers had a warrant that the Court held was valid, but the Court added:

Even if the warrant of arrest were not sufficient to authorize the arrest for possession of the stamps, the arrest therefor was valid because the officers had probable cause to believe that a felony was being committed in their very presence. *Carroll v. United States*, 267 U.S. 132, 156-57.²⁵

No mention of statutory authority appears and no source for the power was cited other than *Carroll*. In *Carroll*, at the pages cited,

21. *Id.* at 310-11.

22. *United States v. Walker*, 246 F.2d 519, 526 (7th Cir. 1957); *cf.* *United States v. Bianco*, 189 F.2d 716, 720 (3d Cir. 1951).

23. *E.g.*, *Jones v. United States*, 362 U.S. 257, 270 (1960).

24. *Supra* note 12.

25. *Id.* at 60.

the Court discussed the common law rule of arrest without a warrant, particularly in reference to its differentiation between misdemeanors and felonies on which the petitioner in that case relied for reversal. The propriety of federal officers exercising common law powers was not discussed, no statutory authority was cited, and the decision did not rest on the existence of such a power, the Court having found an independent power to search vehicles without a warrant regardless of any power to arrest without a warrant.²⁶ At the pages cited in *Rabinowitz* the *Carroll* opinion cited *Kurtz v. Moffitt*²⁷ and *Bad Elk v. United States*,²⁸ each of which assumed without deciding that Congress could constitutionally delegate power to arrest without a warrant and decided that Congress had not delegated such a power in the particular cases.

In *Brinegar v. United States*,²⁹ the Court posed the question for decision in terms of probable cause for arrest³⁰ but apparently decided it on the authority of the *Carroll* case in which no probable cause for arrest was found until after the search.

In *Trupiano v. United States*,³¹ the Court upheld an arrest without a warrant but held the search and seizure of property was not properly incident thereto because the officers had ample opportunity to get a search warrant and failed to do so. The Court's discussion of the arrest point follows:

Reference is made to the well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence. *Carroll v. United States*, 267 U.S. 132, 156, 157, a right said to be unaffected by the fact there may have been adequate time to procure a warrant of arrest. Since one of the petitioners, Antoniole, was arrested while engaged in operating an illegal still in the presence of agents of the Alcohol Tax Unit, his arrest was valid under this view even though it occurred without the benefit of a warrant. . . .

We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest,

26. *Carroll v. United States*, 267 U.S. 132, 158-59 (1925).

27. 115 U.S. 487 (1885).

28. 177 U.S. 529 (1900).

29. *Supra* note 9.

30. *Id.* at 164.

31. 334 U.S. 699 (1948). This case was overruled two years later, but only on the search point, in *United States v. Rabinowitz*, *supra* note 12, at 66.

even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully present. Common sense then dictates that an arrest in that situation is valid despite the failure to obtain a warrant of arrest.³²

Thus the only authority cited on this point in *Trupiano* is the same as that cited in *Rabinowitz*, that is, the *Carroll* discussion of the rule the Court declined to apply.

In *Marron v. United States*,³³ officers executing a valid search warrant found not only what they were looking for under the warrant but also found a person in the act of violating federal law in their presence. The Court held the officers were justified in arresting the person and in seizing additional property as incidental to the arrest although not listed in the warrant.³⁴ No authority for the arrest without a warrant was cited by the Court.

That is the extent of the Supreme Court authority capable of being construed as directly upholding challenged arrests by federal officers without warrants. Of these, only *Draper*, *Trupiano*, and *Marron* unequivocally made the point a basis for decision, and of these three only *Trupiano* involved action by officers who had neither a warrant nor statutory authority. In all of them the existence of the power to arrest without a warrant was assumed, and only its application was litigated or decided.

All of these cases involved crimes committed in the presence of the officers, but the cases show that the officers regularly act on the broader dicta granting them power to arrest without a warrant upon probable cause determined by themselves.³⁵

B. Search of Persons

The inquiry here also begins with *Draper*. The pertinent portion

32. *Id.* at 704-05.

33. *Supra* note 14.

34. *Id.* at 198-99.

35. See, e.g., *Henry v. United States*, 361 U.S. 98, 100 (1959); *Brinegar v. United States*, *supra* note 9, at 164; *Johnson v. United States*, 333 U.S. 10, 15 (1948); *Carroll v. United States*, *supra* note 26, at 156-57. It has been said that the Supreme Court held in *United States v. Di Re*, 332 U.S. 581, 589-90 (1948), *Miller v. United States*, 357 U.S. 301, 306 (1958), and *Johnson v. United States*, *supra* note 5, at 15, that a federal arrest must be tested by state law in the absence of an applicable federal statute. See, e.g., *Ker v. California*, 374 U.S. 23, 37 (1963) (minority opinion); Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U. PA. L. REV. 499, 523, 524 (1964). But all three of those cases involved arrests made jointly by federal officers having no statutory power of arrest without warrant and state officers having such power. *Miller*, *supra* at 305, and *Di Re*, *supra* at 591, specifically so limited the statement.

of that opinion, somewhat overlapping that previously quoted in Part A of this article follows:

If it did, the arrest, though without a warrant, was lawful and the subsequent search of petitioner's person and the seizure of the found heroin were validly made incident to a lawful arrest, and therefore the motion to suppress was properly overruled and the heroin was competently received in evidence at the trial. *Weeks v. United States*, 232 U.S. 383, 392; *Carroll v. United States*, 267 U.S. 132, 158; *Agnello v. United States*, 269 U.S. 20, 30; *Giordenello v. United States*, 357 U.S. 480, 483.

Petitioner does not dispute this analysis of the question for decision. . . .³⁶

The Court's omissions from the list of citations and the specificity of the page references in the citations given are both significant. The Court was apparently unwilling to cite *United States v. Rabinowitz*,³⁷ or *Harris v. United States*,³⁸ each of which might have provided stronger authority for the point.³⁹ The specific page references in the citations the Court relied on disclose the Court's awareness that in each of the four cited cases, the rule of incidental search was not a direct basis of decision.

The original dictum by which the incidental search rule was first imported into Supreme Court law appears at the page cited in *Weeks v. United States*,⁴⁰ as follows:

What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. This right has been uniformly maintained in many cases. 1 Bishop on Criminal Procedure, § 211; Wharton, *Crim. Plead. and Practice*, 8th ed., § 60; *Dillon v. O'Brien and Davis*, 16 Cox C.C. 245.

In tracing the line of authorities suggested in the above quotation, it will be well to remember the phrases "always recognized" and "uniformly maintained in many cases."

The only one of the "many cases" the Court troubled to cite was not an American case, nor even an English case proper. It was an Irish case decided more than a century after the American Revolution, and it apparently arose in the midst of an Irish revolution.⁴¹ Even

36. 358 U.S. at 310-11.

37. *Supra* note 12.

38. *Supra* note 11.

39. The Court has since made its doubts about these cases more specific. See *Abel v. United States*, 362 U.S. 217, 235 (1960); *Wong Sun v. United States*, 371 U.S. 471, 479-80 & n.8 (1963).

40. 232 U.S. 383, 392 (1914). All the subsequent cases rely on this dictum either directly or by citation of the line of authority tracing to it.

41. *Dillon v. O'Brien*, 16 Cox Crim. Cas. 245 (Exch. Div. 1827).

that court could find only three cases to cite as authority for its decision, and it conceded that none of those three actually decided the point for which they were cited but appeared to assume it.⁴² Finally, the actual point decided in *Dillon* was extremely narrow:

I desire to confine myself to the exact question which I think arises—that is, to a case in which the allegation is not that there was a reasonable suspicion of the plaintiff's guilt, but that he was actually guilty; that he was arrested whilst in the actual commission of the crime, that the articles taken were being at the time used in the commission of a crime; and in which their materiality as evidence is also stated as a fact and not upon suspicion.⁴³

Obviously the decision of that limited question in a British court can have little practical application to litigation of American rights of privacy under a Constitution specifically designed to avoid evils experienced under British rule.

The two secondary authorities cited in support of the *Weeks* dictum likewise fail to fully support the proposition when read in context. In Bishop, the section cited should be read along with the preceding and following sections.⁴⁴ In Wharton,⁴⁵ the cited section should be read

42. *Id.* at 248, citing *Regina v. Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771 (1839); *Rex v. Barnett*, 3 Car. & P. 600, 172 Eng. Rep. 563 (1829); *Crozier v. Cundey*, 6 B. & C. 232, 108 Eng. Rep. 439 (1827). *Crozier* involved a search with a search warrant in which items not listed in the warrant were seized and the victim was allowed damages. In *Frost*, money taken from the defendant was ordered returned without objection from the crown. In *Barnett* the court said money taken from a prisoner should be returned if it was not to be used in evidence.

43. *Dillon v. O'Brien*, *supra* note 41, at 248.

44. In 1 BISHOP, NEW CRIMINAL PROCEDURE (1913), the text of the three sections is as follows:

"§ 210. 1. Keep and Search—Seize what—The officer should safely keep an arrested prisoner until lawfully discharged; and if from violent conduct or other reason he fears an attempt to escape, he may search the person and take away any implements therein. But this right is limited; for example, it does not exist where the arrest is for mere disorderly drunkenness, and it is submitted to, and there is no ground to fear an attempt at escape. Again,—

"2. Money and Other Valuables.—In the absence of any special reason, the officer should not take anything from the prisoner's custody: for example, money, 'unless it be in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his defence.' Nor should the watch of one apprehended for rape be taken; and where it was, the court ordered its restoration. But—

"§ 211. 1. Bounds of Doctrine.—The arresting officer ought to consider the nature of the accusation; then if he finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs related to the transaction, he may take and hold them to be disposed of as the court directs. And discoveries made in this lawful search may be shown at the trial in evidence; as, marks and scars on the prisoner's person; and if there are tracks supposed to be his, the officer may require him to put his feet into them, or to take off his boots to be compared with them, the result to appear in evidence at the trial.

