April 11, 1980

Re: No. 78-1729 – United States v. Payner

Dear Lewis:

In due course I will circulate a dissent in this one.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference
Re: 78-1729 - United States v. Payner

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc
Dear Lewis:

Except for the first sentence of the full paragraph on page 8, I think your opinion is fine. I am afraid, however, that I cannot agree that evidence should never be suppressed "without carefully balancing the benefits of exclusion against its high societal cost." If that were the test, I would suppress the evidence in this case. For me, the test is whether the search violated the defendant's constitutional rights. If the answer is yes, I believe suppression is appropriate; if the answer is no, suppression is inappropriate even if the illegality is as serious as we find in this case.

If you can see your way clear to deleting the language I have quoted, I will be happy to join you.

Respectfully,

Mr. Justice Powell
MR. CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion because Payner -- whose guilt is not in doubt -- cannot take advantage of the Government's violation of the constitutional rights of Wolstencroft, who is not a party to this case. The Court's opinion makes clear the reasons for that sound rule. However, the Internal Revenue Service conduct in hiring "private investigators" to secure evidence of Payner's criminal acts, in the manner shown by this record, is repugnant to fundamental tenets of how our Government ought to conduct its affairs.

Orderly government under our system of separate powers should encourage maximum internal self-restraint and discipline in each Branch. Although this Court has supervisory authority with respect to the federal courts, it has no general authority over the Executive Branch. In my view, it is unseemly, to put it mildly, for a government to conduct its law enforcement investigations in the way this case reveals.
Re: 78-1729 - United States v. Payner

Dear Lewis:

I agree with your resolution of this case, but raise a point of concern. I would like to avoid joining any opinion that can be misread as giving approval to an absolute Exclusionary Rule in any class of cases. For example, on page 7 the opinion states

"... exclusion is a necessary deterrent to unlawful conduct in appropriate cases ..."

The remainder of the paragraph qualifies this "approval" of exclusion, but I would not care to make it easy for "leopards" to quote the first sentence of the paragraph out of context.

Your excellent later discussion shows your skepticism about an absolute Exclusionary Rule but those parts will not be quoted by lovers of exclusion. Perhaps it is not always possible to prevent corruption of our opinions, but may I suggest that changing "is" to "may be" in the quoted sentence may do its part. For my part, I would add cites to Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970), and (immodestly) to my dissent in Bivens.

My proposed chastising of the IRS (attached) is open to revision; it is not something best said in a Court opinion.

Regards,

Mr. Justice Powell

p.s. As my concurring opinion indicates, I am prepared to join your opinion if you can see your way to the above ideas.
April 11, 1980

PERSONAL

Re: 78-1729 - United States v. Payner

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Supreme Court of the United States
Washington, D.C. 20543

April 11, 1980

Re: 78-1729 - United States v. Payner

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If you can see your way clear to deleting the language I have quoted, I will be happy to join you.

Respectfully,

[Signature]

Justice Powell
April 14, 1980

Dear Chief:

Thank you for your personal letter of April 11.

I have eliminated the language in the first full paragraph on page 11, that you preferred not to leave in the opinion. Also, as you suggested, I have added a reference to Dallin Oaks' superb article. On balance, I thought it best not to refer to your excellent discussion of the Exclusionary Rule in your Bivens dissent. Although you and I are fairly close together on that rule, I have not yet gone all the way with you. More importantly, I did not want to go too far afield in this case.

I do appreciate your assistance.

Sincerely,

The Chief Justice

1fp/ss
April 14, 1980

Re: No. 78-1729 - United States v. Payner

Dear Lewis:

please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
Re: No. 78-1729 – United States v. Payner

Dear Lewis:

I shall await the dissent.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference
April 14, 1980

Re: No. 78-1729, United States v. Payner

Dear Lewis,

I am glad to join your opinion for the Court.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
RE: 78-1729 - United States v. Payner

Dear Lewis:

I join.

Regards,

Mr. Justice Powell

Copies to the Conference.
April 15, 1980

Re: 78-1729 - United States v. Payner

Dear Lewis:

Please join me.

Respectfully,

Mr. Justice Powell

Copies to the Conference
June 18, 1980

RE: No. 78-1729 United States v. Payner

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

[Signature]

Mr. Justice Marshall
cc: The Conference
Re: No. 78-1729 - United States v. Payner

Dear Thurgood:

Please join me in your dissenting opinion.

