



THANK THE GOOD LORD FOR *MAPP V. OHIO*

William O. Douglas & Felix Frankfurter

On June 16, 1961, in *Mapp v. Ohio*, the U.S. Supreme Court applied its exclusionary rule – that is, the ban on use at trial of evidence acquired via violation of a defendant’s constitutional rights – to the states. It was a big step in a long-running exercise in balancing two public interests: catching law breakers and deterring law-breaking by law enforcers. That exercise has pretty much always involved interaction among lawmakers of all sorts – legislative, executive, and judicial, local and national. In the aftermath of *Mapp*, one behind-the-scenes exclusionary-rule interaction went largely unnoticed. It involved a series of dueling memos by a member of the *Mapp* majority (Justice William O. Douglas) and a *Mapp* dissenter (Justice Felix Frankfurter). The exchange did not matter much – or at all, really – then, nor does it now. But it does compactly and vividly capture some of the concerns motivating proponents of differing approaches to the exclusionary rule. The exchange might also serve as a nice reminder to those among us who are highest and mightiest and surest of our noble rightness on controversial matters that what feels to us (and our fan bases) like brilliant point-scoring today may look to tomorrow’s children like mean-spirited cheap shots. Snark does not always age well. And now, on the next page, we begin with the first salvo from Douglas: a memo to Justice Tom Clark (the author of the opinion for the Court in *Mapp*). The memo is cc’d to the other Justices, including Frankfurter, who wrote the opinion for the Court in *Wolf v. Colorado* (1949), the precedent that was overruled in *Mapp*.

– *The Editors*

William O. Douglas & Felix Frankfurter

January 25, 1962

Dear Tom:

This last weekend at a social occasion I saw Attorney General Stanley Mosk of California and his wife. He said out of the blue "Thank the good Lord for *Mapp v. Ohio*." I asked him what he meant and he went on to give an interesting account, most of which you probably know, which I thought I would pass on to you.

He said that the California Supreme Court decision in the Cahan case was four to three and since it was decided there had been two vacancies on the Court and two new appointments. He said that Phil Gibson and the others who were for the Cahan opinion held their breath until the nominees took office and until they could find out where these nominees stood on Cahan. It so happened that one of the two nominees was for the Cahan decision and one was against it. So far as the Supreme Court of California went, Mosk said that it was barely holding its own.

The newspaper campaign, however, against the Cahan decision, continued unabated. Mosk said that with the system of elective judges they have in California, pressure on the trial courts was very, very great not to apply the Cahan case or to find there were more exceptions to it, or in other words, try to get around it. He said that in practical effect, the Cahan decision, while on the books, was not really given much life or vitality in practice. He mentioned in addition to the newspaper pressure, the pressure of the head of the police in Los Angeles, a man named Parker who, I understand is a lawyer and very vocal.

The result of *Mapp v. Ohio*, according to Mosk, is to take the pressure off the local judge to create exceptions and to follow the exclusionary rule and all its ramifications.

William O. Douglas

Mr. Justice Clark

cc: The Chief Justice, Black, J., Frankfurter, J., Harlan, J., Brennan, J., Whittaker, J., and Stewart, J.¹



¹ Papers of William O. Douglas, box 1254, Library of Congress, Manuscript Division.

Thank the Good Lord for Mapp v. Ohio

January 30, 1962

Dear Brethren:

At the time that Bill Douglas circulated his report of Attorney General Stanley Mosk's rejoicing over *Mapp v. Ohio* nothing was further from my thoughts than intramurally to argue that decision. Nothing is further from my thoughts now. Nor would I have made comment if Attorney General Mosk had founded his approval of the *Mapp* decision on his view of the history of the Fourteenth Amendment or on what he conceived to be the juristic requirements of the Due Process Clause of that Amendment. Instead, he welcomes the opinion because it will check a tendency of California lower court judges and, perchance, even the danger of the California Supreme Court, to make inroads upon the California doctrine regarding search and seizure, as expounded in the *Cahan* case. (*People v. Cahan*, 44 Cal. 2d 434.) Coming from one of the most self-reliant of States, this attitude to look to federal authority for dealing with a local problem – for such was concern over the *Cahan* doctrine until *Mapp* came along – runs counter to one of my oldest convictions which time has only reinforced. And so I am moved to this word of comment.

So-called “states rights” claims are, I know, the happy hunting ground of demagogues as well as of sincere reactionary minds. I have no use for such claims; I did not imbibe them in Vienna or New York or Cambridge or Washington. But I do deeply care about the maintenance of our federalism, and I care deeply about our federalism fundamentally because it is, in my view, indispensable for the protection of civil liberties to avoid concentration of governmental powers in one central government. Those who think that this is an idle fear read the lessons of history and, not least, of recent history, differently from the way I do. It is not without significance that the Royal Commission on Police will, I believe, before long report against a central police force, even for the tight little island of England, or rather even for one-half of that Island. It is of course beside the point of my present concern that *Mapp* may be deemed in support of a civil right.

More than half a century ago Elihu Root, in a famous speech, told the States that the only way for them to preserve local rights they care about is to be alert to their protection and not allow the Federal Government to move into a vacuum of indifference to, and disregard of, the duties and

William O. Douglas & Felix Frankfurter

powers of States. (See Root, Addresses on Government and Citizenship, p. 363, *How to Preserve the Local Self-Government of the States*.)

Let me repeat. I am not addressing myself to Attorney General Mosk's approval of *Mapp v. Ohio*. I am not remotely adverting to the merits of that case. I do feel saddened, much as I respect him, by the ground of his satisfaction over the decision.

Sincerely yours,
F.F.

The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart²



January 30, 1962

Memorandum to the Conference

In re: *Mapp v. Ohio*

I did not ask Attorney General Mosk. But if I had put the question, I am certain he would have also said, "Thank God, California is in the Union."

William O. Douglas

The Chief Justice
Black, J.
Frankfurter, J.
Clark, J.
Harlan, J.
Brennan, J.
Whittaker, J.
Stewart, J.³

² Papers of Earl Warren, box 351, Library of Congress, Manuscript Division.

³ Papers of William O. Douglas, box 1254, Library of Congress, Manuscript Division.

Thank the Good Lord for Mapp v. Ohio



January 31, 1962

Dear Bill:

When next you see Attorney General Mosk please ask him if California was *not* “in the Union” before June 19, 1961.

Sincerely yours,
F.F.

cc: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Whittaker
Mr. Justice Stewart⁴



January 31, 1962

Dear Felix:

When I next see Stanley Mosk, I will put your question to him. My guess is he will say that California was not wholly “in the Union” before *Mapp v. Ohio*, as he thinks, I believe, that the Bill of Rights should be protective of all our constituent members.

William O. Douglas

Mr. Justice Frankfurter

cc: The Chief Justice
Black, J.
Clark, J.
Harlan, J.
Brennan, J.
Whittaker, J.
Stewart, J.⁵



⁴ Papers of William O. Douglas, box 1254, Library of Congress, Manuscript Division.

⁵ *Id.*