Dear Justice Powell,

I thought the Post story today on your opinion was a mile off the mark.

Enclosed is a copy of our own story, which I believe puts the issue in much better perspective. Jim Mann allowed me to write it since I have covered Project Haven from start to finish.

Best wishes,

Bob Jackson
Los Angeles Times

High Court Voids Ruling That Crippled IRS Crackdown

Evidence Found in Illegal Search of Another Man’s Briefcase Admissible, Justices Say

By ROBERT L. JACKSON
Times Staff Writer

WASHINGTON—The Supreme Court, ruled Monday that a lower court judge erred three years ago with a decision that crippled a major Internal Revenue Service investigation of wealthy Americans who use secret Bahamian bank accounts.

In a 6-3 ruling, the court held that U.S. District Judge John M. Manos wrongly threw out the income tax conviction of an Ohio businessman on grounds that the IRS had conducted an illegal search to obtain evidence against him.

Since the object searched was a briefcase belonging to a Nassau banker, H. Michael Wolstencroft, and not the Ohio businessman, Jack Payner, the Supreme Court said evidence of U.S. tax evasion contained in the briefcase should not have been suppressed in Payner’s case.

The net result of the Supreme Court ruling, aside from reinstatement of Payner’s conviction, may be the reopening of dozens of civil or criminal tax cases that grew out of bank customers’ documents found in Wolstencroft’s briefcase, sources said.

The IRS and the Justice Department suspended their wide-ranging investigation into tax evasion through Bahamian bank accounts shortly after the adverse ruling by Manos on April 28, 1977.

Many criminal prosecutions may be lost altogether because the six-year statute of limitations on criminal tax cases has already passed for a number of taxpayers, some government attorneys said.

But Richard E. Jaffe, the IRS agent who headed the Project Haven investigation and helped photograph documents from the briefcase, said Monday he hoped the government “would make every effort to recover tens of millions of dollars in lost taxes” through civil fraud cases. No time limit applies to civil fraud cases.

Jaffe, now retired, was suspended from work on Project Haven after Manos criticized the pilfering of Wolstencroft’s briefcase by Jaffe and Norman L. Casper, a private investigator and IRS informant.

Casper, who secretly “borrowed” the briefcase from the apartment of a friend of Wolstencroft’s for 90 minutes in January, 1973, hailed the Supreme Court ruling from his home in Miami as “a victory for middle-income taxpayers over wealthy folks who run through tax loopholes.”

The Supreme Court majority, in an opinion written by Justice Lewis F. Powell Jr., said it did not condone the briefcase search, which it termed illegal.

But Manos, who cited his “supervisory powers” as a federal judge in throwing out the case because of misconduct, wrongly extended his authority beyond Payner’s own Fourth Amendment protection against unlawful search and seizure, Powell said.

“The supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party (who is not before the court).” Powell wrote for the majority.

To give such power to a judge, he said, would “enable federal courts to exercise a standardless discretion” in view of existing constitutional protections embodied in the Fourth Amendment.

“No court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this ‘briefcase caper,’” Powell said.

“Indeed, the decisions of this court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement. But our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality.”

Documents in Wolstencroft’s briefcase showed that Payner had sworn falsely to the court when the case was heard last November, did not take part in the decision.

In other actions Monday, the court:

—Ruled 5 to 4 that federal judges may turn over to a magistrate the task of hearing pretrial motions in a criminal case. The ruling upheld a 1976 federal law that allows a magistrate to listen to all relevant witnesses and then recommend to a trial judge whether he should grant a motion to suppress evidence.

Under the law and Monday’s decision by Chief Justice Warren E. Burger, the trial judge then reviews the written transcript of the magistrate’s hearing and decides, on his own, whether to grant the motion. Justices Brennan, Marshall, Potter Stewart and Lewis F. Powell Jr. dissented (U.S. v. Raddatz, 79-8).

—Ruled 6 to 3 that federal judges have at least limited jurisdiction over the conduct of attorneys in their courts (In re: Casper, 76-19).

All that jazz.

Catch Leonard Feather’s act.

Weekdays

Cut heating costs with Poolsave.

