

1975

Doing Away With the Exclusionary Rule

Francis A. Gilligan

Fredric I. Lederer

William & Mary Law School, filede@wm.edu

Repository Citation

Gilligan, Francis A. and Lederer, Fredric I., "Doing Away With the Exclusionary Rule" (1975). *Faculty Publications*. 1398.
<https://scholarship.law.wm.edu/facpubs/1398>

Copyright c 1975 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>



THE ARMY LAWYER



DA PAMPHLET 27-50-32 HEADQUARTERS, DEPARTMENT OF THE ARMY, WASHINGTON, D.C.

Doing Away With the Exclusionary Rule

By: Major Francis A. Gilligan and Captain Frederic I. Lederer, Criminal Law Division, TJAGSA

"The criminal is to go free because the constable has blundered."¹ This had been the rule in military courts-martial involving illegal searches and seizures since 1922. Isn't it now time to devise a better rule—one that both protects the rights of the citizen and yet also protects the innocent or negligent military policeman or commander? It is our opinion that an alternative to the exclusionary rule does exist in the military.

The fourth amendment does not expressly or implicitly provide a remedy for its violation. The remedy the courts have fashioned when there is an illegal search or seizure is the exclusionary rule or suppression doctrine. The exclusionary rule was first applied to the federal courts in *Weeks v. United States*,² when the Supreme Court held that evidence obtained in violation of the fourth amendment cannot be admitted in evidence at a criminal trial of the person whose rights were violated. In *Weeks*, the Court stated that without such a rule, the amendment would be of "no value" to those accused of a crime and "might as well be stricken from the Constitution."³ The exclusionary rule was not held applicable to the states until *Mapp v. Ohio*⁴ was decided in 1961. The military, however, adopted the exclusionary rule much earlier with the Navy adopting it in 1922⁵ and the Army in 1924.⁶

The exclusionary rule was set forth in the 1951 *Manual for Courts-Martial*⁷ and was carried over into the current 1969 Revised *Manual*.⁸ The first paragraph of paragraph 152 of the present *Manual* provides that evidence that is "unlawfully" obtained is inadmissible in evidence if the defense has standing to raise the issue. The *Manual* also indicates that the exclusionary rule applies to derivative as well

as primary evidence. The Analysis of Contents of the 1969 *Manual* indicates that paragraph 152 was intended to follow the exclusionary rule as announced by the Supreme Court.⁹ Similarly the Court of Military Appeals has indicated that it follows the fourth amendment standards announced by the Supreme Court.¹⁰ Thus it can be assumed that the military law of the fourth amendment is primarily a reflection of the applicable federal civilian law.

The intent of this article is to focus on the necessity for future use of the exclusionary rule within the military. The rule itself has been also literally enshrined, despite widespread protest, in the civilian law.¹¹ Yet it is a rule that seemingly allows both the criminal and the erring policeman to go unpunished while society suffers the consequences. The justifications behind the fourth amendment exclusionary rule¹² are two: judicial integrity and deterrence of improper police conduct.

Rationale for Exclusionary Rule.

Courts have often stated that judicial integrity requires the exclusion of illegally obtained evidence. Arguing for the exclusion of evidence seized through illegal wiretapping in *Olmstead v. United States*,¹³ Justices Brandeis and Holmes asserted in their dissenting opinions that the issue of judicial integrity is a moral or ethical question not susceptible of easy solution. In *Olmstead*, Justice Holmes stated that it was not enough for the Court to disapprove of the way the evidence was obtained. Rather, he thought it better for some criminal to go free rather than the government "play an ignoble part" in admitting the evidence at trial.¹⁴ Justice Brandeis said that illegally obtained evidence must be excluded to "preserve the judi-

The Army Lawyer

Table of Contents

1	Doing Away With the Exclusionary Rule
6	Punitive vs. Nonpunitive Regulations; The Emasculation of Article 92
12	The Federal Rules of Evidence
22	Prugh Addresses International Law Society
26	Criminal Law Items
30	Judiciary Notes
32	Clemency: A Useful Rehabilitation Tool
34	JAG School Notes
35	Legal Assistance Items
39	Copyright Law Items
40	Reserve Affairs Items
44	CLE News
49	JAGC Personnel Items
50	Current Materials of Interest

The Judge Advocate General

Major General Wilton B. Persons, Jr.