"2. Statutes—in some of the States confirm or extend this authority. Where, on

along with the following one.⁴⁶ So read, the rule becomes much less certain, uniform, and perpetual than the Supreme Court indicated.

Much of the text in Bishop is in terms of seizure alone without indication of any distinction between seizure without search and seizure upon a search. The search power mentioned in section 210 is conditioned on the officer's reasoned fear of an escape attempt. The search mentioned in section 211 is conditioned on a consideration of the nature of the accusation. And in section 212 the prisoner's continuing rights in any property seized are asserted.

In Wharton, neither section 60, cited by the Court, nor section 61 uses the word "search" at all. Furthermore section 60 cites no authority whatever and section 61 is devoted to limitations on the asserted authority to seize.

Turning to the authority cited by Bishop in support of the search rule in section 211, ten case citations will be found.⁴⁷ Of these, one

arrest for larceny, the officer was by the statute directed to 'seize and secure the money, goods, or other articles alleged to be stolen, which shall be found in the possession of such accused person, or which shall be waived by him in flying from justice,' it was held that the shop of the prisoner might be broken open and the stolen goods taken thence.

"§ 212. The Things taken—remain the prisoner's property. The officer, for example, cannot appropriate such money to pay the expense of conveying him to prison. He holds all, whether money or goods, subject to the order of the court; which in proper circumstances will direct him to restore the whole or a part to the prisoner. This power is exercised both in cases where the original taking was wrongful, and where for any reason there ought to be a partial or complete returning of the thing. Where a city marshal took a drum from one arrested for beating it contrary to a by-law, then after the trial retained it to prevent a repetition of the beating, he was held to be liable to the owner in trover."

45. Reference herein is to WHARTON, PLEADING AND PRACTICE (9th ed. 1889), the 8th edition being unavailable to the writer at this time.

46. Both sections follow:

"§ 60—Proofs of crime may be taken from person.

"Those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offence with which the defendant is charged. These articles are properly to be deposited with the committing magistrate, to be retained by him with the other evidence in the case, until the time comes for their return to the prosecuting authorities of the State. Sometimes, however, they are by local usage given at once to the prosecuting authorities. However, this may be, they should be carefully preserved for the purpose of the trial; and after its close returned to the person whose property they lawfully are.

"§ 61.—The right of the arresting officer to remove money from the defendant's person is limited to those cases in which the money is connected with the offence with which the defendant is charged. Any wider license would not only be a violation of his personal rights, but would impair his means for preparing for his defence. When money is taken in violation of this rule, the court will order its restoration to the defendant. That where property is identified as stolen, or is in any way valuable as proof, it may be sequestered, is nevertheless plain."

47. *Ex Parte Hurn*, 92 Ala. 102 (1891); *People ex rel. Tamplin v. Beach*, 49 Colo. 516 (1911); *Newman v. People*, 23 Colo. 300 (1896); *Woolfolk v. State*, 81 Ga. 551 (1888); *State v. Hassan*, 149 Iowa 518 (1910); *Getchell v. Page*, 103 Me. 387 (1908);

was an Irish case—*Dillon v. O'Brien*, previously discussed—and the other nine were state court cases. In six of the cases, the varying statements of the rule for which cited were dicta.⁴⁸ Only three of the opinions considered any constitutional questions,⁴⁹ and of these three, only one touched on federal law at all.⁵⁰ Those mentioning constitutional problems failed to present any rationale for the assumption that the common law or statutory rule asserted was consistent with constitutional principles. One of the opinions cited the same section of Bishop, from an earlier edition, of course. Six of the cases were decided more than a century after the adoption of the fourth amendment, and the oldest case in the lot, *Spalding v. Preston*,⁵¹ was decided more than a half century after the adoption of the fourth amendment. The *Spalding* case, which is cited in several of the later cases, was not decided on any asserted common law rule of incidental search and seizure but on “general grounds of preventive justice.”⁵² The opinion, in fact, was little more than an incoherent roar of rage that anybody would have the gall to bring trover for the return of half-finished counterfeit coins regardless of how they might have come into the clutches of the law.

The citations in the nine opinions add but three additional cases to the line of authority cited in Bishop.⁵³ None is as old as *Spalding* and none provides further authority in point antedating *Spalding*. However, one of them, *Closson v. Morrison*,⁵⁴ provides what appears to be the oldest case in the books linking the incidental search rule to the United States Constitution. For this reason, it may be well to quote the pertinent portion of the opinion in full:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against being deprived of life, liberty, or property without due process of law, is secured by the 4th and 5th amendments to the constitution of the United States, and by articles 15 and 19, Bill of Rights, N. H. constitution.

But in the administration of criminal law, searches and seizures often become, not only reasonable, but highly proper and necessary. The duty of officers under search warrants for specific property in specified places, is

Thatcher v. Weeks, 79 Me. 547 (1887); Smith v. Jerome, 47 Misc. 22 (N.Y. Sup. Ct. 1905); Spalding v. Preston, 21 Vt. 9 (1848); Dillon v. O'Brien, *supra* note 41.

48. *Ex Parte Hurn*, *supra* note 47; *People ex rel. Tamplin v. Beach*, *supra* note 47; *Newman v. People*, *supra* note 47; *Woolfolk v. State*, *supra* note 47; *Getchell v. Page*, *supra* note 47; *Thatcher v. Weeks*, *supra* note 47.

49. *Ex Parte Hurn*, *supra* note 47; *Newman v. People*, *supra* note 47; *State v. Hassan*, *supra* note 47.

50. *Ex Parte Hurn*, *supra* note 47.

51. *Supra* note 47.

52. *Spalding v. Preston*, *supra* note 47, at 12.

53. *Holker v. Hennessey*, 141 Mo. 527 (1897); *Closson v. Morrison*, 47 N.H. 482 (1867); *Houghton v. Bachman*, 47 Barb. 388 (N.Y. Sup. Ct. 1866).

54. *Supra* note 53.

well settled: 1 Ch. Cr. Law, 57, 58; *Com. v. Erwin*, 1 Allen, 587; *Halley v. Mix*, 3 Wend. 351. Our statute provides that 'any officer who shall find any implement, article or thing, kept, used or designed to be used in violation of law, or in the commission of any offence, in the possession of or belonging to any person arrested, or liable to be arrested for such offence, or violation of law, shall bring such implement, article or thing, before the justice or court, having jurisdiction of the offence, who shall make such order respecting their custody or destruction as justice may require.'

And we think that an officer would also be justified in taking from a person whom he had arrested for crime, any deadly weapon he might find upon him, such as a revolver, a dirk, a knife, or sword-cane, a slung-shot, or a club, though it had not been used or intended to be used in the commission of the offence for which the prisoner had been arrested, and even though no threats of violence towards the officer had been made. A due regard for his own safety on the part of the officer, and also for the public safety, would justify a sufficient search to ascertain if such weapons were carried about the person of the prisoner, or were in his possession, and if found, to seize and hold them until the prisoner should be discharged, or until they could be otherwise properly disposed of. *Spalding v. Preston*, 21 Vt. 9, 16.

So we think it might be with money or other articles of value, found upon the prisoner, by means of which, if left in his possession, he might procure his escape, or obtain tools, or implements, or weapons with which to effect his escape. We think the officer arresting a man for crime, not only may, but frequently should, make such searches and seizures; that in many cases they might be reasonable and proper, and courts would hold him harmless for so doing, when he acts in good faith, and from a regard to his own or the public safety, or the security of his prisoner.⁵⁵

The most that can be inferred from this line of authority is that by the middle of the nineteenth century, the custom of law enforcement officers to search their prisoners and keep what they found had grown into a source of litigation and that the state courts were of the opinion that such a power *should* exist with limitations varying according to the facts of the cases and the individual notions of the judges. The judges did not "look into the books" according to the common law rule of *Entick v. Carrington*,⁵⁶ or if they did, they did not find the power there, or if they found it, they did not say where they found it.

So far as this line of inquiry shows, the man that put this rule in the books was Judge Redfield of Vermont whose temper tantrum on paper in 1848⁵⁷ supplied enough law to satisfy such other judges as were thereafter inclined to look in the books before deciding that the common law sanctioned the incidental search rule.

55. *Closson v. Morrison*, *supra* note 53, at 484-85.

56. See note 18 *supra* and accompanying text.

57. *Spalding v. Preston*, *supra* note 47.

C. Search of Places

1. *Dwellings*.—In *Abel v. United States*,⁵⁸ the Supreme Court upheld the search of dwelling quarters (a hotel room) by federal officers without a search warrant as an incident to an arrest under an administrative warrant, but it did so only on the authority of the previous *Rabinowitz*⁵⁹ and *Harris*⁶⁰ cases, which it emphasized were not being reconsidered for reasons peculiar to the case at bar.⁶¹ *Rabinowitz* involved a search of an office and will be considered later.