Most of the heatliterally evaporates with Automatics. The Poolsaver keeps your pool in shape for less.
Donald C. Alexander
July 1, 1980

Hon. Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
1 First Street, N. E.
Washington, D. C. 20543

RE: United States v. Payner

Dear Justice Powell:

As Commissioner of Internal Revenue from May, 1973 to March, 1977, I am deeply concerned about certain of the statements made in Footnote 5 to your majority opinion in the above case. It seems clear that the Court may not have been given a fully accurate picture of the facts. These statements and my comments follow.

1. "We note that in 1976 Congress investigated the improprieties revealed in this record."

It is true that in 1976 Congress investigated the "briefcase caper", but it is difficult for me to see how a person reading the hearings of the two Congressional investigations, that made by Chairman Rosenthal’s Subcommittee of the House Government Operations Committee and cited in Footnote 5 and the other by Representative Vanik’s Oversight Subcommittee of the Committee on Ways and Means, could conclude that the "improprieties" investigated were those involved in the taking of the briefcase. Instead, the primary interest of both Subcommittees was investigating allegations about me. Certain members of the law enforcement community (including the people who set up the briefcase caper) joined with their associates in the media in planting and disseminating the contention that I called off Operation Haven, using the briefcase incident as a pretext, to protect my former law firm and its clients. That Congressmen Rosenthal and Vanik were investigating these allegations, and other allegations that I was "soft on crime" is obvious from a reading of the records. See, e.g., Rosenthal’s record at pp. 30, 82-99, 112, 116-7, 992-927 and 1265-1323.
2. "As a result, the Commissioner of Internal Revenue called off Operation Trade Winds."

Neither Operation Trade Winds nor Operation Haven was called off as a result of any Congressional hearing. Operation Trade Winds had previously been curtailed when the Internal Revenue Service reexamined its policy and practices regarding informants. Operation Haven was temporarily suspended after the "briefcase caper" became known to the IRS National Office officials, and was resumed, at IRS' request, through a grand jury convened by the Department of Justice. Congress had nothing to do with any curtailment; instead, some in Congress were attacking me for having attempted to make law enforcement officers abide by the law.

3. "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."

The first half of this statement is deeply disturbing to me. What more "positive" actions could I have taken? I find it surprising that anyone aware of the facts in 1975-76, or willing to inquire into the facts, could speak so slightingly. I attempted, as strongly as I could and with more vigor than discretion, to prevent certain overzealous IRS criminal investigators from violating the Constitution and the law. For this effort, I was subjected to a continuing (and almost successful) campaign of personal harassment in the media and in Congress. I was the target of a grand jury investigation in Washington, and I also had to testify in my defense before a grand jury in Miami. In the end, thanks to the fact that the allegations against me were completely false and the fact that Secretary Simon, President Ford and Attorney General Levi were honorable men, I was cleared and I remained in office.

Since it appears clear that you and your office were not acquainted with these facts, I am enclosing some clippings describing the allegations made and the actions taken.

As I stated immediately after the first allegations about me were carried on national television, this is the price one has to pay for trying to prevent lawless conduct by law enforcement officials. I think that those who head law enforcement
RE: United States v. Payner

agencies are fully aware of what happened to me and why it happened; and it is unrealistic to assume that they will deliberately subject themselves to the same treatment.

Sincerely yours,

Donald C. Alexander

Enclosures
July 3, 1979

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

MEMORANDUM TO THE CONFERENCE:

I received today the enclosed letter from Donald C. Alexander, who was Commissioner of Internal Revenue at the time of the events in the above suit. Mr. Alexander objects to the second, third, and fifth sentences (exclusive of citations) in footnote 5 of the Court opinion. In particular, he asserts that he did all he could to require IRS agents to conform to the law, and that he was severely criticized for calling off Operation Trade Winds when he learned of the improprieties revealed in the Payner case.

From newspaper clippings attached to Mr. Alexander's letter, I gather that he was falsely accused of suspending the Bahamian bank investigation in order to protect persons whom he knew. Congress investigated this and similar accusations in the hearings cited in footnote 5. In the course of the investigation, however, the congressional committee delved at length into the illegal acts committed by Mr. Jaffe and Mr. Casper in the "briefcase caper." Thus, I believe it was accurate to state that "in 1976 Congress investigated the improprieties revealed in this record."

