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Words That Counted--A Vignette

Jack G. Day

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In a footnote to Justice Harlan's dissenting opinion in *Mapp v. Ohio*[1] these words appear:

> This case presents the issue of whether evidence obtained in an illegal search and seizure can constitutionally be used in a State criminal proceeding. We are aware of the view that this Court has taken on this issue in *Wolf v. Colorado*. It is our purpose by this paragraph to respectfully request that this Court re-examine this issue and conclude that the ordered liberty concept guaranteed to persons by the due process clause of the Fourteenth Amendment necessarily requires that evidence illegally obtained in violation thereof, not be admissible in state criminal proceedings.[2]

Harlan's quote is taken from an amicus brief. I believe these slender sentences represent the total reference to the suppression issue in the entire literature of *Mapp* before the amicus brief in the Supreme Court of the United States. It is the purpose of this vignette to explain how the sentences happen to be there.

The amicus brief of the American and Ohio Civil Liberties Union was the product of a committee of lawyers representing the Union. The members included Ralph Hertz, a very experienced, very bright and aggressive lawyer, formerly Judge of the Common Pleas Court of Cuyahoga County, and three able and respected young lawyers—Bernard A. Berkman, Fred J. Livingstone, and Julian C. Renswick.[3]

The young men were anxious to brief the constitutionality of the suppression issue. Judge Hertz thought the issue was foreclosed by *Wolf v. Colorado*[4] and would not budge.[5] The young lawyers came to

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† Retired judge, Ohio Court of Appeals for the Eighth Circuit.

1 367 U.S. 643 (1961).

2 *Id.* at 673 n.5 (Harlan, J., dissenting) (citation omitted) (quoting Brief Amici Curiae on behalf of American Civil Liberties Union and Ohio Civil Liberties Union at 20, Mapp v. Ohio, 367 U.S. 643 (1961) (No. 60-236)).

3 I was on the committee but resigned because of stylistic objections to the brief. With that act I walked out of a significant piece of legal history into obscurity. *Sic semper* snob!

4 338 U.S. 25 (1949).

5 Judge Hertz may have been of the same mind as Justice Owen W. Roberts when the latter declared, in *Smith v. Allwright*, 321 U.S. 649 (1944), that

> the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that

me and said, "We need a son-of-a-bitch and you are our first choice. Will you try and soften the Judge on this issue?" I agreed and approached Judge Hertz, emphasizing the history of the high court in modification of principle. He relented. This was enough to get committee unanimity. The language from the amicus brief quoted in Harlan's dissent came into being.

And that provided the hook upon which a constitutional addendum was hung.

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the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject.

Id. at 669 (Roberts, J., dissenting).