

2-28-1956

Address Delivered Before the Exchange Club of San Francisco on the Subject of Searches and Seizures

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/carter>

 Part of the [Judges Commons](#)

Recommended Citation

"Address Delivered Before the Exchange Club of San Francisco on the Subject of Searches and Seizures" (1956). *The Jesse Carter Collection*. Paper 8.

<http://digitalcommons.law.ggu.edu/carter/8>

This Article is brought to you for free and open access by the The Jesse Carter Collection at GGU Law Digital Commons. It has been accepted for inclusion in The Jesse Carter Collection by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

ADDRESS DELIVERED BY JUSTICE JESSE W. CARTER OF THE SUPREME
COURT OF CALIFORNIA BEFORE THE EXCHANGE CLUB OF SAN FRANCISCO
ON TUESDAY, FEBRUARY THE 28TH, 1956, AT THE ST. FRANCIS HOTEL
ON THE SUBJECT OF SEARCHES AND SEIZURES

Mr. President and Gentlemen:

If you were seated in your home with your family and suddenly the door was broken open and officers rushed in and proceeded to search you and the premises where you live, including your private papers and personal effects, I am sure you would voice a protest and demand an explanation. You would no doubt ask the officer if he had a search warrant. If he said he did not, you would no doubt inquire as to the reason for invading your privacy. You would probably react in the same manner if such an entry were made into your office or place of business. If you and your family were riding in an automobile on a public street or highway and an officer stopped you and demanded that you permit him to search you and your car, including your suit cases, brief cases and personal effects,

you would no doubt challenge his right to do so unless he was acting under a valid search warrant. For many years these things have been happening in California under the guise of official power, and if any evidence of law violation was discovered, it could be used in our courts to convict the victims of the search, even though the officer acted in violation of the law, that is, without a search warrant and had no reason or cause to believe that any evidence of law violation was in the possession of the victim of the search. This procedure was followed by some of the peace officers of this state notwithstanding the right guaranteed to every person in this country by the Fourth Amendment to the Constitution of the United States, and to every person in this state by section 19 of Article I of the Constitution of California. These constitutional mandates provide: "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."

This right is known as the right of privacy -- the right to be secure against police surveillance unless there is reasonable cause to believe that a crime has been or is being committed by the victim of the search, and that he has material evidence of law violation in his possession.

The Supreme Court of the United States has repeatedly held that a search without a search warrant or reasonable cause is a violation of the right of privacy guaranteed by the Fourth Amendment to the Constitution of the United States and that evidence obtained as the result of such a search is inadmissible in any federal court. The basic reason for this holding is that to permit the use of evidence so obtained, would encourage law enforcement officers to violate this constitutional right and render it ineffectual.

In 1922, the Supreme Court of California held in the

case of People v. Mayen (188 Cal. 237) that evidence illegally obtained is admissible in a criminal prosecution and may be used in the courts of this state to convict the victims of such illegal searches. But in April, 1955, in the case of People v. Cahan (44 Cal.2d 434) a majority of the Supreme Court of California overruled the previous decisions of the court and held that such evidence is inadmissible in a criminal prosecution and that a conviction based upon such evidence cannot stand. The basis for this decision is the same as that advanced by the Supreme Court of the United States in holding such evidence inadmissible in a federal court.

The decision in the Cahan case brought forth a storm of protest from law enforcement officers as they apparently wish to continue with the practice of making searches and seizures without a search warrant or reasonable cause to believe that the victim of the search is committing a crime or has material evidence of law violation in his possession, even though this practice violates the constitutional provisions above mentioned.

The decision in the Cahan case simply declared that evidence illegally obtained is inadmissible in a criminal case. In other words, law enforcement officers must obey the law in obtaining evidence of law violation or the evidence obtained cannot be used in a criminal prosecution. This would not seem to cast too great a burden upon the law enforcement agencies. But some prosecutors and peace officers seem to think that it does. After the decision in the Cahan case was announced, Mr. Clarence Linn, Chief Assistant Attorney General of California, was credited with the statement that the Cahan decision was a Magna Carta for the criminals, and Chief of Police Parker of the City of Los Angeles declared: "The ruling in the Cahan case is catastrophic in its effect on efficient law enforcement and places insurmountable handicaps upon police officers."

Speaking of law enforcement officers, I wish to state very frankly and sincerely, that in general, our law enforcement officers are a very fine, outstanding group of people engaged

in a very difficult task. I say this advisedly because twenty years of my official life were devoted to law enforcement.