Sincerely,

Mr. Justice Marshall

cc: The Conference
MEMORANDUM TO THE CONFERENCE:

I propose to add the following to footnote 8 at page 8 of the proposed opinion in this case:

The dissent, post, at 8, urges that the balance of interests under the supervisory power differs from that considered in Alderman and like cases, because the supervisory power focuses upon the "need to protect the integrity of the federal courts." Although the District Court in this case relied upon a deterrent rationale, we agree that the supervisory power serves the "two-fold" purpose of deterring illegality and protecting judicial integrity. See post, at 7. As the dissent recognizes, however, the Fourth Amendment exclusionary rule serves precisely the same purposes. Ibid., citing, inter alia, Dunaway v. New York, 442 U.S. 200, 218 (1979), and Mapp v. Ohio 367 U.S. 643, 659-660 (1961). Thus, the Fourth Amendment exclusionary rule, like the supervisory power, is applied in part "to protect the integrity of the court rather than to vindicate the constitutional rights of the defendant ...." Post, at 10; see generally Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 486 (1974).

In this case, where the illegal conduct did not violate the respondent's rights, the interest in preserving judicial integrity and in deterring such conduct is outweighed by the societal interest in presenting probative evidence to the trier of fact. See supra; see also, e.g., Stone v. Powell, supra, at 485-486. None of the cases cited by the dissent, post, at 7-9, supports a contrary view, since none of those cases involved criminal defendants who were not themselves the
victims of the challenged practices. Thus, our decision today does not limit the traditional scope of the supervisory power in any way; nor does it render that power "superfluous." Post, at 12. We merely reject its use as a substitute for established Fourth Amendment doctrine.

L.F.P., Jr.
This criminal case comes to us on certiorari from the United States Court of Appeals for the Sixth Circuit. The respondent was indicted on a charge of falsifying an income tax return by denying that he had a foreign bank account.

A document critical to the government's case had been obtained by an unlawful search of a third party's briefcase. The facts are bizarre and provide interesting reading even if they reflect credit on the conduct of an IRS agent.

The facts are set forth in detail in our opinion filed today. In briefest summary, it was learned that an officer of a Bahamas bank would be in Miami with account records in his briefcase. The bank officer, not a defendant in this case, was enticed to dine with a lady, engaged for the purpose. While he was being entertained, an IRS agent arranged for an illegal entry, and the surreptitious photographing of the bank account records.

The search clearly violated the Fourth Amendment rights of the Bahamas bank official, but no constitutional rights of respondent were violated.
The courts below nevertheless suppressed the evidence so obtained, exercising their inherent supervisory powers.

Although no court would condone the setting up of the bank official and the deliberate invasion of his Fourth Amendment rights, the critical fact is that he is not involved in this case. No right of respondent has been violated, and accordingly - under settled doctrine of our cases - he had no standing under the Fourth Amendment to demand exclusion of the evidence. The supervisory power may not be used in this way to deny access to highly probative evidence.

It is the clear responsibility of the Executive Branch to insist, by appropriate sanctions, upon compliance with its own insistence that constitutional rights be respected.

Accordingly, we reverse the judgment of the Court of Appeals. Mr. Justice Marshall has filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Blackmun have joined.
Supreme Court of the United States

Memorandum

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Does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court.
In United States v. Caceres, 440 U. S. 741, 754-757 (1979), we refused to exclude all evidence tainted by violations of an executive department's rules. And in Elkins v. United States, 364 U. S. 206, 216 (1960), the Court called for a restrained application of the supervisory power.

"[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for unhampered disclosure of competent and relevant evidence in a court of justice." 364 U. S., at 216.

See also Nardone v. United States, 308 U. S. 338, 340 (1939).

We conclude that the supervisory power does not permit a federal court to suppress evidence tainted by an unlawful search without carefully balancing the benefits of exclusion against its high societal costs. And our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. Rakas v. Illinois, supra, at 137; Alderman v. United States, supra, at 174-175. The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

1 "The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment. But we are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." Alderman v. United States, supra, at 174-175. See also Stone
that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule. Although exclusion is a necessary deterrent to unlawful conduct in appropriate cases, the Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. E. g., Rakas v. Illinois, supra, at 137-138; United States v. Ceccolini, 435 U. S. 268, 275-279 (1978); Stone v. Powell, 428 U. S. 454, 459-461 (1976); see Michigan v. Tucker, 417 U. S. 433, 450-451 (1974); Kaufman v. United States, 394 U. S. 217, 237-238 (1969) (Black, J., dissenting). Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. E. g., Stone v. Powell, supra, at 485-489; United States v. Calandra, 414 U. S. 338, 348-349 (1974). After all, it is the defendant, and not the constable, who stands trial.

The same societal interests are at risk when a criminal defendant invokes the supervisory power to suppress evidence seized in violation of a third party's constitutional rights. The supervisory power is applied with some caution even when the defendant asserts a violation of his own rights. 6 Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the defendant by "willful disobedience of law." McNabb v. United States, 318 U. S. 332, 345 (1943); see Elkins v. United States, 364 U. S. 206, 223 (1960); Rea v. United States, 350 U. S. 214, 216-217 (1956); cf. Hampton v. United States, 425 U. S. 484, 498 (POWELL, J., concurring in the judgment). This Court has never held, however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute or rule. The supervisory power merely permits federal courts to supervise "the administration of criminal justice" among the parties before the bar. McNabb v. United States, supra, at 340.

