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July 11, 1995

BY HAND DELIVERY

Senator Orrin G. Hatch
Chairman
Committee on the Judiciary
SD-224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Senator Hatch:

The Section on Criminal Law and Individual Rights of the District of Columbia Bar is writing to urge preservation of the Fourth Amendment exclusionary rule for searches and seizures conducted without a warrant -- that is, without prior judicial approval.[1] We believe that if the exclusionary rule were repealed, many more warrantless searches and seizures would take place outside judicial supervision, placing them effectively beyond the reach of the rule of law.

Repealing the exclusionary rule for warrantless searches and seizures unless a law enforcement agent's violation of the Constitution was the product of "bad faith" or an "unreasonable mistake," is a step in exactly the same direction. Moreover, the idea of "reasonable" violations of the Fourth Amendment is incongruous. The Fourth Amendment on its face bars "unreasonable" searches and seizures. The enactment of legislation saying that the police "reasonably" may conduct unreasonable searches and seizures, and on that basis pardoning violations of the Constitution, would introduce a new incoherence to search and seizure law, denigrate the Fourth Amendment, and compromise the rights the Fourth Amendment was intended to protect.

A forcible search or seizure is a pure exercise of the coercive power of the state. There is inherent

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[1]These views are those of the Section on Criminal Law and Individual Rights and not necessarily those of the District of Columbia Bar or its Board of Governors.

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violence in a law enforcement agent's invocation of the authority of his or her office to execute a forcible entry into a home or business,[2] search for and seize belongings and papers,[3] seize and search cars and their contents, however personal,[4] or detain and search people, including clothing and even body cavities, against their will.[5] Such encounters are likely to be galling or humiliating and may be highly traumatic, even if overt violence is avoided. And it is not always avoided.

Recent history can be cited to make this point, but it is not a new lesson: One of the precipitating causes of the American Revolution was unbridled power arrogated by British authorities in the colonies to search and seize at will. James Otis, in his famous 1761 argument against issuance of the detested writs of assistance, decried creation of "a power that places the liberty of every man in the hands of every petty officer," allowing each such officer to "reign secure in his petty tyranny," and "to lord it over us."[6]

At the same time, almost no one would dispute that properly supervised federal and state police forces must be allowed to search and seize within constitutional and legal bounds. This power is essential for our

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[2] E.g., Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (police entering house through screen door, arresting occupant in bathroom); Donovan v. Dewey, 452 U.S. 594 (1981) (warrantless inspections of mines).

[3] E.g., Andresen v. Maryland, 427 U.S. 463 (1976) (exhaustive four-hour search of development corporation's offices).

[4] E.g., California v. Acevedo, 500 U.S. 565 (1991) (warrantless search of car including package in trunk).

[5] E.g., United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (cavity examination after 16-hour detention for purpose of allowing inspection of contents of detainee's excrement).

[6] 1 B. Schwartz, The Bill of Rights: A Documentary History 190 (1971) (quoting John Adams's account of Otis's argument).

protection from a wide range of dangers and harms through enforcement of criminal and regulatory laws.

Our law traditionally has balanced these concerns by requiring close judicial supervision of the power of the police to search and seize. Judicial supervision can be most effectively exercised before the fact in the process of issuing particularized warrants upon probable cause. It may be that the founders of our nation, when the Fourth Amendment became part of the Constitution, assumed that warrantless searches and seizures would be rare, and that police would be effectively restrained by magistrates who denied them the opportunity to seek out evidence except on probable cause and a particularized description of what they were after.

Current reality, however, is otherwise. Present-day exigencies mean that a great deal of searching and seizing takes place unregulated by the warrant process. The exclusionary rule has been essential to fill this gap. The most important difference is that the warrant process operates before the fact, and the exclusionary rule operates after, but both processes invoke essentially the same sanction: denying the police the evidence they seek unless they satisfy constitutional standards. In this way, the exclusionary rule has fulfilled the basic expectation of those who drafted and adopted the Fourth Amendment (and has done so by analogous means and at similar cost), namely that the power to search and seize should not be left in the unfettered hands of the police. Rather, it should be managed and confined by an impartial judiciary.

The Supreme Court in United States v. Leon[7] held that the exclusionary rule should not require suppression of evidence when the police have acted on authority of a warrant, unless the officer executing the warrant was unreasonable in relying on it. Legislation now before the Congress would expand that rule to what in our view is the totally different situation of searches and seizures conducted under the sanction of no prior authorization at all. In Leon, the Supreme Court could view subsequent judicial supervision of police searches and seizures through the exclusionary rule as redundant and pointless except in egregious cases. Supervision

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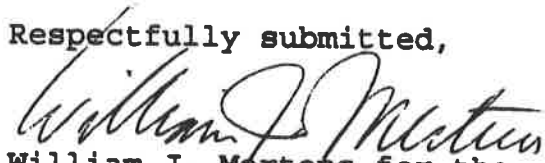
[7] 468 U.S. 897 (1984).

already occurred when a neutral and detached magistrate approved a warrant application and issued a warrant particularly describing the premises the police were authorized to search and the items they were authorized to seize. It is a wholly different situation, however, when the police act without prior judicial authorization. Then, the exclusionary rule is essential if judicial supervision is to take place at all. Furthermore, a full-strength exclusionary rule is necessary for that supervision to remain meaningful, and also to avoid creating fresh incentives for law enforcement officers to evade the exacting judicial scrutiny of warrant applications.

We believe that the exclusionary rule debate should not be couched as a conflict between law-and-order, on the one side, and solicitude for presumptive criminals, on the other. That is a false debate, whose outcome is preordained. Freedom from unreasonable searches and seizures is a right of all the people, not a right exclusive to criminal suspects. History, which our more recent experience amply confirms, teaches that a system of judicial scrutiny and supervision is essential for that right to last. The exclusionary rule has played that role, and we urge the Congress not to nullify it, either in whole or by half measures. We urge rejection of proposals to repeal the exclusionary rule except for searches and seizures that, in addition to violating the Fourth Amendment, involve "bad faith" or "unreasonable mistake," somehow defined. A search and seizure that violates the Fourth Amendment is unreasonable, and the courts should remain free to say so and to declare the fruits of unreasonable searches and seizures inadmissible.

Respectfully submitted,



William J. Mertens for the
Section on Criminal Law and
Individual Rights

cc: Judiciary Committee members