

Memorandum



Subject

Issues Relating to Elimination of the
Exclusionary Rule in Fourth Amendment
Search and Seizure Cases

Date

September 24, 1981

To

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

From

Carolyn B. Kuhl
Special Assistant to
the Attorney General

A handwritten signature in black ink, appearing to read "CBK", written over the typed name and title.

As you are aware, the Attorney General's Task Force on Violent Crime has recommended that the Justice Department urge adoption by the courts or the legislature of a "reasonable, good-faith" exception to the exclusionary rule in Fourth Amendment search and seizure cases. In evaluating that recommendation we are also considering proposals for eliminating the exclusionary rule in such cases. We therefore request your assistance in answering the following questions relating to possible elimination or modification of the exclusionary rule.

I. Could Congress constitutionally require that evidence shall not be excluded from any federal criminal proceeding solely because that evidence was obtained in violation of the Fourth Amendment?

II. Assume Congress enacts legislation providing that evidence shall not be excluded from any federal criminal proceeding because of a Fourth Amendment violation if the officer acted in a reasonable, good-faith belief that his conduct was in conformity to the Fourth Amendment. The legislation also provides that a showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good-faith belief.

A. Would such legislation be constitutional?

B. What are the policy reasons for and against such legislation?

III. A. Is S. 101 constitutional?

B. What are the policy reasons for and against legislation?

IV. Assume Congress enacts legislation providing a tort remedy against federal officers and employees as individuals for violation of a person's Fourth Amendment rights by an illegal search and seizure. The legislation limits recovery to \$20,000 per occurrence and specifically permits federal officers and employees to insure against such losses. The legislation also provides for recovery of a maximum of \$2,000 in punitive damages where the violation is found to have been intentional, but states that punitive damages may not be paid from insurance proceeds. The legislation provides for an absolute defense to the tort claim where the officer or employee acted in the reasonable, good-faith belief that his conduct complied with the Fourth Amendment.

A. Given this legislative scheme, could Congress constitutionally eliminate the exclusionary rule from federal criminal proceedings with respect to searches and seizures?

B. If you conclude in response to subpart A that Congress cannot eliminate the exclusionary rule, are there alterations in this legislative scheme which might make it constitutional (e.g., creation of a quasi-judicial panel to attempt to eliminate prejudice against plaintiffs who were indicted or convicted of crimes)?

C. What are the policy arguments in favor of and against such legislation?

V. A. Is S. 751 constitutionally permissible?

B. If you conclude in response to subpart A that Congress cannot eliminate the exclusionary rule, are there alterations in this legislative scheme which might make it constitutional?

C. What are the policy arguments in favor of and against such legislation?

D. Assume that S. 751 is enacted, but with the following change: Section 2693 is eliminated and in its place a provision is inserted requiring that all recoveries in actions under § 2692 shall be paid from the budget of the federal agency which employs the investigative or law enforcement officer whose conduct is at issue. Would such legislation be constitutional?

E. What are the policy arguments in favor of and against S. 751 modified as described in subsection D.

VI. Assume that Congress enacts legislation stating that in a federal criminal proceeding a court shall not apply the exclusionary rule in a case in which a search or seizure has been conducted in violation of the Fourth Amendment so long as the federal agency makes a showing that it has disciplined or will discipline the responsible investigative or law enforcement officer in a manner consistent with deterring violations of the Fourth Amendment. The legislation also provides that federal agencies which are involved in investigative or law enforcement functions shall promulgate disciplinary regulations designed to deter violation of the Fourth Amendment in conducting searches and seizures and that such regulations may specify attendance at legal training programs as one form of appropriate discipline.

A. Would such legislation be constitutional?

B. If you conclude in response to subpart A that such legislation would be unconstitutional, are there alterations in this legislative scheme which might make it constitutional?

B. What type of internal agency hearing, if any, would be required before an officer could be disciplined by an agency for a Fourth Amendment violation?

C. What are the policy arguments in favor of and against such legislation?

VII. Assume Congress enacts legislation which provides that in a federal criminal proceeding a court shall not exclude evidence solely because it was obtained by an illegal search and seizure if it is shown that (1) the federal agency which employs the responsible investigative or law enforcement officer has in force rules and regulations concerning search and seizure which reasonably conform with relevant existing case law interpreting the Fourth Amendment; and (2) the responsible officer acted in conformance with the agency rules and regulations. The legislation also provides that an investigative or law enforcement officer who conducts a search or seizure which does not comply with agency rules and regulations shall be subject to appropriate discipline by the federal agency in accordance with agency regulations.