6 Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the defendant by "willful disobedience of law." McNabb v. United States, 318 U. S. 332, 345 (1943); see Elkins v. United States, 364 U. S. 206, 223 (1960); Rea v. United States, 350 U. S. 214, 216-217 (1956); cf. Hampton v. United States, 425 U. S. 484, 498 (POWELL, J., concurring in the judgment). This Court has never held, however, that the supervisory power authorizes suppression of evidence obtained from third parties in violation of Constitution, statute or rule. The supervisory power merely permits federal courts to supervise "the administration of criminal justice" among the parties before the bar. McNabb v. United States, supra, at 340.
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At respondent's nonjury trial for falsifying a federal income tax return by denying that he maintained a foreign bank account, respondent moved to suppress a loan guarantee agreement in which he pledged the funds in the bank account as security. The District Court found respondent guilty on the basis of all the evidence, but then (1) found that the Government had discovered the guarantee agreement as the result of a flagrantly illegal search of a bank officer's briefcase, (2) suppressed all the Government's evidence except for respondent's tax return and related testimony, and (3) set aside the conviction for failure to demonstrate knowing falsification. The court held, inter alia, that, although the illegal search did not violate respondent's Fourth Amendment rights, the inherent supervisory power of the federal courts required it to exclude evidence tainted by the illegal search. The Court of Appeals affirmed.

Held:

1. Respondent lacks standing under the Fourth Amendment to suppress the documents illegally seized from the bank officer. A defendant's Fourth Amendment rights are violated only when the challenged conduct invaded his legitimate expectation of privacy rather than that of a third party, and respondent possessed no privacy interest in the documents seized in this case. Cf. Rakas v. Illinois, 439 U. S. 128; United States v. Miller, 425 U. S. 435. Pp. 4-6.

2. The supervisory power of the federal courts does not authorize a court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court. Under the Fourth Amendment, the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. And the values assigned to the competing interests of deterring illegal searches and of
Amendment decisions of this Court. In the Government’s view, such an extension of the supervisory power would enable federal courts to exercise a standardless discretion in their application of the exclusionary rule to enforce the Fourth Amendment. We agree with the Government.

III

We certainly can understand the District Court’s commendable desire to deter deliberate intrusions into the privacy of persons who are unlikely to become defendants in a criminal prosecution. See 434 F. Supp., at 135. No court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this “briefcase caper.”5 Indeed, the decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. E. g., Jackson v. Denno, 378 U. S. 368, 386 (1964); see Olmstead v. United States, 277 U. S. 438, 455 (1928) (Brandeis, J., dissenting). But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

Thus, the exclusionary rule “has been restricted to those areas where its remedial objectives are most efficaciously served.” United States v. Calandra, 414 U. S. 338, 348 (1974). The Court has acknowledged that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case. E. g., Rakas v. Illinois, supra, at 137–138; United States v. Ceccolini, 435 U. S. 268, 275–279 (1978); Stone v. Powell, 428 U. S. 464, 489–491 (1976); see Michigan v. Tucker, 417 U. S. 433, 450–451 (1974).6 Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury. E. g., Stone v. Powell, supra, at 485–489; United States v. Calandra, supra, at 348. After all, it is the defendant, and not the constable, who stands trial.

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5 “The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed.” Alderman v. United States, 394 U. S. 165, 175 (1969). We note that in 1976 Congress investigated the improprieties revealed in this record. See Oversight Hearings into the Operations of the IRS before a Subcommittee of the House Committee on Government Operations (Operation Tradewinds, Project Haven, and Narcotics Traffickers Tax Program), 94th Cong., 1st Sess. The result, the Commissioner of Internal Revenue “called off” Operation Trade Winds. Tr. of Oral Arg. 35. The Commissioner also adopted guidelines that require agents to instruct informants on the requirements of the law and to report known illegalities to a supervisory officer, who is in turn directed to notify appropriate state authorities. IRS Manual Supp. 2-21, §§ 9373.2 (3), 9373.4 (Dec. 27, 1977). Although these measures appear on their face to be less positive than one might expect from an agency charged with upholding the law, they do indicate disapproval of the practices found to have been implemented in this case. We cannot assume that similar lawless conduct, if brought to the attention of responsible officials, would not be dealt with appropriately. To require in addition the suppression of highly probative evidence in a trial against a third party would penalize society unnecessarily.


7 Federal courts may use their supervisory power in some circumstances to exclude evidence taken from the defendant by “willful disobedience of law.” McNabb v. United States, 318 U. S. 332, 343 (1943); see Black v. United States, 395 U. S. 276, 283 (1969); cf. Hammon v. United States, 350 U. S. 344, 349–351 (1956); cf. Hampton v. United States, 425 U. S. 484, 496 (POWELL, J., concurring in the judgment). This Court has never held, however, that the supervisory power authorizes suppression of evi-