There is probably no problem more delicate or fraught with more serious consequences to both the officer and the private citizen than the proper exercise of official power in a criminal investigation. We have on one side, the right of the citizen, protected and guaranteed by fundamental law -- the Constitutions of the United States and of California -- to be secure in his person, home, office, papers and effects, which should include his automobile or other means of transportation, against an unreasonable search or seizure. On the other side, we have the officer, whose sworn duty it is to detect law violation and apprehend those who may be guilty thereof. On this side the interests of the public are at stake. If this were a new question -- if a new public policy were to be declared, I am sure there would be a sharp division of opinion as to both policy and practice as they might relate to the enforcement of different laws. But our public policy has been

declared -- written with indelible ink on permanent parchment, vouchsafed by over a century and a half of tradition, that the right of privacy of the individual as declared in the Fourth Amendment to the Constitution of the United States transcends the right of the public against its violation unless there is reasonable cause to believe that the individual has committed a public offense. In the words of the late Justice Robert H. Jackson: "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them." (United States v. Di Re, 332 U.S. 581, 595.)

In the Di Re case from which I have just quoted, Justice Jackson was simply applying the rule that the United States Supreme Court had applied in cases of this character for over 40 years. It is true that this rule has been referred to as a rule of evidence. It might also be referred to as a judicial policy -- a refusal by the courts to permit officers of the law to use evidence in a criminal prosecution which they obtained in violation of the law. As Mr. Justice Holmes declared in his great dissent in *Olmstead v. United States*, 277 U.S. 438, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." However, the critics of this rule want the right to violate the Constitution -- to commit a crime themselves in order to obtain evidence to be used in a criminal prosecution against others. It must be remembered that the constitutional provisions both of the United States and of California prohibit only unreasonable searches. All searches based upon reasonable grounds may now be made without a search

warrant the same as before the Cahan decision. What these critics want is the right to search anybody or any place at any time without a warrant or cause for belief that a crime is being committed. If it were not for the rule in the Cahan case an officer could stop any automobile and not only search the automobile but the people riding in it, and if they had suit cases, brief cases or packages, could open all of them and examine every article contained therein. If they found anything in the nature of contraband, they could then arrest the occupants of the automobile and use the evidence so obtained in their prosecution. If they found no contraband, the victims of the search would have an action for damages against the officers, but anyone familiar with such cases is aware of the utter futility in obtaining redress which would justify the bringing of such an action. Law enforcement officers are generally not people of wealth, and there would be little satisfaction to the victim of obtaining an uncollectible judgment after paying counsel fees and court costs necessary to the prosecution of a law suit of this character.

It is obvious that what the critics of the Cahan decision are seeking is a nullification of the Fourth Amendment to the Constitution of the United States and section 19 of article I of the Constitution of California which is a counterpart of the Fourth Amendment. I have long contended that the provisions of the Fourteenth Amendment should be extended to cover the Fourth Amendment making an illegal search and seizure a deprivation of due process of law on the part of the state which would render a judgment based on evidence obtained as a result of such a search, absolutely void.

In the case of Rochin v. California, 342 U.S. 165, the Supreme Court of the United States reversed the Supreme Court of California in a case involving illegally obtained evidence. You will no doubt recall this case as the so-called "stomach pump" case where the officers broke into the defendant's home, and observing him attempting to swallow what they thought was a narcotic drug, seized him by the throat and tried to prevent him from swallowing it, but finding they were

too late, carried him from his bed, took him to an emergency hospital, strapped him to a board, and forcibly pumped out the contents of his stomach, which they used as evidence against him in a criminal prosecution. All this was done without a search warrant or proof that they had reasonable cause to believe that the defendant was engaged in the commission of a crime at the time of the illegal entry and search. While the reversal of this case by the Supreme Court of the United States was not based upon the Fourth Amendment but upon the due process clauses of the Fifth and Fourteenth Amendments, it cannot be denied that the decision of the Supreme Court of the United States in the Rochin case was a warning to the Supreme Court of California that it should not permit such practices to be tolerated in this state. In that case the Supreme Court of the United States declared that the abuses practiced on Rochin were of such gravity and so inhuman as to shock the conscience of mankind and that such course of proceeding by agents of government to obtain evidence is bound to offend even hardened

sensibilities. Needless to say that both Justice Schauer and dissented in the Rochin case when that case was before Supreme Court of California. After the decision in the Rochin case, the case of Irvine v. California came before the Supreme Court of the United States and the record there disclosed that police officers, without a warrant and by means of a skeleton key entered the home of the defendant, placed a so-called "bug" in his bedroom by means of running an electric wire through a hole which they had bored through the roof and then recorded the conversations taking place therein for several weeks. They later used this evidence to prosecute Irvine for violation of the so-called "bookmaking law" of California. Irvine was convicted, and his case ran the gamut of the California courts, Justice Schauer and I dissenting against the denial of a hearing when it came before the Supreme Court of California. The case finally reached the Supreme Court of the United States. There, four of the justices voted to reverse the case because officers had violated the rights of the defendant under the

Fourth Amendment, but because of the rule in *Wolfe v. Colorado*, majority held that the Fourteenth Amendment could not be invoked to prevent state courts from using illegally obtained evidence in a criminal prosecution, and the conviction was affirmed notwithstanding the scathing denunciation by all of justices of the conduct of the peace officers in thus illegally invading the rights of the defendant

After the decision in the Irvine case, the Attorney General of California, the Honorable Edmund G. Brown, rendered an opinion to the District Attorney of Los Angeles County, the Honorable S. Ernest Roll, in which he declared that illegally obtained evidence should not be used in criminal prosecutions in California. Notwithstanding the strong position taken by the Supreme Court of the United States in the *Rochin* and Irvine cases against the illegal conduct of the law enforcement officers of California in obtaining the evidence used in those cases, and the position of the Attorney General of California as evidenced by his opinion to which I have referred, we are met

with blasts of criticism from certain prosecutors and law enforcement officers because a majority of the Supreme Court of California felt that it was time to say to the peace officers of California: "You must obey the law yourselves in obtaining evidence of law violation or the evidence you illegally obtain will not be admissible in the courts of this state." This the Supreme Court of California said for the first time in People v. Cahan. The only trouble with this decision is that it is 35 years too late. I say this advisedly, because it has been my observation that since the decision of People v. Mayen in 1922 (188 Cal. 237) there has been a rising tide of lawless conduct by some of the law enforcement officers of this state in their attempt to obtain evidence of law violation and this lawless conduct by law enforcement officers has been given the sanction of the courts of California until the Cahan decision.

During the more than 16 years that I have been a member of the Supreme Court of California some 40 or 50 cases involving this question have come before the court and I have

dissented against the approval of this rule in every one of
these cases.

It is true that the constitutionally guaranteed right of privacy is an impediment against indiscriminate searches and seizures which would enable peace officers to obtain evidence of law violation. As heretofore stated, it is not necessary for a law enforcement officer to obtain a search warrant before making a valid search in every case. It is only necessary that the officer have reasonable cause to believe that a felony is being committed to justify a lawful search. But without a search warrant or reasonable cause for the belief that a felon is being committed, a search or seizure is invalid and constitutes a violation of the individual's constitutional right of privacy.

While I do not believe that the application of the rule in the Cahan case is an impediment against law enforcement in this state and there is no justification whatsoever for the public criticism directed against this rule, I think it proper

to call attention to some of the other constitutional safeguards which may likewise be said to make it more difficult to bring criminals to justice. There can be no question but that the constitutional mandate against depriving a person of life liberty or property without due process of law, which is contained in both the Fifth and Fourteenth Amendments to the Constitution of the United States and also in the Constitution of California, may have this effect. These provisions have been interpreted to mean that a coerced confession may not be used to convict in a criminal case. In other words a person under suspicion for the commission of a crime may not be starved or beaten or threatened or otherwise intimidated into confessing his guilt. By a long line of decisions of both the Supreme Court of the United States and the Supreme Court of California, convictions based upon such confessions, have been held absolutely void as having been obtained in violation of due process of law. Many other safeguards including the right of an accused person to counsel, the right to procure witnesses

be confronted with the witnesses against him, the privilege against self-incrimination, and many other safeguards guaranteed by the Bill of Rights, are all impediments against the conviction of the guilty as well as the innocent and interfere with the over-zealous conduct of prosecutors and law enforcement officers in seeking to convict the guilty and make it hot for the innocent.

We are told that the Nazis, Fascists and Communists found the above mentioned safeguards too onerous for the speedy dispatch of those whose existence they determined would be detrimental to the welfare of their totalitarian state. And I feel disposed to state to those who would break down any of these safeguards that the American system of ordered liberty does not lend itself to the methods employed by the Gestapo, the storm trooper or the commissar for the preservation of the totalitarian state under a Nazi, Fascist or Communist regime.