Perhaps the political climate prevented Mr. Alexander from taking more positive measures to discipline the agents responsible for the briefcase affair. It nevertheless remains true that the measures taken "appear on their face to be less positive than one might expect from an agency charged with enforcing the law." Therefore, I would not change the second or fifth sentences in footnote 5.
The third sentence, however, may be inaccurate in its implication. It reads: "As a result [of the congressional investigation], the Commissioner of Internal Revenue 'called off' Operation Tradewinds." The information submitted by Mr. Alexander shows that he suspended the operation before any congressional investigation began. It therefore appears appropriate to correct the statement that the Commissioner's action was triggered by Congress' interest in the matter. In fact, it seems more likely that Congress' interest was prompted in part by the Commissioner's actions. Thus, I propose that the sentence be changed to read: "Moreover, the Commissioner of Internal Revenue--on his own initiative--'called off' Operation Trade Winds."

Unless there is some objection, I will instruct the Reporter to substitute the language quoted above for the third sentence of footnote 5. I plan no other changes in the footnote.

L.F.P., Jr.

[Handwritten note: There were no objections.]
July 15, 1980

Donald C. Alexander, Esquire
Morgan Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

Re: United States v. Payner

Dear Mr. Alexander:

Thank you for your letter of July 1. It may well be (in light of the clippings you sent) that the Court was not fully advised of all of the facts surrounding the events mentioned in the opinion. As of course you understand, however, we normally do not go beyond the facts of record, including the briefs.

Your primary concern relates to footnote 5. I will comment briefly on my understanding of the points that you question:

1. As you observe, the congressional investigation undertaken in 1976 focused upon accusations - later shown to be groundless - that IRS enforcement efforts had been hampered in order to protect highly placed executives. The hearings referred to in footnote 5 of the Court's opinion did, however, include lengthy testimony concerning the brief case theft at issue in the Payner case. It therefore seems accurate to state that the Improprieties involved in the litigation before us were a subject of the congressional investigation.

2. The statement that Operation Trade Winds was curtailed "as a result" of the congressional investigation was based upon representations made to us by counsel. As the inference now appears to be inaccurate, the Court has agreed to change the sentence to read: "Moreover, the Commissioner of Internal Revenue - on his own initiative - 'called off' Operation Trade Winds."
3. I have no doubt that your actions were an example of responsible and courageous administration in the face of unjustified criticism. Yet, the record before the Court certainly demonstrated serious improprieties by personnel of the IRS. Nothing in the record indicated that appropriate measures had been taken to discipline or discharge the individuals responsible for what was certainly a gross and deliberate violation of constitutional rights. The record presented to this Court showed, in substance, only that the IRS had discontinued the operation and issued new guidelines. The Court therefore stated that these measures "appear on their face to have been less positive than one might expect from an agency charged with upholding the law." (Emphasis added).

I do understand your concern, and wish that the case had been presented to us in a way that avoided any possible inference of impropriety on your part. It is fair to say, I think, that none of us here thought in terms of such impropriety, except possibly to the extent that the disciplinary action was inadequate. I do hope that the change the Court has made in the one troublesome sentence will be helpful.

As you know, the Court normally makes no explanation of an opinion. Yet, in view of your letter, I am happy to have this opportunity to respond.

Sincerely,

[Signature]

[Note: The reporter was asked to make this change]
Hon. Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
1 First Street, N.E.
Washington, D. C. 20543

RE: United States v. Payner

Dear Justice Powell:

Thank you very much for your letter of July 15. I deeply appreciate your interest in this important matter.

With my letter of July 1, I submitted clippings giving some detail of what happened to me by reason of my effort to prevent overzealous actions by IRS criminal investigators and to impose managerial controls (like those used by the FBI) upon IRS criminal investigations. Had I attempted to go further than I did, I am absolutely convinced that, at a minimum, I would have been removed from office. The power of the law enforcement community, investigative reporters who work with such community and congressmen (and their staffs) who work with both the media and the law enforcement community is almost incalculable. I did not realize this when I acted to try to bring IRS law enforcement activities under control, but I surely realize it now.

When I took office, I was firmly opposed to the exclusionary rule. I know better now. This rule is essential to the protection of American liberties.

Finally, I regret the language in Footnote 5 "[a]lthough these measures appear on their face to be less positive than one might expect from an agency charged with upholding the law . . . " apparently remains. The Oversight Hearings of Congressman Rosenthal's House Government Operations Subcommittee were cited immediately above this statement. I would like to
August 5, 1980

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

Dear Lewis:

Your July 3 suggestion re this case is entirely acceptable to me.