The Assistant Judge Advocate General

Major General Lawrence H. Williams

Commandant, Judge Advocate General's School

Colonel William S. Fulton, Jr.

Editorial Board

Colonel Barney L. Brannen

Lieutenant Colonel Jack H. Williams

Editor

Captain Paul F. Hill

Administrative Assistant

Ms. Helena Daidone

The Army Lawyer is published monthly by The Judge Advocate General's School. By-lined articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army. Manuscripts on topics of interest to military lawyers are invited to: Editor, The Army Lawyer, The Judge Advocate General's School, Charlottesville, Virginia 22901. Manuscripts will be returned only upon specific request. No compensation can be paid to authors for articles published. Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971.

cial process from contamination." "If the Government becomes a law breaker," he stated in an oft-quoted passage, "it breeds contempt for law; . . . it invites anarchy."¹⁵ In 1968, the Court in *Terry v. Ohio*¹⁶ reemphasized the question of judicial integrity:

Courts which sit under our Constitution cannot and will not be made a part to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasion.¹⁷

While lawyers and judges alike should be deeply concerned about the integrity of the judicial process, English courts have admitted such evidence for years¹⁸ without noticeably losing their integrity. Indeed what integrity exists in letting the guilty and potentially dangerous escape justice?

The second and, we believe, the principal justification for the exclusionary rule¹⁹ is the deterrence of illegal police conduct. As stated by the Supreme Court:

The purpose of the exclusionary rule "is to deter—to compel respect for the Constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."²⁰

There is little doubt that the fourth amendment exclusionary rule owes its existence to the perception that it offered the only chance of deterring improper police conduct.²¹ The courts have indulged in two basic presumptions: that the rule does in fact deter improper conduct and that no reasonable alternatives to the rule exist. Both presumptions are open to serious question. At present it seems safe to say that most commentators and many of the judiciary have concluded that there is no evidence that the exclusionary rule does deter police misconduct.²² That leaves the second prong of the exclusionary rule's support—the absence of alternative remedies.

Alternatives to Exclusionary Rule.

Historically in the United States the type of remedy available in England to victims of police misconduct—civil law suit against the

police²³—has been notoriously unsuccessful. Other remedies have been slow to take root and it is fair to say that at the time of the *Mapp* decision, let alone *Weeks*, no viable alternative to the exclusionary rule may have existed. This, however, is no longer the case, whether in the civilian world or the military community. A serviceman or woman who believes that a fourth amendment violation has occurred may take any or all of the following steps: request relief under Article 138, UCMJ;²⁴ institute a law suit under state substantive law;²⁵ institute suit under section 1 of the Civil Rights Act of 1971;²⁶ institute a federal law suit pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*;²⁷ submit a claim under the Federal Tort Claims Act;²⁸ or prefer criminal charges under Articles 98, 133 or 134 of the UCMJ.²⁹ The availability of these varied remedies is crucial for if the exclusionary rule is not the sole legitimate remedy for a fourth amendment violation, it may well be that the exclusionary rule could be dispensed with. Chief Justice Burger stated in *Bevins v. Six Unknown Named Agents of the Federal Bureau of Narcotics*³⁰ that:

The [exclusionary] rule has rested on a theory that suppression of evidence in these circumstances was imperative to deter law enforcement authorities If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule.

It is our thesis that viable alternatives to the exclusionary rule do exist within the military, and that consideration should be given to creation of a system of remedies that will allow illegal seized evidence to be admissible at trial while correcting the mistakes that led to the illegal seizure. After all, unlike the fifth amendment (and Article 31) exclusionary rule and the exclusion of evidence at trial for irrelevancy, all of which is partially based on an assumption of unreliable evidence, evidence illegally under the fourth amendment is perfectly relevant and probative—only public policy prevents its admission. It is not within the scope of this article to create a complete system of alternative remedies—that must await an expanded

version to be printed at a later time. However, we believe that when combined with the other remedies that already exist, creation of one new military institution—a military fourth amendment review board to be created at the installation or division level—would allow departure from the exclusionary rule.

The Review Board.

It is our assumption that military police and commanders alike would approve of a local review board that would implement the fourth amendment so long as:

1. There was a clear set of guidelines for military police and commanders to follow; and
2. Military police and commanders were represented on the review board.

The review board would review alleged violations of a set of model rules designed to render the fourth amendment comprehensible and to supply implementing authorities with clear guidelines as to their legal authority in various situations. The rules would be similar in scope to the *Model Rules for Law Enforcement: Warrantless Searches of Persons and Places* written by the Project on Law Enforcement located at Arizona State University.³¹ The review board would not have disciplinary authority per se. If it found that an individual had committed an *intentional* or *flagrant* abuse it would have the power to recommend disciplinary action to the appropriate commander. On the other hand, if it were to find that a violation of the fourth amendment had taken place through negligence or ignorance it could recommend that no action be taken, that the individual be counseled by an attorney in the office of the staff judge advocate as to the nature of the mistake, or where it was clear from past actions of the individual that he was unable, despite good intent, to apply the rules to real life situations, that appropriate administrative action be taken. Particularly important would be the board's ability to recommend changes in the local rules to ensure that they were as workable as possible in view of the constitutional restraints. The reader may suggest that such a board would be of little use

in protecting the important constitutional rights involved. However, this is to ignore two important points. Firstly, if the board establishes a history of failing to take appropriate action, the local trial judge will have no option but to bring back the exclusionary rule. Secondly, to allow intentional or flagrant violation of promulgated rules is no less a violation of military discipline than any other disobedience of orders or military procedure, and certainly our brethen of the line would not tolerate such behavior once the rules were sufficiently clear to be understood and enforced.

Composition of the Review Board.

The effectiveness of a review board would depend to a great extent on its membership. The board could be composed entirely of commanders or officers. However, a better and more effective board would probably contain a mixture of commanders, military police, and at least one JAGC officer. Thus the board could take advantage of the expertise of its members when weighing the actions of a commander or military policeman (to include the CID) or when considering changes within the model rules. Since the board would be composed of military personnel intimately familiar with the realities of law enforcement it would tend to be less tolerant of unjustified error and equally less prone to recommend severe corrective actions solely because of an academic mistake. Similarly its decisions should be subject to great deference within the military law enforcement community. Since the police would be policing themselves, our law enforcement personnel could take pride in the board rather than resenting its actions.

Procedure.

The board's procedure can only be suggested in the most general terms. Experience at the local level will be essential for proper functioning. However, some elements can be suggested. A complaint may be brought before the board by any member of the armed services in the jurisdiction served by the board who claims to have been the victim of a fourth amendment violation, by any board member or by the defense counsel or commander of an individual so ag-

grieved. While an anonymous complaint *might* prove desirable we think that it could too easily be made a vehicle for harassment and believe that an individual making a complaint must be prepared for his identity to be made known to the board. In terms of general procedure it is suggested that the board act pursuant to Army Regulation 15-6 and thus comply with all regulatory requirements.

Promulgation of Model Rules.

The model rules for search and seizure should not hinder the functions of the commander, military police, or criminal investigators. The rules would be promulgated at the local level by the local board after appropriate consultation with the staff judge advocate, and they could be updated as experience requires. Lest there be fear that the rules might fail to comply with constitutional requirements, the reader should keep in mind that failure to conform to constitutional minimums would invalidate the board and reintroduce the exclusionary rule. Additionally, the existence of the board should have no effect on the various fiscal remedies that would exist concurrently. The model rules would be explicit guidelines that could be followed by laymen rather than vague principles of academia.