It must be remembered that the Fourth Amendment to Constitution of the United States was adopted for the

protection of all of the people of this country, and that section 19 of article I of the Constitution of California was adopted for the protection of all of the people of this state. The object and purpose of the framers of these constitutional mandates was to guarantee and make secure the fundamental right of privacy to every person -- the right to be secure against police surveillance unless the police have reasonable cause to believe that an offense is being committed. This does not mean mere suspicion as some of our courts have recently indicated. The obvious reason for the rule that evidence obtained as the result of an illegal search, cannot be used against the victim of the search, is to protect innocent people by discouraging such searches. It is a matter of common knowledge that it has been the practice of law enforcement officers of this state to make searches of the persons and property of individuals whenever they saw fit regardless of whether reasonable or any cause existed, and many innocent people have been subjected to the indignity and humiliation of having their persons, homes,

offices and automobiles searched by law enforcement officers with impunity when nothing of an incriminating nature was found and no arrests or prosecutions resulted therefrom. Many of these invasions of the constitutional right of privacy received no public mention because the victims did not wish to incur the expense and endure the inconvenience and publicity incidental to seeking redress in the courts. It is probable that for every case where evidence of a crime has been found there have been numerous illegal searches which uncovered no evidence whatsoever, and we know from the reported cases that the practice of illegal searches in this state has increased many fold in recent years. If the above mentioned constitutional provisions have any meaning whatsoever, then the victim of an illegal search may assert the right of privacy guaranteed to him and resist such search. If he does so, either he or the officer may be injured or killed. If this should occur, where should the blame fall? Obviously, a prosecutor who favors such illegal conduct on the part of law enforcement officers would

be disposed to prosecute the victim of the illegal search if he should injure or kill the officer in his effort to resist the search, and would not prosecute the officer who injured or killed the victim in the forcible execution of his illegal project.

From the intemperate and misleading statements appearing in the public press recently as having been made by heads of police departments and prosecuting officers of this state against the rule in the Cahan case, we are forced to assume that they feel that great credit and high praise should go to those law enforcing officers who ruthlessly violate the above mentioned constitutional guarantees, and that hatred, contempt, ridicule and obloquy should be heaped upon those who insist upon their observance and preservation. I will again repeat what I have said many times both as a private citizen and as a public official of this state, that I have a sincere devotion to the American system for the administration of justice as postulated by the Constitution of the United States and the Bill of Rights; that I can conceive of no emergency

short of a threat to our national security, which would justify striking down any of the safeguards for the protection of the rights of the people embraced within that system. The impediments against law enforcement, the escape of some criminals from conviction and punishment, and the cost to the public incidental to the operation of such a system, fades into insignificance when we offset and balance against those factors the glorious feeling which stems from the consciousness that, because of this system, we live in an atmosphere where we may enjoy life, liberty and the pursuit of happiness with dignity and self-respect, secure against any invasion of our fundamental personal rights without due process of law.

The Elder Pitt, in his speech on the Excise Tax, gave expression to what later became the Fourth Amendment. What he said then is just as important today. He said that "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the winds may blow through it; the storms may enter; the rain may enter -- but the

King of England cannot enter. All his forces cannot cross the threshold of the ruined tenement." Yet, prior to the decision in the Cahan case, the police and other so-called enforcement officers in California could ruthlessly force their way into the home of a private citizen, and without a search warrant, seize whatever they found and use it as evidence in our courts notwithstanding they violated the constitutional right -- the right of privacy -- of the citizen in obtaining it.

Another great Englishman, Lord Coke, had this to say on this same subject: "The house of everyone is to him as his castle and fortress, as well for his defense against injury and violence as for his repose."

Every student of history recognizes that the abuse of official power has been the source of the major ills inflicted upon mankind since the existence of organized governments. This is true notwithstanding the effort of those who believe in a democratic form of government to establish a system of checks and balances so that boundless power is not reposed in any

single official or branch of government. Hence the provision in both the Fourth Amendment to the Constitution of the United States and section 19 of article I of the Constitution of California, that before a search may be made or evidence seized, proof under oath must be submitted to a magistrate a judicial officer -- that probable cause exists for such search and seizure, and a warrant issued by such magistrate "particularly describing the place to be searched and the person or thing to be seized." Those constitutional mandates were designed to place a curb or restriction upon the power of the law enforcing branch of the government, requiring it to obtain judicial sanction, in cases where a search is necessary to obtain such evidence. It is sheer nonsense to say that those who drafted those constitutional provisions ever had any other thought in mind than that evidence obtained in violation thereof would not be accepted by any court or accorded judicial sanction. As Mr. Justice Douglas so aptly stated in the McDonald case, "We are not dealing with formalities. The presence of a search

warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." (McDonald v. United States, 335 U.S. 451.)

The only argument which I have heard advanced against the rule announced in the Cahan case is based upon expediency; that is, the application of the rule to certain cases will enable some criminals to escape punishment. This is undoubtedly true. But without the rule, the right of privacy guaranteed to every person would be jeopardized if not destroyed. So, as Mr. Justice Holmes said: "We have to choose," and for my part, the choice was made when our forefathers adopted the Bill of Rights. If the rights there granted and guaranteed have any efficacy whatsoever, the Cahan case does nothing more than preserve them as living principles of the American way of life.