In *Harris*, the Court upheld a five-hour search by five federal officers of a three-room-and-bath apartment as an incident to a lawful arrest under two valid arrest warrants. The Court reasoned as follows:

The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to a lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello v. United States, supra*, at 30, it was 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.' It is equally clear that a search incident to arrest, which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subjected to search.

Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four-room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and the other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive. But the area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room as contrasted to some other room of the apartment.⁶²

Thus the Court inverted the *Entick* rule approved in the *Boyd* case.⁶³

58. *Supra* note 13.

59. *Supra* note 12.

60. *Supra* note 11.

61. *Abel v. United States, supra* note 13, at 235. See note 39 *supra*.

62. *Harris v. United States, supra* note 11, at 150-52.

63. See note 18 *supra* and accompanying text.

Instead of looking into the books for a justification of the power and taking their silence as a witness against the existence of the power, the Court looked in the books and interpreted the silence as confirming the power and negating the right.

Of course, the Court did, by footnote,⁶⁴ contend that the *Agnello*⁶⁵ and *Marron*⁶⁶ cases supported the extension of the search, but neither of those cases went as far in its holding as the *Harris* court contended. *Agnello* struck down the only asserted power that the defendant contested on the very grounds that it was too far from the place of arrest. In *Marron*, the extent of the search was not in issue because a search warrant had covered the whole premises, and only the extent of seizure was in issue.

The *Agnello* expansion of the *Carroll*⁶⁷ and *Weeks*⁶⁸ dicta does not, of course, go as far, even by way of further dictum, as the actual holding in *Harris*. Furthermore, none of the authorities cited in the *Harris* footnotes⁶⁹ appears to support such an extensive and intensive search as the Supreme Court approved. A study of those authorities, however, does disclose one American case earlier than *Spalding*⁷⁰—an 1838 Massachusetts case involving a statute specifically referring to arrests for larceny and permitting contemporary seizure of the stolen goods.⁷¹ Compare this with the limiting dictum in *Houghton v. Bachman*.⁷²

An indication of the depth of the *Harris* Court's research in its vain effort to support an insupportable holding was its citation of *Sheares's Case*⁷³ in support of the assertion that incidental search was of ancient origin.⁷⁴ Even *Sheares's Case*, however, is not quite as ancient as the fourth amendment, having been tried in 1798. Furthermore, a reference to the page cited in the original report discloses only that a letter presumably taken from Mr. Sheares's parlor or study was admitted into evidence without objection or discussion of any legal point. The relevance of the citation to the *Harris* issue is difficult for this writer to follow.

Thus the law to justify a federal officer's search of dwellings without warrant apparently found its way into the books belatedly by the

64. *Harris v. United States*, *supra* note 11, at 152 n.16.

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

66. *Supra* note 14.

67. *Supra* note 26.

68. *Supra* note 40.

69. *Harris v. United States*, *supra* note 11, at 150-52 nn.11-16.

70. *Supra* note 47.

71. *Banks v. Farwell*, 38 Mass. (21 Pick.) 156 (1838).

72. *Supra* note 53.

73. 27 How. St. Tr. 255 (1798).

74. 331 U.S. at 150 & n.11.

same process that brought in the power to search arrested persons.

2. *Other Houses.*—In *United States v. Rabinowitz*,⁷⁵ the Supreme Court backed off from two prior decisions. It overruled the main holding in *Trupiano v. United States*,⁷⁶ that a search could not be justified as incidental to a lawful arrest if the officers had opportunity to get a search warrant⁷⁷ and emphasized points of difference between the case before it and the *Harris* case, particularly the fact that the place searched was a single business room open to the public.⁷⁸ The search in *Rabinowitz* was upheld as an incident to a lawful arrest in the office searched. In *Harris* the Court had indicated in a footnote that the only difference between an office and a dwelling was that “Stricter requirements of reasonableness may apply where a dwelling is being searched,”⁷⁹ citing two cases, including *Davis v. United States*.⁸⁰

In *Davis*, the Court came very close to reading places of business entirely out of the protection of the fourth amendment, at least where Congress has established a power of inspection on some ground or other. The particular congressional action involved in that case—gasoline rationing—was taken under the war powers clause,⁸¹ and the case was decided at a time when the Court may well have been affected by both war psychology and favorable inclinations toward economic masterminding. It may therefore be that the holding will have no sequel. It has not, however, been overruled, and the same sort of rationale appears more explicitly in a different context in *United States v. Morton Salt Co.*⁸² and similar cases involving business corporations and administrative powers of investigation.

In incidental search cases, it seems likely that the only difference will be in the standards applied in determining probable cause as suggested in the *Harris* footnote and the *Rabinowitz* decision.

Inspection of the authorities cited in *Rabinowitz* discloses that the ultimate source of this power, whatever it is, is the same as the source of the powers previously discussed and that it is shrouded in the same uncertainties as to origin.

3. *Open Fields.*—Mr. Justice Oliver Wendell Holmes was a master at annihilating an argument with a phrase. The damage he did to the right of free speech by relating it to the right to shout fire in a

75. *Supra* note 12.

76. *Supra* note 31.

77. *United States v. Rabinowitz*, *supra* note 12, at 66.

78. *Id.* at 58, 64.

79. 331 U.S. at 152 n.15.

80. 328 U.S. 582 (1946).

81. U.S. CONST. art. I, § 8, cl. 11-18.

82. 338 U.S. 632, 651-53 (1950).

crowded theater⁸³ may be vaguely gauged by reference to the number of times lesser minds have parroted the phrase in less appropriate contexts.

In *Hester v. United States*,⁸⁴ with even more devastating effect, Mr. Justice Holmes cooped up within four falls every American's expansive right to be secure from unreasonable seizures and searches. He did it with a dictum of a sentence and a half tacked onto a decision already reached on other grounds: "[T]he special protection accorded by the fourth amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226."⁸⁵

The pages cited in Blackstone concern the curtilage concept developed at common law in burglary cases. Mr. Justice Holmes, who did not like to explicate the obvious for the benefit of fools, neglected to explain the connection between the common law rules applicable to burglary prosecutions and the scope of the fourth amendment. He also neglected to explain the source of the powers to search and seize, which are necessarily assumed in the act of determining that the fourth amendment does not prohibit them. He also failed to explain why the amendment would not, nevertheless, cover the objects to be seized in open fields—say papers and effects—even if the location were not protected from search. Perhaps some non-fool will explain these obvious matters for the rest of us if the question ever comes up again.

On the present record, however, the source of the federal power to search private lands without warrant is Mr. Justice Holmes, who found it in Blackstone by implication.

D. Search of Vehicles

Mr. Chief Justice Taft did the only really creditable job of supporting a federal power to search and seize without a warrant on behalf of the Court. In *Carroll v. United States*,⁸⁶ he showed first that the officers were acting under the authority of a statute specifically designed to enforce a specific amendment to the Constitution—the eighteenth. This immediately linked the power to the Constitution from which all federal powers must be derived. Then he showed that the statute provided a different standard for seizures from moving vehicles than from stationary places, and that the distinction was a deliberate Congressional decision based on the rationale that the

83. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

84. 265 U.S. 57 (1924).

85. *Id.* at 59.

86. *Supra* note 26.

warrant procedure was not practical for movable vehicles. Then he reviewed the fourth amendment cases and noted that none involved a search of a movable vehicle. He then enunciated the rule he intended to apply: that a search for and seizure of contraband from a movable vehicle could be based on probable cause to believe that the vehicle contained contraband.

Then he noted the language in *Boyd v. United States*,⁸⁷ asserting that customs seizures were in a class by themselves, and had been so treated by Congress since the first import revenue act, the Act of July 31, 1789.⁸⁸ He then quoted the search and seizure provisions of that act which required warrant procedure for the search of a "dwelling house, store, building, or other place," but not for search of any ship or vessel. The logic of this contemporaneous construction of the fourth amendment is fully set forth. Then, to tie the whole argument together, he pointed out that the particular load of whisky involved in the case before the Court had been imported and was being transported from the port of entry inland at the time the contested search and seizure occurred.

Although the applicability of the case to vehicles engaged in internal commerce may be less certain, it may be conceded that insofar as movable vehicles involved in the import trade are concerned, the power to search and seize without a warrant has been well supported from the "books."⁸⁹

E. Seizure of Things

The Supreme Court has not always distinguished carefully between a search and a seizure in discussing questions primarily involving search problems, and it has sometimes even used the phrase "search and seizure" as the subject of a singular verb.⁹⁰ In *Abel v. United States*,⁹¹ however, Mr. Justice Frankfurter, with his usual thoroughness, made the distinction and some of its consequences quite clear:

Were the articles seized properly subject to seizure, even during a lawful search? We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for

87. *Supra* note 18.

88. 1 Stat. 29 (1789).

89. The *Carroll* rule was applied to an internal liquor car search in *Husty v. United States*, 282 U.S. 694, 700-01 (1931). However, in *Brinegar v. United States*, 338 U.S. 160 (1949), the Court purported to follow *Carroll* although stating the issue in terms of the incidental search rule, and in more recent cases of searches of vehicles the Court has ignored the *Carroll* distinction and ruled in terms of the incidental search rule entirely. See *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

90. See, e.g., *Preston v. United States*, 376 U.S. 364, 365 (1964).

91. 362 U.S. 217 (1960).

use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled v. United States*, 255 U.S. 298, 310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen v. United States*, 353 U.S. 346. . . .

Documents used as a means to commit crime . . . are seizable when discovered in the course of a lawful search, *Marron v. United States*, 275 U.S. 192.

The other item seized in the course of the search of petitioner's hotel room was item (1), a piece of graph paper containing a coded message. This was seized by Schoenenberger as petitioner, while packing his suitcase, was seeking to hide it in his sleeve. An arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, or that relevant evidence will be destroyed. Once this piece of graph paper came into Schoenenberger's hands, it was not necessary for him to return it, as it was an instrumentality for the commission of espionage. This is so even though Schoenenberger was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items. When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for. See *Harris, supra* 331 U.S. at 154-55.⁹²

It is to be noted, however, that even with his thoroughness, Mr. Justice Frankfurter omitted to cite any statutory or constitutional source of the powers he declared federal officers have. As his citations indicate, however, the power of seizure in this context traces to the same vague beginnings as the previous powers mentioned in this paper.

It would unduly lengthen this paper to attempt to explore and untangle the additional questions involved in the power of government agents to seize contraband without warrant when no search or trespass is involved, or to explore the related problems of congressional power to declare private property contraband.⁹³

F. Case Law Summary

If the inquiry were confined to the majority opinions of the Supreme Court of the United States, the answers to the three questions posed at the outset would be: (1) Except in the case of ships and vehicles, the law was put into the books by judges sitting long after the fourth amendment was adopted; (2) the judges got it from their own heads or from books that did not purport to deal with federal powers or

92. *Id.* at 234-35, 238.

93. It should be noted, however, that the Court found no occasion even to mention constitutional problems in the leading "probable cause" case involving internal seizure without mention of search, *Stacey v. Emery*, 97 U.S. 642 (1878).

even the ultimate sources of state powers; and (3) its clarity falls far short of being proportional to the exorbitance of the powers.

II. STATUTES

A. *Seizure of Persons*

The Excise Tax Technical Changes Act of 1958⁹⁴ added the following language to the Internal Revenue Code of 1954:⁹⁵

Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—

- (1) carry firearms;
- (2) execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;
- (3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing such felony; and
- (4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.⁹⁶

The Senate Finance Committee, in reporting favorably on the bill including the above delegation of power,⁹⁷ saw no occasion to discuss the source of congressional authority to delegate such a power, and made only the following comment on it:

Internal revenue officers whose duty it is to enforce criminal and forfeiture provisions perform an important law enforcement function, and it is desirable that specific statutory authority be provided for all such officers similar to the existing statutory authority provided in the case of other law enforcement officers who perform comparable duties (for example, the authority granted to agents of the Bureau of Narcotics and to Customs officers under section 7607).

The authority of internal revenue officers to make searches and seizures without warrant under certain circumstances is well recognized, and it is not intended that this section be construed as limiting any such existing authority.⁹⁸

The narcotic officers' section referred to by the committee had been

94. 72 Stat. 1275, 26 U.S.C. §§ 4216-26 (1958).

95. 72 Stat. 1430, 26 U.S.C. §§ 5001-862 (1958).

96. INT. REV. CODE OF 1954, § 7608.

97. S. REP. No. 2090, 85th Cong., 2d Sess. (1958).

98. *Id.* at 213.

added by the Narcotic Control Act of 1956.⁹⁹ The House Ways and Means Committee, in reporting favorably¹⁰⁰ on that bill likewise mentioned no constitutional problem:

Because present law has proved inadequate and in some cases has placed serious obstacles in the path of enforcement officers your committee is recommending appropriate changes in the applicable statutes.

For example, recent court decisions have tended, under certain circumstances, to furnish the criminal with a cloak of immunity to the detriment of society as a whole. These decisions have forced changes in recognized investigative procedures which have been sanctioned by the courts for many years. The narcotic traffickers, who are in most cases well organized professional racketeers, take full advantage of any limitations placed on enforcement officers. In some instances enforcement officers have been restricted in their right to arrest without a warrant, and to search and seize contraband before and after a valid arrest. The use of evidence of admissions and of confessions following an arrest has been curtailed. The enforcement officers have been required to secure an arrest warrant or a search warrant, even though circumstances indicate the impracticability of such a procedure. The delay involved in obtaining a warrant permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible, larger racketeers and wholesalers, an advantage over law-enforcement officers in their efforts to combat the illicit narcotic traffic.

Accordingly, your committee urges that the corrective measures provided in H.R. 11619 would provide for (1) authorization for more effective searches and seizures in narcotic cases; (2) authority for Federal agents to carry firearms, to execute and serve warrants, and to make arrests without warrants for narcotic violations under certain circumstances; . . . (4) the United States to have the right of appeal from certain court orders granting a defendant a motion to suppress evidence or to return seized property. . . .¹⁰¹

Thus appears the spectacle of Congress delegating a power to officers who already had been exercising it by judicial permit, not with any complaint that congressional authority in delegating powers had been bypassed by the courts, but with the complaint that the judiciary had not been sufficiently permissive. Yet the power delegated is no different and no broader than that already recognized by the Supreme Court.¹⁰² This does little to remove the confusion about

99. INT. REV. CODE OF 1954, § 7607. See notes 21 & 23 *supra* and accompanying text. The power granted for arrest without warrant in this section is essentially identical to that applying to felonies under § 7608. See text accompanying note 95 *supra*.

100. H. R. REP. No. 2388, 84th Cong., 2d Sess. (1956).

101. *Id.* at 3283. That it may well be the Narcotic Control Act's extreme punishments rather than any defects in enforcement powers that promotes crime has been suggested in some of the responsible criticism of narcotic policies now beginning to appear in general circulation publications. See, e.g., Straus, *Give Drugs to Addicts*, Saturday Evening Post, Aug. 8-15, 1964, p. 6.

102. See the cases referred to in Part 1(A), *supra*. The only broadening of the search power in the act was in respect to issuance of night search warrants.

federal arrest statutes noted in *United States v. Di Re*.¹⁰³ Nevertheless, it indicates a clear legislative concurrence in the judicial rule with respect to arrest without a warrant by federal officers. Further evidence of such concurrence is not lacking in other statutes now in force.¹⁰⁴ For instance, United States marshals¹⁰⁵ and Federal Bureau of Investigation agents¹⁰⁶ have powers delegated in similar terms. In addition, officers making arrests without warrants within these limitations may search buildings maliciously without incurring the penalties provided by statute for other persons searching buildings without warrants.¹⁰⁷ Even broader powers are conferred on coast guardsmen, customs officers and conservation officers in limited circumstances.¹⁰⁸

But, as pointed out by the Supreme Court in the *Di Re* case,¹⁰⁹ the statutory evidence is conflicting. A number of statutes delegate powers of arrest in limited areas without specifying whether a warrant is required or not.¹¹⁰ Others specifically limit the power of arrest without warrant to cases in which there is likelihood the person to be arrested may escape before a warrant can be procured,¹¹¹ and still others specifically limit the power of arrest without warrant to cases in which the offense occurs in the "presence" or "presence and view" of the arresting officer.¹¹² None of these appears to be consistent with a congressional assumption that all federal officers automatically have a power to arrest persons without a warrant, except, perhaps, those few sections that word the limitations in terms of specific prohibitions rather than qualifications on the delegation. Even these prohibitions fall short of showing any congressional concurrence in the desirability of having federal officers exercising the full powers delegated by the Supreme Court cases.

103. 332 U.S. 581, 590 (1948).

104. Because of the writer's limited access to older sources of legislative history, this review is necessarily limited largely to the implications of the statutes themselves.

105. 18 U.S.C. § 3053 (1958).

106. 18 U.S.C. § 3052 (1958).

107. 18 U.S.C. § 2236(b) (1958).

108. 50 Stat. 327 (1937), 16 U.S.C. § 772d(b) (1958).

109. *Supra* note 103.

110. *E.g.*, Library of Congress guards, 64 Stat. 412 (1950), 2 U.S.C. § 167h (1958); park police, 47 Stat. 1420 (1933), 16 U.S.C. §§ 10a, 415 (1958); forestry officers, 33 Stat. 873 (1905), 16 U.S.C. § 559 (1958); Secret Service agents, 18 U.S.C. § 3056 (1958); customs officers, 14 Stat. 180 (1866), 19 U.S.C. § 507 (1958); congressional sergeants at arms and Capitol police, 60 Stat. 719 (1946), 40 U.S.C. §§ 193, 212a (1958).

111. Immigration officers, 66 Stat. 233 (1952), 8 U.S.C. § 1357a(2), (4) (1958); prison personnel, 18 U.S.C. § 3050 (1958).

112. Conservation officers, 58 Stat. 102 (1944), 16 U.S.C. §§ 631j, 690e, 706, 727, 852d, 959, 990 (1958) and 57 Stat. 304 (1943), 48 U.S.C. § 192 (1958); conservation and customs officers, 18 U.S.C. § 3054 (1958); harbor inspectors, 72 Stat. 970, 33 U.S.C. § 446 (1958); officers enforcing navigation laws, 54 Stat. 166 (1940), 46 U.S.C. § 526n (1958).

This conflicting evidence to be found in the current sections of the United States Code presents a more orderly and significant picture when the confusion caused by codification is reduced by reference to the chronological order in which the various provisions were originally enacted.