A. Would such legislation be constitutional?

B. If you conclude in response to subpart A that such legislation would be unconstitutional, are there alterations in this legislative scheme which might make it constitutional?

C. What are the policy arguments in favor of and against such legislation?

97TH CONGRESS
1ST SESSION

S. 751

To amend titles 18 and 28 of the United States Code to eliminate, and establish an alternative to, the exclusionary rule in Federal criminal proceedings.

IN THE SENATE OF THE UNITED STATES

MARCH 19 (legislative day, FEBRUARY 16), 1981

Mr. HATCH (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend titles 18 and 28 of the United States Code to eliminate, and establish an alternative to, the exclusionary rule in Federal criminal proceedings.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 223 of title 18, United States Code, is
4 amended by adding at the end thereof the following new
5 section:

★(Star Print)

1 "§ 3505. Elimination of exclusionary rule as it pertains to
2 the fourth amendment.

3 "Evidence, otherwise admissible in a Federal criminal
4 proceeding, shall not be excluded on the grounds that such
5 evidence was obtained in violation of the fourth amendment
6 to the United States Constitution."

7 (b) The table of sections for chapter 223 of title 18,
8 United States Code, is amended by adding at the end thereof
9 the following new item:

"3505. Elimination of exclusionary rule as it pertains to the fourth amendment."

10 SEC. 2. (a) Title 28, United States Code, is amended by
11 adding immediately after chapter 171 a new chapter 172 as
12 follows:

13 "Chapter 172.—ILLEGAL SEARCH AND SEIZURE

"Sec.

"2691. Definitions.

"2692. Tort claims; illegal search and seizure.

"2693. Sanctions against investigative or law enforcement officers; illegal search
and seizure.

"2694. Judgment as a bar.

"2695. Attorney fees and costs.

"2696. Applicability of other tort claims procedures.

14 "§ 2691. Definitions

15 "As used in this chapter, and section 1346(g) of this
16 title, the term—

17 "(1) 'Federal agency' includes the executive de-
18 partments, military departments, independent establish-
19 ments of the United States, and corporations primarily
20 acting as instrumentalities or agencies of the United

1 States, but does not include any contractor with the
2 United States; and

3 “(2) ‘Investigative or law enforcement officer’
4 means any officer of the United States who is empow-
5 ered by law to execute searches, to seize evidence, or
6 to make arrests for any violation of Federal law, or
7 any person acting under or at the request of such
8 officer.

9 “§ 2692. Tort claims; illegal search and seizure

10 “(a) The United States shall be liable for any damages
11 resulting from a search or seizure conducted by an investiga-
12 tive or law enforcement officer, acting within the scope of his
13 office or employment, in violation of the fourth amendment to
14 the United States Constitution.

15 “(b) Any person aggrieved by such a violation may re-
16 cover actual damages and such punitive damages as the court
17 may award under subsection (c).

18 “(c) Punitive damages may be awarded by the court,
19 upon consideration of all of the circumstances of the case,
20 including—

21 “(1) the extent of the investigative or law en-
22 forcement officer’s deviation from permissible conduct;

23 “(2) the extent to which the violation was willful,
24 reckless, or grossly negligent;

1 “(3) the extent to which the aggrieved person’s
2 privacy was invaded;

3 “(4) the extent of the aggrieved person’s personal
4 injury, both physical and mental;

5 “(5) the extent of any property damage; and

6 “(6) the effect such an award would have in pre-
7 venting future violations of the fourth amendment to
8 the United States Constitution.

9 “(d) Notwithstanding subsections (b) and (c), the recov-
10 ery of any person who is convicted of any offense for which
11 evidence of such offense was seized in violation of the fourth
12 amendment to the United States Constitution is limited to
13 actual physical personal injury and to actual property
14 damage sustained as a result of the unconstitutional search
15 and seizure.

16 “(e) No judgment, award, compromise, or settlement of
17 any action brought under this section shall exceed the
18 amount of \$25,000, including actual and punitive damages.
19 The United States shall not be liable for interest prior to
20 judgment.

21 “(f) Any action under this section shall be brought
22 within the period of limitations provided in section 2401(b) of
23 this title.

1 "§2693. Sanctions against investigative or law enforce-
2 ment officers; illegal search and seizure

3 "An investigative or law enforcement officer who con-
4 ducts a search or seizure in violation of the fourth amend-
5 ment to the United States Constitution shall be subject to
6 appropriate discipline in the discretion of the Federal agency
7 employing such officer, if that agency determines, after notice
8 and hearing, that the officer conducted such search or seizure
9 lacking a good faith belief that such search or seizure was
10 constitutional.

11 "§2694. Judgment as a bar

12 "The remedy against the United States provided under
13 this chapter shall be the exclusive civil remedy for a violation
14 of the fourth amendment to the United States Constitution by
15 any investigative or law enforcement officer acting within the
16 scope of his office or employment whose act or omission gave
17 rise to the claim.

18 "§2695. Attorney fees and costs

19 "In any action brought under this chapter, the court
20 may award any claimant who prevails in such action reason-
21 able attorney fees, and other litigation costs reasonably
22 incurred.

23 "§2696. Applicability of other tort claims procedures

24 "The procedures provided in sections 2672, 2675,

1 tions, any investigative or law enforcement officer who con-
 2 ducts a search and seizure in violation of the fourth amend-
 3 ment to the Constitution shall be treated as if he were an
 4 'employee of the government'.".

5 (b) The table of chapters for title 28, United States
 6 Code, and for part VI of title 28, United States Code, are
 7 each amended by inserting immediately after the item relat-
 8 ing to chapter 171 the following:

"172. Illegal Search and Seizure..... 2691".

9 SEC. 3. Section 1346 of title 28, United States Code, is
 10 amended by adding immediately after subsection (f) the fol-
 11 lowing new subsection:

12 "(g) The district courts, together with the United States
 13 District Court for the District of the Canal Zone, the United
 14 States District for the Territory of Guam, the District Court
 15 for the Northern Mariana Islands, and the District Court of
 16 the Virgin Islands, shall have exclusive original jurisdiction
 17 of any civil action on a claim against the United States, for
 18 money damages, brought under chapter 172 of this title."

19 SEC. 4. (a) Section 1402(b) of title 28, United States
 20 Code, is amended by inserting after "subsection (b)" the fol-
 21 lowing: "or subsection (g)".

22 (b) Section 1504 of title 28, United States Code, is
 23 amended by striking "section 1346(b)" and inserting in lieu

1 thereof "under subsection (b) or subsection (g) of section
2 1346".

3 SEC. 5. The civil action against the United States pro-
4 vided by the amendments to title 28, United States Code,
5 made by this Act shall apply only to claims arising on or
6 after the date of enactment of this Act.

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97TH CONGRESS
1ST SESSION

S. 101

To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings.

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 5), 1981

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That (a) chapter 223 of title 18, United States Code, is
- 4 amended by adding at the end thereof the following new
- 5 section:
- 6 "§ 3505. Definition and limitation of exclusionary rule
- 7 "(a) Evidence shall not be excluded from any Federal
- 8 criminal proceeding solely because that evidence was ob-

1 tained in violation of the fourth amendment to the Constitu-
2 tion unless the court finds as a matter of law that—

3 “(1) a violation has occurred, and

4 “(2) such violation was intentional or substantial.

5 “(b) In determining whether a violation is substantial for
6 the purposes of this section, the court shall consider all of the
7 circumstances, including—

8 “(1) the extent to which the violation was reck-
9 less;

10 “(2) the extent to which privacy was invaded;

11 “(3) the extent to which exclusion will tend to
12 prevent such violations; and

13 “(4) whether, but for the violation, the things
14 seized would have been discovered; or whether the re-
15 lationship between the things discovered and the viola-
16 tion is attenuated.”.

17 (b) The table of sections of such chapter is amended by
18 adding at the end thereof the following item:

“3505. Definition and limitation of exclusionary rule.”.

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SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

September 24, 1981

TO: Ken Starr
Hank Habicht
Tex Lazer
John Roberts
Chips Stewart

FM: Carolyn Kuhl

This is the memo we sent to OLC
regarding the exclusionary rule.

I think it would be useful for
each of us to try to list policy reasons
for and against the proposals we have
asked OLC to evaluate.

Attachment