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What protection do the Fourth and Fifth Amendments afford against acquisition of evidence by search and seizure, actual or constructive? Does an individual have a constitutional privilege against the disclosure of records he is required by law to keep? May police officers search premises on which an arrest is made and seize contraband which they find there? A series of cases recently decided by a closely divided Supreme Court has enveloped this field in the same deep fog of uncertainty which now hangs over so many other areas of constitutional law. The unstable quality of these precedents is attested by the fact that in every case but one, the shifting vote of a single member, Justice Douglas, has been decisive. Nevertheless, their implications are too far-reaching to be ignored.

I

COMPULSORY PRODUCTION OF REQUIRED RECORDS

The concept of unreasonable search and seizure is not limited to the physical invasion of private premises and the carrying away of evidence. Under the doctrine of *Boyd v. United States*[1] it also embraces a subpoena requiring an individual to produce in a criminal proceeding documentary evidence which might incriminate him. The *Boyd* decision was unanimous, but the Court divided as to the rationale for its holding. The majority held that compulsory disclosure would offend both the Fourth and Fifth Amendments to the constitution; two Justices believed that only the prohibition of the Fifth Amendment against self incrimination would be violated. Speaking for the majority, Justice Bradley said:

> "Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation. . . . In this regard the Fourth and Fifth Amendments run almost into each other."[2]

This rule has not been without practical consequences. Although the result in the *Boyd* case was dictated by both the Fourth and Fifth

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[1] 116 U.S. 616, 6 S.Ct. 524 (1886).

[2] Id. at 630.

Amendments, the coverage of the two is not coextensive in all cases. The Fourth Amendment does not prohibit compulsory production of evidence merely because it is incriminating. Extortion of such evidence is deemed to be unreasonable only when the Fifth Amendment forbids compulsion of self incrimination. But a subpoena may violate the Fourth Amendment if it is too indefinite or too sweeping, or if the inquiry is one which the demanding agency is not authorized to make, even though the evidence is not privileged.[3] By this reasoning corporations have been given some degree of protection against compulsory production of their records.

In *Hale v. Henkel*[4] the Court held that since the privilege against self incrimination applies only to natural persons, a subpoena of corporate records is not invalid simply by reason of their incriminating character. Nevertheless the subpoena issued in that case was held invalid as being "far too sweeping in its terms to be regarded as reasonable." Said the Court:

> "If the writ had required the production of all the books, papers and documents found in the office of the MacAndrews & Forbes Company, it would scarcely be more universal in its operation, or more completely put a stop to the business of that company. Indeed, it is difficult to say how its business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case, and is clearly in violation of the general principle of law with regard to the particularity required in the description of documents necessary to a search warrant or subpoena. Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown . . . to justify an order for the production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms."[5]

Again, in *Federal Trade Comm. v. American Tobacco Co.*,[6] in an opinion written by Justice Holmes, the Court refused to permit a "fishing expedition" into corporate records by an order for the production of documents not shown to be relevant to any lawful inquiry, but sought simply in a search for evidence of crime.

In the future, natural persons will have to rely more heavily on the Fourth Amendment as a result of the holding in *Shapiro v. United*

[3] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946).

[4] 201 U.S. 43, 26 S.Ct 370 (1906); see also Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538 (1911); Wheeler v. United States, 226 U.S. 487, 33 S.Ct. 158, (1913).

[5] 201 U.S. 43 at 77, 26 S.Ct. 370 (1906).

[6] 264 U.S. 298, 44 S.Ct. 336 (1924).

States[7] that an individual cannot claim the protection of the Fifth Amendment when ordered to produce records he is required by law to keep. In obedience to a subpoena, Shapiro had appeared at a hearing before an enforcement officer of the Office of Price Administration, with certain records which he was obliged to keep pursuant to the regulations issued by that agency. His counsel inquired whether he was being granted immunity as to the matters under investigation. The presiding officer replied that he was entitled to whatever immunity flowed as a matter of law from the production of the records. Shapiro then produced the records, claiming his constitutional privilege. Upon being prosecuted for violations of OPA regulations, he claimed immunity under section 202(g) of the Emergency Price Control Act,[8] which incorporated by reference the provisions of the Compulsory Testimony Act of 1893.[9]

The Court interpreted this statute to grant immunity only when a witness is required to give evidence as to which he is entitled to claim a privilege against self incrimination under the Fifth Amendment. Proceeding to the constitutional question, it found that Amendment inapplicable, saying:

> "[T]he principle enunciated in the *Wilson* case, and reaffirmed as recently as the *Davis* case, is *clearly* applicable here: namely, that the privilege which exists as to private papers cannot be maintained in relation to "records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established."[10]

Dissenting opinions were written by Justices Frankfurter, Jackson and Rutledge. Justice Murphy joined in the opinion of Justice Jackson. All agreed that the Court's construction of the immunity statute was too narrow, and that it raised grave doubts as to the constitutionality of that act as thus interpreted. Justice Frankfurter asserted categorically that it did contravene the Bill of Rights. Justices Jackson and Murphy seemed to entertain the same view. Justice Rutledge confessed doubt on the constitutional issue, but expressed no "conclusive opinion" about it.

