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IN DEFENSE OF THE EXCLUSIONARY RULE

by Timothy Lynch

Executive Summary

The Fourth Amendment to the U.S. Constitution protects Americans against unreasonable searches and seizures by government officials. Like other guarantees in the Bill of Rights, however, the Fourth Amendment cannot enforce itself.

Much of the modern debate about the enforcement of the Fourth Amendment has focused on the wisdom of and constitutional necessity for the so-called exclusionary rule, under which evidence obtained in violation of the Fourth Amendment is ordinarily inadmissible in a criminal trial. Conservatives often oppose the rule as not grounded in the Constitution, not a deterrent to police misconduct, and not helpful in the search for truth. Abolishing the exclusionary rule has been a high priority for conservatives for more than 30 years. When Republicans gained control of Congress in 1995, they immediately set their sights on the exclusionary rule. Although that "reform" effort did not succeed, it is likely that similar efforts may resurface.

The drive to abolish the exclusionary rule is fundamentally misguided, on constitutional grounds, for the rule can and should be justified on separation-of-powers principles, which conservatives generally support. When agents of the executive branch (the police) disregard the terms of search warrants, or attempt to bypass the warrant-issuing process altogether, the judicial branch can and should respond by "checking" such misbehavior. The most opportune time to check such unconstitutional behavior is when prosecutors attempt to introduce illegally seized evidence in court. Because the exclusionary rule is the only effective tool the judiciary has for preserving the integrity of its warrant-issuing authority, any legislative attempt to abrogate the rule should be declared null and void by the Supreme Court.

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Introduction and Background

The Fourth Amendment to the U.S. Constitution reads:

> 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.

Like the other amendments that constitute the Bill of Rights, the Fourth Amendment was written and ratified to protect the citizenry against overweening government. But none of those amendments is self-enforcing. Much of the modern debate surrounding enforcement of the Fourth Amendment has focused on the so-called exclusionary rule--on whether it is wise or constitutionally necessary. Under that rule, evidence obtained in violation of the Fourth Amendment is ordinarily inadmissible in a criminal trial.

A simple example will illustrate how the exclusionary rule can affect a criminal investigation. If a policeman got a tip that a local cab driver, Tom Smith, was moonlighting as a cat burglar, the officer might launch an investigation and search for evidence that would enable him to arrest and prosecute Smith. But if the policeman decided that the fastest way to find evidence was to break into Smith's home without a search warrant, his effort would be for naught. Even if the police officer discovered seven stolen TV sets in Smith's living room, the case would almost certainly be thrown out of court--at least under current law. It would be thrown out because Smith's attorney could have the trial judge bar the admission of the stolen goods as evidence since it was obtained through an illegal search. And without that illegally obtained evidence, the district attorney would probably be unable to successfully prosecute a case of theft.

The exclusionary rule is very controversial. Conservatives often oppose the rule as not grounded in the Constitution, not a deterrent to police misconduct, and not helpful in the search for truth in criminal proceedings. They believe there are more sensible ways to handle abuses by law enforcement personnel. Liberals, on the other hand, have generally defended the exclusionary rule, both as an appropriate judicial remedy for Fourth Amendment violations and because the rule can operate to deter police misconduct. This study will conclude that

the exclusionary rule is fundamentally sound, but for somewhat different reasons than liberal legal scholars typically offer.

Before addressing the constitutional merits of the exclusionary rule, however, it is important to emphasize that the Fourth Amendment was designed to shield the citizenry from unbridled police power. No power of government, short of arrest and incarceration, has such a direct impact on the life, liberty, and property of individual citizens. As Fourth Amendment scholar John Wesley Hall Jr. observes,

> The raw power held by a police officer conducting a search is enormous. An officer wielding a search warrant has the authority of law to forcibly enter one's home and search for evidence. The officer can enter at night and wake you from your sleep, roust you from bed, rummage in your drawers and papers, and upend your entire home. Even though the particularity clause of the warrant defines the scope of the search, the search, as a practical matter, will be as intense as the officer chooses to make it.[1]

Indeed, when the police come to a house or business and demand entrance, the individual citizen has only a moment to decide whether to risk violence by withholding consent or, alternatively, to yield to one or more strangers. If police officers gain entrance and then abuse their search authority--such as by using profanity in front of young children, by pointing their weapons at nonthreatening occupants, by damaging family belongings, by detaining residents for inordinate periods of time, by spreading innuendo to neighbors or local news reporters, or by using excessive force against the individual or his family--the individual citizen can only stand by helplessly until such time as the police decide to leave. An aggrieved citizen might later hire a lawyer and file a lawsuit, but his success would be far from certain and it could take years to secure any compensation or vindication for such abuse.

Many citizens have lost their very lives during police searches. Here are a few recent examples of the tragic consequences of police searches:

- In 1995 sheriff's deputies in Beaver Dam, Wisconsin, burst into a trailer home to execute a search warrant as part of a drug investigation. Moments after the deputies entered the trailer, one of them shot and killed 29-year-old Scott Bryant. Bryant,

who was unarmed and offered no resistance, died in front of his eight-year-old son. A search of the residence uncovered a few grams of marijuana.[2]

• In 1994 a police SWAT team in Boston broke down an apartment door without warning and tackled an elderly occupant. When the search did not turn up any drugs, the police realized they had raided the wrong home. The elderly man the police had tackled and handcuffed turned out to be a retired minister. The Reverend Accelynne Williams suffered a severe heart attack during the search and died the same afternoon.[3]

• In 1992 California law enforcement agents burst into Donald Scott's Malibu ranch at an early morning hour. Scott, who was in the process of getting dressed, thought he was being burglarized so he went to get his handgun. When he rushed into his living room carrying his gun, he was shot dead by the police. A subsequent inquiry into this incident by the local district attorney found that drugs were never located on the ranch and that Scott was completely innocent.[4]

• In 1996 an Iowa City patrolman's suspicions were aroused when he noticed that the door to a business firm was ajar at midnight. The patrolman thought a burglary might be in progress so he requested a back-up unit. When another police unit arrived on the scene, officers entered the business to investigate. Moments after entering the building, a patrolman shot and killed 31-year-old Eric Shaw. Shaw turned out to be an artist who frequently worked on his sculptures at his father's business late in the evening because he ran his own small business during the day. Shaw was unarmed, offered no resistance, and had his father's permission to work on the premises.[5]

Given such chilling examples--regrettably, only a small sample--fair-minded people from across the political spectrum should be able to agree that the Fourth Amendment's safeguards against unreasonable searches are as important today as they were 200 years ago.

At the same time, people of good will must also recognize and acknowledge the existence of a reciprocal danger. The life, liberty, and property of ordinary Americans are also threatened by criminal predators who rob, rape, and kill. Millions of Americans are victimized each year by violent criminals. Police are expected to track criminals down quickly so they can be removed from

society and punished. An impatient public can sometimes encourage law enforcement officials to cut corners in their quest to apprehend the guilty. After all, the rationale runs, serious harm might result if shortcuts are not taken.

Thus, one of the great challenges of crime fighting in a free society is to develop and maintain legal procedures that will make it possible to bring the guilty to justice without subjecting citizens to unreasonable searches, unfounded accusations, or even death. In facing that challenge, Americans must resolve many difficult issues that plague our criminal justice system. This study will focus on one such issue--the constitutionality of the exclusionary rule.

The study will show that the exclusionary rule can be justified by separation-of-powers principles. When agents of the executive branch (the police) disregard the terms of search warrants, or attempt to bypass the warrant-issuing process altogether, the judicial branch can respond by "checking" that misbehavior when it is able to do so. As it happens, the most opportune time to check such unconstitutional behavior is when executive branch lawyers (prosecutors) attempt to introduce illegally seized evidence in court. Because the exclusionary rule is the only effective tool the judiciary has for preserving the integrity of its warrant-issuing process, any legislative attempt to abrogate the rule should be declared null and void by the Supreme Court.

First Principles: The Separation-of-Powers Doctrine

Before examining the constitutional merits of the exclusionary rule in detail, it will be useful to begin with first principles and then proceed, through deduction, to the narrow question of whether the exclusionary rule can be justified in criminal proceedings.

It is no overstatement to say that the central organizing principle of the U.S. Constitution, as distinct from its substantive principles, is the separation-of-powers doctrine. Although the phrase "separation of powers" does not appear in the constitutional text, no one can deny that the Constitution is structured on that maxim. Article I vests certain "legislative Powers" in Congress; Article II vests the "executive Power" in the president; and Article III vests the "judicial Power" in the Supreme Court. As Justice Joseph Story observed,

> The first thing, that strikes us, upon the slightest survey of the national Constitution, is, that its structure contains a fundamental separation of the three great departments of government, the legislative, the executive, and the judicial. The existence of all these departments has always been found indispensable to due energy and stability in a government. Their separation has always been found equally indispensable, for the preservation of public liberty and private rights. Whenever they are all vested in one person or body of men, the government is in fact a despotism, by whatever name it may be called, whether a monarchy, or an aristocracy, or a democracy.[6]

Because 200 years have passed since the ratification of the Constitution, modern-day Americans tend to forget that the Constitution of 1787 represented a bold new experiment in political science. In England, the balance of power would shift back and forth between the king and Parliament. The judiciary was not known as a separate power; it was in both theory and practice a part of the executive.[7] While it is true that the Framers of the U.S. Constitution incorporated those aspects of the British Constitution that they deemed worthwhile, the separation-of-powers principle and an independent judiciary were distinctively American innovations.[8]

To guard against the danger of one branch's seizing the powers and prerogatives of the others, the Framers devised a sophisticated series of "checks and balances." Congress has the power to pass and repeal laws, but the president can check those measures by vetoing bills. Congress can, in turn, override a veto if it can muster a two-thirds vote. The Supreme Court has the power of judicial review, but the president has the power to nominate judges and justices and Congress can confirm or reject executive nominations. The House of Representatives has the power to impeach executive and judicial officers who engage in misconduct, but the Senate tries all impeachments and the constitutional threshold for conviction is high--concurrence of two-thirds of the members present. By equipping each branch with powers of self-defense, the Framers believed they could prevent the concentration of governmental power in any one branch.

The constitutional system of checks and balances also operates within the criminal justice system. At a general level, of course, the legislature passes criminal laws, the executive enforces the law, and the judiciary inter-

prets and applies the law. Often the relations among the three branches of government are cordial and they cooperate with one another, but sometimes they clash. Under a system of separate and coordinate powers, however, each branch is expected to remain within its sphere and to respect the powers that the Constitution has assigned to the other branches. Acrimonious disagreements were expected, of course; encroachment, on the other hand, was proscribed because the usurper would essentially be declaring itself above the fundamental law of the Constitution.

To illustrate the potentially disastrous consequences of encroachment or usurpation in criminal cases, it will be useful to consider a few examples in which one branch of government blatantly disregards the separation-of-powers principle. Police officers would be acting outside their sphere, for example, if they were to execute prisoners on the basis of their own assessment of the evidence. Even if California state authorities had acquired ironclad proof that Charles Manson and his cohorts were killers, summary executions would have been unconstitutional. The U.S. Constitution expects executive officers to present their evidence in court and to respect judicial processes.

The legislature cannot bypass the judicial branch. Any law that called for the immediate arrest and execution of certain citizens would be null and void because of the Constitution's prohibition of bills of attainder and its requirement that citizens be given an opportunity to defend themselves.[9] Even if Congress had unanimously passed a resolution declaring Julius and Ethel Rosenberg guilty of espionage in 1950, the couple would still have had the right to a trial by a jury in a court of law.

The separation-of-powers doctrine also applies to the judiciary. If a judge were to order prosecutors to file criminal indictments against certain citizens, for example, he would be acting outside the judicial sphere. The power to prosecute is an executive power that cannot be assumed by any judge or judicial officer.[10]

Modern academics sometimes disparage the Framers' idea of checks and balances as a formula for "gridlock," but such criticism misses the point. The primary purpose of the Constitution is to safeguard the freedom of the American people, not to facilitate government programs or operations. As Judge Frank Easterbrook has noted, "Separation of powers--the inability of any one person or branch to have its way--was thought to be an essential component of a free Republic, not a hindrance to good government."[11]

Separation of Powers and the Fourth Amendment

In his famous treatise, Commentaries on the Constitution of the United States, Justice Story wrote that the provisions of the Fourth Amendment were "doubtless occasioned by the strong sensibility excited, both in England and America, upon the subject of general warrants almost upon the eve of the American Revolution." Story also remarked that the Fourth Amendment is "little more than the affirmance of [the] great constitutional doctrine of the common law."[12]

At first blush, Story's statements about the Fourth Amendment may seem inconsistent and implausible. After all, why would the American revolutionaries revolt against Great Britain and its general warrants only to turn around and incorporate English legal principles into their own Bill of Rights? The answer to that question lies in the distinction between the common law (judge-made law) and statutory law (legislative law). The early Americans admired the English common law with respect to searches and seizures, but they detested the statutory laws of Parliament--precisely because those legislative acts flouted common-law principles.

Under the common law, the courts issued only special warrants, which carefully circumscribed the power of Crown officers. Parliament, however, had the discretionary power to authorize nonjudicial officials to issue the much despised general warrant, which was notorious for its sweeping and open-ended terms. Against that background, Story's commentary on the Fourth Amendment makes perfect sense. The Fourth Amendment "constitutionalized" the common-law principles of search and seizure so that Congress could not dilute or distort those principles with the simple passage of a statute.

Executive Warrants, Multiple Officeholding, and Writs of Assistance

During the 1730s the British government sought to prevent the American colonies from conducting business with non-English industries. To enforce the trading restrictions, Parliament authorized the issuance of general search warrants that were called writs of assistance. Those writs conferred broad discretionary powers on individual officials to enter homes and shops in search of contraband. Disruptions during the French and Indian War prevented the writs from being widely used, but once that conflict ended, British officials turned their attention to

raising tax and tariff revenue in order to retire their enormous war debt. A general crackdown on smuggling soon began. The colonists fiercely resisted the restrictions on trade, the custom duties, and the capricious customs officers who attempted to enforce the British policy.

It is important to note that during this period the separation-of-powers principle was still inchoate: it was largely an abstract idea, discussed in books and newspapers. Still, certain Crown practices began to be judged against that fundamental principle--even if only in the court of public opinion. Thus, when William Shirley, governor of Massachusetts, began to issue "gubernatorial search warrants" to customs officers in the summer of 1753, he was forced to abandon the practice because of public opposition.[13] British officers had to resume the practice of applying for warrants from the Superior Court. Although still structurally a part of the Crown, the courts had adjudicative powers sufficiently distinct from the Crown's executive powers to afford some relief for the colonists.

Another Crown practice that drew the ire of the colonists was multiple officeholding. It was not uncommon during this period for government officials to hold several posts simultaneously. Thus, Thomas Hutchinson, a prominent defender of the writs of assistance, served as the Massachusetts Colony's lieutenant governor; but as president of the colony's council, he was also the highest ranking legislator. To top it all off, Hutchinson was also appointed chief justice of the colony's highest court. Hutchinson's accumulation of titles provoked widespread antagonism among the people of Massachusetts. The people viewed him as a government lackey who had no concern for their liberty or well-being. Indeed, the colonists came to loathe Hutchinson and his titles, deriding him as "Summa Potestatis," the supreme power.[14]

In 1761, after public resentment of snooping customs officials and their oppressive search tactics had reached the boiling point, a group of Boston merchants retained attorney James Otis to challenge the legality of the writs of assistance. The case was closely watched. In fact, Otis's forceful speech became one of the most famous legal arguments in the annals of American law.

> I will to my dying day oppose with all the powers and faculties God has given me all such instruments of slavery, on the one hand, and villainy, on the other, as this writ of assistance is. It appears to me the worst instrument

> of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English lawbook. . . . [T]he writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer. . . . A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Customhouse officers may enter our houses when they please; we are commanded to permit their entry. . . . Bare suspicion without oath is sufficient. . . . Every man prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor's house may get a writ of assistance.[15]

Although Chief Justice Hutchinson and his colleagues upheld the legality of the writs, American historian Albert Bushnell Hart credits Otis's fiery speech as being "the first in the chain of events which led directly and irresistibly to revolution and independence."[16] John Adams, who heard Otis's argument, said that every man in that crowded audience "appeared to me to go away, as I did, ready to take up arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[17]

Colonial Admiration for Lord Camden and the Common Law

The American colonists were not the only ones struggling against the general search warrant. English citizens in London and elsewhere were also battling against the overbearing British Crown. One of the most noteworthy legal controversies in Great Britain was Entick v. Carrington (1765).[18] That case began in November 1762, when the Earl of Halifax, the secretary of state, issued an executive warrant to seize John Entick, as well as his books and papers. Entick, a writer for an opposition newspaper, was suspected of publishing seditious libels. "The officers executing the warrant ransacked Entick's home for four hours and carted away great quantities of books and papers."[19] After that search, Entick sued the Crown's agents for trespass, and a jury ultimately awarded him 300 pounds in damages.

On appeal to the Court of Common Pleas, the British officials argued that their search warrant immunized them

from trespass lawsuits such as the one brought by Entick. The presiding judge, Lord Camden, found the warrant to have no legal validity whatsoever:

> If this point should be decided in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel. . . . This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. . . . I cannot be persuaded that such a power can be justified by the common law.[20]

As news of that ruling spread, Lord Camden was hailed on both sides of the Atlantic for his bold and clear-eyed expression of the common law and the rights of Englishmen. The judge was so revered in America that many towns and cities were named after him (e.g., Camden, New Jersey; Camden, Maine; Camden, South Carolina).[21] The Baltimore Orioles' baseball stadium is called Camden Yards, but few sports fans know that the site on which the stadium stands was named for the great English judge who stood for liberty and against tyranny.

There is an important footnote to the historic ruling of Entick v. Carrington. Although Lord Camden declared the executive warrant that had been issued by the secretary of state to be null and void, he conceded that such a warrant-issuing procedure--however odious its tendencies--could be authorized by an act of Parliament. Parliament could, after all, override the common law whenever it wished. Entick prevailed in his case because Secretary of State Halifax had simply assumed the power to issue search warrants without any prior authorization from Parliament. The concession noted by Lord Camden was acknowledged by all to be a correct exposition of English law. But the American patriots who were fighting against the writs of assistance viewed that concession with alarm: it was a dangerous loophole that could be exploited by Parliament.

Americans "Constitutionalize" Common-Law Principles

When the American revolutionaries sat down to draw up their plans for a new government, they were keenly aware of the shortcomings of the British Constitution. While they clearly admired the protections of the common law,

they also knew that Parliament could easily sweep common-law principles aside--especially in the case of searches and seizures. The lesson the Founders took to heart was that the British Constitution was "only and whatever Parliament said it was."[22]

Thus, the Framers of the American Constitution were determined to devise a better way to secure their hard-won liberties. Under the American Constitution, the powers of the government would be reduced to writing; they would be enumerated and divided among three separate branches, and the powers of the legislative body would be limited. As Chief Justice John Marshall noted in Marbury v. Madison (1803), "[T]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."[23]

It is against that background that one must read and interpret the words of the Fourth Amendment. The purpose of the Fourth Amendment was to elevate the common-law principles of search and seizure so that they would be beyond the reach of the legislature. The amendment essentially constitutionalized four precepts of the English common law: (1) the judicial nature of the "warrant-issuing" process, (2) the "probable cause" requirement, (3) the "oath or affirmation" requirement, and (4) the "particularity" requirement. Much has been written about the last three precepts, but little attention has been paid to the first. Yet it is the warrant-issuing process that holds the key to the controversy over whether the exclusionary rule can be constitutionally justified.

Under the common law, warrants would issue only "upon probable cause," and the determination of whether probable cause had been established was thought to be judicial in nature. Sir Matthew Hale, for example, said that the justice of the peace was to judge the reasonableness of suspicions or allegations. If the justice of the peace found the causes of the suspicions to be reasonable, the suspicions would then be his as well as the accuser's, and a warrant would accordingly be issued. Whether the warrant was or was not issued, the reasonableness of the accuser's suspicions would have been, in Hale's words, "adjudged."[24] Similarly, Lord Mansfield wrote in 1765 that "under the principles of the common law. . . . It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer."[25] Again, Blackstone wrote that it was the duty of the justice of the peace to "judge" the "ground of suspicion" before issuing a warrant.[26] Thus, the funda-

mental point is this: the determination of probable cause belongs to the judiciary. That is the common-law principle that was constitutionalized through the Fourth Amendment.[27]

Under the U.S. Constitution, then, the power to search is divided between the executive and judicial branches.[28] That fact has enormous implications for the American criminal justice system. To begin with, police officers must apply for search warrants from judicial officers before they can lawfully invade the homes and businesses of citizens. Judicial officers, in turn, must remain within their sphere and respect the searching prerogatives of the executive branch. The judiciary, for example, cannot issue commands to executive officers with respect to which houses ought to be searched. Even if a judge has firsthand knowledge that a particular home holds contraband, he cannot issue a search warrant and order the police to search that home. That is because the "governmental investigation and prosecution of crimes is a quintessentially executive function."[29] The judiciary can only react to the applications that are brought before it by agents of the executive branch; the judiciary cannot initiate an investigation or prosecution.[30] Those are just a few of the implications of the Fourth Amendment's division of powers between the executive and the judicial branch.

But for purposes of the exclusionary rule debate, what is most important is this: Whereas Parliament could tinker with, manipulate, and indeed pervert the common-law principles pertaining to searches and seizures, American legislatures must respect the warrant-issuing power the Constitution has lodged within the judicial branch. Under the U.S. Constitution, even a unanimous vote in Congress cannot alter the Bill of Rights or constitutional procedures. The Supreme Court recognized that point in Bram v. United States (1897):

> Both [the Fourth and Fifth Amendments] contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.[31]

Justice Antonin Scalia expressed the same sentiment in 1991 when he said, "It is the function of the Bill of Rights to preserve [the judgment of the Founders], not

only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices."[32]

Thus, the crux of the modern debate over the exclusionary rule is hidden within the basic constitutional question, Who issues search warrants? In America, judicial officers decide when search warrants are to be issued. Once the judicial nature of the warrant-issuing process is admitted, the constitutional debate over the exclusionary rule is essentially over, for any attempt by the legislative or executive branches to seize control of the warrant-issuing process amounts to a violation of the separation-of-powers principle.

Encroachment on the Judiciary: The Frontal Assault

Over the course of American history, many attempts have been made by the legislative and executive branches (sometimes separately, sometimes in concert) to wrest the search-warrant process from the judicial branch. Such attempts fall into three categories: (1) executive acts denying the constitutional role of the judiciary in the issuance of search warrants; (2) legislative acts attempting to reduce the judiciary's warrant-issuing procedure to nothing more than rubber stamping for the police; and, most subtle, (3) legislative acts attempting to cripple the judiciary's ability to defend itself against executive branch encroachment. Although attacks on the exclusionary rule fall into the last category, it will be useful to examine the more egregious instances of encroachment before turning to the more subtle threats to the constitutional powers and prerogatives of the judiciary.

The most blatant move against the judiciary's warrant-issuing process has taken the form of a denial, from the executive branch, that warrants are a constitutional prerequisite to searches of citizens' homes and businesses. Executive branch lawyers have made the claim that their agents can proceed with a search without having to ask a judge for a search warrant. In this view, the only constitutional question raised by warrantless searches is whether the police acted "reasonably."[33] Such a claim is nothing short of a frontal assault on the role of the judicial branch. The Supreme Court has had to thwart that attempted end-run around the courts on many occasions. In Johnson v. United States (1948), Justice Robert Jackson explained the constitutional role of the judicial officer in search and seizure situations:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman, or government enforcement agent.[34]

In other words, the Fourth Amendment places a judicial officer between the police and the citizenry "so as to prevent the police from acting as judges in their own cause."[35]

It should be noted here that the Supreme Court has never insisted upon a search warrant in each and every search situation.[36] If a homeowner voluntarily consents to a search, for example, the police do not have to obtain a warrant. And in emergency or "exigent circumstances" the police do not have to apply for a search warrant. Thus, if a policeman is in an automobile chase with a bank robber and the suspect suddenly turns off the public highway onto a private farm road, the policeman can continue the chase even though he has no judicial warrant for being on private land. Absent consent or exigent circumstances, however, the general rule is that the police must apply for a search warrant from the judicial branch prior to the invasion of any home or business.[37]

Some state legislatures have attempted to help the executive branch bypass the judiciary by vesting judicial powers in police agents. The New Hampshire legislature, for example, vested the warrant-issuing power within the office of the justice of the peace. Such laws, by themselves, were very common, but the New Hampshire law proved to be controversial because it contained almost no limitation on who could hold the title of "justice of the peace." When that legal procedure was challenged in the case of Coolidge v. New Hampshire (1971),[38] questioning by the trial judge and defense attorneys revealed that police

officers had been subverting the Fourth Amendment by issuing search warrants to themselves. Here is a telling excerpt from the trial transcript:

> The Court: You mean that another police officer issues these [search warrants]?
>
> The Witness: Yes. Captain Couture and Captain Shea and Captain Loveren are J.P.'s.
>
> The Court: Well, let me ask you, Chief, your answer is to the effect that you never go out of the department for the Justice of the Peace?
>
> The Witness: It hasn't been our--policy to go out of the department.
>
> Q.: Right. Your policy and experience, is to have a fellow police officer take the warrant in the capacity of Justice of the Peace?
>
> A.: That has been our practice.[39]

The Supreme Court declared the New Hampshire practice unconstitutional precisely because search warrants were being issued by executive branch agents.[40]

The judicial branch has a solemn duty to check the legislature by invalidating laws that transfer the judicial power to the executive branch--whether the transfer was effectuated by purposeful design or negligence.[41] That is what the separation-of-powers doctrine is all about. The New Hampshire practice was a throwback to the colonial days of multiple officeholding and executive warrants. Thus, the Coolidge ruling was a sound application of the doctrine.[42]

Some state courts have relied on the separation-of-powers doctrine in their own state constitutions to invalidate incursions into their warrant-issuing authority. In People v. Payne (1985),[43] for example, the Supreme Court of Michigan relied explicitly on the Michigan Constitution and its separation-of-powers doctrine to invalidate a search warrant that had been issued by a district court magistrate who was serving also as a deputy sheriff. Echoing Lord Camden and other sages of the common law, Justice James Ryan wrote that "the probable cause determination must be made by a person whose loyalty is to the judiciary alone, unfettered by professional commitment, and therefore loyalty, to the law enforcement arm of the executive branch."[44]

Encroachment on the Judiciary: The Lateral Assault

Thus far, then, efforts by the legislative branch to directly transfer the warrant-issuing power from the judicial branch to the executive branch have failed. But what about an indirect transfer of power? Legislatures have attempted to compromise the independence of the judiciary by converting the warrant-issuing procedure into a rubber-stamping process for police officers. Laws have been passed that essentially command the judiciary to issue search warrants once a legislatively prescribed set of circumstances has occurred. Such lateral assaults on the judiciary's warrant-issuing authority have also been recognized as a constitutional violation and have thus far been thwarted. Although that form of usurpation has not succeeded, it is nevertheless useful, by way of background, to study how the danger arose--and, more important, to learn how the courts repaired to constitutional principles to avert encroachment.[45]

At the turn of the century, state legislators tried to step up enforcement of local alcohol-prohibition laws by rigging the outcome of the warrant-issuing procedure. Most commonly, the legal threshold for warrant issuance was lowered by allowing executive agents to swear merely that they believed that a law had been violated instead of requiring them to swear that they believed that a particular set of facts had occurred. Then, once that very general threshold was satisfied, the law mandated that the judicial officer issue a search warrant.

Both of those changes were attempts to short-circuit basic Fourth Amendment principles. And the practical effect was to increase significantly the power of the executive branch vis-à-vis the judicial branch. Legislators were essentially holding the judicial officer's hands behind his back and inviting the executive to rifle through the judicial robes for a search warrant.

A prohibitory liquor case from the state of Indiana illustrates the legislature's lateral maneuver against the warrant-issuing prerogative of the judiciary. The relevant portion of the Indiana law reads:

> If any person shall make an affidavit before any . . . justice of the peace or judge of any court that such affiant has reason to believe, and does believe, that on any described or designated premises or tract of land, there is intoxicating liquor or a still or distilling apparatus which is being sold, bartered, used, or given away, or

> possessed, in violation of the laws of this state, such justice of the peace . . . or judge shall issue his warrant to any officer having power to serve criminal processes, and cause the premises designated in such affidavit to be searched. . . .[46]

That statutory procedure was employed in 1925, when a search warrant application was submitted to a justice of the peace in Henry County, Indiana. The application consisted of a single affidavit, which stated that "the undersigned affiant . . . has reason to believe and does believe that James Wallace has in his possession intoxicating liquor . . . in violation of the laws of this state."[47] On that information alone, a warrant was issued, and then served at Wallace's residence. Wallace was prosecuted and convicted of violating the liquor laws of Indiana on the basis of incriminating evidence discovered at his home. But he appealed his case to the state supreme court, arguing that the search of his home had been unconstitutional.

The Supreme Court of Indiana agreed with Wallace's argument, finding the affidavit procedures prescribed by the state legislature to violate the state constitution. Here is how the court explained its ruling:

> If it was intended by this statute to declare that an allegation in the affidavit, such as therein prescribed, shall be sufficient to show probable cause, and that an affidavit embodying such allegation alone is proof sufficient to warrant the magistrate to determine the question of probable cause, then in our opinion the Legislature, in that respect, exceeded its power. . . . The averment in the affidavit amounts solely to the possibility, not the probability, that affiant's belief will prove to be a fact, rather than a belief, upon the execution of the warrant, and not before. The affidavit, if untrue, would not subject affiant to prosecution for perjury, unless it can be proved that affiant, at the time he made the affidavit, knew that there was no intoxicating liquor at the place described.[48]

As that passage suggests, the whole purpose of the oath requirement is to help deter false or frivolous charges by making a sworn complaint against one's neighbor a matter of some risk.[49] Filing a complaint is supposed to be an act of some moment--for once the complaint is filed with

the police, the machinery of the state can be unleashed on the accused citizen. If a person is willing to assume the risk that attends the making of a sworn statement, and a judge finds the accuser's story coherent and credible enough to establish probable cause, an arrest or search warrant will issue.[50] That was the procedure of the common law, and that was the procedure that the Founders constitutionalized. Note, however, that if the legislative body could change the rules in such a way as to make the initiation of the state's legal process "cost free" by lowering the threshold with a mere generalized belief standard, it would undermine the Fourth Amendment's "Oath or affirmation" safeguard by making perjury prosecutions totally impracticable.[51] Fortunately, the courts have recognized that danger and have invalidated affidavit standards that allow warrants to issue on flimsy or unsubstantiated claims.[52] Persons filing sworn complaints must supply a statement of supporting facts from which the accuser concluded that a law was violated.[53]

Such threats to the oath requirement are tantamount to a transfer of power from the judicial to the executive branch. When judges must issue warrants upon the mere belief of police officers, they are reduced to rubber stamps. By inviting such flimsy or unsubstantiated search warrant applications to be submitted, and then compelling the issuance of the warrant, legislators have tried to make judicial officers subservient to the police. Such a naked transfer of power was also found by the Supreme Court of Indiana to violate the search and seizure provision of the Indiana Constitution:

> The judicial officer before whom an application for a search warrant is filed must exercise his judicial power to determine whether or not a warrant shall issue; such judicial function can be moved only by the facts brought before him, which are under oath or affirmation. A warrant to search and seize, which follows upon a statement based solely upon the belief of the affiant, based upon the secret facts of which he may have knowledge, and the conclusion which results from such reasoning is affiant's, not that of the judicial officer. The judicial process to ascertain probable cause is then transferred from the judicial officer to the affiant. The Constitution permits no such thing.[54]

Although the phrase "separation of powers" did not appear in its ruling, the Supreme Court of Indiana did allude to that concept when it analogized the warrant process to a

trial process, saying that it "was not within the [legislative] province to say to any judicial officer that, when he has heard proof of certain facts the evidence thus adduced before him shall constitute conclusive proof of the fact in issue in the trial of the cause before him."[55] Just as Congress must refrain from telling the Supreme Court how to decide a constitutional controversy in a pending case, so too must the legislature refrain from telling judicial officers when they must issue search warrants.[56]

The judiciary has thus far fended off attacks on its warrant-issuing prerogative from the executive and legislative branches. The frontal and lateral moves against the judiciary have been stymied. Yet the judicial role in searches and seizures is far from secure. The executive and legislative branches are as determined as ever to undercut, bypass, or override the judiciary.[57] In recent years, in fact, those branches have attempted to invade the judicial province through the "back door."

Encroachment on the Judiciary: The Back-Door Assault

Thus far we have seen how the judiciary has used its power of judicial review to defend its warrant-issuing prerogative from encroachment. But judicial review is only one of the judiciary's constitutional weapons. The primary weapon with which the judiciary has defended its role in searches and seizures has been the exclusionary rule, which bars the introduction of illegally obtained evidence in criminal trials.

The exclusionary rule can be justified on the basis of separation-of-powers principles. When agents of the executive branch (the police) disregard the terms of search warrants, or attempt to bypass the warrant-issuing process altogether, the judicial branch can respond by checking such misbehavior, when it is able to do so. As it happens, the most opportune time to check that kind of executive branch mischief is when executive branch lawyers (prosecutors) attempt to introduce illegally seized evidence in court. Because the exclusionary rule helps the judiciary to uphold the integrity of its warrant-issuing process, it is an inestimable weapon against executive branch transgressions.

The Exclusionary Rule: A Response to Executive Branch Lawlessness

As noted earlier, one way in which the executive branch has sought to expand its search and seizure powers is by denying the legal necessity of search warrants. Regardless of the reasons offered, it is a fact that police officers frequently choose to proceed with a search without applying for a warrant. Because judges and judicial magistrates are not on the scene when such searches take place, only much later does the judicial branch become aware of the circumstances surrounding a warrantless search--when prosecutors are in court seeking to present the evidence that the police acquired during the search. If the attorney for the accused contends that the search was unlawful and objects to the admission of illegally seized evidence, how should a trial judge respond? Should the evidence be excluded or admitted?

The Supreme Court addressed those questions in Weeks v. United States (1912).[58] Weeks, who was suspected of illegal gambling activity, was taken into custody at his place of employment, while a separate group of police officers went to his home and entered it without his permission and without a search warrant. The police seized various books, papers, and letters and turned those items over to prosecutors. When prosecutors tried to introduce some of those incriminating papers at Weeks's trial, the defense attorney cited the peculiar circumstances of the search and lodged an objection. The trial court overruled the objection, allowing the prosecution to introduce the seized papers. Weeks was convicted, but he appealed his case all the way to the Supreme Court, arguing that the trial court's failure to exclude the incriminating papers was a legal error.

Because a warrant is not required for every search, the Supreme Court began its analysis by reviewing the limited instances in which police may conduct searches without warrants. Finding none of those exceptions applicable to the case under review, the Court concluded that the search was unlawful and that the trial court should not have allowed prosecutors to introduce illegally seized evidence at trial.

> The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction

> of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. . . . To sanction such [methods of evidence gathering] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.[59]

The Weeks precedent makes sense. The Fourth Amendment manifests a preference for a procedure of antecedent justification that the police must follow before they can invade American homes or businesses. The exclusionary rule is a logical and necessary corollary to the principle of antecedent justification. Enforcement of the rule puts executive branch agents in the position they would have been in had there been no violation of the warrant clause. Thus, the exclusionary rule restores the equilibrium that the Fourth Amendment established.

The exclusionary rule is also appropriate where executive branch agents obtain a search warrant but then disregard its terms and conditions. Such misconduct is more common than many people think. In 1994, for example, a state judge in Oklahoma issued a warrant that authorized a search of the residence of one Albert Foster. Consistent with the particularity requirement of the Fourth Amendment, the warrant specifically identified the items to be searched for and seized--four firearms (one Remington shotgun, one Taurus .38 special, and two 22-caliber Rugar carbines) and any marijuana they might find. But the officers executing the search seized the following items:

> several VCR machines, miscellaneous video equipment, a socket set, two bows and a sheath containing six arrows, a pair of green coveralls, a riding lawn mower, three garden tillers, a brown leather pouch containing miscellaneous gun shells, a holster, several stereo systems, a CB radio base station, two soft tip microphones, several televisions with remote controls, a Dewalt heavy duty drill, a Vivitar camera tripod, a Red Rider BB-gun Daisy model, a Corona Machete in brown leather case, an ASAHI Pentex Spotmatic Camera, a Bowie type knife in black sheath, a Yashica camera MAT-124, a black leather bag with tapes, a metal rod, a Westinghouse clock radio,

> five hunting knives, a box of pellets, a screwdriver set, three vehicles, and a small box containing old coins, knives, watch, and jewelry.[60]

When a court hearing was held to determine the legality of the search, one of the police officers admitted that it was standard practice for his department to conduct open-ended searches. Here is a telling excerpt from the transcript of the hearing:

> COUNSEL: Would it be a fair statement that anything of value in that house was taken?
>
> MARTIN: Yes, sir. . . .
>
> COUNSEL: And would it be a fair statement that as long as you have been deputy in Sequoyah County that when you all do a search that this is the way in which it is conducted?
>
> MARTIN: Yes, sir.
>
> COUNSEL: You go in and look for everything that's there, for any leads or anything that might lead to something being stolen, or whatever?
>
> MARTIN: Yes, sir.[61]

Foster's defense attorney moved to suppress as evidence all of the property seized during the search. The trial court granted that defense motion because the police had "exhibited flagrant disregard for the terms of the warrant by conducting a wholesale seizure of Foster's property [which amounted] to a fishing expedition for the discovery of incriminating evidence."[62]

The executive branch cannot be permitted to make a mockery of the search warrant. When law enforcement officers disregard the terms of a warrant, the Constitution's particularity requirement is undermined and a valid, specific warrant is transformed into a general warrant. Since judicial officers are not on the scene when search warrants are flouted, the most opportune time to sanction such lawlessness is when executive branch representatives (prosecutors) come into court seeking the judge's permission to introduce the illegally obtained evidence. The only way the judiciary can maintain the integrity of its warrant-issuing process is by withholding its approval. The judicial branch cannot--and should not--rely on the executive branch to discipline its own agents.[63]

The exclusionary rule fits neatly within the Constitution's separation-of-powers framework. The men who framed and ratified the Constitution recognized "the insufficiency of a mere parchment delineation of the boundaries"[64] between the three branches of government. "The great security," wrote James Madison,

> against a gradual concentration of the several powers in the same department consists in giving those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.[65]

The exclusionary rule is a "commensurate" judicial response to the executive branch's attack on the judiciary's warrant-issuing prerogative. As the California Supreme Court has noted, since "the very purpose of an illegal search and seizure is to get evidence to introduce at trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced."[66] Withholding such "aid" in appropriate cases is a measured response to executive branch encroachment.

Executive and Legislative Branches Attack Exclusionary Rule

The exclusionary rule has always been controversial. The most contentious question is whether the rule is grounded in the Constitution or is merely a "judicially created remedy" for Fourth Amendment violations. The resolution of that question has very important policy implications. If the exclusionary rule is grounded in the Constitution, the executive and legislative branches must live with it--no matter how much they may dislike it. If the exclusionary rule is not grounded in the Constitution, Congress could try to abrogate the rule.

Unfortunately, the Supreme Court has wavered on the question of whether the exclusionary rule is embedded in the Constitution. Some Supreme Court rulings have suggested that the exclusionary rule is an inseparable corollary of the Fourth Amendment.[67] Other rulings have suggested that the exclusionary rule is only a judicially created rule of evidence that Congress might negate.[68] The latter view seems to be the dominant position of the modern Court.

Conservative critics of the exclusionary rule have seized upon the notion that the rule is nothing more than a judicially created remedy. In the mid-1980s, the Department of Justice issued a report that urged Attorney General Edwin Meese and President Ronald Reagan to pursue policies that would "result in the abolition of the exclusionary rule."[69] In 1994 the Republicans' Contract with America featured various reforms for the criminal justice system--including a curtailment of the exclusionary rule.[70]

When Republicans gained control of Congress in 1995, conservative legislators immediately set their sights on the exclusionary rule. Sen. Orrin Hatch (R-Utah), chairman of the Senate Judiciary Committee, crafted the Republican crime bill, section 507(b) of which sought to completely eliminate the exclusionary rule in federal criminal prosecutions. The new section of title 18 of the U.S. Code would have read:

> § 3502A. Admissibility of evidence obtained by search and seizure
>
> . . . Evidence obtained as a result of a search or seizure that is otherwise admissible in a Federal criminal proceeding shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment to the Constitution.[71]

That legislative attempt to stop trial courts from excluding illegally seized evidence was a back-door assault on the judiciary's warrant-issuing prerogative. The legislature has been unable to vest the warrant-issuing power in the executive branch. It has also been unable to diminish that power by converting the warrant-issuing procedure into a rubber-stamping process for executive branch agents. Its latest effort, therefore, is to negate the power by stripping the judicial branch of the one tool, the exclusionary rule, that has been most effective in thwarting encroachment by executive branch agents. Yet even that effort has thus far failed to win enough votes to succeed.

Despite those setbacks, many people in the legislative and executive branches are relentlessly pressing to limit the judicial role in searches and seizures by short-circuiting the warrant-issuing process. Make no mistake, abolishing the exclusionary rule would give executive branch agents a license to bypass the warrant application process and to disregard the terms of search warrants. After collecting evidence in warrantless searches, police

and prosecutors could enter court confident that the judge's hands would be tied by the new law, which says illegally seized evidence cannot be excluded in federal proceedings.

Critics of the exclusionary rule often stress that they wish to replace it with "a more effective remedy" for illegal police searches.[72] The substitute remedy typically offered is a civil damages action that would enable victims of unlawful searches to sue police departments for money damages. There are at least two responses to such a proposal. First, it begs the central constitutional question. In order to accept the suggestion that the judiciary ought to surrender its exclusionary rule in exchange for enactment of a civil damages action, one must first accept the proposition that the rule has no constitutional dimension. For all of the reasons outlined above, that proposition is not acceptable. The exclusionary rule can be justified on the basis of separation-of-powers principles. That means Congress cannot negate the rule with legislation.

Second, history shows that where courts do not employ the exclusionary rule, the problem of police lawlessness only gets worse. When the exclusionary rule was not in effect in the state of Ohio, for example, the Cincinnati police force rarely applied for search warrants. In 1958 the police obtained three warrants. In 1959 the police obtained none.[73] Although civil trespass actions were available to victims of unlawful searches, the potential threat of a lawsuit had a negligible effect on police behavior. (One has to suspect that when evidence of a crime is discovered through an illegal search, the chances of recovery through a damage award are substantially reduced.) The pervasive attitude among police officers was that if illegally seized evidence could be used in court, there was no reason to bother with the search warrant application process.[74]

Since many opponents of the exclusionary rule take the Constitution's text, structure, and history seriously, they would be well advised to step back and rethink misguided initiatives--such as the Hatch bill--in light of separation-of-powers principles. Again, the general thrust behind the separation-of-powers doctrine "is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other."[75] Legislative rules that seek to curtail or abolish the exclusionary rule represent an invasion of the judicial province. On the surface, such proposals may appear to be simple rules of evidence. Beneath the sur-

face, however, they are an attempt to transfer judicial power to the executive branch. That may not be the underlying motivation of some of the proponents, but that would unquestionably be the practical effect of a legislative abolition of the exclusionary rule. The legislature accomplishes that end by "directing" judicial officers and "restraining" them from exercising their constitutionally assigned responsibilities. Any legislative attempt to abrogate the exclusionary rule should therefore be declared null and void by the judiciary.

Common Objections to the Exclusionary Rule

Before concluding this study, it will be useful to address briefly some of the most common objections that have been lodged against the exclusionary rule.

The Rule Appears Nowhere in the Text of the Constitution

It is true that the exclusionary rule is not mentioned in the Constitution. It is also true that the exclusionary rule is not discussed in the writings of the Framers. But those observations should not end the inquiry into whether the exclusionary rule can be constitutionally justified.

In general, the Constitution says almost nothing about what should happen when constitutional principles are violated. The Sixth Amendment, for example, provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." Nothing is said, however, about how the speedy trial guarantee is to be enforced. The Supreme Court has had to grapple with that issue because over the years many accused persons have lodged complaints that the government has denied them a speedy trial. The Court has held that it is appropriate for trial courts to enforce the speedy trial guarantee against the executive branch by dismissing the prosecution's case with prejudice.[76] A dismissal with prejudice essentially nullifies the charges set forth in the indictment so that no further action can be taken against the defendant.

The measured response of the judiciary to speedy-trial violations is proper--even though the power "to dismiss indictments" is mentioned nowhere in the Constitution. Similarly, the exclusionary rule, also unmentioned, is a proper way to enforce the Fourth Amendment's warrant clause against executive branch violations.

The Rule Is Contrary to the Common Law

It is true that the exclusionary rule is inconsistent with the common law. Under the common law, a criminal defendant cannot object to the use of illegally obtained evidence at trial. That rule was expressed by a Massachusetts court in 1841:

> If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue. When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully.[77]

That is an accurate statement of the common law of England, but the court erred when it imported that rule into the Massachusetts legal system. The court failed to recognize the implications of the separation-of-powers doctrine in the search and seizure context, and that failure led the court to its erroneous legal conclusion.[78]

Critics of the exclusionary rule miss the point when they claim to find support for their position in the fact that the legal systems of other countries admit illegally seized evidence in criminal trials.[79] Comparing the exclusionary rule with the evidentiary rules of other countries is a fruitless exercise.[80] In America, the power to search is divided between our executive and judicial branches. The exclusionary rule is a byproduct of our Fourth Amendment and our unique system of checks and balances.

The "Costs" of the Rule Exceed the "Benefits"

The question of whether the "costs" of the exclusionary rule exceed its "benefits" is hotly contested among academic researchers.[81] But that policy debate has no bearing on the central contention of this study--that the exclusionary rule can be constitutionally justified on separation-of-powers principles.

On that point, it may be useful to draw another analogy with the Sixth Amendment. Everyone recognizes that jury trials are more expensive and time-consuming than bench trials, but that fact has no bearing on how we should interpret the jury-trial clause. The language of

the Sixth Amendment is unmistakably clear: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[82] The Constitution calls for jury trials even though they are not the most efficient trial procedure available. Policymakers cannot do anything about that (short of amending the Constitution itself). To paraphrase Justice Scalia, the president and Congress are not at liberty to conduct a cost-benefit analysis of constitutional guarantees and then adjust the meaning of those guarantees to comport with their findings.[83] That is why the executive and legislative branches must respect the Fourth Amendment and the judicial branch's warrant-issuing prerogative--even if a new study is conducted and conclusively shows that the exclusionary rule fails to satisfy cost-benefit criteria.

The Rule Provides No Remedy for the Innocent

Because the exclusionary rule typically shields persons who otherwise would probably be convicted, it has no bearing on innocent people who have wrongly been subjected to search and seizure. But the objection that the rule provides no remedy for such people can be very misleading since it does not take into account the nature of the judicial process.

The judiciary, after all, can only review the cases that are brought to court by the prosecution. As Justice Robert Jackson once observed, "There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which . . . we never hear."[84] The cases that ultimately reach the courtroom have already been filtered through a selection process controlled by the executive branch. When the police conduct a warrantless raid on a home or business but find nothing incriminating, the matter is almost always dropped. Obviously, the executive branch is not anxious to bring such matters to court because doing so would only reveal the extent of its lawlessness.

It is important to note, however, that proponents of the exclusionary rule wholeheartedly support legislative measures that would give a legal remedy to innocent victims of illegal searches--but "as a supplement to, not a substitute for, the exclusionary rule."[85]

The Rule Lets Criminals Off "Scot-Free"

This objection confuses the exclusionary rule with the substantive legal safeguards that are set forth in the Fourth Amendment. Justice Potter Stewart exposed the faulty reasoning underlying the objection in 1983:

> Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place. . . . The inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant shall issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power.[86]

If critics of the exclusionary rule are not willing to "pay the price" that will inevitably accompany governmental respect for the Fourth Amendment, they should try to persuade the citizenry to amend the Constitution in accordance with the procedures outlined in Article V of that charter.

The Rule Undermines the "Truth-Seeking" Function of the Criminal Justice System

This objection has surface appeal, but close scrutiny will reveal a fatal misstep. It is important to recognize that the purpose of the Constitution and the Bill of Rights is not simply to authorize and empower government but to limit it as well. Yes, the criminal justice system searches for the truth, but not by just any means. This objection blurs the difference between the police officers of a free society and those of a police state.

An example will illustrate the point. The Federal Bureau of Investigation and Fidel Castro's police force are both "law enforcement" agencies. Both agencies share general "truth-seeking" objectives. Both seek to detect and apprehend people who disobey the law. The key difference between the two agencies is that the FBI, unlike Castro's police force, must operate within a constitutional framework of limited government. In America, the truth-seeking objective is subordinated to the higher objective of safeguarding liberty and preventing tyranny.

That was clearly the thinking behind the Constitution. As Professor Charles Reynard once observed,

> There seems little doubt that the Fourth Amendment's framers had at least two objectives in mind as they approached their task. First, they clearly intended to prohibit the use of general warrants and writs of assistance as means of law enforcement; and second, in the fulfillment of this end, they intended that the guilty should be protected as well as the innocent. In fact, it is not too much to say that protection of the guilty was a matter of particular concern. [John Entick was] harrassed [sic] by general warrants because of [his] publication of seditious libels; and the American colonists were similarly harrassed [sic] by the writs of assistance in connection with their smuggling activities in violation of existing customs laws.[87]

Indeed, the first signer of the Declaration of Independence, John Hancock, was one of America's most prominent smugglers of uncustomed goods.[88] Hancock and many other early Americans were "lawbreakers" in the years preceding the Revolutionary War. The point is this: the Framers of the Constitution were more interested in curbing oppressive law enforcement tactics than they were in enabling governmental authorities to ascertain "the truth."

Conclusion

The U.S. Constitution creates three separate branches of government: legislative, executive, and judicial. The separation-of-powers principle requires each branch to respect the constitutional responsibilities that have been assigned to the other branches.

In America, the power to search is divided between our executive and judicial branches. That means executive

agents must obtain search warrants from judicial officers before they invade the homes or businesses of citizens. When executive agents bypass the warrant application procedure or disregard the terms and conditions of search warrants, they are engaged in unlawful behavior.

The judiciary can respond to executive mischief by barring the admission of illegally seized evidence in criminal trials. The purpose of the exclusionary rule is to compel respect for the judiciary's warrant-issuing prerogative. By removing the incentive to disregard the warrant clause and the judicial role in searches and seizures, the rule seeks to restore the equilibrium that the Fourth Amendment established.

In recent years, the legislative branch has weighed into the longstanding power struggle between the executive and judicial branches. Congress has tried to transfer power from the judicial branch to the executive branch by abrogating the exclusionary rule. Congress is essentially trying to alter the constitutional equilibrium with mere legislation. Legislative proposals to abolish the exclusionary rule represent a "back-door" assault on the judicial branch. The Supreme Court has a duty to defend the judicial province, including the judiciary's warrant-issuing prerogative, against encroachment. Any legislative rule that attempts to abrogate the exclusionary rule should therefore be declared null and void.

Notes

1. John Wesley Hall Jr., Search and Seizure (New York: Clark, Boardman, Callaghan, 1991), vol. 1, p. ix.

2. See "Dodge County Detective Can't Remember Fatal Shot; Unarmed Man Killed in Drug Raid at His Home," Milwaukee Journal Sentinel, April 29, 1995, p. A1. See also "The Week," National Review, June 12, 1995, p. 14.

3. See Sara Rimer, "Raid on Wrong Boston Home Results in Death of a Minister," New York Times, March 28, 1994, p. A1.

4. See Michael White, "A Second Death in Drug Raids Is Raising Questions in California," Philadelphia Inquirer, November 1, 1992, p. A8. See also Office of the District Attorney, County of Ventura, State of California, "Report on the Death of Donald Scott," March 30, 1993.

5. See Charles Bullard, "Iowa City Man on Phone When Shot," Des Moines Register, September 4, 1996, p. 4.

6. Joseph Story, A Familiar Exposition of the Constitution of the United States (1859; Lake Bluff, Ill.: Regnery Gateway, 1986), p. 68.

7. As Professor Stanley Katz of Princeton University once noted, "It was not until the era of the American Revolution that the judiciary was conceived of as a functionally independent member of a government triad." Stanley N. Katz, Introduction to William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769 (Chicago: University of Chicago Press, 1979), vol. 1, p. ix.

8. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (opinion of Scalia, J.).

9. Article I, section 9, para. 3; and Article I, section 10, para. 1.

10. In 1801 two judges on the Circuit Court for the District of Columbia instructed the local district attorney to institute a prosecution for libel against the editor of the National Intelligencer for publishing a sharp attack on the federal judiciary. The district attorney objected to the interposition of the court and refused to follow the judicial instructions. See Charles Warren, The Supreme Court in United States History (1926; Littleton, Colo.: Fred B. Rothman, 1987), vol. 1, pp. 194-98. See also Young v. United States, 481 U.S. 787, 815-25 (1987) (Scalia, J., concurring).

11. Frank H. Easterbrook, "Presidential Review," Case Western Reserve Law Review 40 (1990): 918.

12. Joseph Story, Commentaries on the Constitution of the United States (Boston: Hilliard, Gray, 1833), vol. 3, §1895, p. 748.

13. See Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (Baltimore: Johns Hopkins University Press, 1937), pp. 55-56. See also Tracey Maclin, "The Central Meaning of the Fourth Amendment," William and Mary Law Review 35 (1993): 221.

14. See A. J. Langguth, Patriots: The Men Who Started the American Revolution (New York: Simon and Schuster, 1988), p. 17.

15. Quoted in Hall, vol. 1, p. 7 n. 35.

16. Albert Bushnell Hart, American History Leaflets, no. 33 (New York: A. Lovell, 1902), p. 1.

17. John Adams, Letter to William Tudor, March 29, 1817, in The Works of John Adams, ed. Charles Francis Adams (Boston: Little, Brown, 1856), vol. 10, pp. 247-48.

18. Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765).

19. Marcus v. Search Warrant, 367 U.S. 717, 728 (1961) (discussing Entick).

20. Entick at 1063, 1072.

21. See Akhil Reed Amar, "The Fourth Amendment, Boston, and the Writs of Assistance," Suffolk University Law Review 30 (1996): 65-66.

22. Langguth, p. 23.

23. Marbury v. Madison, 5 U.S. 137, 176 (1803). As state constitutions were being written at the time, they, too, were constitutionalizing common-law principles against unreasonable searches and seizures. For a sampling of early state constitutional provisions pertaining to searches, see Neil H. Cogan, ed., The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins (New York: Oxford University Press, 1997), pp. 234-35.

After the passage of the Civil War Amendments, state officials were also constrained by the federal guarantees set forth in the Bill of Rights. See Robert J. Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment," Temple Law Review 66 (1993): 361. The relevant Supreme Court cases concerning the Fourth Amendment's application to the states include Wolf v. Colorado, 338 U.S. 25 (1949); and Mapp v. Ohio, 367 U.S. 643 (1961).

24. Matthew Hale, The History of the Pleas of the Crown (London: E. and R. Nutt and R. Gosling), vol. 2, pp. 79, 150.

25. Leach v. Three of the King's Messengers, 19 Howell's State Trials 1001, 1027 (K.B. 1765). See also Frisbie v. Butler (1787) (Justice of the Peace "acts judicially" when he must decide whether a search warrant ought to be granted), in Ephraim Kirby, Reports of the Cases Adjudged in

the Superior Court of the State of Connecticut from the Year 1785 to May 1788 (Delmar, N.Y.: Scholars' Facsimiles and Reprints, 1986), p. 213.

26. Blackstone, vol. 4, p. 288.

27. See Gerstein v. Pugh, 420 U.S. 103, 114-16 (1975).

28. "[H]istory undeniably supports the proposition that the framers opposed leaving the power to search and seize solely in executive hands." Joseph D. Grano, "Rethinking the Fourth Amendment Warrant Requirement," American Criminal Law Review 19 (1982): 620. It is noteworthy that the earliest federal laws on the subject of searches respected the judicial branch's warrant-issuing prerogative. See, for example, Act of July 31, 1789, 1 Stat. 29, 43 (application for warrant on oath or affirmation before justice of the peace); and Act of March 3, 1791, 1 Stat. 199, 207 (oath or affirmation, establishing grounds for reasonable cause for suspicion, before U.S. judge or justice of the peace).

29. Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

30. See Young at 815-25 (Scalia, J., dissenting); and Irvine v. California, 347 U.S. 128, 142 (1954) (Black, J., dissenting). See also Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 379-80 (1975); United States v. Cox, 342 F.2d 167, 171 (1965); and Smith v. Gallagher, 185 A.2d 135, 149-54 (1962).

31. Bram v. United States, 168 U.S. 532, 544 (1897).

32. County of Riverside v. McLaughlin, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting) (emphasis in original).

33. See, for example, the argument of the attorney general of California in Respondent's Brief, Chimel v. California, 395 U.S. 752 (1969), pp. 38-41.

Yale law professor Akhil Reed Amar has championed a very similar view of the Constitution. Amar maintains that the ultimate touchstone of the Fourth Amendment is reasonableness, not warrants. That is, the police do not need search warrants or even probable cause to search the homes of citizens. According to Amar, police excesses can be adequately checked by civil damage lawsuits where civil juries will hold government officials "liable for unreasonable intrusions against person, property, and privacy."

Akhil Reed Amar, "Fourth Amendment First Principles," Harvard Law Review 107 (1994): 759.

Amar's self-described "package" of search and seizure "first principles" is interesting, but in the end it represents nothing more than a set of ad hoc judgments with respect to what constitutes sound public policy. See ibid., pp. 800-816. Amar's attempt to ground his analysis and conclusions in the Constitution's text and history is laudable but unconvincing.

This is not the place for scrutinizing Amar's thesis, but the Supreme Court of Michigan once offered a brief and persuasive response to those who would play down the significance of the warrant clause. In Robison v. Miner & Haug, 37 N.W. 21, 25 (1888), the Michigan court observed that "if the Legislature could evade [the particularity requirement] by providing for seizures and searches without legal warrant, the [warrant clause] would be useless." For a more in-depth critique of Amar's thesis, see Carol Steiker, "Second Thoughts about First Principles," Harvard Law Review 107 (1994): 820; Tracey Maclin, "When the Cure for the Fourth Amendment Is Worse Than the Disease," Southern California Law Review 68 (1994): 1; and Thomas Y. Davies, Statement before the Senate Committee on the Judiciary, Hearing on S. 3, Bill to Control Crime, and for Other Purposes, 104th Cong., 1st sess. March 7, 1995 (Washington: Government Printing Office, 1997), p. 121.

34. Johnson v. United States, 333 U.S. 10, 13-14 (1948). For a strong defense of the warrant procedure, see Phyllis T. Bookspan, "Reworking the Warrant Requirement: Resuscitating the Fourth Amendment," Vanderbilt Law Review 44 (1991): 473.

35. Jacob W. Landynski, "In Search of Justice Black's Fourth Amendment," Fordham Law Review 45 (1976): 462.

36. The Supreme Court has notably insisted, however, that when a warrantless search does take place, the executive branch must bear the burden of proof in court to show that the search was lawful. As Justice Robert Jackson observed, "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify [his conduct] by pointing to some real immediate and serious consequences if he postponed action to get a warrant." McDonald v. United States, 335 U.S. 451, 460 (1948) (Jackson, J., concurring). See also Vale v. Louisiana, 399 U.S. 30, 35 (1970); and Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

37. A vast body of case law has refined those two exceptions. For a general overview, see Hall, pp. 379-463 (consent), 581-99 (exigent circumstances).

38. 403 U.S. 443 (1971).

39. Quoted in ibid. at 452.

40. Ibid. at 453. It should be noted that in Ocampo v. United States, 234 U.S. 91 (1914), the Supreme Court sanctioned a statutory procedure whereby arrest warrants could issue solely upon a prosecutor's information. Fortunately, however, the Court has subsequently recognized that the Ocampo ruling was mistaken and has made it clear that that holding has no precedential value. See Gerstein at 118 n. 20.

41. Interestingly, when the New York Court of Appeals encountered a situation where the state legislature had tried to vest executive powers in a judge, Chief Judge Benjamin Cardozo saw that law as an "encroachment upon the independence of the judicial power"--and thus a violation of the separation-of-powers principle. See In Re Richardson, 160 N.E. 655, 657-58 (1928). By parity of reasoning, the legislative branch should not be permitted to invest judicial powers in executive agents.

42. For some inexplicable reason, the Supreme Court has been hesitant to rely upon a separation-of-powers analysis. Thus far, the Court's jurisprudence has rested upon the nebulous requirement of a "neutral and detached magistrate." See, for example, Shadwick v. City of Tampa, 407 U.S. 345 (1972). For a glimmer of hope that someday the Court will move to the proper foundation, see United States v. United States District Court, 407 U.S. 297, 317 (1972).

43. 381 N.W.2d 391 (1985).

44. Ibid. at 395. See also State v. Davey, 89 A.2d 871, 874-75 (1952); State v. Ruotolo, 247 A.2d 1, 3-4 (1968); and Hagerstown v. Dechert, 32 Md. 369 (1870).

45. See, for example, the separation-of-powers analysis in United States v. Klein, 80 U.S. 128 (1871), where the Supreme Court resisted a congressional attempt to manipulate the outcome of pending legal claims. See also Plaut; Murneigh v. Gainer, 685 N.E.2d 1357 (1997); and People v. Tenorio, 473 P.2d 993 (1970).

46. Quoted in Wallace v. State, 157 N.E. 657, 660 (1927).

47. Quoted in ibid. at 658.

48. Ibid. at 660-661.

49. In Veeder v. United States, 252 Fed. 414, 418 (1918), a federal appellate court stated, "If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury."

50. Of course, the potential risk of a subsequent perjury prosecution will depend on the circumstances of each case. Since perjury is a knowing lie, an accuser who tells what he believes to be the truth assumes little risk--even if a more extensive investigation fails to confirm his belief. On the other hand, an accuser who swears out a complaint containing blatant falsehoods runs a substantial risk of a perjury prosecution--even if a more extensive investigation happens to confirm his allegation. Some allegations lend themselves to subsequent perjury actions; others do not but still may be sufficient, in the circumstances, to establish "probable cause" to believe a crime has been committed.

51. "[The] true test of sufficiency of complaint or affidavit to warrant issuance is whether it has been drawn in such a manner that perjury could be charged thereon if any material allegation contained therein is false." Simon v. State, 515 P.2d 1161, 1165 (1973). See also People v. Sullivan, 437 N.E.2d 1130, 1133 (1982).

52. The Supreme Court of Michigan, led by Thomas Cooley, recognized the danger of diluting the oath requirement in Swart v. Kimball 5 N.W. 635, 640 (1880). Judge Cooley observed that "[t]he man most free from any reasonable suspicion of guilt [will not be] safe if he holds his freedom at the mercy of any man 300 miles off who will swear that he has been informed and believes in his guilt. It is easy to tell falsehoods, and those who are least fitted to judge of their credibility are generally the very persons who will believe them because they are told. But to substantiate charges within the meaning of the law, evidence is required, and not merely suspicions or information or beliefs." Judge Cooley concluded that a warrant based solely on the belief of an accuser was inconsistent with the Michigan Constitution.

53. See, for example, Nathanson v. United States, 290 U.S. 41, 47 (1933).

54. Wallace at 661.

55. Ibid. at 660-61. See also State v. Gleason, 4 P. 363 (1884); and Lippman v. People, 51 N.E. 872 (1898).

56. "The Warrant Clause says only when warrants may not issue, not when they may, or must. Even if all the minimum prerequisites spelled out in the Warrant Clause are met, a warrant is still unlawful, and may not issue, if the underlying search or seizure it would authorize would be unreasonable." Amar, "Fourth Amendment First Principles," p. 774. It is also interesting to note that, before the American Revolution, many colonial courts refused to issue general warrants to Crown officials. The independent posture of the courts rankled British officialdom no end. See Charles A. Reynard, "Freedom from Unreasonable Search and Seizure--A Second Class Constitutional Right?" Indiana Law Journal 25 (1950): 271-74.

57. The modern administrative state is testing the resolve of the judicial branch on a number of fronts. Officials at the Immigration and Naturalization Service, for example, are trying to revive the idea of executive warrants. See 8 C.F.R. §242.2(c) (1992). The legislative and executive branches are also using a new sentencing regime to get around constitutional norms. See Mistretta v. United States, 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting); United States v. McCrory, 930 F.2d 63, 70-72 (1991) (Silberman, J., concurring); and Elizabeth Lear, "Is Conviction Irrelevant?" UCLA Law Review 40 (1993): 1219-20. Dozens of regulatory agencies are aggrandizing search powers under the rubric of "administrative inspections." See Timothy Lynch, "Polluting Our Principles: Environmental Prosecutions and the Bill of Rights," Temple Environmental Law and Technology Journal 15 (1996): 171-77. Those problems are beyond the scope of this study, but for a general overview of the Supreme Court's failure to defend the judicial branch from legislative incursions, see Amy D. Ronner, "Judicial Self-Demise: The Test of When Congress Impermissibly Intrudes on Judicial Power after Robertson v. Seattle Audubon Society and the Federal Appellate Courts' Rejection of the Separation of Powers Challenges to the New Section of the Securities Exchange Act of 1934," Arizona Law Review 35 (1993): 1037.

58. 232 U.S. 383 (1914).

59. Ibid. at 393-94.

60. United States v. Foster, 100 F.3d 846, 848 n. 1 (1996).

61. Ibid. at 850-51 nn. 5, 6.

62. Quoted in ibid. at 847. For another example of this type of executive misbehavior, see United States v. Medlin, 842 F.2d 1194 (1988).

63. As Justice Frank Murphy noted in Wolf at 42, "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." (Murphy, J., dissenting). See also Irvine at 137 (opinion of Jackson, J.).

64. Alexander Hamilton, Federalist no. 73, in The Federalist Papers (New York: New American Library, 1961), p. 442.

65. James Madison, Federalist no. 51, in The Federalist Papers, pp. 321-22.

66. People v. Cahan, 282 P.2d 905, 912 (1955).

67. See Mapp at 655-57; Olmstead v. United States, 277 U.S. 438, 462-63 (1928); and Weeks.

68. See United States v. Leon, 468 U.S. 897 (1984). In 1971 Chief Justice Warren Burger invited Congress to abrogate the exclusionary rule, stating, "I see no insuperable obstacle to the elimination of the [exclusionary rule] if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials." Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting). In 1979 (then) Justice William Rehnquist invited the solicitor general to submit written arguments on the question of "whether, and to what extent, the so-called 'exclusionary rule' of Weeks v. United States, should be retained." California v. Minjares, 443 U.S. 916 (1979) (Rehnquist, J., dissenting from the denial of stay).

69. See U.S. Department of Justice, Office of Legal Policy, "Report to the Attorney General on the Search and Seizure Exclusionary Rule," February 26, 1986, reprinted in University of Michigan Journal of Law Reform 22 (1989): 581.

70. See Contract with America, ed. Ed Gillespie and Bob Schellhas (Washington: Times Books, 1994), pp. 52-53.

71. S. 3, 104th Cong., 1st sess. §507(b) (1995) (emphasis added).

72. See, for example, Orrin G. Hatch, Statement before the Senate Committee on the Judiciary, Hearing on S. 3, Bill to Control Crime, and for Other Purposes, p. 3; and Amar, "First Principles," p. 759.

73. See Bradley C. Canon, "Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion," Kentucky Law Journal 62 (1974): 709. Cincinnati's experience vindicated a prescient opinion filed by Judge Thomas A. Jones in 1936. See State v. Lindway, 2 N.E.2d 490 (1936) (Jones, J., concurring).

74. Canon, p. 709. See also Sidney E. Zion, "Detectives Get a Course in Law," New York Times, April 28, 1965, p. 50.

75. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (opinion of Sutherland, J.). In an 1819 letter, Thomas Jefferson wrote, "My construction of the constitution . . . is that each department is truly independent of the others. . . . [The judicial department] cannot issue a mandamus to the President or legislature, or to any of their officers." Thomas Jefferson, Letter to Judge Spencer Roane, September 6, 1819, in Jefferson: Writings (New York: Library of America, 1984), pp. 1426-27. By parity of reasoning, the legislature cannot issue commands to judicial officers with respect to matters touching upon their constitutionally assigned duties.

76. See Barker v. Wingo, 407 U.S. 514, 522 (1972). See also Chambers v. NASCO, Inc., 501 U.S. 32, 58-60 (1991) (Scalia, J., dissenting); and Morrison at 710-11 (Scalia, J., dissenting).

77. Commonwealth v. Dana, 43 Mass. 329, 337 (1841).

78. Since the Massachusetts Constitution of 1780 constitutionalized the judicial nature of the warrant-issuing process and explicitly incorporated the separation-of-powers doctrine, the court should have vigorously defended the judicial province from executive encroachment. Instead, the court gave the executive branch a green light to bypass the warrant clause of the state constitution.

79. See U.S. Department of Justice, pp. 617-20.

80. Originalists like Justice Scalia recognize this point. In County of Riverside at 65-66, Justice Scalia contrasted our Fourth Amendment rules with the laws of England (Scalia, J., dissenting). Note also Plaut at 240, where Justice Scalia describes the separation-of-powers principle as a "distinctively American political doctrine."

81. See, for example, Canon; Thomas Y. Davies, "A Hard Look at What We Know (and Still Need to Learn) About the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests," American Bar Foundation Research Journal 3 (1983): 611; Richard A. Posner, "Rethinking the Fourth Amendment," Supreme Court Review 3 (1981): 49; and Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," University of Chicago Law Review 37 (1970): 665.

82. See Timothy Lynch, "Rethinking the Petty Offense Doctrine," Kansas Journal of Law and Public Policy 4 (1994): 7-22.

83. See Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting).

84. Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

85. Yale Kamisar, "Does (Did) (Should) the Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition'?" Creighton Law Review 16 (1983): 665.

86. Potter Stewart, "The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," Columbia Law Review 83 (1983): 1392-93.

87. Reynard, p. 275.

88. Lasson, p. 72. In certain criminal cases, judicial officers will doubtless be tempted to avert their eyes from official misconduct so that the exclusionary rule will not have to result in, say, an obviously guilty thief being set free. But that temptation ought to be resisted. As Justice Scalia has pointed out, "[T]here are many desirable dispositions that do not accord with the constitutional structure we live under. And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous." Mistretta at 427 (Scalia, J., dissenting). See also Maryland v. Craig, 497 U.S. 836, 870 (1990), where Justice

Scalia defends the right of the accused to confront witnesses--even in instances where that might "disserve" the truth-seeking imperative. (Scalia, J., dissenting).

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