Regards,

[Signature]

cc: The Conference
Subject: **United States v. Payner**  

To: Paul Cane  

From: L.F.P., Jr.  

Attached hereto is Mr. Alexander's letter of July 28, and a draft of a proposed letter to The Conference.  

You will note my statement that one of my clerks has examined the affidavit referred to in the Alexander letter. I would appreciate it if one of you would undertake this. If the affidavit is not too long, perhaps a xerox copy could be obtained.  

Then, have Sally hold these papers in suspense until September 8th.  

L.F.P., Jr.
Subject: United States v. Paynor

To: The Conference

From: L.F.P., Jr.

The enclosed copy of a letter dated July 28th from Donald C. Alexander refers to my letter to him of July 15, a copy of which I sent to each of you before releasing it.

You will recall that Mr. Alexander was Commissioner of Internal Revenue at the relevant time. Although I know Mr. Alexander only casually, he has the reputation of being a lawyer of character. In any event, I am sure we would not wish to do him an injustice.

His letters of July 1st (that I believe I also sent you), and that of July 28, argue that he took the lead in curbing "overzealous actions" by IRS agents, and that the new regulations were the most restrictive he could obtain.

One of my law clerks has reviewed Special Agent Jaffe's affidavit on pages 232-238 of the Oversight Hearings of the House Operations Subcommittee, and it generally is supportive of Mr. Alexander's position.

As the portion of Footnote 5 to which he objects is gratuitous to some extent, I am willing to delete it from our opinion if this meets with your approval. There is no urgency about this, and so I am suspending my file until September 8th. If I have heard no objection by that date, I will advise Mr. Alexander that we are deleting the language which distresses him.

L.F.P., Jr.
Subject: United States v. Payner

To: Paul Cane

From: L.F.P., Jr.

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L.F.P.
L.F.P., Jr.
Subject: United States V. Paynor

To: The Conference

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L.F.P., Jr.
MEMORANDUM TO: Mr. Justice Powell
FROM: Paul Cane
RE: United States v. Payner

I examined the House Hearings cited by Mr. Alexander in his letter to you. The affidavit to which he refers does support his assertion that he took the lead in curbing overzealous actions by IRS agents, but does not mention any new regulations.

In your memo to the Conference, you characterized the affidavit as "generally . . . supportive" of Mr. Alexander's position. That seems accurate.

Paul
P.W.C. 8/20/80

See my letter of 9/4. I decided not to make a change.
August 22, 1980

 honors Lewis F. Powell, Jr.
 Associate Justice
 Supreme Court of the United States
 1 First Street, N.E.
 Washington, D.C. 20543

RE: United States v. Payner

Dear Justice Powell:

After sending my letter of July 28 to you, I realized that I should have enclosed a copy of the materials to which I referred.

A copy of Special Agent Jaffe's November, 1979 Affidavit is attached. Mr. Jaffe states on page 236 that he was the subject of a criminal investigation and that he was advised that the Federal Grand Jury in Miami would take his testimony. This Affidavit was part of the record in the Oversight Hearings specifically cited in Footnote 5 discussed in your letter of July 15 in response to mine of July 1.

As stated in my prior letters, I don't know what more IRS or I could have done. Surely IRS should not be blamed for the unwillingness of the Department of Justice to prosecute a law enforcement officer.

I hope that after reviewing this material you will modify the statement in Footnote 5 that "these measures appear on their face to be less positive than one might expect from an agency charged with upholding the law, . . . ." Mr. Jaffe - and many others in the IRS, the Department of Justice, Congress and the media - considered these actions to be much too positive.

Thank you again for your consideration.

With best wishes,

Sincerely,

Donald C. Alexander

Enclosure
call your attention to Special Agent Jaffe's affidavit on pages 232-238 of these Hearings. This and other material in the Subcommittee's Hearings, a part of the record, make it clear, I believe, what was done and that what was done was as much as was humanly possible to do.

With best wishes,

Sincerely yours,

Donald C. Alexander
August 22, 1980

78-1729 United States v. Payner

MEMORANDUM TO THE CONFERENCE:

The enclosed copy of a letter dated July 28 from Donald C. Alexander refers to my letter to him of July 15, a copy of which I sent to each of you before releasing it.