As indicated at the outset, the Internal Revenue Service agents' statutory authority dates only from 1958 and narcotic agents' from 1956. FBI agents' statutory power in present terms dates only from 1951¹¹³ when Congress eliminated the requirement of the original 1934 delegation¹¹⁴ that the power be limited to cases in which there was likelihood the person to be arrested might escape before a warrant could be procured. Marshals were first specifically delegated the general power of arrest without a warrant in 1935.¹¹⁵ Before that time marshals had only such powers in this respect as might be inferred from the early delegation to them of powers analogous to those of sheriffs in the several states.¹¹⁶ Thus the four groups of officers who account for the vast bulk of federal arrests without warrants have had specific statutory authority for it for less than thirty years. The exemption of officers making arrests from the penalties for conducting searches without warrant also originated less than thirty years ago.¹¹⁷ Application of the escape statute¹¹⁸ to persons in custody pursuant to lawful arrest was also added in this period.¹¹⁹ The rescue statute¹²⁰ has not yet been so amended.

Thus most of the statutory evidence in support of the general rule has found its way into the books since the Supreme Court rule was developed in the *Carroll*,¹²¹ *Agnello*,¹²² and *Marron*¹²³ cases in the 1920's.

Of the other code sections considered, only one is as much as one hundred years old, and that one derives from the 1795 statute generally giving marshals power analogous to those of a sheriff in the respective states.¹²⁴

B. Search of Persons

In spite of the strong language about search powers quoted above

113. 64 Stat. 1239 (1951), amending 18 U.S.C. §§ 3052, 3107 (1958).

114. 48 Stat. 1008 (1934).

115. 49 Stat. 377 at 378 (1935), 28 U.S.C. § 504a (1958).

116. REV. STAT. § 788 (1875), 28 U.S.C. § 549 (1958).

117. 49 Stat. 877 (1935), 27 U.S.C. § 122 (1958).

118. 18 U.S.C. § 751 (1958).

119. 49 Stat. 513, 514 (1935), amending 46 Stat. 327 (1930).

120. 18 U.S.C. § 752 (1958).

121. 267 U.S. 132 (1925).

122. 269 U.S. 20 (1925).

123. 275 U.S. 192 (1927).

124. *Supra* note 116.

from the congressional committee reports on bills delegating to liquor and narcotic agents the power to arrest without warrant¹²⁵ it is noticeable that no specific power for search without warrant may be found in either of those laws as enacted.¹²⁶ Congress thus was apparently content as of 1956 and 1958 to continue to leave the power of search to be delegated by the courts. But that is not the only implication of the action. The committee's emphasis on evidence suggests that Congress may have adopted the police officer's too-ready assumption that the purpose of arrest is to get evidence instead of vice versa.

However that may be, it remains true that Congress has been sparing of specific delegations of general powers of search either of the person or of property without a warrant. The present code appears to have only nine sections delegating powers to search persons or their packages or baggage. Of these nine, five relate to the customs,¹²⁷ two to control of plant pests,¹²⁸ one to enforcement of conservation laws,¹²⁹ and one to liquor trade in the Indian country.¹³⁰ The oldest of these provides for customs searches of persons in language originally enacted in 1866.¹³¹ The next oldest¹³² does not provide for a search of the person although it specifies that packages may be searched.

The only statute that appears on its face to recognize any power by federal officers to search the person as an incident of a lawful arrest does not delegate such a power, but merely provides a penalty for persons who exercise such a power on the pretense of being a federal officer.¹³³ This statute dates only from 1935, long after the power had been recognized in Supreme Court dicta.¹³⁴

C. Search of Places

1. *Dwellings*.—One code section dating from 1957 authorizes warrantless searches of "premises" for plant pests,¹³⁵ and another dating

125. See text accompanying notes 98 & 101 *supra*.

126. INT. REV. CODE OF 1954, §§ 7607, 7608.

127. REV. STAT. § 3061 (1875), 19 U.S.C. § 482 (1958); 46 Stat. 717 (1930), 19 U.S.C. § 1461 (1958); 46 Stat. 727 (1930), 19 U.S.C. § 1496 (1958); 46 Stat. 747 (1930), 19 U.S.C. § 1581 (1958); 46 Stat. 748 (1930), 19 U.S.C. § 1582 (1958).

128. 71 Stat. 34 (1957), 7 U.S.C. § 150ff. (1958); 45 Stat. 468 (1928), 7 U.S.C. § 164a (1958).

129. 50 Stat. 325 (1937), 16 U.S.C. § 772d (1958), derived from 14 Stat. 178 (1866).

130. 18 U.S.C. § 3113 (1958).

131. REV. STAT. § 3061 (1875), 19 U.S.C. § 482 (1958).

132. 18 U.S.C. § 3113 (1958), derived from 13 Stat. 29 (1864).

133. 18 U.S.C. § 913 (1958), derived from 49 Stat. 877 (1935).

134. 232 U.S. 383 (1914).

135. 71 Stat. 34 (1957), 7 U.S.C. § 150ff (1958).

from 1875 delegates power to search "places" without warrant for liquor in the Indian country.¹³⁶ This appears to be as close as Congress has come to delegating power to search dwellings.

Some implication of congressional concurrence in the judicial declarations on this subject appears by implications of two 1935 provisions; one is the false personation statute¹³⁷ and the other the statute providing penalties for searches of dwellings without warrant.¹³⁸ The implication of the latter arises from the specific exemption of officers making lawful arrests.

An implication of sorts tending the other way arises from the fact that Congress has provided no authority for breaking doors to exercise the incidental search power comparable to that provided for officers serving search warrants.¹³⁹

This scarcity of statutory authority is consistent with the historic congressional reluctance to provide a general power of search of dwellings even with warrants.¹⁴⁰

The power to search dwellings without a warrant cannot easily be attributed to the initiative of Congress.

2. *Other Houses.*—In addition to the two statutes authorizing warrantless searches of "premises" and "places,"¹⁴¹ which might arguably include dwellings, two other current code sections delegate powers to search buildings in terms that cannot include dwellings.¹⁴² These, too, seem to have originated less than one hundred years ago in special purpose statutes that have had little or no impact on the law of search and seizure.

3. *Open Fields.*—Two additional statutes, other than those mentioned in the two preceding subsections, authorize entry on private lands without warrants. Both of these originated in the last quarter of a century. One provides for searches for opium poppies,¹⁴³ and the other provides for entries limited to border patrol work.¹⁴⁴ This falls somewhat short of showing congressional approval of Mr. Justice

136. 18 U.S.C. § 3113 (1958).

137. 18 U.S.C. § 913 (1958).

138. 18 U.S.C. § 2236 (1958), derived from 49 Stat. 877 (1935).

139. 18 U.S.C. § 3109 (1958). The Supreme Court, however, has obligingly supplied the statutory omission by implication. See *Miller v. United States*, 357 U.S. 301 (1958).

140. See the extensive summary of this point in Mr. Justice Frankfurter's dissent in *Davis v. United States*, 328 U.S. 582, 594 (1946).

141. See notes 135 and 136 *supra*.

142. 35 Stat. 426 (1908), 33 U.S.C. § 446 (1958), ("manufacturing works" to prevent harbor pollution); 21 Stat. 177 (1880), 39 U.S.C. § 700 (1958), ("any store or house, other than a dwelling house" to keep down competition with the post office).

143. 56 Stat. 1047 (1942), 21 U.S.C. § 188g (1958).

144. 66 Stat. 233 (1952), 8 U.S.C. § 1357(a)(3) (1958).

Holmes's dictum reading open fields entirely out of the protection of the fourth amendment.¹⁴⁵

D. Search of Vehicles

The only power of search without a warrant that has unequivocal support from the statutes dating from constitutional times is the power to search ships at ports of entry. As pointed out in the *Carroll* case,¹⁴⁶ the same Congress that proposed the Bill of Rights provided for customs searches of vessels without warrants in the first tariff act.¹⁴⁷

Nevertheless, the current statutes show no great congressional purpose to expand this into a general power to search vehicles of all kinds except in limited classes of cases. For enforcement of the customs, the power now applies to land vehicles as well as vessels¹⁴⁸ within the limits of the *Carroll* case. However, the power to search vessels without a warrant has been expanded beyond the customs field only in the conservation,¹⁴⁹ plant disease,¹⁵⁰ and harbor pollution¹⁵¹ statutes. Such searches of other vehicles for other than customs purposes are limited to searches for plants and plant pests,¹⁵² aliens,¹⁵³ and liquor in the Indian country.¹⁵⁴

Of these current sections, only three antedate the *Carroll* decision—those concerning liquor in the Indian country, customs, and harbor pollution. And of these, only the provision for customs searches of vessels antedates the Civil War.

E. Seizure of Things

Congress has delegated the power to seize property so freely and for such a long period without providing warrant procedures as to make a detailed survey here prohibitive. Suffice it to say that the first Congress saw no difficulty about delegating the power to seize property for the enforcement of import duties,¹⁵⁵ and subsequent

145. See notes 84 & 85 *supra* and accompanying text.

146. See notes 86-89 *supra* and accompanying text.

147. 1 Stat. 43 (1789).

148. REV. STAT. § 3061 (1875), 19 U.S.C. § 482 (1958); 46 Stat. 747 (1930), 19 U.S.C. § 1581 (1958).

149. 58 Stat. 102 (1944), 16 U.S.C. § 631j (1958); 50 Stat. 325 (1937), 16 U.S.C. § 772d(a) (1958); 64 Stat. 1070 (1950), 16 U.S.C. § 990 (a) (1958).

150. 71 Stat. 32 (1957), 7 U.S.C. § 150dd (1958); 71 Stat. 34 (1957), 7 U.S.C. § 150ff (1958); 45 Stat. 468 (1928), 7 U.S.C. § 164a (1958).

151. 35 Stat. 426 (1908), 33 U.S.C. § 446 (1958).

152. See statutes cited note 150 *supra*.

153. 66 Stat. 233 (1952), 8 U.S.C. § 1357(a)(3) (1958).

154. 18 U.S.C. § 3113 (1958).

155. 1 Stat. 39 (1789).

Congresses have expanded the delegation rather freely in support of other measures.¹⁵⁶

The power thus traces chronologically to constitutional times if not logically to constitutional principles, and the power has been delegated primarily by Congress rather than by the courts.

Nevertheless, seizures for general law enforcement purposes have been authorized more grudgingly. For instance, FBI agents are empowered only "to make seizures under warrant for violation of the laws of the United States."¹⁵⁷ Only revenue agents—the most recently empowered large group—have general statutory seizure power.¹⁵⁸

F. *Statutory Summary*

Congress, clearly, has been much more reluctant to grant officers power to act as their own magistrates than the courts have been, but the power may now be found clearly in the statute books at least with respect to seizures of persons and property.

Answering the questions posed at the outset as to how this body of law came into the books: (1) Congress, of course, put it there; (2) with the exception of customs searches and seizures of vessels, and limited searches and seizures in the Indian country, Congress appears first to have found it in the case books; and (3) it has been more grudgingly delegated and therefore even less clear in proportion to the exorbitance of the powers officers actually exercise than the court-delegated powers.

Just as the case law search came to an end in the middle of the nineteenth century with vague reference to state law, so the statutory search ends with little relationship to the constitutional period.

III. THE CONSTITUTION AND ITS HISTORY

No court seems to have approached the question of search or seizure in terms of the fundamental federal constitutional rule that the federal government can exercise only those powers delegated in the Constitution or necessarily implied as incidental to those delegated.¹⁵⁹ The original Constitution contains no specific delegation of power to seize or search, and therefore any exercise of such a power must depend

156. See Mr. Justice Frankfurter's comment at part A of the appendix to his dissenting opinion in *Davis v. United States*, 328 U.S. 582, 616 (1946).

157. 18 U.S.C. § 3107 (1958).

158. INT. REV. CODE OF 1954, § 7608(4).

159. *United States v. Butler*, 297 U.S. 1, 63 (1936); *Kansas v. Colorado*, 206 U.S. 46, 82 (1907); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 398 (1804).

on implication. The power of arrest, of course, is essential to the power to punish crime,¹⁶⁰ and the unlimited power of legislation in the District of Columbia and other federal areas¹⁶¹ may be assumed to have included both seizure and search powers so far as they may be necessary to local law enforcement. If it were not for the fourth amendment, however, there would be room for argument that the powers to search and seize property were neither necessary nor proper means for carrying out any of the purely federal powers delegated. There still is room for argument as to its proper use in particular cases, but the fourth amendment clearly recognizes that the powers exist to some extent by providing a limitation on them.

For present purposes, it may be assumed that the powers, however conferred and however exercised, are always used only in aid of a legitimate federal power to which search and seizure are appropriately incidental. The questions remain:

(1) Whether the courts may delegate the powers independently of Congress other than by the issuance of special process.

(2) Whether the power may be exercised without a warrant consistently with the fourth and fifth amendments.

The first question may be briefly answered. Even the power to issue arrest warrants, though considered incidental to judicial power, was for at least a century considered only in relation to the congressional power to confer it on specific officers.¹⁶² And the power to arrest without a warrant was specifically denied in the absence of congressional delegation as late as the beginning of this century.¹⁶³ That the court opinions approving officers' actions without warrants are legislative in nature and effect is a proposition too plain to admit of serious argument.¹⁶⁴ The court's declarations of federal officers' "rights" to search and seize without warrants are in fact treated as general warrants¹⁶⁵ issued to all federal officers in blank and in per-

160. Delegated specifically in U.S. CONST. art. I, § 8 cls. 6 and 10, and expressly mentioned in U.S. CONST. art. II, § 4 and art. III, § 3. It should be noted, however, that these sections mention only counterfeiting, piracies and felonies committed on the high seas, offenses against the law of nations, treason and bribery, thus leaving much of the criminal jurisdiction itself to implication.

161. U.S. CONST. art. I, § 8, cl. 17. The different considerations applicable to local law enforcement have been excluded from the present inquiry, but this by no means concedes that significantly different results would be required in this area.

162. See *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897).

163. *Bad Elk v. United States*, 177 U.S. 529 (1900). See also *United States v. Di Re*, 332 U.S. 581, 589 (1948); *Kurtz v. Moffitt*, 115 U.S. 487 (1885); see notes 27 and 28 *supra* and accompanying text.

164. In at least one case, a court of appeals has refused to give the Supreme Court rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), more than the prospective effect characteristic of legislation. *Gaitan v. United States*, 317 F.2d 494 (10th Cir. 1963).

165. See the dissenting opinion of Mr. Justice Murphy in *Harris v. United States*, 331 U.S. 145, 183 (1947).

petuity, and they are therefore even broader grants of power than any ever issued by an English court in colonial times in the form of the hated general warrants or writs of assistance.¹⁶⁶ This is a patent violation of the Constitution's careful separation of powers principle.¹⁶⁷

It is not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.¹⁶⁸

The second question may also be briefly answered for those who can throw off the clichés learned in freshman criminal law long enough to take a fresh look at the constitutional language. For those who accept the Supreme Court's unadjudicated assumption that the language needs interpretation, a more tedious analysis may be necessary. But first, the short answer.

The first rule of constitutional construction is that if there is no ambiguity in the language there is no room for construction.¹⁶⁹ Applying this rule, no need appears for construing the language of the fourth amendment.¹⁷⁰ It plainly declares the existence¹⁷¹ of a right to be *secure* from unreasonable searches and seizures and then provides an exclusive method for initiating reasonable ones.¹⁷² One determined to avoid that procedure might argue that the amendment does not say the procedure is exclusive, and therefore that other procedures may be devised.¹⁷³ But the argument implies that the authors

166. See LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 51 (1937).

167. U.S. CONST. art. I, § 1.

168. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

169. *Reid v. Covert*, 354 U.S. 1, 8 n.7 (1957), and cases there cited.

170. "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." U.S. CONST. amend. IV.

171. The amendment does not create the right declared, but only recognizes it.

172. "The principle was that all seizures without judicial authority were deemed 'unreasonable.'" Mr. Justice Frankfurter, dissenting in *Davis v. United States*, 328 U.S. 582, 605 (1946). Of course he, too, recognized exceptions to this obvious reading and sanctioned reference to extrinsic evidence for the purpose, but he nowhere points out the ambiguity of language that would justify the departure from the principle he perceived.

173. Judges express this idea not by reasoning from an ambiguity but by parroting the bromide from *Harris v. United States*, 331 U.S. 145, 150 (1947), that "it is only unreasonable searches and seizures which come within the constitutional interdict," or other phrases of similar vacuity. See, e.g., *United States v. Peisner*, 311 F.2d 94, 100

of the language trusted executive and police officers and distrusted only judges.¹⁷⁴ This is absurd. It may be that a wise public policy could be developed on other procedures, but no other can fairly be read into this language.¹⁷⁵ Besides, the argument overlooks the fact that the Bill of Rights does provide language to supply the alleged omission. The fifth amendment, the self-incrimination clause of which has already been solidly woven into the fourth amendment by the Supreme Court itself,¹⁷⁶ also provides that no person shall be deprived of liberty or property without due process of law.¹⁷⁷ Seizure always deprives a person of either liberty or property. Can it be doubted that the procedure for finding and seizing it prescribed by the second clause of the fourth amendment is the "due process" required in such cases by the fifth? If there were doubts, would they not be dispelled by the prospect of equating "due process" with "no process?" Finally, can any citizen call himself "secure" when he must submit to any federal officer or risk the outcome of an ex post facto determination of something as nebulous as whether the police officer had knowledge of facts on which he was entitled to assume he had "probable cause?"¹⁷⁸

Unless the fourth amendment language is arbitrarily mixed with hornbook conceptions of common law rules applicable to local law enforcement, it seems too plain for debate that when the federal government undertakes to lay hands on a citizen, enter his premises, or seize his property, it must invoke the warrant procedure. Since

(4th Cir. 1962); *McDonald v. United States*, 307 F.2d 272, 274 (9th Cir. 1962); *Price v. United States*, 262 F.2d 684, 685 (10th Cir. 1959); *Smith v. United States*, 254 F.2d 751, 756 (D.C. Cir. 1958); *United States v. Abel*, 258 F.2d 485, 490 (2d Cir. 1958); *Bryant v. United States*, 252 F.2d 746, 749 (5th Cir. 1958); *Lawson v. United States*, 254 F.2d 706, 708 (8th Cir. 1958); *McCinnis v. United States*, 227 F.2d 598, 602 (1st Cir. 1955); *Bradford v. United States*, 194 F.2d 168, 170 (6th Cir. 1952); *United States v. O'Brien*, 174 F.2d 341, 346 (7th Cir. 1949).

174. The complaint against general warrants and writs of assistance at the inception of the Revolution was that they "placed 'the liberty of every man in the hands of every petty officer.'" *Boyd v. United States*, 116 U.S. 616, 625 (1886), quoting from James Otis's argument in the writs of assistance cases in Boston in 1761. See note 203 *infra*.

175. The legislative history of the adoption of the fourth amendment is skimpy, particularly as to the manner in which the provision was changed into independent clauses. But such as there is indicates strongly that the intent was to provide broader rather than narrower protection. See *LASSON, op. cit. supra* note 166, at 100.

176. *Mapp v. Ohio*, 367 U.S. 643, 646 (1961); *Boyd v. United States*, 116 U.S. 616, 634 (1886).

177. "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

178. In determining whether to resist in such cases, the citizen has no warrant on which to base judgment, or even any recitation of the facts or supposed facts on which the officer may be acting. If the citizen guesses wrong he may be exposed to criminal prosecution for resisting. 18 U.S.C. § 2231 (1958).

the Supreme Court has already arbitrarily so mixed the language,¹⁷⁹ however, it will be necessary to explore the historical context of the fourth amendment in more detail.

A. *Seizure of Persons*

The right of the people to be secure in their persons . . . against unreasonable . . . seizures . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons . . . to be seized.

—U.S. CONST. amend. IV

No person shall . . . be deprived of . . . liberty . . . without due process of law

—U.S. CONST. amend. V

It cannot be denied that arrest without a warrant is a practice of ancient origin. So are most of the practices outlawed by the Bill of Rights. On the other hand, the use of warrants to authorize actions against citizens dates from the earliest records of Anglo-Saxon law.¹⁸⁰ The notion that the law of the land controls interference with liberty from the initial capture, and not merely upon a prisoner's appearance in court, dates at least from Magna Carta.¹⁸¹ And as early as 1256 an officer was held liable in damages for arresting an innocent person and there was apparently no discussion of "probable cause."¹⁸²

At the time of the American Revolution, the common law made distinctions between the authority of various local peace officers to arrest without a warrant. According to Blackstone,¹⁸³ a justice of the

179. *Carroll v. United States*, 267 U.S. 132 (1925); *Robertson v. Baldwin*, *supra* note 162.

180. See LASSON, *op. cit. supra* note 166, at 20, quoting from the *MIRROR OF JUSTICES* (1290).

181. Reprinted in PERRY, *SOURCES OF OUR LIBERTIES* 11 (1959). Chapter 39 provided: "No free man shall be *taken* or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land." (Emphasis added.) The modern fashion of discounting Magna Carta on grounds it meant something different in the technical language of feudalism is pointless. Accepting the contention, the fact remains that Lord Coke's interpretation intervened and provided the meaning Americans had in mind when they demanded the liberties of Englishmen, and this is the meaning that is pertinent in determining the relationship between Magna Carta and the American Bill of Rights. See PERRY, *op. cit. supra* at 7; 1 CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* at 255-57 (1956). LASSON, *op. cit. supra* note 166, at 19.

182. 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 583 n.1 (2d ed. 1898).

183. 4 BLACKSTONE, *COMMENTARIES* *292. The present discussion is limited to Blackstone because the work was published on the eve of the American Revolution, it seems accurately to represent the common law on the subject as of that time, and it was widely accepted as such in the early days of the Republic. See Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924). The refinements usually included in more modern statements of the "common law" of arrest reflect the work of nineteenth century jurists and text writers.

peace could arrest anyone committing a felony or breach of peace in his presence; a sheriff or coroner could arrest any felon within his county without a warrant; and a constable could:

without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue, he may upon probable suspicion arrest the felon

Night watchmen could "*virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody til the morning." All peace officers, in common with private citizens, were required to arrest for felonies committed in their presence and upon "probable suspicion also . . . arrest the felon, or other person so suspected," although "such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when the felony is committed."¹⁸⁴ Also felons and those who had dangerously wounded others could be pursued by hue and cry.¹⁸⁵

It will be observed that all of these provisions apply only to common law felonies, except for breach of the peace in the presence of justices of the peace, offenses falling within the purview of night watchmen, and dangerous woundings. These, clearly, are narrow provisions developed to meet the exigencies of local law enforcement, not to carry out revenue measures and high state policy comparable to the powers conferred generally on the federal government in this country. With the possible exception of the areas of unlimited federal jurisdiction,¹⁸⁶ it could hardly have been in the minds of the authors of the fourth amendment that any such exceptions would ever have any application to enforcement of federal law.

But suppose all of Blackstone's exceptions to the rule of arrest by warrant had been expressly written into the fourth amendment. Would a revenue officer act by the rule applicable to a sheriff, a constable, or a private citizen? What would the word "felony" mean? The Constitution deals in things, not names,¹⁸⁷ and neither Congress nor the courts could have assigned a new meaning to the word. Would it mean those specific crimes deemed felonies in England in 1776—or 1790? Or those deemed felonies in one or more of the states in 1790? Or would it be the standard of forfeiture that was outdated in Blackstone's time or the capital punishment standard applicable in his time?¹⁸⁸ The authors of the amendment could hardly have expected Congress to re-define the words willy-nilly by first defining felony in

184. 4 BLACKSTONE *292-93.

185. *Id.* at *293-94.

186. U. S. CONST. art. I, § 8, cl. 17.

187. *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 433 (1830).

188. 4 BLACKSTONE, *op. cit. supra*, note 183, at *98.

terms of one year's punishment,¹⁸⁹ and then scaling punishments for individual crimes up and down according to temporary punitive policies without thought of the constitutional impact. Surely words read into the amendment by doubtful implication ought not to be less certain in meaning.

The fact is that the common law exceptions could be read into the fourth amendment in their 1790 meaning without validating any considerable portion of the arrests daily made by federal officers without warrant in the twentieth century.

B. Search of Persons

The right of the people to be secure in their persons . . . against unreasonable searches . . . shall not be violated

—U.S. CONST. amend. IV

The above attempt at extracting the constitutional language pertinent to this particular sub-topic discloses the only real ambiguity in the fourth amendment. The second clause fails to mention searches of the person, thus providing some basis for arguing that, at least in searching the person, an officer might proceed without a warrant. This distinction, however, has apparently never been suggested,¹⁹⁰ and if it were, the problem of seizure without a warrant would still be posed.¹⁹¹

Logically, this is the most easily supported of all of the alleged powers of search without warrant. An officer may reasonably disarm a prisoner and it is only a small step from depriving him of arms in open view to patting his pockets to see if he has any concealed weapon. It is more difficult, however, to follow the officers (and the judges who uphold them) into a prisoner's pockets, and thence beneath his clothes and into the interior of his body.¹⁹²

Whatever power of search of the person was exercised in colonial times in England, it does not seem to have produced any litigation. Professor Lasson's exhaustive examination of the authorities seems to have turned up none and the present writer has found none. The earliest cases in either England or the United States appear to have arisen nearly forty years after the American Bill of Rights was ratified.¹⁹³ A single case in Queen Anne's time has been cited in a

189. 18 U.S.C. § 1 (1958).

190. The Supreme Court has assumed searches of the person to be on a par with other searches. *United States v. Di Re*, 332 U.S. 581 (1948); *Giordenello v. United States*, 357 U.S. 480 (1958).

191. See subpart E *infra*.

192. See the cases cited at notes 2, 5, and 6, *supra*.

193. The earliest seems to be *Rex v. Barnett*, 3 Car. & P. 600, 172 Eng. Rep. 563 (1829), in which no question was made of search.

seizure context, but the brief reported statement on the point is ambiguous as to whether it was a seizure in the present sense or the mere taking of a note for an unauthorized fee.¹⁹⁴ By either reading, the court disapproved the sheriff's action.

C. Search of Houses

1. Dwelling and Other Houses.—

The right of the people to be secure in their . . . houses . . . against unreasonable searches . . . 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

—U.S. CONST. amend. IV

As of Blackstone's time, the common law provided no basis for the search of any kind of a house without a warrant, unless a breaking to capture a felon be deemed a search.¹⁹⁵ The litigation and debate in both the United States and England in the eighteenth century concerned the issuance, limitations, execution, and return of warrants of some kind or other.¹⁹⁶ And even these usually were not the warrants of the common law courts, which seem to have been limited at that time to the purpose of recovering stolen property.¹⁹⁷ The warrants in issue were the prerogative warrants inherited from the Star Chamber by the Exchequer Chamber and the warrants of high administrative officers of the king, none of whom felt themselves bound by common law procedures. Indeed, on first challenge in King's Bench, Lord Hardwick held himself without jurisdiction to rule on the validity of these contested warrants.¹⁹⁸ But when the matter was finally brought in proper form before the common law courts, judgments for heavy damages were awarded and affirmed not only against those who executed the void warrants, but against those who issued them.¹⁹⁹

The common law clearly considered the determination of probable cause for the issuance of a search warrant to be a judicial act.²⁰⁰ Therefore it is unlikely that the authors of an amendment to the Constitution that so strongly emphasized the principle of separation

194. *Regina v. Johnson*, 11 Mod. Rep. 62 (1705).

195. 4 BLACKSTONE, *op. cit. supra*, note 183, at * 292-93.

196. The best review of all aspects of these controversies will be found in LASSON, *op. cit. supra*, note 166, at 40-76.

197. This was the only example Lord Camden mentioned in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765). See 2 HALE, PLEAS OF THE CROWN 113 (1778), where he disagrees with Lord Coke's opinion that even these warrants were illegal. 4 COKE, INSTITUTES *176.

198. *Rex v. Earbury*, 2 Barn. 396, 94 Eng. Rep. 544 (K.B. 1733).

199. *Huckle v. Money*, 2 Wils 206, 95 Eng. Rep. 768 (K.B. 1763); *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (1763); *Money v. Leach*, 3 Burr 1692, 19 How. St. Tr. 1001, 97 Eng. Rep. 1050 (1765); *Entick v. Carrington*, *supra* note 197.

200. 2 HALE, *op. cit. supra*, note 197, at 150.

of powers could have anticipated that executive warrants could be issued under the second clause of the fourth amendment.²⁰¹

The common law did provide a basis for distinguishing between dwelling houses and other houses,²⁰² but the contemporary history does not suggest that the American colonists made any such distinction in a search context. Surely the merchants of Boston were more concerned about the security of the smuggled goods in their warehouses than those in their private homes when they hired James Otis to resist the issuance of new writs of assistance after the death of the king in 1760.²⁰³ It seems much more probable that the authors of the fourth amendment had the more general meaning of the word in mind—the concept represented in such terms as *warehouse*, *custom-house*, *ale-house*, *coffee-house* and *House of God*. Certainly the first Congress so interpreted it,²⁰⁴ and the Supreme Court has generally done likewise.²⁰⁵

In any event, the fourth amendment was three-quarters of a century old before searches of any kind by federal officers without a warrant seem to have been even suggested.²⁰⁶ Similarly, state police practices seem to have led to no litigation over a search of a building without a warrant during the first half century of the republic.²⁰⁷

2. Search of Open Fields.—

The right of the people to be secure in their . . . effects, against unreasonable searches . . . 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

—U.S. CONST. amend. IV

A distinction between entry upon land and breaking into a house was made in the case of an owner seeking to recover his goods in the fifteenth century,²⁰⁸ and the common law courts, in enforcing the extreme penalties provided for burglars, made a distinction between

201. But the administrative warrant is with us yet. See *Abel v. United States*, 362 U.S. 217 (1960).

202. *Penton v. Brown*, 1 Keble 699, 83 Eng. Rep. 1193 (1664).

203. Professor Lasson gives the balanced story based on careful reading of all the usual sources and adds a few of his own. LASSON, *op. cit. supra* note 166, at 51. For a more dramatic account, see BOWEN, *JOHN ADAMS AND THE AMERICAN REVOLUTION* 203-19 (1950).

204. 1 Stat. 29 (1789).

205. Except for the implications of the *Davis* case as subsequently modified. See the discussion of the point notes 75-82 *supra* and accompanying text.

206. See the discussions in Parts I and II(C)(1) *supra*.

207. The writer has found no case in which a court either approved or disapproved a search of a building without a warrant or other process earlier than the 1838 case of *Banks v. Farwell*, 38 Mass. (21 Pick.) 156 (1838).

208. See LASSON, *op. cit. supra* note 166, at 74 n.78, citing Holdsworth's citation of *Y.B. Mich. 9 Edw. 4, 10*.

the mansion house and other property.²⁰⁹ Nevertheless, the right of property in land included the right to keep others even from bruising one's grass,²¹⁰ and trespass was and remains unlawful as to land, although subject to milder penalties.

But the argument implied by Mr. Justice Holmes's dictum in the *Hester* case,²¹¹ suggests that the authors of the fourth amendment did not choose to extend its protection to open fields but only to houses, papers and effects. The argument overlooks the eighteenth century meaning of the words.

In 1783, the United States entered into a treaty with Sweden in which the word "effects" was used, and that word has been uniformly interpreted in cases arising under that treaty to include both real and personal property.²¹²

It is true, of course, that the original wording as submitted to Congress was changed in committee to substitute "effects" for "other property."²¹³ But there is no indication that Congress had any idea of doing more than smoothing the language as it did at the same time by eliminating repetitions. Furthermore, all the evidence indicates that the search and seizure provisions adopted during the same period by the states were intended to cover precisely the same basic right, and the various choices of words indicate a broad conception of the coverage intended by such words as "possession"²¹⁴ and "places."²¹⁵

Finally the word selected in the second clause of the fourth amendment as the subject of search was "place," which is certainly broad enough to cover open fields.

This evidence is not conclusive, but in the absence of evidence to the contrary the rule of liberal construction of the right against the power should prevail.²¹⁶ And if the logic of the rule of exclusion is to keep the courts from being accomplices in the illegal acts of enforcement officers,²¹⁷ no reason appears for drawing the line between

209. 4 BLACKSTONE, *op. cit. supra* note 183, at *223, *225, *226.

210. See *Boyd v. United States*, 116 U.S. at 627 (1886), quoting from *Entick v. Carrington*, *supra* note 197.

211. 265 U.S. 57 (1924).

212. *Adams v. Akerlund*, 168 Ill. 632 (1897); *In Re Anderson*, 166 Iowa 617 (1914); *In Re Stixrud*, 58 Wash. 339 (1910).

213. LASSON, *op. cit. supra* note 166, at 100-01.

214. *E.g.*, Pennsylvania Declaration of Rights, art. X (1776); Tennessee Declaration of Rights § 7 (1796). The latter has been interpreted as including a field far from the dwelling house so long as it was possessed or occupied. *Welch v. State*, 154 Tenn. 60 (1926).

215. *E.g.*, Virginia Bill of Rights art. X (1776).

216. *Byars v. United States*, 273 U.S. 28, 32 (1927).

217. See *Elkins v. United States*, 364 U.S. 206, 222-23 (1960), quoting approvingly from the dissenting opinions of Justices Holmes and Brandeis in *Olmstead v. United States*, 277 U.S. 438, 469, 470 (1928), and the opinion of the Court in *McNabb v. United States*, 318 U.S. 332, 345 (1943).

illegal trespass on land and illegal trespass on other property. Either would sully the temple.

D. Search of Vehicles

Vehicles are unquestionably "effects" by any definition. Whatever may be the validity of the reasoning of the *Carroll* case²¹⁸ as to customs searches of ships and land vehicles at the threshold of United States territorial jurisdiction, the extension of that reasoning to the problems of internal law enforcement finds no justification in any cases arising either before or after the prohibition era.²¹⁹

E. Seizure of Things

The right of the people to be secure in their . . . papers, and effects, against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the . . . things to be seized.

—U.S. CONST. amend. IV

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . property, without due process of law

—U.S. CONST. amend. V

The only legitimate object of any governmental search is the discovery of something to seize. Since the clear language of the fourth amendment requires a warrant to justify a seizure, and the historical evidence provides nothing persuasive to the contrary, by what reasoning are officers allowed to seize what they find in a search without a warrant? Or if they might "reasonably" seize it, why should it not be returned immediately to the court so that the officer's judicial act of determining probable cause for seizure can be put to the test immediately as in cases of seizure of persons?²²⁰

Nothing in the historical evidence helps to resolve this fourth amendment kicker that only Mr. Justice Frankfurter appears to have perceived—and he only incompletely.²²¹

IV. CONCLUSION

With the exception of customs searches of ships at ports of entry and seizures of dutiable goods, no federal power of search or seizure of persons or property without prior special warrant or other pro-

218. See Part I(D) *supra*.

219. See note 89 *supra*.

220. FED. R. CRIM. P. 5.

221. See text at notes 91, 92 *supra*.

cess,²²² can be derived from the Constitution of the United States either by reference to its language, its context, or its history. The cases to the contrary that arose more than a century and a quarter after the Constitution was adopted are not based upon a careful analysis of the language of the Constitution or a complete study of its history. They are based on hornbook conceptions of proper local law enforcement procedures as developed in the state courts during the nineteenth century.

These cases now have just a half-century of antiquity²²³ to support them, but "no degree of antiquity can give sanction to a usage bad in itself."²²⁴ And the Supreme Court has often refused to follow its own dicta in the face of what it deems a clear command of the language of the Constitution.²²⁵ Who knows whether it will stand by its dicta in this area until somebody brings the issue appropriately before it?²²⁶

222. Other types of judicial process, such as executions, can justify searches and seizures of property, of course. See *Boyd v. United States*, 116 U.S. at 624 (1886).

223. *Weeks v. United States*, 232 U.S. 383 (1914), was decided in 1914. Perhaps this is enough antiquity to avoid contradicting the Supreme Court. See *Harris v. United States*, 331 U.S. at 150 (1947), text at Court's note 11. Mr. Justice Cardozo's contention that it goes back to the days of hue and cry is hard to support. See *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923).

224. *Money v. Leach*, *supra* note 199.

225. *E.g.*, *Mapp v. Ohio*, *supra* note 176; *Elkins v. United States*, *supra* note 217; *Brown v. Board of Education*, 347 U.S. 483 (1954). A more directly analogous example is the rule Greenleaf apparently made up out of whole cloth that a court will not stop to consider how officers obtained relevant evidence, 1 GREENLEAF, EVIDENCE § 254a (10th ed. 1860). See Way, *Exclusion of Evidence Illegally Obtained*, 26 TENN. L. REV. 332, 336 (1959). The Supreme Court quoted Greenleaf's rule with approval in *Adams v. New York*, 192 U.S. 585, 594-95 (1904). The Court's effort to reconcile the *Adams* dictum with the *Boyd* case, 116 U.S. (1886), resulted in the development of the pre-trial motion to suppress evidence under the *Weeks* case, 232 U.S. 383 (1914). It took another half century of litigation to render the *Adams* case entirely obsolete, as it now clearly is. See *Elkins v. United States*, *supra* note 216; *Mapp v. Ohio*, *supra* note 176.

226. The Court has issued its invitation to the bar. See *Wong Sun v. United States*, 371 U.S. at 480 n.8 (1963).