Benefit of a Set of Model Rules.

A set of *specific* guidelines for personnel with law enforcement responsibilities would increase their efficiency by providing the military policeman or commander with as many specific answers as can be foreseen. The rights of the individual soldier should receive increased protection since the guidelines would be specific enough to prevent predictable fourth amendment mistakes. Placing the rule-making authority in the hands of the experts involved, bearing in mind as always that the board *must* comply with fourth amendment standards, would ensure realistic and comprehensible rules giving ample consideration to local problems and interests. Centralized decision making by the board when promulgating or updating the rules would allow the commander, military policeman, or criminal investigator to function according to the rules and with less fear of the con-

sequences of making a fourth amendment decision.

The use of a review board at post level when coupled with a set of model rules would provide a reasonable alternative to the exclusionary rule. The "police officer's" blunder would no longer require that the evidence be suppressed. Rather the evidence would be admissible (except perhaps in the most egregious intentional violation) and the "policeman" could be subject to the type of administrative correction any impartial professional law enforcement agent would accept. For good faith mistake remedial education or simply a *full* explanation of the error might be appropriate. For repeated good faith error, possible MOS reclassification or other remedy could be appropriate. And for gross negligence or intentional violation, the entire variety of administrative and criminal penalties would be available. Thus society and the "police" would be protected. Only the criminal would lose.

A Possible Scenario.

While the courts may well accept substitutes for the exclusionary rule, they are likely to be most hesitant in doing so. It is highly unlikely that the military trial bench or our appellate courts would allow use of illegally seized evidence simply because a post has promulgated model rules and set up a review board. We think that for maximum likelihood of success, a command would have to set up its system and operate it for a reasonable time period—six months or longer—before the government could attempt to persuade the local trial judge that a viable alternative to the exclusionary rule existed in the jurisdiction. At that test case, the prosecution would have to prove that the board had been effective. Proof would require adequate evidence of attempts to publicize the board's existence, the number and nature of complaints brought before it, and the board's action in each case. Follow-up actions or lack thereof would also have to be demonstrated. Would the prosecution succeed? That would obviously depend on the trial judge. For a test case to survive for consideration of the appellate courts, the military judge would have to rule that a search or

seizure was illegal but that the exclusionary rule didn't apply. Further, to do so the judge would have to depart from the seemingly clear language of the *Manual for Courts-Martial*. This, however, should not be as difficult as it might seem. As illustrated herein, the military has applied civilian fourth amendments standards and paragraph 152 of the *Manual* can easily be interpreted as applying only federal fourth amendment law including the rationales for the exclusionary rule already discussed. Precedent for this conclusion and approach can be found in the decision by the Court of Military Appeals in *United States v. Clark*.³² In that case the court nullified the plain meaning of paragraph 140a(2) of the *Manual* which requires offer of counsel during any interrogation of a military suspect or accused, holding that the intent behind that paragraph had only been to adopt *Miranda*.

Creation of a legitimate alternative to the fourth amendment exclusionary rule will not be easy. At a minimum it will take a great deal of effort and time. It could well prove fruitless at any specific installation or command. However, at the very least creation of the rules and board should improve search and seizure practices. The effort to arrive at a replacement for the exclusionary rule will not be simple, but haven't too many criminals gone free already?

Footnotes

1. *People v. Defore*, 242 N.Y. 13, 21, 150 N.E.2d 585, 587 (1926) (opinion by Mr. Justice Cardozo).
2. 232 U.S. 383 (1914). The history of the exclusionary rule is set forth in an article written by Chief Justice of the United States Supreme Court Warren E. Berger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 4-10 (1964).
3. *Weeks v. United States*, 232 U.S. 383, 393 (1914).
4. 367 U.S. 643 (1961).
5. CMO 10-1922, p. 12.
6. Dig. Ops. JAG 1912-40, 220 (CM 165750).
7. *Manual for Courts-Martial, United States*, 1951 para. 152.
8. *Manual for Courts-Martial, United States*, 1969 (Rev. ed.) para. 152.
9. Analysis of Contents, *Manual for Courts-Martial, United States*, 1969, Revised Edition, 27-39 thru 27-40 (1970).
The matter pertaining to search and seizure was completely rewritten due to the many changes effected in this area by the Supreme Court of Military Appeals.

