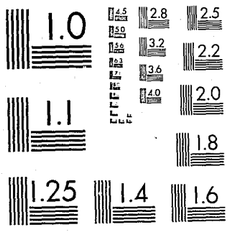

Department of Justice

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ADDRESS

OF

THE HONORABLE WILLIAM FRENCH SMITH
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE 23RD ANNUAL CONFERENCE

OF

UNITED PRESS INTERNATIONAL EDITORS

FAIRMONT HOTEL
DENVER, COLORADO

On this day a century ago, the railroad tycoon William H. Vanderbilt was asked whether he operated his railroads for the benefit of the public and responded: "The public be damned!" In recent years, many citizens have wondered whether government's attitude toward fighting crime has become: Let the law-abiding public be damned. Although government has regularly redoubled its efforts, it has been amazingly unsuccessful in halting even the growth of crime. When I entered office last year, nearly nine of ten Americans believed that the courts in their own areas failed to deal harshly enough with criminals -- an increase of almost one-third since 1972. Nearly eight of ten Americans did not believe that our system of law enforcement worked to discourage people from committing crimes -- an increase of almost fifty percent since 1967.

To some extent, we have needlessly allowed our historic concern for the rights of the accused to overwhelm the even more historic first principle of government: providing for the defense of society. More and more Americans recognize that an imbalance has arisen in the struggle between law and the lawless. Today, I want to speak in some detail about one weight that contributes to the imbalance, the exclusionary rule.

Beginning in its 1914 decision in Weeks v. United States, the U.S. Supreme Court has declared that evidence obtained in violation of the fourth amendment to the Constitution is inadmissible in federal criminal prosecutions. The exclusionary rule is a judicially created rule of law. It is not articulated in the fourth amendment itself, which reads instead:

> "The right of the people to be secure
> in their persons houses, papers, and
> effects, against unreasonable searches
> and seizures, shall not be violated."

In fact, the exclusionary rule is not to be found anywhere in the Constitution, the Bill of Rights, or the federal criminal Code. It was also not inherited from English law. To this day, neither English law nor the law of any other civilized country requires the exclusion of such evidence.

Although this court-created doctrine has been criticized from its inception, it has become a very significant feature of the federal criminal justice system. The states themselves were less convinced of the rule's value following its enunciation in the Weeks case. In the three decades following the Weeks decision, sixteen states adopted the rule -- but thirty-one states refused.

In 1949, the U.S. Supreme Court squarely confronted the decision of most states not to adopt the exclusionary rule. In Wolf v. Colorado, the Court held that the fourth amendment did apply to the states through the due process clause of the fourteenth amendment, but that the fourteenth amendment did not forbid state courts from admitting evidence obtained by an unreasonable search and seizure. Twelve years later, in Mapp v. Ohio, the Supreme Court changed its mind and held the exclusionary rule enforceable against state criminal prosecutions.

Since 1961, the exclusionary rule has been applicable to all state and federal criminal prosecutions -- with the effect predicted by Justice Cardozo long ago: "The criminal is to go free

because the constable has blundered." Indeed, the scope and applicability of the rule have been expanded by the courts in recent decades far beyond the more limited beginning in the Weeks case. As Harvard Professor James Q. Wilson summarized the situation more recently:

> "... the cost of deterring improper police
> conduct does not generally fall on the
> police. No officer is punished when the
> exclusionary rule is invoked; rather the
> prosecutor's case is lost .... If a
> guilty person goes free because improperly
> collected evidence that would have
> established his guilt is excluded, then
> the victim of the crime, and society at
> large, bear the costs of the police error
> .... The exclusionary rule often operates
> as a kind of regressive tax that places
> the burden of attaining some public
> purpose on those least able to pay."

Clearly, the most disturbing feature of the exclusionary rule is that its invocation can result in the freeing of a demonstrably guilty criminal. No matter how technical a mistake an officer makes -- even if he is acting in reasonable good faith, for example, by acquiring a warrant that is only subsequently held to be technically incorrect -- an illegal search results in the

exclusion of any evidence resulting from the search. There is no weighing by the court of the seriousness of the crime or the significance of the evidence. Even a good faith attempt by a law enforcement officer to ensure the legality of the search will not -- if a technical flaw is uncovered -- save the evidence of crime.

