

Olmstead

Vs

United States

Nos. 493, 532 and 533

04.06.1928

TAFT, J., lead opinion

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F.2d 842 and 850. The petition in No. 493 was filed August 30, 1927; in Nos. 532 and 533, September 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wiretapping amounted to a violation of the Fourth and Fifth Amendments.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully. [277 U.S. 456] It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month, sales amounted to \$176,000; the aggregate for a year must have exceeded two millions of dollars.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of \$10,000 to the capital; eleven others contributed \$1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the "stuff," to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches already referred to

One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room -- the "bull pen." The call numbers of the telephones were given to those known to be likely customers. At times, the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was

largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small [277 U.S. 457] wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides --

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

And the Fifth: "No person . . . shall be compelled, in any criminal case, to be a witness against himself." [277 U.S. 458]

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

**Boyd v. United States**, 116 U.S. 616, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against thirty-five cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in twenty-nine cases previously imported. The fifth section of the Act of June 22, 1874, provided that, in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice belonging to the defendant would tend to prove any allegation made by the United States, might, by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and, if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This Act had succeeded the Act of 1867, which provided that, in such cases, the District Judge, on affidavit of any person interested, might issue a warrant to the marshal to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the Act of 1863 of a similar tenor, except that it directed the warrant to the collector, instead of the marshal. The United States Attorney followed the Act of 1874 and compelled the production of the invoice.

The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621): [277 U.S. 459]

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that, by refusal, he should be conclusively held to admit the incriminating [277 U.S. 460] character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is *Weeks v. United States*, 232 U.S. 383 -- a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest, other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and, on introduction of the papers, contended that the search without warrant was a violation of the Fourth and Fifth Amendments, and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and, upon making seasonable application, he was entitled to have them restored, and that, by permitting their use upon the trial, the trial court erred.

The opinion cited with approval language of Mr. Justice Field in *Ex parte Jackson*, 96 U.S. 727, 733, saying that the Fourth Amendment, as a principle of protection, was applicable to sealed letters and packages in the mail, and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In *Silverthorne Lumber Company v. United States*, 251 U.S. 385, the defendants were arrested at their homes and [277 U.S. 461] detained in custody. While so detained, representatives of the Government, without authority, went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the District Attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

Thus, the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned, or at all events ratified, the whole performance.

And it held that the illegal character of the original seizure characterized the entire proceeding, and, under the *Weeks* case, the seized papers must be restored.

In *Amos v. United States*, 255 U.S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial, he presented a petition asking that private property seized in a search of his house and store "within his curtilage" without warrant should be returned. This was denied. A woman who claimed to be his wife was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered, and found whiskey. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whiskey and to exclude the testimony was error.

In *Gouled v. The United States*, 255 U.S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty, and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direction [277 U.S. 462] of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the U.S. Army, pretending to make a friendly call on him, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents. One of these belonging to Gouled, was delivered to the United States Attorney, and by him introduced in evidence. When produced, it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

*Agnello v. United States*, 269 U.S. 20, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest, and seized there without a warrant. Under such circumstances, the seizure could not be justified as incidental to the arrest.

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones, They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the

Amendment. Therefore, many had supposed that, under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was [277 U.S. 463] unimportant. This was held by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Dana*, 2 Metcalf, 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in *Entick v. Carrington*, 19 Howell State Trials, 1029. Mr. Justice Bradley made effective use of this case in *Boyd v. United States*. But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the *Boyd* case. This appears too in the *Weeks* case, in the *Silverthorne* case, and in the *Amos* case.

*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances [277 U.S. 464] became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant, and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

The Amendment itself shows that the search is to be of material things -- the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized.

It is urged that the language of Mr. Justice Field in *Ex parte Jackson*, already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wiretapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Post Office Department and the relations between the Government and those who pay to secure protection of their sealed letters. See Revised Statutes, §§ 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and § 3929, which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants. [277 U.S. 465]

By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

This Court, in *Carroll v. United States*, 267 U.S. 132, 149, declared:

The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Justice Bradley, in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

*Hester v. United States*, 265 U.S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house, and saw him come out and hand a bottle of whiskey to another was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. *United States v. Lee*, 274 U.S. 559, 563; *Eversole v. State*, 106 Tex.Cr. 567.

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, [277 U.S. 466] and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here, those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below -- that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical, and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection, we shall deal with it in both of its phases.