The doctrine applied here had been enunciated in earlier cases, but only in dicta. In the *Boyd* case itself, the Court had recognized that

[7] 335 U.S. 1, 68 S.Ct. 1375 (1948); see also the companion case, United States v. Hoffman, 335 U.S. 77, 68 S.Ct. 1413 (1948).

[8] 56 Stat. L. 23 at 30, 50 U.S.C. Supp. 5, §922.

[9] 27 Stat. L. 443, 49 U.S.C. §46.

[10] 335 U.S. 1 at 32 and 33, 68 S.Ct. 1375 (1948) (italics added).

". . . [T]he supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures."[11]

Justice Frankfurter pointed out that the invoice which the government sought to subpoena in the *Boyd* case was in truth a document which the statute required to be kept.[12] That fact seems to have escaped the Court's notice. Throughout the opinion, the invoice was treated as a private paper.

Even stronger was the statement of Justice Hughes in *Wilson v. United States*.[13] The issue there was whether an officer of a corporation could be compelled to produce corporate records which might incriminate both the corporation and himself. Upholding a subpoena of such records, Justice Hughes said:

"But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were *private* papers . . . was constantly emphasized. . . The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."[14]

The *Davis* case,[15] to which the Chief Justice alluded, involved an actual seizure of documents rather than a subpoena. The papers taken were gasoline ration coupons, which remained property of the government. The statement was made that the custodian of public papers is "not protected against the production of incriminating documents."[16] In the *Shapiro* case, Justice Frankfurter sharply challenged the view

[11] 116 U.S. 616 at 623 and 624, 6 S.Ct. 524 (1886).
[12] 335 U.S. 1 at 67 and 68, 68 S.Ct. 1375 (1948).
[13] 221 U.S. 361, 31 S.Ct. 538 (1911).
[14] Id. at 380.
[15] Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946), rehearing den. 329 U.S. 824, 67 S.Ct. 107 (1946).
[16] 328 U.S. 582 at 593, 66 S.Ct. 1256 (1946).

that required records should be treated as public records so far as the Fifth Amendment is concerned.

The *Shapiro* decision had been more clearly foreshadowed by *Zap v. United States*[17] which was decided on the same day and by the same majority as the *Davis* case. Government agents, while inspecting records which Zap, as a contractor with the government was required to keep, found and took possession of a cancelled check which had been used in connection with a scheme to defraud the government. Although this seizure was assumed to be unlawful, the Supreme Court held that admission of the check in evidence against Zap was within the sound discretion of the district court. Speaking for the majority, Justice Douglas said that by entering into a contract with the government, the contractor waived the protection of the Fourth and Fifth Amendments. Of course, apart from these constitutional provisions, the unauthorized seizure was just an ordinary trespass which would not have affected the admissibility of the check as evidence.[18] This, however, was not the position taken by the Court. Instead, it relied upon the fact that the agents had acquired knowledge of the existence and contents of the check lawfully. Hence, it said that the agents could have given oral testimony as to the contents of the paper and admission of the check itself in evidence was a mere technicality. Lower court decisions permitting officers to testify concerning information gleaned from examination of records assumed to be privileged from subpoena were cited with approval.[19]

In similar vein, the Chief Justice stated in the *Shapiro* opinion that the information disclosed by the books was "legally obtained" and "available as evidence."[20] This reflects the persistent confusion engendered by the partial identification of the Fourth and Fifth Amendments in *Boyd v. United States*.[21] Under the former, inquiry is made into the legality of the acquisition of evidence, and evidence obtained in violation thereof is suppressed to remove the temptation to law officers to ignore constitutional restraints. This consideration is irrelevant in determining whether the government has a right to compel an individual to furnish evidence against himself.

To be sure, in permitting oral testimony covering facts discovered by inspection of records, courts have emphasized that the custodian

[17] 328 U.S. 624, 66 S.Ct. 1277 (1946); rehearing den. 329 U.S. 824, 67 S.Ct. 107 (1946); vacated on other grounds, 330 U.S. 800, 67 S.Ct. 857 (1947).

[18] 8 WIGMORE ON EVIDENCE, 3d ed., §2183 (1940).

[19] Lisansky v. United States, (C.C.A. 4th, 1929) 31 F. (2d) 846 at 850 and 851; In re Sana Laboratories, Inc., (C.C.A. 3d 1940) 115 F. (2d) 717 at 718; Darby v. United States, (C.C.A. 5th, 1943) 132 F. (2d) 928 at 929.

[20] 335 U.S. 1 at 34 and 35, 68 S.Ct. 1375 (1948).

[21] 116 U.S. 616, 6 S.Ct. 524 (1886).

consented to the examination. In the absence of a contractual obligation to permit inspection, should such "consent" be deemed a waiver of constitutional rights? In *Amos v. United States*,[22] the Court held that when officers demanded entrance to a home for the announced purpose of searching for violations of the revenue law, no waiver of constitutional rights was effected by the opening of the door to admit them because of the "implied coercion"[23] presented. Is there any less coercion when government agents enter a place of business and demand to inspect books which the law commands the individual to keep and to submit to examination? In permitting the inspection does the custodian do more than acquiesce in the government's claim of right?

It must be noted that in the *Zap* case, Justice Frankfurter conceded that the "search was legal and the inspectors could testify to what they had gleaned from the inspection."[24] In that case the examination was authorized by contractual consent as well as by statute, but the Justice did not suggest that the right to give oral testimony depended upon the source of the authority to make the inspection. With that concession, the dissents in both the *Zap* and *Shapiro* cases are unconvincing. If the government is to be allowed to use in a criminal case, over a claim of constitutional privilege, information obtained from books which it requires an individual to keep and to submit to examination, the only satisfactory basis for such result is the forthright pronouncement that the Fifth Amendment does not cover such records.

Hereafter, when called upon to produce required records, individuals will stand upon the same footing as corporations. In the past, the latter have had only moderate success in convincing courts that government demands for documentary evidence, however extensive, were unauthorized or unreasonable.[25] But the Chief Justice assumed that:

> "[T]here are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prose-

[22] 255 U.S. 313, 41 S.Ct. 266 (1921).

[23] Id. at 317. See also Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367 (1948).

[24] 328 U.S. 624 at 632, 66 S.Ct. 1277 (1946).

[25] In the following cases record keeping requirements or demands for evidence were sustained:

Interstate Commerce Comm. v. Baird, 194 U.S. 25, 24 S.Ct. 563, (1904);

Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538 (1911);

Baltimore & Ohio R. Co. v. Interstate Commerce Comm., 221 U.S. 612, 31 S.Ct. 621 (1911);

Wheeler v. United States, 226 U.S. 478, 33 S.Ct. 158 (1913);

Interstate Commerce Comm. v. Goodrich Transit Co., 224 U.S. 194, 32 S.Ct. 436, 56 L. Ed. 729 (1912);

Essgee Company v. United States, 262 U.S. 151, 43 S.Ct. 514 (1923);

Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 63 S.Ct. 339 (1943);

cuting statutory violations committed by the record-keeper himself."[26]

Justice Rutledge expressed doubt about the reasonableness and hence the validity under the Fourth Amendment of the record keeping requirements in this case, apart from the question of self incrimination.[27] The same misgivings about the invasion of individual rights which evoked the vigorous dissent of four Justices in the *Shapiro* case may prompt lower courts to compensate in part for the protection denied under the Fifth Amendment by a more sympathetic application of the standards of reasonableness under the Fourth.

II

SEARCH AND SEIZURE INCIDENT TO ARREST

A more serious invasion of privacy occurs when a home or office is searched and evidence seized as an incident of arrest. The recent decisions on this subject are as inconsistent with each other as with earlier opinions. First, the Court surprised the legal profession and the public by sanctioning a practically unlimited right to search the premises on which an arrest is made. Shortly thereafter, it executed a partial retreat by limiting the exercise of this right to emergencies when it is not feasible to obtain a search warrant.

Davis v. United States[28] and *Harris v. United States*[29] let down the constitutional bars against police action. In the former, officers arrested defendant on the exterior premises of a filling station after they had

United States v. Bausch & Lomb Optical Company, 321 U.S. 707, 64 S.Ct. 805 (1944); Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946).
See also Brown v. United States, 276 U.S. 134, 48 S.Ct. 288 (1928), sustained in part.
In the following cases demands for evidence were denied in whole or in part:
Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906);
Ellis v. Interstate Commerce Comm., 237 U.S. 434, 35 S.Ct. 645 (1915);
Federal Trade Comm. v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336 (1924); Jones v. Securities & Exchange Comm., 298 U.S. 1, 56 S.Ct. 654 (1936).
See also Mobile Gas Company v. Patterson, 288 F. 884 (D.C. Ala. 1923);
Cudahy Packing Co. v. United States, (C.C.A. 7th, 1926), 15 F. (2d) 133;
Bank of American Natl. Trust & Savings Assn. v. Douglas, (App. D.C. 1939) 105 F. (2d) 100.

[26] 335 U.S. 1, 32, 68 S.Ct. 1375 (1948).

[27] 335 U.S. 1, 75, 68 S.Ct. 1375 (1948).

[28] 328 U.S. 582, 66 S.Ct. 1256 (1946); rehearing den. 329 U.S. 824, 67 S.Ct. 107 (1946).
This paper does not deal with cases turning on the validity or adequacy of search warrants, nor with searches of movable vehicles, nor those executed in open fields, nor with search of the person of individuals arrested at such places. For a recent decision concerning the right to arrest and search the occupant of an automobile, see United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222 (1948).

[29] 331 U.S. 145, 67 S.Ct. 1098 (1947); rehearing den. 331 U.S. 867, 67 S.Ct. 1527 (1947).

seen an employee sell gasoline without receiving ration coupons. They demanded that defendant open a locked room and produce the ration coupons he kept there. At first he refused, but after an implied threat of entrance by force, he unlocked the door, took the coupons from a drawer and handed them to the agents. This case is not significant as a precedent because the Supreme Court upheld the district court's finding that the coupons were surrendered voluntarily and did not decide whether the seizure would have been reasonable in the absence of such consent. Apparently the surrender was found to be voluntary only because the defendant was under a duty to give them up on demand. The Court intimated that the government may use stronger methods to obtain possession of its own property than otherwise would be approved.[30] Justice Frankfurter, dissenting, challenged the finding that the surrender was voluntary: that the coupons were public property merely made them appropriate subjects of seizure under warrant but did not authorize coercion without a warrant. He further insisted that an arrest did not authorize a search for which a warrant would not have been issued.[31] At this time no warrant could have been obtained because the offense was a misdemeanor.

More clear-cut and far-reaching was the *Harris* case. There Federal agents went to defendant's four-room apartment and, pursuant to a warrant, arrested him for two federal offenses growing out of check forgeries. Thereupon, they made a thorough five hour search of the entire apartment, looking for two cancelled checks which defendant was believed to have stolen and used in connection with the forgeries, and for any other objects which might have been used in committing the crime. In a bureau drawer, underneath some clothing, they discovered a sealed envelop marked "George Harris, personal papers." Opening the envelop, they found another envelop containing draft cards and registration certificates. These, together with a quantity of pens, paper and celluloid, were seized. Apparently the government never did obtain sufficient evidence to prosecute defendant for the crimes for which he had been arrested, but he was convicted of violating the Selective Training and Service Act.

By a five to four decision the Supreme Court upheld the search and seizure and sustained the admission in evidence of the draft papers. The thesis of the court was that the agents had gained access to the apartment lawfully, that as an incident to the arrest they had a right to make a reasonable search of the premises, that the search made was

[30] 328 U.S. 582, 593, 66 S.Ct. 1256 at 1261 (1946).
[31] 328 U.S. 582 at 594, 600, 601 and 613, 66 S.Ct. 1256 (1946).

no more thorough than necessary to find the easily concealed checks, that the agents were acting in good faith, that the draft documents found were government property whose possession and concealment constituted a continuing offense committed in the presence of the officers and that seizure of the documents was therefor lawful.

The first intimation of a new shift in the Court's position came in *Johnson v. United States*,[32] where the Court held invalid the search of a hotel room and the seizure of opium smoking apparatus immediately following the arrest of the defendant. The arrest itself was unlawful because based only on suspicion created by the odor of opium emanating from the room. Justice Jackson, speaking for the Court, also stated that the search was unreasonable because the officers had ample opportunity to obtain a warrant.[33] Here Justice Douglas joined the Justices who dissented in the *Harris* case to constitute the present majority; Chief Justice Vinson, Justices Black, Reed and Burton dissented.

A few months later this principle acquired the dignity of a clear cut decision in *Trupiano v. United States*.[34] Officers, acting on information supplied by a government agent who was in defendant's employ, entered premises, with the consent of the owner, on which a still was located. The owner was not a party to the unlawful enterprise. The agents arrested the operator of the still without a warrant, searched the premises and seized distilling apparatus which they could see through an open door. Despite violation of law in the presence of the officers, use of the premises to maintain a nuisance, and location of the distilling apparatus in plain view—facts which had previously been held sufficient to sustain a seizure incidental to arrest,[35] the same majority as in the *Johnson* case held the seizure illegal because the agents had sufficient time and information to procure a search warrant before the arrest was made. Justice Murphy said:

> "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant."[36]

[32] 333 U.S. 10, 68 S.Ct. 367 (1948).
[33] Id. at 15.
[34] 334 U.S. 699, 68 S.Ct. 1229 (1948).
[35] Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927).
[36] 334 U.S. 699 at 708, 68 S.Ct. 1229 (1948).

Chief Justice Vinson, now speaking for the dissenters, joined issue on this point:

> "The validity of a search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search."[37]

This doctrine was invoked again in *McDonald v. United States*.[38] One afternoon policemen who had been watching McDonald's movements surrounded the rooming house where he lived. When the sound of an adding machine was heard, officers suspected that a numbers game was in progress. One of them climbed through a window into the landlady's quarters and admitted the other officers through a door. Standing on a chair outside the room whence the sound came, an officer looked through the transom, saw McDonald operating the machine with a quantity of money and numbers slips beside him, and shouted to him to open the door. When he complied, he was arrested; the adding machine, money and a suitcase full of papers were seized. The conviction obtained by introduction of this evidence was reversed by the Supreme Court with six Justices concurring in the result, but only four joining in the opinion of the Court.

This seizure was attacked on two grounds: (1) that the entry to the building was illegal and made the subsequent seizure unlawful; and (2) that the seizure was unreasonable because no emergency made it impracticable to obtain a warrant. Justice Douglas, writing the opinion of the Court, adopted the second view. He accepted *arguendo*, the contention of the government that:

> "Although it was an invasion of privacy for the officers to enter Mrs. Terry's room, that was a trespass which violated her rights under the Fourth Amendment, not McDonald's. Therefore so far as he was concerned, the officers were lawfully within the hallway, as much so as if Mrs. Terry had admitted them. Looking over the transom was not a search, for the eye cannot commit the trespass condemned by the Fourth Amendment. Since the officers observed McDonald in the act of committing an offense, they were under a duty then and there to arrest him. . . . The arrest being valid the search incident thereto was lawful."

[37] Id. at 714.
[38] 17 U.S. LAW WEEK 4045 (1948).

But he brushed the argument aside, saying:

"We do not stop to examine that syllogism for flaws. Assuming its correctness, we reject the result.

"This was not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law. . . . When the officers heard the adding machine and, at the latest, when they saw what was transpiring in the room, they certainly had adequate grounds for seeking a search warrant. . . . 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. . . . Power is a heady thing; and history shows that the police acting on their own cannot be trusted."[39]

Although Justice Rutledge did not concur in the entire opinion, he did assent to the foregoing views,[40] so that they carry the authority of a majority of the Court. Justice Jackson agreed with the opinion of the Court, but he also wrote a concurring opinion in which Justice Frankfurter joined, arguing that the seizure was illegal for the further reason that the entry of the officers was unlawful and its felonious character "followed every step of their journey inside the house. . . ."[41] Justice Black concurred in the result without indicating the basis of his judgment. In view of his dissent in the *Trupiano* case, and in view of the emphasis in the *Harris* opinion upon the legality of the entrance to the apartment, it may be surmised he condemned this seizure only because of the illegal manner by which the officers entered the rooming house.

Three members of the Court did not find either of these objections persuasive. Justice Burton, dissenting in an opinion in which Chief Justice Vinson and Justice Reed concurred, argued as follows:

"The petitioners, as tenants or occupants of a room, had no right to object to the presence of officers in the hall of the rooming house. The actual observance by the police of the commission of the suspected crime thereupon justified their immediate arrest of those engaged in it without securing a warrant for such arrest. . . . In this case there was no search for the seized property because its presence was obvious. Also, there was no seizure of anything other than the articles which the arresting

[39] Id. at 4046.
[40] Id. at 4047.
[41] Ibid.

officer saw in use in some material connection with the crime which the accused committed in the officer's presence."[42]

These cases present two distinct issues: (1) when may a search be made without warrant as an incident of a lawful arrest? and (2) what is the extent of the right of search and seizure sanctioned in such circumstances?

Although dicta can be found to give color of support to nearly every point of view, no solid basis for any of these decisions is to be found in established precedents. On both points they depart from principles which had been deduced from decisions, usually unanimous, handed down in the last two decades.

The idea of search incident to arrest had developed from the proposition that "a warrant to take a person into custody is authority for taking into custody all that is found upon his person or in his hands."[43] Justice Jackson would stop there.[44] In the *Harris* case, Justices Frankfurter, Murphy and Rutledge conceded the further right to "seize all that is on the person, or is in such open and immediate physical relation to him as to be, in a fair sense, a projection of his person."[45] The majority accepted the much broader view of this right enunciated in *Agnello v. United States:*

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."[46]

[42] Id. at 4048 and 4049.

[43] 331 U.S. 145 at 196, 67 S.Ct. 1098 (1947).

[44] 331 U.S. 145 at 196 to 198, 67 S.Ct. 1098 (1947): Justice Jackson said, "The difficulty with this problem for me is that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the Court—and that means to me no limit at all.

"I am unable to suggest any test by which an incidental search, if permissible at all, can in police practice be kept within bounds that are reasonable. I hear none. I do not agree with other Justices in dissent that the intensity of this search made it illegal. It is objected that these searchers went through everything in the premises. But is a search valid if superficial and illegal only if it is thorough? It took five hours on the part of several officers. But if it was authorized at all, it can hardly become at some moment illegal because there was so much stuff to examine that it took overtime. It is said this search went beyond what was in 'plain sight'. It would seem a little capricious to say that a gun on top of a newspaper could be taken but a newspaper on top of a gun insulated it from seizure. If it were wrong to open a sealed envelope in this case, would it have been right if the mucilage failed to stick?" Id. at 197.

[45] Id. at 168.

[46] 269 U.S. 20, 46 S.Ct. 4 (1925); quoted in 331 U.S. 145 at 151, 67 S.Ct. 1098 (1947).

This expression was dictum, the search challenged there having taken place in defendant's home several blocks from the place of arrest. The closest the Court previously had come to sanctioning a search of premises on which an arrest was made was in *Marron v. United States*.[47] There, officers, armed with a warrant to search premises used for the sale of intoxicating liquor and to seize the liquor and articles for the manufacture thereof, entered the described premises and observed the unlawful activities. They arrested the person in charge, searched the entire premises, consisting of six or seven rooms, and found a quantity of liquor in a closet. While in the closet, they noticed and seized a ledger and some bills for utility services. Petitioner demanded return of the papers because they were not described in the warrant. The Court held that while the warrant authorized seizure only of the items described therein, the taking of the ledger and bills was justified as an incident of the arrest, since they were used in the unlawful business and were in the immediate custody and control of the person arrested.

Since search of the premises was lawful, the only question actually decided was the validity of the seizure of the ledger and bills. However, the Court said in its opinion that

> "The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. . . The authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose."[48]

The opinions in *Go-Bart Importing Co. v. United States*,[49] and *United States v. Lefkowitz*[50] made it clear that the *Marron* case rested upon its special facts, namely that the person arrested had committed a crime in the presence of the officers and that there was no general search or rummaging through private files, but that the papers taken were "visible and accessible and in the offender's immediate custody."[51] In each of these later cases, an arrest made in an office had been followed by a general search and seizure of files, not in quest of instrumentalities of crime, but for any evidence that might be turned up.

[47] 275 U.S. 192, 48 S.Ct. 74 (1927).
[48] Id. at 199.
[49] 282 U.S. 344, 51 S.Ct. 153 (1931).
[50] 285 U.S. 452, 52 S.Ct. 420 (1932).
[51] 282 U.S. 344 at 358, 51 S.Ct. 153 (1931).

Both decisions held that the search and seizure was unlawful, the Court emphasizing that an arrest does not confer a right to rummage through the private papers of an individual or a corporation in search of evidence to be used against the owner or custodian. Although they neither affirmed nor denied the right of search incident to arrest, the impression prevailed that they merely limited the scope of such search, especially with respect to private papers. Lower courts have continued to sanction searches without warrant contemporaneously with an arrest and some, in reliance on the *Marron* case, have allowed police a wide discretion in such cases.[52]

Despite the gap between what the Court has said and what it has done in earlier cases, a gap which was not overlooked by the dissenting Justices,[53] the Chief Justice seemed to consider the right of incidental search too well settled to require extended discussion:

> "The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control."[54]

Neither did he find it necessary to elaborate upon the "appropriate circumstances" which would justify such search. So far as his opinion discloses, the only additional fact which must be present to make valid a search of the premises at the time of an arrest is a bona fide belief of the officers that contraband or instruments of crime may be found there. He made no reference to the existence *vel non* of an opportunity to obtain a search warrant, although both Justices Frankfurter and Murphy insisted that such opportunity existed and that this in itself was enough to make the search without warrant unreasonable.[55]

The primary concern of the Chief Justice was to determine whether the kind of search and seizure made in the *Harris* case was reasonable. In contrast, the *Trupiano* and *McDonald* cases were disposed of by a finding that the circumstances did not justify a search without a warrant; hence, there was no need to consider the character of the particular search and seizure made. The *Harris* case has not been expressly

[52] United States v. Poller, (C.C.A. 2d, 1930) 43 F. (2d) 911; United States v. 71.41 Ounces Gold, (C.C.A. 2d, 1938) 94 F. (2d) 17. Cheng Wai v. United States, (C.C.A. 2d, 1942) 125 F. (2d) 915. Matthews v. Correa, (C.C.A. 2d, 1943) 135 F. (2d) 534. United States v. Lindenfeld, (C.C.A. 2d, 1944) 142 F. (2d) 829.

[53] Justice Jackson said, "While the language of this Court sometimes has been ambiguous, I do not find that the Court heretofore has sustained this extension of the incidental search." 331 U.S. 145 at 196, 67 S.Ct. 1098 (1947).

[54] 331 U.S. 145 at 151, 67 S.Ct. 1098 (1947).

[55] Id. at 172, 189 and 190.

overruled. In the *Trupiano* case, Justice Murphy made an unconvincing attempt to distinguish it by saying,

> "We do not take occasion here to reexamine the situation involved in *Harris v. United States, supra.* The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest. That circumstance was wholly lacking in the *Harris* case. . . Moreover, the *Harris* case dealt with the seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search. In contrast, the contraband seized in this case could easily have been specified in a prior search warrant. These factual differences may or may not be of significance so far as general principles are concerned. But the differences are enough to justify confining ourselves to the precise facts of this case, leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable."[56]

The reference to the character of the papers taken in the *Harris* case gives rise to some speculation as to the views of Justice Douglas. Why did he consider the *Harris* seizure legal and that in the *Trupiano* case unlawful? The other members of the Court believed that both cases should be decided in the same way; four considered the action of the officers legal in both cases; four others held both seizures invalid. The character of the papers found in the Harris apartment did not make the prior search legal; a search is not validated by what it turns up.[57] In the *Davis* case Justice Douglas wrote the opinion upholding the right of the government to obtain possession of ration coupons by methods which he intimated might not have been proper in the case of private papers. Is it possible that he considered the seizure of the draft cards lawful, irrespective of the legality of the prior search? If the cancelled checks for which the agents were looking had been found and carried away for use as evidence, would he have upheld the action? The Court held the search legal and he concurred without reservation. But on the facts stated by the Court—that the agents had information indicating that stolen checks were in defendant's possession—it appears, as the dissenters asserted, that the agents could have obtained a search warrant in advance. In that event, it is hard to reconcile the *Trupiano* case with a finding that the *Harris* search was valid.

[56] 334 U.S. 699 at 708 and 709, 68 S.Ct. 1229 (1948).
[57] Byars v. United States, 273 U.S. 28, 47 S.Ct. 248 (1927).

Although a few cases involving other issues had contained dicta to the effect that when there is sufficient opportunity to obtain a warrant a search or arrest without one is unlawful,[58] that requirement had not been thought pertinent to a search made in connection with an arrest. Such a condition contradicts the very concept of incidental search as conduct authorized by the warrant of arrest (or by facts which justify an arrest without a warrant). If that warrant authorizes the search, what difference does it make that a search warrant might have been obtained too?

Without the *Harris* decision, it is unlikely that the limitations of the *Trupiano* case would have been imposed. As long as incidental searches were confined within narrow bounds, the requirement of a search warrant in addition to the authority to make the arrest seemed a useless technicality. But it became a matter of substantial importance when a five-hour search of every nook and cranny of a four-room apartment was labeled "incidental."

Still to be considered is the kind of search and seizure which will be deemed reasonable when "appropriate circumstances" do exist for search without warrant. Reasonableness will depend upon several factors: (1) the extent and character of the premises searched; (2) the objects sought; (3) the intensity of the quest, and (4) the character of the property seized.

In *Davis v. United States*,[59] Justice Douglas pointed out that seizure of the ration coupons took place on business premises and hinted that the right of search of such a place might be greater than in case of a private home.[60] Justice Frankfurter took exception to this suggestion.[61] In the *Harris* case, Chief Justice Vinson said that the fact that the place of arrest was a dwelling was not enough to prevent a search. Apparently Justice Douglas' earlier remark was no more than a makeweight added to strengthen his argument. Occasionally Congress has differentiated private homes and other places in authorizing search warrants,[62] but the Supreme Court's condemnation of the general search of offices in the *Go-Bart Importing* and *Lefkowitz* cases leaves

[58] Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280 (1925) (search of vehicle). Go-Bart Importing Company v. United States, 282 U.S. 344, 51 S.Ct. 153 (1931) defective warrant of arrest); Taylor v. United States, 286 U.S. 1, 52 S.Ct. 466 (1932) (search of unoccupied premises).

[59] 328 U.S. 582, 66 S.Ct. 1256 (1946).

[60] Id. at 592.

[61] Id. at 596.

[62] For example, see 41 Stat. L. 305 at 315 (National Prohibition Act).

little room for such distinction as a matter of constitutional interpretation.[63]

The more serious issue presented by the *Harris* case lies not in the extent or nature of the premises searched, but rather in the character of the search and seizure—its object, its intensity, and particularly the opening and seizure of contents of a sealed envelope marked "personal papers." The professed objects of this search were two stolen cancelled checks and any tools, pens or other articles which might have been used as instruments of the crimes charged. The Court relied on the quest for the cancelled checks as justifying the intensity of the search, but indicated no disapproval of the wider objective, the discovery of any other instruments of the crime that might be turned up. This has dangerous possibilities. As Justice Murphy pointed out in his dissent,

> "Small, minute objects are used in connection with most if not all crimes; and there is always the possibility that some fruit of the crime or some item used in the commission of the offense may take the form of a small piece of paper. Using the subterfuge of searching for such fruits and instrumentalities of the crime, law enforcement officers are now free to engage in an unlimited plunder of the home . . . Under today's decision, a warrant of arrest for a particular crime authorizes an unlimited search of one's home from cellar to attic for evidence of "anything" that might come to light, whether bearing on the crime charged or any other crime. A search warrant is not only unnecessary; it is a hindrance."[64]

Assuming that the search in the *Harris* case was lawful, was the seizure of the draft papers permissible? The majority justified the taking by the character of the documents as government property, the possession and concealment of which constituted a continuing offense. The minority disagreed, arguing that private papers could not be seized even under warrant, and the only consequence of their status as public papers was to authorize seizure pursuant to lawful warrant. Justice Frankfurter also contended that the right of seizure without a warrant should be no greater than the right under warrant, and under a warrant only objects particularly described therein may be seized.[65] It is interesting to note, however, that in his dissent in *Zap v. United States*,[66] which involved illegal seizure of a check discovered during a lawful inspection of business records, he had conceded that:

[63] See Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261 (1921).
[64] 331 U.S. 145 at 190, 67 S.Ct. 1098 (1947).
[65] Id. at 165 (1947).
[66] 328 U.S. 624, 66 S.Ct. 1277 (1946).

"If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized."[67]

The very point of the *Marron* decision was that while the papers taken into custody there could not have been seized under the warrant because not described therein, the seizure without search was lawful as incident to the arrest. That case can, of course, be distinguished since the papers were in plain sight and not discovered by search. Even so, Justice Frankfurter has indicated dissatisfaction with the result,[68] and its authority is undermined by the *McDonald* case. There Justice Douglas said that even if the officers did not have enough information to obtain a warrant before entering the rooming house, they could have done so after observing the unlawful activities through the transom, so the seizure without warrant was unjustified.[69] A similar argument was made by Justice Frankfurter in the *Harris* case,[70] and probably could have been made in the *Marron* case. But if the search itself was unreasonable, the doctrine of *Silverthorne v. United States*[71] might foreclose the issuance of a warrant to seize the materials found. In the *Silverthorne* case, papers seized during an illegal raid had been carried away, examined and copied. Thereafter the original papers were returned. When the government sought to require their production in court, its request was denied by the Supreme Court. Justice Holmes, speaking for a unanimous Court, held that since knowledge of the contents of the papers had been obtained illegally, the government should not be allowed to profit by its own wrong by making use of the evidence, even though the same information might have been acquired legally in some other way. That case differed from the *Harris* case in that the papers seized were private and not government property, but the principle announced was broad enough to cover any situation where the government uncovers evidence by illegal searches.

Since the *Harris* decision rested in part at least upon the fact that the draft cards were public property, there remains a question as to whether seizure of other types of materials, such as tools or papers used in the commission of a different crime, would have been sustained. Justice Murphy interpreted the majority opinion to mean that officers might search "for the fruits, instrumentalities and any-

[67] Id. at 632.
[68] 331 U.S. 145, 166, 67 S.Ct. 1098 (1947).
[69] 17 U.S. LAW WEEK 4045 at 4046 (1948).
[70] 331 U.S. 145 at 172, 67 S.Ct. 1098 (1947).
[71] 251 U.S. 385, 40 S.Ct. 182 (1920).

thing else connected with the crime charged or with any other possible crime."[72] Where, in the language of Justice Frankfurter, from the very nature of the materials, the possession or concealment of them constitutes a crime, there seems to be no logical reason for distinguishing them from government property. But if, as in the case of the ledger and bills seized in the *Marron* case, the articles are deemed instruments of crime only because of their relation to some unlawful business, it is by no means certain that the majority would uphold a seizure, if they were not related to the crime for which the arrest was made.

At the bottom of all these problems lies a common element of danger—the opportunity and temptation to abuse which will be offered to police officers if they are allowed to use evidence obtained without a warrant. If the search is not limited to specific objects, but extends to any instruments of crime that may be found, few, indeed, will be the occasions when agents will lack an excuse to ransack the entire premises on which an arrest is made. If it is not limited to objects relating to the crime which provokes the arrest, an arrest for a minor offense may be made the occasion for a general search. If police may carry off whatever contraband or instruments or fruits of crime they find, any attempt to limit the objects of search by judicial opinion would be unrealistic. It has been well said that:

> ". . . [L]imitations upon the fruit to be gathered tend to limit the quest itself. . . ."[73]

On the other hand

> "Words of caution will hedge an opinion, but they are not very effective in hedging searches."[74]

To forestall abuses of this order, the Fourth Amendment requires that search warrants particularly describe both the place to be searched and the articles to be seized. Common sense dictates that searches without warrant be circumscribed no less carefully. Although the *Trupiano* and *McDonald* decisions did not deal with the scope of incidental search, the logical consequence of the holding that search warrants are required where it is feasible to obtain them is that officers shall not be allowed to go farther without a warrant than they might if they secured one.

[72] 331 U.S. 145 at 191, 67 S.Ct. 1098 (1947).

[73] Judge Learned Hand in United States v. Poller, (C.C.A. 2d, 1930) 43 F. (2d) 911 at 914.

[74] Justice Jackson, dissenting in Harris v. United States, 331 U.S. 145 at 197, 67 S.Ct. 1098 (1947).

III

CONCLUSION

The cardinal facts which cannot be overlooked in any effort to evaluate these cases are the close division within the Court and the shifting alignment of the Justices. The *Davis* and *Zap* cases were four to three decisions. At that time, there was a vacancy by reason of the death of Chief Justice Stone, and Justice Jackson did not participate in the decisions. The opinion of the Court in each case was written by Justice Douglas, with Justices Black, Reed and Burton concurring; in each, Justices Frankfurter, Murphy and Rutledge dissented. A similar division prevailed in the *Harris* and *Shapiro* cases, with the Chief Justice joining the majority and Justice Jackson adding his dissent. However, in the *Johnson* and *Trupiano* cases, Justice Douglas parted company with the earlier majority and joined the former dissenters to make their views controlling. Finally in the *McDonald* case the division was even more confusing. Justice Douglas wrote the opinion of the Court, with Justices Murphy, Frankfurter and Jackson concurring. Justice Rutledge concurred in part and dissented in part. Justice Black concurred in the result and the Chief Justice, Justice Reed and Justice Burton dissented.

Such division and instability of opinion within the Court itself does nothing to promote the respect and confidence necessary to insure faithful adherence to constitutional restraints by law enforcement officers. Neither does it furnish to such officers the definite and certain standards requisite for the efficient discharge of their duties.

How much the *Shapiro* decision will help or hinder government agencies in obtaining information from business records and using it in prosecution of violations of law is a matter of speculation. On the surface at least, it appears that the *Harris* decision was a costly victory for the government. Until the right of incidental search was pushed to such an extreme, the existence of the right had not been seriously challenged. Now, under the *Trupiano* and *McDonald* cases, police officers making an arrest for a crime committed in their presence cannot even seize instruments of crime which are in plain view, if they had time to secure a warrant in advance.

In litigation as in war, the victor is often the loser.