What then are the arguments in favor of the exclusionary rule?

As originally enunciated by the Supreme Court, the rationale for the exclusionary rule was twofold: to deter unlawful police conduct and to preserve judicial integrity by preventing courts from becoming "accomplices in the willful disobedience of a Constitution they are sworn to uphold." In recent years, however, the Court has refused to cite the judicial integrity rationale. This is not surprising. After all, what good does it do to judicial integrity to enforce a court-made rule that requires the release of clearly guilty criminals on the most technical of grounds? In recent years, as in the 1960 case of Elkins v. United States, the Court has instead emphasized:

> "[The] purpose [of the exclusionary rule] is to deter -- to compel respect for the Constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it."

Nevertheless, even as the Court has emphasized the deterrent rationale for the exclusionary rule, a substantial body of evidence has grown up questioning the efficacy of the rule in achieving its goal of deterrence.

In 1970, Utah Supreme Court Justice Dallin Oaks -- then a professor at the University of Chicago Law School -- reported the results of his exhaustive study for the American Bar Foundation. He concluded:

> "Today, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness."

As Chief Justice Burger himself has noted:

> "There is no empirical evidence to support the claim that the rule deters illegal conduct of law enforcement officials .... [W]e should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the innocent victims of official misconduct."

The lack of empirical evidence in support of the exclusionary rule should come as no surprise. As Justice Rehnquist has stated, the rule "unrealistically requires that

policemen investigating serious crimes make no errors whatsoever." One of the greatest problems with the exclusionary rule is that it often places an impossible burden on police officers. The rule is invoked upon the most technical of violations -- even when the officer could not have reasonably been expected to have done differently. The rule is applied in a fashion that requires of police officers a better understanding of what the law will be than is required of judges. And when the police officer fails to meet that impossible burden, society is made to suffer the release of a guilty criminal who would otherwise be behind bars. Simply put, the law of the fourth amendment is so uncertain and so constantly changing that police officers cannot realistically be expected to know what judges themselves do not yet know.

Let me illustrate my point with several cases that have reached the United States Supreme Court in just the last two terms. In 1981, the United States Supreme Court decided the cases of New York v. Belton and Robbins v. California. The cases are remarkably similar factually. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in the Robbins case, an officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In the Belton case, an officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

Both cases required a technical analysis of several complicated doctrines: the "automobile exception" cases concerning

the validity of warrantless searches of cars and their contents; the doctrine of "search incident to arrest" defined by Chimel v. California; and the watershed case of United States v. Chadwick, in which the Court held that police must obtain a warrant to open a closed container in an automobile when its possessor has exhibited a "reasonable expectation of privacy" in it.

In the two cases of Belton and Robbins, three justices held both searches legal. Three justices held both illegal. And three justices controlled the ultimate decision that Robbins was illegal and Belton legal. Even after Robbins and Belton, however, the law governing police conduct in similar searches remained uncertain. Justice Brennan observed in his dissent in Belton:

> "The Court does not give the police any 'bright line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying Chimel, it offers no guidance to the police officer seeking to work out these answers for himself."

To the same end, Justice Rehnquist dissented in Robbins and cited Justice Harlan's 1971 concurring opinion in Coolidge v. New Hampshire:

> "State and federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty, which extends even to

> such an every day question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to have been used during the commission of a crime."

It is not surprising that less than one year after these decisions the Supreme Court asked both sides to address whether Robbins should be reconsidered. In its 1982 decision in United States v. Ross, the Court reconsidered the holding in Robbins and reversed itself.

To understand fully what confronts a police officer who attempts in good faith to comply with the fourth amendment, one need only consider these three cases. The search that the Supreme Court held illegal in the Robbins case had been found to be legal by the California courts. The search that the Supreme Court held to be legal in the Belton case had been found illegal by the New York Court of Appeals. The searches that the Supreme Court held lawful in the Ross case had been held unlawful by the D.C. Circuit en banc. Of the fourteen judges that considered Robbins seven found the search lawful, seven found it unlawful, and the Supreme Court held it unlawful. In Belton although eight judges considered the search unlawful, fourteen judges and the Supreme Court found the search lawful. In Ross, fifteen judges found at least one of the two searches unlawful, thirteen found at least one of the searches lawful, and the Supreme Court held both searches lawful. In just these three cases, there were thirty votes that at least one of the searches was unlawful, but thirty-four that at least one of the searches was lawful. In spite of this judicial disagreement, the Supreme Court would today apparently hold all of these searches lawful. Is it really any wonder that police officers attempting to observe the strictest requirements of the fourth amendment may sometimes guess wrong. With so much uncertainty, however, should society punish a wrong guess by letting a criminal go free?

The deterrent purpose of the exclusionary rule is not served when courts apply it to situations in which appellate cases are unclear, confused, or even contradictory. Yet courts do apply it in those circumstances. And police are confronted with the question of whether to conduct a warrantless search in the field when the circumstances they are facing are not covered by existing case law.

Supporters of the exclusionary rule argue, however, that the rule does not have any significantly adverse effects on the criminal justice system. They claim that it is infrequently invoked and even less frequently applied. Proponents of the rule often rely upon a 1979 study by the General Accounting Office. According to that report, evidence was actually suppressed at trial in only 1.3 percent of federal criminal cases, and only four-tenths of one percent of declined cases were declined because of fourth amendment problems. That study is, however, exceedingly weak support for the exclusionary rule's continuation.

First, the 1.3 percent is a percentage not of cases that reached trial but of all cases brought into less than half of the U.S. Attorneys' offices. It does not account for those cases that law enforcement agencies never formally presented to U.S.

Attorneys' offices because of fourth amendment problems. The 1.3 percent is not a percentage of cases brought to court or to trial -- which would be a larger and more significant figure for assessing the impact of the exclusionary rule on the courts. Indeed, the GAO study itself notes that thirty-three percent of the defendants who went to trial filed fourth amendment suppression motions. It also notes that more than fifty-five percent of all motions filed by defendants involved the fourth amendment -- an amount two and one-third times greater than the next most numerous type of motion. And a careful reading of the GAO Report indicates that -- in the very large U.S. Attorneys' offices, for example -- twenty percent, not 1.3 percent, of the defendants who went to trial and had hearings on their suppression motions actually succeeded in having evidence suppressed.

The burden of the exclusionary rule is similarly great at the appellate level. As Judge Malcolm Wilkey has noted about his own U.S. Court of Appeals for the District of Columbia:

> "In the ... years 1979-81 we wrote opinions in 95 criminal cases, in 21 of which, or 22.1%, the question of excluding the evidence because of an alleged illegal search and seizure required analysis and decision."

Just as the exclusionary rule places a tremendous burden on our courts, it consumes many of our scarce prosecutorial resources. The size of that burden can be assessed by a recent survey we conducted of our U.S. Attorneys throughout the country. They

reported that modification of the exclusionary rule was the legislative change that would be of most help to them. In fact, nearly sixty percent of the U.S. Attorneys listed modification of the exclusionary rule as their first or second priority.

The 1.3 percent figure also fails to account for the effect of fourth amendment concerns on the more than eighty-five percent of cases disposed of through plea bargains or decisions to discontinue prosecution. Such concerns often lead to the disposal of cases prior to a verdict at trial.

The figure of four-tenths of one percent concerning cases declined primarily because of fourth amendment problems is similarly misleading. The GAO admits that it considered only felony cases. Yet, it is a general policy not to decline to prosecute felony cases when fourth amendment problems are unclear, as they usually are.

Last, the GAO study focuses only upon U.S. Attorneys' offices. The exclusionary rule has an even greater impact upon the states because that is where the overwhelming number of criminal cases are handled. Indeed, the empirical studies of state criminal systems have apparently shown a much higher percentage of successful suppression motions than the GAO study found in the federal system. For example, in a 1971 study of three branches of the Chicago Circuit Court, thirty percent of the defendants charged with gambling, narcotics, or concealed weapons offenses successfully moved to suppress evidence of their crimes.

The courts are overburdened in their attempts to dispense justice, and the exclusionary rule is a major cause of

that burden and the resulting slowness and uncertainty in the course of justice.

This much is then clear. The exclusionary rule does result in the release of guilty criminals. The exclusionary rule consumes a tremendous amount of our scarce judicial and prosecutorial resources -- and contributes to the public perception of inefficient and ineffective justice.

In addition, other mechanisms now exist to deter violations of the fourth amendment by law enforcement officers. As Justice Rehnquist observed three years ago, changes in the law since the Supreme Court's extension of the exclusionary rule to the states in 1961 have made "redress more easily available by a defendant whose constitutional rights have been violated." As Rehnquist notes, the Supreme Court's decision in Monroe v. Pape

> "gave a private cause of action for redress of constitutional violations by state officials. The subsequent developments in this area have ... expanded the reach of that [private cause of action]. Monell v. New York City Dept. of Social Services ... made not only the individual police officer who may have committed the wrong, and who may have been impecunious, but also the municipal corporation which employed him, equally liable under many circumstances. Bivens v. Six Unknown Fed. Narcotics Agents ... made individual agents of the Federal Bureau of Narcotics suable for damages

> resulting from violations of Fourth Amendment guarantees. In addition, many States have set up courts of claims or other procedures so that an individual can as a matter of state law obtain redress for a wrongful violation of a constitutional right through the state mechanism."

The availability of other means of deterring police misconduct and the deficiencies of the exclusionary rule provide substantial support for the proposition that the rule should either be abolished or modified.

In order to promote needed change as soon as possible, the Administration has at this time proposed only modification of the exclusionary rule. Although the modifications we seek would have a positive effect on our criminal justice system, they are not revolutionary. We have not proposed abolition of the exclusionary rule. Our proposal would govern only federal courts. The proposed legislation would eliminate the rule -- and its absurd consequence of releasing the guilty -- only in those circumstances in which the rule could not possibly have its intended deterrent effects. Our legislative proposal would create a reasonable good faith exception to the exclusionary rule and would allow the admission of evidence whenever an officer either obtains a warrant or conducts a search or seizure without a warrant but with a reasonable, good faith belief that he was acting in accordance with the fourth amendment.

This modification would avoid the release of criminals when an officer commits at most a technical violation that he reasonably could not be expected to have avoided. The effect of the rule on our criminal justice system -- and the public's perception of that system -- is so substantial that I cannot understand why any reasonable person would oppose our modification. It would retain the putative deterrent value of the rule -- if any exists -- but would allow a greater number of guilty individuals to be sent where they clearly belong -- to jail -- when no deterrent value could be served.

As a result of the 1980 decision of the Fifth Circuit in United States v. Williams, the approach we are suggesting is already the law in the Fifth and Eleventh Circuits. It is now time for Congress to make this reasonable modification applicable in all federal courts. Clearly, Congress has the power to act in this way. As the Supreme Court itself stated in Wolf v. Colorado:

> "The Federal Exclusionary Rule is not a command of the fourth amendment but is a judicially created rule of evidence which Congress might negate."

It is time for Congress at least to modify this rule and to bring a new degree of reason to the federal criminal justice system. We have been handicapped in the fight against crime for too long by the most stringent form of the exclusionary rule.

As the Attorney General's Task Force on Violent Crime -- chaired by former Attorney General Griffin Bell and Governor Jim Thompson of Illinois -- concluded in 1981:

> "In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution .... If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees."

As Justice White once observed, the exclusionary rule is "a senseless obstacle to aiming at the truth in many criminal trials." It is time to eliminate at least the most clearly senseless features of the exclusionary rule. The time for reasonable change has not only arrived. It is also long overdue.

The modifications in the exclusionary rule that I have advanced today are one part of a comprehensive effort by this Administration to redress imbalance that has arisen in recent decades between the forces of law and the forces of lawlessness. Crime is out of control in America. In the last decade alone, violent crime jumped nearly sixty percent. Last year, one out of every three households in this country was victimized by some form of crime. The proposals we have made -- like modification of the exclusionary rule -- would, when added together, greatly strengthen the ability of government to protect the law abiding -- without impairing our Constitutional liberties.

END