Duquesne Law Review

Volume 13 | Number 1 Article 14

1974

Constitutional Law - Fourth Amendment - Search and Seizure - Exclusionary Rule - Grand Jury

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Recent Decisions

CONSTITUTIONAL LAW—FOURTH AMENDMENT—SEARCH AND SEIZURE—EXCLUSIONARY RULE—GRAND JURY—The Supreme Court has held that a grand jury witness offered immunity is not entitled to a suppression hearing and may not refuse to answer questions based on evidence obtained in an illegal search.

United States v. Calandra, 414 U.S. 338 (1974).

On December 11, 1970, federal agents obtained a warrant authorizing the search of respondent John Calandra's place of business, the Royal Machine and Tool Co.[1] The warrant specified that the objects of the search were gambling paraphernalia; it authorized the seizure of betting slips, cash and betting records. On December 15, 1970, federal agents conducted an extensive search of the entire business premises. Although no gambling paraphernalia were found, one agent did find a card which indicated that a known victim of "loansharking" had been making periodic payments to Calandra. The agents seized this card along with stock certificates, company records and address books. Calandra was subpoenaed to testify before a special federal grand jury investigating possible violations of federal laws prohibiting extortionate credit transactions.[2] He appeared, but refused to answer questions, invoking his fifth amendment privilege against self-incrimination.[3] The federal prosecutor requested that Calandra be granted transactional immunity.[4] Calandra moved to suppress the seized evidence on the grounds that the search warrant was issued without probable cause and that the search exceeded the scope of the warrant.[5] At the immunity hearing,

1. The master affidavit filed in support of the search warrant contained evidence from three sources: court authorized wiretaps, physical surveillance, and informants. *In re* Calandra, 332 F. Supp. 737, 742 (N.D. Ohio 1971).

2. 18 U.S.C. §§ 892-94 (1970).

3. U.S. CONST. amend. V provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . "

4. 18 U.S.C. § 2514 (1968), authorizes United States attorneys to request transactional immunity (*i.e.*, immunity from prosecution) for any witness whose testimony the attorney feels is necessary.

5. The motion was pursuant to Fed. R. Crim. P. 41(e) (1961), which allows the victim of an unlawful search and seizure to have seized property returned to him and suppressed as

Calandra stipulated that he would refuse to answer questions based on the evidence seized in the December search.

The district court[6] held that due process required the granting of a suppression hearing to a grand jury witness. The evidence was suppressed,[7] and Calandra was excused from answering grand jury questions based on that evidence. The court of appeals affirmed.[8] On certiorari,[9] the only issue before the Supreme Court was the very narrow question of whether a grand jury witness was entitled to suppress illegally seized evidence and thereby avoid answering questions based on that evidence.[10] The Court reversed.[11]

Justice Powell balanced two competing concepts: the historical role of the grand jury and the exclusionary rule. Historically,[12] the grand jury has fulfilled two functions: determining whether probable cause exists to bring criminal charges against an individual; and protecting citizens from unfounded accusations. In order to carry out these functions, the grand jury has been accorded broad investigatory powers,[13] while the rights of grand jury witnesses have been

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evidence for certain enumerated reasons. The motion to suppress must be made "before trial or hearing" unless circumstances prevent it.

6. *In re* Calandra, 332 F. Supp. 737 (N.D. Ohio 1971).

7. Chief Judge Battisti found that there was no probable cause to support the issuance of the warrant. *Id.* at 742-44. He also found that the search exceeded the scope of the warrant since the evidence seized was not that specified in the warrant. *Id.* at 745.

8. United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972).

9. United States v. Calandra, 414 U.S. 338 (1974).

10. The government did not seek review of the court of appeals finding that the search and seizure was unlawful, nor was the order directing the return of the seized property challenged.

11. The decision was 6-3 for reversal. Justice Powell wrote the opinion for reversal, joined by Chief Justice Burger, and Justices Stewart, White, Blackmun, and Rehnquist. Justice Brennan wrote the dissenting opinion, joined by Justices Douglas and Marshall.

12. For discussion of the history of the grand jury see Costello v. United States, 350 U.S. 359 (1956); G. EDWARDS, THE GRAND JURY 1-44 (1906); Kennedy & Briggs, *Historical and Legal Aspects of the California Grand Jury System*, 43 CALIF. L. REV. 251 (1955). *See also* Branzburg v. Hayes, 408 U.S. 665 (1972); Wood v. Georgia, 370 U.S. 375, 390 (1962); Russell v. United States, 369 U.S. 749 (1962).

13. For example, as Justice Powell points out, the grand jury may compel a witness to appear. New York v. O'Neill, 359 U.S. 1, (1959) (upholding statute authorizing interstate subpoena); United States v. Bryan, 339 U.S. 323 (1950) (upholding international subpoena).

The grand jury witness must testify, even if he fears retribution. Piemont v. United States, 367 U.S. 556 (1961) (witness feared for his life and lives of his family); Blair v. United States, 250 U.S. 273 (1919) (public duty to testify). *See also* Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Johnson, 319 U.S. 503 (1943).

The grand jury may hear incompetent or illegal evidence and base indictments thereon. United States v. Blue, 384 U.S. 251, 255 n.3 (1966) (evidence obtained in violation of fifth

restricted.[14] Although the grand jury theoretically is subject to judicial control,[15] the Court has been loath to uphold challenges which would result in any delay to a grand jury investigation or would in any way circumscribe the investigatory function of the grand jury.[16]

Turning to the exclusionary rule, Justice Powell noted that the prime purpose of the rule is the deterrence of unlawful police activ-

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amendment will sustain indictment); *accord*, Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956) (hearsay evidence); Holt v. United States, 218 U.S. 245 (1910) (incompetent evidence).

The witness's fifth amendment privilege may be overridden by a grant of immunity. This immunity need not guarantee that the witness will never be prosecuted for crimes he may reveal (transactional immunity), but only that his compelled testimony will not be used against him if he is brought to trial (use immunity). Kastigar v. United States, 406 U.S. 441 (1972). *Contra*, Brown v. Walker, 161 U.S. 591 (1896).

14. He may not present favorable testimony. Charlton v. Kelly, 229 U.S. 447 (1913). He is not permitted to have his attorney present in the grand jury room. FED. R. CRIM. P. 6(d). He cannot assert his first amendment rights, Branzburg v. Hayes, 408 U.S. 665 (1972); challenge the materiality of the questions asked, Nelson v. United States, 201 U.S. 92 (1906); or attack the constitutionality of the statute the violation of which the grand jury is investigating, Blair v. United States, 250 U.S. 273 (1919); Carter v. United States, 417 F.2d 384 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970). He may, however, assert common law privileges; *e.g.*, Blau v. United States, 340 U.S. 332 (1951) (husband-wife).

The respective positions of grand jury and witness have provoked some criticism. *See, e.g.*, Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153 (1965); Fahringer, *Grand Juries: Lawyer for the Witness*, TRIAL, Jan.-Feb., 1973, at 12; Foster, *Grand Jury Practice in the 1970's*, 32 OHIO ST. L.J. 701 (1971); Tigar & Levy, *The Grand Jury as the New Inquisition*, 50 MICH. ST. B.J. 693 (1971); Note, *American Grand Jury: Investigatory and Indictment Powers*, 22 CLEV. ST. L. REV. 136 (1973). *But see, e.g.*, Sharp, *Grand Juries: An Investigative Force*, TRIAL, Jan.-Feb., 1973, at 10; Younger, *The Grand Jury Under Attack (Part III)*, 46 J. CRIM. L.C. & P.S. 214 (1955); 39 CALIF. L. REV. 573 (1951).

15. For example, the grand jury cannot itself find a witness in contempt, but must ask the court to do so. Levine v. United States, 362 U.S. 610 (1960); Brown v. United States, 359 U.S. 41 (1959); *In re* Oliver, 333 U.S. 257 (1948); FED. R. CRIM. P. 17(g). The court may discharge the grand jury at any time. FED. R. CRIM. P. 6(g). It is the court which issues subpoenas. FED. R. CRIM. P. 17(c). A subpoena may be challenged if compliance would be unreasonable or oppressive. Application of Certain Chinese Family Benevolent & Dist. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956); FED. R. CRIM. P. 17(c). There is authority for the proposition that a subpoena must comport with fourth amendment reasonableness standards and that a witness may challenge a subpoena on the grounds that it is an unreasonable search and seizure. Hale v. Henkel, 201 U.S. 43 (1906); Boyd v. United States, 116 U.S. 616 (1886). *See* Note, *United States v. Dionisio: The Grand Jury and the Fourth Amendment*, 73 COLUM. L. REV. 1145, 1150 (1973). *But see* United States v. Dionisio, 410 U.S. 1 (1973) (no showing of reasonableness required).

16. Challenges to the grand jury usually come in two ways. First, a witness may refuse, on various grounds, to comply with a subpoena. Hale v. Henkel, 201 U.S. 43 (1906) (subpoena too broad). Or, he may refuse to answer questions; *e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (first amendment grounds); Gelbard v. United States, 408 U.S. 41 (1972) (questions based on illegal wiretaps); Blair v. United States, 250 U.S. 273 (1919) (grand jury investigating violation of unconstitutional statute); Nelson v. United States, 201 U.S. 92 (1906) (ques-

ity, with the incidental enforcement of fourth amendment rights.[17] The rule is a remedial device and will be applied only where its remedial objective of deterrence will be most "efficaciously served,"[18] *i.e.*, at trial. Since police presumably have the greatest incentive to conduct an illegal search and seizure when a conviction will result, the exclusion at trial of evidence so obtained should deter most illegal police activity. Application of the rule has never been required merely because such activity would be deterred.[19] Instead, the exclusionary rule may be invoked only by those defendants in a criminal trial whose personal fourth amendment rights have been violated.[20] Since Calandra was not a defendant, he could not have the evidence suppressed. Justice Powell refused to expand the rule to include grand jury proceedings because the only police activity to be deterred by such an expansion would be activity consciously directed at producing evidence for grand jury use. Since the evidence would not be admissible at the search victim's trial, police would presumably have little incentive to carry out such activities. On balance, this minimal deterrent impact would not justify the

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tions immaterial). The Court has been willing to hear these challenges only if the witness has the requisite standing. In order to gain standing, the witness must place himself in contempt, in effect, buying a delay in the grand jury proceeding at the cost of his freedom. United States v. Ryan, 402 U.S. 530 (1971) (subpoena; contempt is required); Cobbledick v. United States, 309 U.S. 323 (1940) (denial of motion to quash subpoena is not appealable; contempt conviction is necessary); *see* United States v. Calandra, 465 F.2d 1218, 1225 (6th Cir. 1972), where Judge Miller notes that the alternative to a suppression hearing is a contempt proceeding, which he feels is far more disruptive.

The second challenge to the grand jury arises when a defendant challenges his indictment, thereby placing at issue the power of the grand jury to hear evidence which would be inadmissible at trial. These challenges are not successful; *e.g.*, United States v. Blue, 384 U.S. 251 (1966) (evidence obtained in violation of fifth amendment privilege); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359 (1956) (hearsay); Holt v. United States, 218 U.S. 245 (1910) (incompetent testimony).

17. The fourth amendment reads as follows:

> 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.

U.S. CONST. amend. IV.

18. 414 U.S. at 348.

19. Thus, illegally seized evidence can be used to impeach a defendant's testimony. Walder v. United States, 347 U.S. 62 (1954) (exclusionary rule cannot be used as a shield to perjury). Illegal evidence may be admitted at sentencing hearings. United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

20. Alderman v. United States, 394 U.S. 165 (1969) (defendant was not the victim of the unlawful search and seizure).

resultant severe impediment to grand jury investigations. The Court also rejected respondent's argument that each grand jury question based on illegally seized evidence works a new, independent fourth amendment violation.[21]

The dissent decried Justice Powell's treatment of the exclusionary rule as a "startling misconception"[22] which entirely overlooked the considerations of judicial integrity upon which the exclusionary rule was first based.[23] Justice Brennan saw the majority opinion as signaling the beginning of the end for the exclusionary rule.[24] More concretely, he relied on *Silverthorne v. United States,*[25] which he contended "plainly controls this case,"[26] and *Gelbard v. United States.*[27] In *Silverthorne,* papers were seized in a warrantless search

21. Justice Powell argued that the fourth amendment was designed to prevent only one wrong—unlawful government invasions into houses, papers and effects. The violation of the fourth amendment guarantees occurs when the illegal search and seizure is complete. Grand jury questions based on illegally seized evidence work no new fourth amendment violation; they are merely derived from the original violation. The derivative use of illegal evidence to gather legal evidence is really a matter of exclusionary rule remedies rather than fourth amendment rights. Justice Powell refused to distinguish between the direct use of illegal evidence and indirect use of it, holding that the same deterrence analysis applies to both. Since the derivative use was not to be at trial, Calandra cannot have the evidence suppressed.

22. 414 U.S. at 356 (Brennan, J., dissenting).

23. The exclusionary rule was first articulated in Weeks v. United States, 232 U.S. 383 (1914), where the Court reversed a federal conviction based on evidence seized in a warrantless search by a federal agent. The Court noted that all federal agents and federal courts are charged with the duty of upholding the Constitution; the Court must remain untainted in the eyes of the people by refusing to sanction the failure of federal agents to live up to their charge. In Olmstead v. United States, 277 U.S. 438 (1928), the Court affirmed convictions based largely on evidence derived from illegal wiretaps. Justice Holmes dissented, saying that in choosing between the desire to detect criminals and the desire to have a law abiding government, it was better that some criminals escape than to have the government commit crimes. Justice Brandeis also dissented, fearing "terrible retribution" if the Court permitted the government to commit crimes in order to detect private crimes. *Id.* at 485 (Brandeis, J., dissenting). *See* McNabb v. United States, 318 U.S. 332 (1943); Byars v. United States, 273 U.S. 28 (1927); Burdeau v. McDowell, 256 U.S. 465, 476 (1921) (Brandeis, J., dissenting).

24. Justice Brennan felt that if police activity were not deterred by excluding evidence at the grand jury stage of the criminal process, then certainly the majority would find no deterrent purpose in excluding it at trial.

25. 251 U.S. 385 (1920).

26. 414 U.S. at 362 (Brennan, J., dissenting).

27. 408 U.S. 41 (1972). *Gelbard* arose from contempt convictions for refusal to answer grand jury questions because they were the result of illegal wiretaps. A federal statute, 18 U.S.C. § 2515 (1970), provided that no evidence resulting from an illegal wiretap could be admitted in any proceeding before a grand jury. Noting Congressional concern for judicial integrity, the Court held that the statute was a defense to contempt citations. Justice Powell distinguished *Gelbard* on the basis of the statute: the wiretap problem is unique; the statute was designed to handle that problem and nothing more.

made the same day a grand jury returned indictments against the Silverthornes. The papers were copied and the originals returned after an application for their return was granted. The grand jury then attempted to regain the papers through issuance of a subpoena duces tecum. Silverthorne refused to comply and was found in contempt. The Court reversed, holding that what cannot be done in one step (illegally seizing evidence) cannot be done in two (illegally seizing evidence and then attempting to obtain it legitimately through a grand jury subpoena). To hold otherwise would reduce the fourth amendment to a mere "form of words."[28] Justice Holmes said that the exclusion of illegally seized evidence was not to be limited to trials; such evidence was not to be used *at all.*[29] Justice Powell distinguished *Silverthorne* on several grounds.[30] First, he argued that since Silverthorne had already been indicted when the papers were seized, he could invoke the exclusionary rule. He was a criminal defendant, while Calandra had not been indicted, was not a defendant, and therefore had no standing to suppress the evidence. Second, since the grand jury's investigation was over, and the subpoena was issued merely to gather evidence for use at trial, the real effect of the *Silverthorne* holding was to exclude the evidence at Silverthornes' trial. Calandra's motion, on the other hand, would deprive the grand jury of necessary testimony. Third, *Silverthorne* involved no delay to the grand jury proceeding. There had already been an adjudication, as a result of the successful application for the return of the papers, that the search and seizure was unlawful. There had been no such determination in *Calandra* and, consequently, the grand jury investigation was delayed considerably.

The dissent viewed *Silverthorne* differently. First, since new indictments could have resulted from production of the papers, Justice Brennan found no basis for the majority's conclusion that the real effect of *Silverthorne* was to exclude the evidence from trial. Second, Justice Brennan noted that there was no indication in *Silverthorne* that the district court erred in granting the application for return. The inference to be drawn from this is that Justice

28. 251 U.S. at 392.

29. *Id.*

30. Justice Powell treated *Silverthorne* in a footnote, giving one the impression that he would rather have ignored it entirely but was forced to deal with it only because Justice Brennan relied so heavily on the case.

Holmes simply was not concerned with potential impairment of the grand jury investigation through the loss of the papers. This inference is supported by Justice Holmes' concern with the illegal search and seizure and his reliance on the judicial integrity rationale to prohibit any use of the illegally seized evidence. It was this reliance which was most important to Justice Brennan.

Justice Powell's treatment of *Silverthorne* appears faulty in some respects.[31] Most important is his failure to recognize the true distinction between *Silverthorne* and *Calandra*. As the dissent points out, *Silverthorne* relied on the judicial integrity rationale, which logically mandates the exclusion of illegally seized evidence at all stages of the criminal process. Justice Powell, however, relied on the deterrence rationale, which requires the exclusion of tainted evidence only at trial. Justice Powell intimated this distinction when he said that the broad language of *Silverthorne* (illegally seized evidence should not be used at all) had been undermined by more recent exclusionary rule cases.[32] Justice Powell would have done better to squarely face the distinction, overrule *Silverthorne*, and thereby dispose of an otherwise controlling precedent.[33]

While the result in *Calandra* can be criticized and several alterna-

31. For example, Justice Powell is unduly concerned with delay of grand jury proceedings. As Chief Judge Battisti points out, there is no evidence how many witnesses will seek hearings. 332 F. Supp. at 740. It should be noted in this respect that *Calandra* is the first case before the Supreme Court on the narrow issue of whether a grand jury witness may have a suppression hearing; *see, e.g.*, Centracchio v. Garrity, 198 F.2d 382 (1st Cir.), *cert. denied*, 344 U.S. 866 (1952) (pre-indictment motion to suppress is rare). *Compare* cases cited note 16 *supra*. In any event, "delay" means avoidable delay, and adjudication of constitutional rights should never be considered delay. 332 F. Supp. at 741.

32. What he meant, of course, is that the rationale for the exclusionary rule gradually shifted from judicial integrity to deterrence. Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A.L. REV. 1129 (1973). *Compare* Terry v. Ohio, 392 U.S. 1 (1968); Linkletter v. Walker, 381 U.S. 618, 636-37 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960), *with* cases cited note 23 *supra*.

33. Justice Powell's conclusion that the real effect of the *Silverthorne* holding was the exclusion of the papers at trial is misleading. Silverthorne was not attempting to suppress evidence at his trial, because he was not then being tried. He was simply refusing to comply with a grand jury subpoena which was based on a violation of his fourth amendment rights. The effect of *Silverthorne*, therefore, was to allow the exclusion of evidence from the grand jury. (That the grand jury still retained copies of the papers, and therefore was not completely deprived of investigatory material, may have been an important factor to the district court, but Justice Holmes did not seem concerned with the potential impact on the grand jury investigation.) Thus, had Justice Powell confronted *Silverthorne* on this basis he would have had to overrule the case. His exclusionary rule analysis, which permits suppression of evidence from the trial court, but not the grand jury, would permit no other result.

tive arguments can be formulated to support a different result,[34] effort can be better expended in projecting the scope of its future application. Clearly, the decision does not signal the end of the exclusionary rule.[35] What it may signal is a significant diminution of fourth amendment rights, with no realistic means of redress.[36] In *Calandra*, the agents used a colorably valid search warrant. Tomorrow, there may be no warrant at all. And the day after tomorrow, police may engage in a warrantless search solely to gather evidence for grand jury use, with no intention whatsoever of prosecuting the victim. It is this potential for abuse that is most disturbing about *United States v. Calandra.*

While the Court did not indicate that it would sanction deliber-

34. For example, the Court could have held that grand jury questions based on illegally seized evidence constituted an unreasonable search and seizure. Although Justice Powell rejected this argument, he overlooked an analogy to Hale v. Henkel, 201 U.S. 43 (1906). There, the Court held that a grand jury subpoena duces tecum, like a search warrant, could be too broad and farsweeping to be sustained as reasonable. Similarly, in Boyd v. United States, 116 U.S. 616 (1886), the Court held that a subpoena which ordered the production of incriminating papers constituted an unreasonable search and seizure where failure to comply was deemed an admission of guilt. The Court relied heavily on the incriminating nature of the papers, however, thus basing its decision to a large degree on the fifth amendment. *See* Application of Certain Chinese Family Benevolent & Dist. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956), (subpoena compelling production of records quashed as unreasonably broad). *But see* United States v. Dionisio, 410 U.S. 1 (1972) (no showing of reasonableness required).

35. Justice Powell relied heavily on the continuing viability of the exclusionary rule at trial. His argument against expanding the rule to grand jury proceedings was based on incentive/deterrence: police have the greatest incentive to conduct an unlawful search when a conviction will result. They presumably have little interest in illegally gathering evidence for use by a grand jury, since the very evidence used to indict the victim of the search cannot be used to convict him. To abandon the exclusionary rule at trial would remove this impediment and encourage illegal police activity. Ot course, Justice Powell's fundamental premise is that most police activity is directed at the detection and apprehension of all criminals. This is not always the case. *See* text following note 37 *infra.*

36. The traditional "remedy" for the victim of an illegal search and seizure is the exclusion of the evidence at his trial. The remedy assumes that the victim actually goes to trial; if he does not, the remedy is meaningless. As the majority point out, Calandra may be able to sue the offending officers and recover money damages. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). This leaves the impression that the government may purchase the right to violate constitutional guarantees. 414 U.S. at 365 (Brennan, J., dissenting). The ineffectiveness of the exclusionary rule as a deterrent is frequently noted, as is the absence of meaningful alternative remedies. *See, e.g., Bivens, supra* at 411 (Burger, C. J., dissenting); Horowitz, *Excluding the Exclusionary Rule—Can There be an Effective Deterrent?*, 47 L.A.B. BULL. 91 (1972); McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy*, 52 J. CRIM. L.C. & P.S. 266 (1961); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) [hereinafter cited as Oaks]; Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255 (1961).

ate, bad faith searches, neither did it indicate that it would not. Instead, the Court gave tacit approval to an investigatory practice which necessarily involves the violation of fourth amendment rights. In the vast majority of cases, police search a person's house to gather evidence to convict its occupant. This is the underlying premise of the incentive/deterrence rationale for the exclusionary rule. In some cases however, notably, those involving organized crime, the prosecution may make a judgment that it is better to sacrifice (through an illegal search and seizure) the conviction of a small-time operator (*O*) in order to gather evidence against the key men in the organization.[37] After *Calandra*, the evidence may be used not only against those whom it implicates, but the prosecution may now legally call *O* before a grand jury and use the illegally seized physical evidence to gather more testimonial evidence against others.[38] *O* may plead his fifth amendment privilege against self-incrimination, but only until he is granted immunity from the use of his testimony against him. After *Calandra*, he may not move to suppress the evidence before the grand jury. The witness's fear that he may be killed if he testifies will result at the least in protective custody, and at the most in an offer by the government to relocate *O* to a new community with a new identity. For Justice Powell, it is enough that *O* may not be *prosecuted* by the use of the illegally seized evidence. But he may be forced to live in virtual exile from his family and friends. It may be justifiable to ask a citizen to voluntarily assume a new identity in order to fulfill his civic duty, but it seems morally reprehensible that he can be forced to do so through governmental exploitation of a deliberate violation of his fourth amendment rights.

It therefore becomes worthwhile to seek workable limitations on the *Calandra* holding. One limitation would be to require the good faith execution of a search warrant. In discussing *Silverthorne*, Jus-

37. *See* Terry v. Ohio, 392 U.S. 1 (1968), where the Court recognized that the rule was ineffective where prosecution was not the goal of the search and seizure. *See also* Oaks, *supra* note 36, at 708; White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333, 351 (1970).

38. The result in *Calandra* was foreshadowed in Goldstein v. United States, 316 U.S. 114 (1942), where the Court held admissible the testimony of two witnesses who turned state's evidence only after being confronted with illegal wiretap evidence. No mention of the illegal wiretaps was made at trial, and petitioners were not parties to the communications. Thus the Court sanctioned pre-trial use of illegally obtained evidence as a means of gathering further evidence against others. Justice Murphy dissented, saying that the result would reduce fourth amendment protections.

tice Powell ignored that no search warrant had issued at any time—a fact that could have served as a more persuasive basis for distinction. This failure to comment may indicate that the absence of a search warrant is not important to a majority of the Court and leads to one of two conclusions: Either the Court is encouraging warrantless searches in the absence of the traditional exceptions to the warrant requirement,[39] or it recognizes that if search warrants are required, the police will simply fabricate them. Nevertheless, the requirement of a warrant seems the most significant way to restrict *Calandra*. A second limitation would be to grant standing to suppress evidence to all those defendants whom the police reasonably expected to be implicated by the illegal search.[40] This would remove the incentive to violate *O*'s rights and would encourage police compliance with fourth amendment guarantees, since evidence gathered in a legal search could still be used. In light of the majority's exclusionary rule analysis, however, adoption of this restriction does not appear likely.

Of course, the result in *United States v. Calandra* does not compel the police to knowingly violate the fourth amendment, nor does it invite them to do so. But the overbroad conclusion arguably encourages such activity. It may be that the Court felt that the only practical application of *Calandra* is in the investigation of organized crime. The potential for abuse, however, transcends the facts in *Calandra* and threatens the right of privacy of all citizens. It is to be hoped, therefore, that the Court will take the earliest opportunity to place workable limitations on the *Calandra* doctrine.

Robert S. Adams

CONSTITUTIONAL LAW—FEDERAL COURTS—JUDICIALLY CREATED REMEDIES—DAMAGES FOR VIOLATION OF FIRST AMENDMENT—The United States District Court for the District of Hawaii has held that damages are recoverable in a federal action under the Constitution

39. The fourth amendment does not require a search warrant in all cases. It requires only that searches be reasonable. Thus, the Court has authorized warrantless searches where the object of the search is highly mobile, Carroll v. United States, 267 U.S. 132 (1925) (automobile); where the officers are conducting a lawful arrest, Chimel v. California, 395 U.S. 752 (1969); or are in hot pursuit of a suspect, Warden v. Hayden, 387 U.S. 294 (1967).

40. *See* White & Greenspan, *Standing to Object to Search and Seizure*, 118 U. PA. L. REV. 333 (1970).