While a Territory, the English common law prevailed in Washington, and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently, are those of the common law. *United States v. Reid*, 12 How. 361, [277 U.S. 467] 363, 366; *Logan v. United States*, 144 U.S. 263, 301; *Rosen v. United States*, 245 U.S. 467; *Withaup v. United States*, 127 Fed. 530, 534; *Robinson v. United States*, 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence, is not affected by the illegality of the means by which it was obtained. Professor Greenleaf, in his work on evidence, vol. 1, 12th ed., by Redfield, § 254(a) says:

It may be mentioned in this place, that though papers and other subjects of evidence may have been **illegally taken** from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.

Mr. Jones, in his work on the same subject, refers to Mr. Greenleaf's statement and says:

Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute.

Vol. 5, § 2075, note 3.

The rule is supported by many English and American cases cited by Jones in vol. 5, 2075, note 3, and § 2076, note 6, and by Wigmore, vol. 4, § 2183. It is recognized by this Court, in *Adams v. New York*, 192 U.S. 585. The *Weeks* case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. *People v. Defore*, 242 N.Y. 13. But those who do treat it as an exception to the general common law rule, and required by constitutional limitations. *Hughes v. State*, 145 Tenn. 544, 551, 566; *State v. Wills*, 91 W.Va. 659, 677; *State v. Slamon*, 73 Vt. 212, 214, 215; *Gindrat v. People*, 138 Ill. 103, 111; *People v. Castree*, 311 Ill. 392, 396, 397; *State v. [277 U.S. 468] Gardner*, 77 Mont. 8, 21; *State v. Fahn*, 53 N.Dak. 203, 210. The common law rule must apply in the case at bar. Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence the admission of which is not unconstitutional because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to, such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be

violated by admitting it.

The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 26518) that:

Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor [277 U.S. 469]

This statute does not declare that evidence obtained by such interception shall be inadmissible, and, by the common law already referred to, it would not be. *People v. McDonald*, 177 App.Div. (N.Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union cannot affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in *United States v. Reid*, 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another.

See also *Withaup v. United States*, 127 Fed. 530, 534.

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

**Affirmed.**

HOLMES, J., separate opinion

MR. JUSTICE HOLMES:

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. *Gooch v. Oregon Short line R.R. Co.*, 258 U.S. 22, 24. But I think, as MR. JUSTICE BRANDEIS says, that, apart from the Constitution, the Government ought not to use [277 U.S. 470] evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and, to that end, that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crime, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that, in future it will pay for the fruits. We have to choose, and, for my part, I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such iniquities to succeed. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. And if all that I have said so far be accepted, it makes no difference that, in this case, wiretapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that, in a criminal proceeding, the Court will not take notice of the manner in which papers offered in evidence have been [277 U.S. 471] obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks v. United States*, 232 U.S. 383, and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

BRANDEIS, J., dissenting

MR. JUSTICE BRANDEIS, dissenting.

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wiretapping was employed on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wiretapping on the ground that the Government's wiretapping constituted an unreasonable search and seizure in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes [277 U.S. 472] that, if wiretapping can be deemed a search and seizure within the Fourth Amendment, such wiretapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. See *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 9; *Northern Pacific Ry. Co. v. North Dakota*, 250 U.S. 135; *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163; *Brooks v. United States*, 267 U.S. 432. We

have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387; *Buck v. Bell*, 274 U.S. 200. Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said, in *Weems v. United States*, 217 U.S. 349, 373:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions [277 U.S. 473] and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify -- a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life -- a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. *Boyd v. United States*, 116 U.S. 616, 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. [277 U.S. 474]

Moreover, "in the application of a constitution, our contemplation cannot be only of what has, been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. {1} To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." {2} Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in *Boyd v. United States*, 116 U.S. 616, 627-630, a case that will be remembered as long as civil liberty lives in the United States. This Court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in *Entick v. Carrington*, 19 Howell's State Trials 1030:

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employes of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, [277 U.S. 475] personal liberty and private property, where that right has never been forfeited by his conviction of some public offence -- it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods is within the condemnation of that judgment. In this regard, the Fourth and Fifth Amendments run almost into each other. {3}

In *Ex parte Jackson*, 96 U.S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below:

True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed, but these are distinctions without a difference.

The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations [277 U.S. 476] between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.

Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385. Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in *Gouled v. United States*, 255 U.S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment, rather than at its underlying purpose, would hold, as this Court did in *Ex parte Jackson*, 96 U.S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: "No person shall be compelled in any criminal case to be a witness against himself." Yet we have held not only that the [277 U.S. 477] protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman v. Hitchcock*, 142 U.S. 547, 562, 586, but that:

[i]t applies alike to civil and criminal proceedings, wherever the answer might tend to subject to

criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.

*McCarthy v. Arndsten*, 266 U.S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object,

to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.

*Counselman v. Hitchcock*, *supra*, p. 562.

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; {4} whether the paper when taken by the federal officers was in the home, {5} in an office, {6} or elsewhere; {7} whether the taking was effected by force, {8} by [277 U.S. 478] fraud, {9} or in the orderly process of a court's procedure. {10} From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined - - as where they are testified to by a federal officer who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere {11} -- any such use constitutes a violation of the Fifth Amendment.

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings, and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence [277 U.S. 479] in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding. {12}

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wiretapping is a crime. {13} Pierce's [277 U.S. 480] Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin v. Brundage*, 276 U.S. 36, *id.*, 604. [277 U.S. 481]

The situation in the case at bar differs widely from that presented in *Burdeau v. McDowell*, 256 U.S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a [277 U.S. 482] federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wiretapping and of facts ascertained thereby. {14} There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

As Judge Rudkin said below:

Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States.

The Eighteenth Amendment has not, in terms, empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. *Compare Maryland v. Soper*, 270 U.S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit [277 U.S. 483] crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction. {15}

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation, for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. *Compare The Paquete Habana*, 189 U.S. 453, 465; *O'Reilly deCamara v. Brooke*, 209 U.S. 45, 52; *Dodge v. United States*, 272 U.S. 530, 532; *Gambino v. United States*, 275 U.S. 310. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Will this Court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. {16} The maxim of unclean hands comes [277 U.S. 484] from courts of equity. {17} But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling. {18}

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. {19} Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes [277 U.S. 485] spoken of as a rule of substantive law. But it extends to matters of procedure, as well. {20} A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself. {21} It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

BUTLER, J., dissenting

MR. JUSTICE BUTLER, dissenting.

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases. [277 U.S. 486]

The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions, because they are not within the jurisdiction taken by the order.

The Court is required to construe the provision of the Fourth Amendment that declares:

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

The Fifth Amendment prevents the use of evidence obtained through searches and seizures in violation of the rights of the accused protected by the Fourth Amendment.

The single question for consideration is this: may the Government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down, and report the private messages and conversations transmitted by telephones?

The United States maintains that

The "wiretapping" operations of the federal prohibition agents were not a "search and seizure" in

violation of the security of the "persons, houses, papers and effects" of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment.

The Court, adhering to and reiterating the principles laid down and applied in prior decisions\* construing the search and seizure clause, in substance adopts the contention of the Government.

The question at issue depends upon a just appreciation of the facts. [277 U.S. 487]

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs, including communications that are private and privileged -- those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission, the exclusive use of the wire belongs to the persons served by it. Wiretapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

In *Boyd v. United States*, 116 U.S. 616, there was no "search or seizure" within the literal or ordinary meaning of the words, nor was Boyd -- if these constitutional provisions were read strictly according to the letter -- compelled in a "criminal case" to be a "witness" against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the Government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (*Byars v. United States*, 273 U.S. 28, 32), as well as to those granting governmental powers. *McCulloch v. Maryland*, 4 Wheat. 316, 404, 406, 407, 421. *Marbury v. Madison*, 1 Cranch 137, 153, 176. *Cohens v. Virginia*, 6 Wheat. 264. *Myers v. United States*, 272 U.S. 52.

This Court has always construed the Constitution in the light of the principles upon which it was founded. [277 U.S. 488] The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason, and in full accord with the course of decisions since *McCulloch v. Maryland*. That is the principle directly applied in the *Boyd* case.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

STONE, J., dissenting

MR. JUSTICE STONE, dissenting.

I concur in the opinions of MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS. I agree also with that of MR. JUSTICE BUTLER so far as it deals with the merits. The effect of the order granting certiorari was to limit the argument to a single question, but I do not understand that it restrains the Court from a consideration of any question which we find to be presented by the

record, for, under Jud.Code, § 240(a), this Court determines a case here on certiorari "with the same power and authority, and with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal."

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