.....
The exclusionary rule, of course, applies to derivative

evidence obtained as a result of information supplied by the illegal search on the ground that it, too, has been obtained as a result of the illegal acts. However, in *Wong Sun v. United States*, 371 U.S. 471 (1963), the Supreme Court stated that evidence would be considered as having been obtained as a result of the illegal acts only if it has been come at by an exploitation of those acts instead of by means sufficiently distinguishable to be purged of the taint of the illegality.

10. See, e.g., *United States v. Poundstone*, 22 U.S.C.M.A. 277, 46 C.M.R. 277 (1973).
11. See generally, Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & C. 1 (1975).
12. Compare *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961) with *Elkins v. United States*, 364 U.S. 206, 217 (1960) and *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911 (1955).
13. 277 U.S. 438 (1928).
14. *Id.* at 470.
15. *Id.* at 484-85.
16. 392 U.S. 1 (1968).
17. *Id.* at 13. See also *Mapp v. Ohio*, 367 U.S. 643, 659 (1961), placing emphasis on the "imperative of judicial integrity."
18. See e.g., *Kuruma v. The Queen* [1955] A.C. 197; *Callis v. Gunn* [1963] 48 Crim. App. Repts. 36; *King v. Reginam* [1968] 52 Crim. App. Repts. 353; *Regina v. Murphy* [1965] Northern Ireland Courts-Martial Appeal Court 138. But see *Regina v. Payne* [1963] 1 All E.R. 848; *Hampton Criminal Procedure and Evidence* 407-08 (London 1973).
19. *United States v. Calandra*, 414 U.S. 338, 347 (1974).
20. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). The lack of a federal remedy was a substantial factor in the Court's decision to impose the exclusionary rule. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 S. CT. REV. 1, 2-20.
21. See e.g. *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) in which Chief Justice Traynor stated:

We have been compelled to reach that conclusion because other remedies have completely failed to secure

compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.

When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced. . . , 37

22. Galligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule*, 66 J. CRIM. L. & C. 1, 2-5 (1975).
23. See e.g. HAMPTON CRIMINAL PROCEDURE AND EVIDENCE 707 (London 1973). Statistics indicate for example that total complaints against police in England and Wales excluding the Metropolitan Police equaled in 1968, 9,286 of which 1,158 complaints were substantiated. This number appears reasonably consistent for the years 1965 through 1968 varying from a low of 8,183 complaints in 1966 to the 1968 high. ENGLISH, CASES AND MATERIALS ON THE RIGHTS OF THE INDIVIDUAL IN THE CRIMINAL PROCESS (unpublished materials University of Exeter, England, 1970) citing the 1970 Report of the Advisory Committee on Drug Dependence, *Powers of Arrest and Search in Relation to Drug Offenses*, paras. 58, 59. The cited statistic apparently refer to complaints for all reasons. As to the English penchant for bringing suit against police officers, see e.g. *Christie v. Leachinsky* [1947] A.C. 573; *Dallison v. Caffery* [1965] 1 Q.B. 348; *Wiltshire v. Barrett* [1965] 2 All E.R. 271.
24. Uniform Code of Military Justice art. 938, 10 U.S.C. § 138 (1970).
25. Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).
26. 42 U.S.C. § 1983 (1970).
27. 403 U.S. 388 (1971).
28. 28 U.S.C. §§ 1346, 2674 *et seq.* (1970).
29. Uniform Code of Military Justice arts. 98, 133 and 134, 10 U.S.C. §§ 898, 933 and 934 (1970).
30. 403 U.S. 388, 413-14 (1971).