You will recall that Mr. Alexander was Commissioner of Internal Revenue at the relevant time. Although I know Mr. Alexander only casually, he has the reputation of being a lawyer of character. In any event, I am sure we would not wish to do him an injustice.

His letters of July 1 (that I believe I also sent you), and that of July 28, argue that he took the lead in curbing "overzealous action" by IRS agents, and that the new regulations were the most restrictive he could obtain. He objects to the statement in fn. 5 that implies that the IRS did not take appropriate action.

One of my law clerks has reviewed Special Agent Jaffe's affidavit on pages 232-234 of the Oversight Hearings of the House Operations Subcommittee, and it generally is supportive of Mr. Alexander's position.

As the portion of fn. 5 to which he objects may be viewed as gratuitous to some extent, I am willing to delete it from our opinion if this meets with your approval. There is no urgency about this, and so I am suspending my file until September 15. If I have heard no objection by that date, I will advise Mr. Alexander that we are deleting the language which distresses him.

L.F.P., Jr.
September 5, 1980

78-1729 United States v. Payner

Dear Mr. Alexander:

This will acknowledge your letters of June 28 and August 22 that were received while I was in Richmond and did not have access conveniently to our files.

Although I can understand your sensitivity, I do not feel justified in recommending, on the basis of the record before us, a change in the sentence that concerns you. Nor do I think that the intelligent reader will think that you were responsible personally. Indeed, I did not. I regarded the misconduct in the investigation as being wholly unauthorized, and the action finally taken as the product of departmental compromise—a result not uncommon in Washington.

In sum, after the change already made at your request, I am quite hesitant to make a further change in the note. If, however, you wish me to submit your correspondence to the entire Court, I will be happy to do so.

I add that I have heard no Justice speak critically of you personally.

Sincerely,

Hon. Donald C. Alexander
Morgan, Lewis & Bockius
1800 M Street, N.W.
Washington, D.C. 20036

lfp/ss
September 15, 1980

Hon. Lewis F. Powell, Jr.
Associate Justice
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

RE: 78-1729 United States v. Payner

Dear Justice Powell:

Thank you for your letter of September 5. I am grateful for what you said and I fully accept your conclusion, although, of course, I wish that you had been willing to change the sentence that concerns me.

Let me again express my gratitude for your patience and your responsiveness. Perhaps the correspondence might be of interest to other members of the Court as an example of what may happen when the head of a law enforcement agency attempts to curb excesses. However, I am aware of the very heavy demands on the Court's time.

With best wishes,

Sincerely,

[Signature]

Donald C. Alexander
September 17, 1980

RE: 78-1729 United States v. Payner

Dear Lewis:

I leave this matter in your hands.

Regards,

Mr. Justice Powell

Copies to the Conference
September 17, 1980

78-1729 United States v. Payner

MEMORANDUM TO THE CONFERENCE:

You will recall that last July, responding to a request by Donald Alexander (former Commissioner of the IRS), we made a small change in footnote 5.

This did not entirely satisfy his concerns and he wrote me twice during the summer. I responded in my letter of September 5, copy enclosed. I now have his letter of September 15, in which he suggests that other members of the Court may be interested in the correspondence. Accordingly, I enclose copies of his three letters. In my view, nothing further need be done.

L.F.P., JR.
September 17, 1980

78-1729 United States v. Payner

MEMORANDUM TO THE CONFERENCE:

You will recall that last July, responding to a request by Donald Alexander (former Commissioner of the IRS), we made a small change in footnote 5.

This did not entirely satisfy his concerns and he wrote me twice during the summer. I responded in my letter of September 5, copy enclosed. I now have his letter of September 15, in which he suggests that other members of the Court may be interested in the correspondence. Accordingly, I enclose copies of his three letters. In my view, nothing further need be done.

L.F.P., Jr.
September 17, 1980

Re: 78-1729 - United States v. Payner

Dear Lewis:

Thanks for sharing copies of your correspondence with Donald Alexander. Although I am sympathetic with his concern, I agree with you that nothing further need be done.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
September 18, 1980

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

Dear Lewis:

I concur in the views stated in your memorandum of September 17th that nothing further need be done in this case.

Sincerely,

Mr. Justice Powell

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

Dear Lewis:

I agree that nothing further need be done.

Sincerely,

Mr. Justice Powell

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

Dear Lewis:

I share your feeling that nothing further need be done.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference