Olmstead v US
Roy Olmstead, Jerry L. Finch, Clarence G. Healy, Cliff Maurice, Tom Nakagawa, Edward Engdahl, Myer Berg, John Earl, & Francis Richard Brown, Petitioners,
versus
USA (#493),

Charles S. Green, Emory A. Kern, Z.J. Hendrick, Edward Erickson, William P. Smith, David Trotsky, Louis O. Gilliam, Clyde Thompson, & B.G. Ward, Petitioners,
versus
USA (#532),

Edward H. McInnis, Petitioner,
versus
USA (#533).

Argued 1928-02-20 & 21. Decided 1928-06-04.

On writs of certiorari to the US Circuit Court of Appeals for the 9th Circuit to review judgments of the District Court for the Western District of Washington, convicting petitioners of conspiracy to violate the National Prohibition Act. Affirmed.

Mr. John F. Dore argued the cause, &, with Messrs. F.C. Reagan & J.L. Finch, filed a brief for petitioners:

The rights guaranteed under the Constitution by the amendments are indispensable to the full enjoyment of personal security, personal liberty, & private property; they are to be regarded as of the very essence of constitutional liberty; & the guaranty of them is as important & as imperative as are the guaranties of the other fundamental rights of the individual citizen.

Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Weeks v US 232 US 383, 58 LEd 652, LRA 1915B, 834, 34 SCtRep 341, AnnCas 1915C, 1177; Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261; Byars v US 273 US 28, 71 LEd 520, 47 SCtRep 248.

If fraud, subterfuge, trespass, or theft is perpetrated by government officials, or if a government official participates directly or indirectly therein, the evidence thus secured is not admissible for the reason that it was secured in a manner which violates the provisions of the 4th & 5th Amendments to the Constitution of the US.

Byars v US, supra; US v Mandel (DC) 17 F2 270.

It is not necessary that the act complained of be strictly a search or seizure, if the effect of the act be to compel a man to furnish the evidence to convict himself of crime, & the act be 1 of governmental agency.

Boyd v US, supra; Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261; Euclid v Ambler Realty Co 272 US 365, 71 LEd 303, 54 ALR 1016, 47 SCtRep 114.

Mr. Frank R. Jeffery also argued the cause & filed a brief for petitioners:

Evidence, over the defendants' objections, of alleged telephone conversations heard by government agents over the private telephone lines of the defendants by means of secretly tapping such wires, in violation of their rights under the 4th & 5th Amendments, was not admissible.

Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Ex parte Jackson 96 US 727, 24 LEd 877; Gouled v US 255 US 298 @309, 65 LEd 647 @653, 41 SCtRep 261; Byars v US 273 US 28, 71 LEd 520, 47 SCtRep 248; Euclid v Ambler Realty Co 272 US 365, 71 LEd 303, 54 ALR 1016, 47 SCt 114.

Messrs. Otto B. Rupp, Charles M. Bracelen, Robert H. Strahan, & Clarence B. Randall, by special leave of court, filed a brief, as amici curiae, for the Pacific Telephone & Telegraph Company, American Telephone & Telegraph Company, US Independent Telephone Association, & Tri-State Telephone & Telegraph Company:

The use of evidence of private telephone conversations between the defendants & others, intercepted by means of wire tapping, is a violation of the 4th & 5th Amendments & therefore not permissible in the Federal courts.

Ex parte Jackson 96 US 727, 24 LEd 877; Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Weeks v US 232 US 383, 58 LEd 652, LRA 1915B, 834, 24 SCtRep 341, AnnCas 1915C, 1177; Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261; Agnello v US 269 US 20, 70 LEd 145, 51 ALR 409, 46 SCtRep 4; Byars v US 273 US 28, 71 LEd 520, 47 SCtRep 248; International News Service v AP 248 US 215, 63 LEd 211, 2 ALR 293, 39 SCtRep 68; ICC v Brimson 154 US 447, 38 LEd 1047, 4 IntersComRep 545, 14 SCtRep 1125.

Special Assistant to the Attorney General Michael J. Doherty argued the cause, &, with Solicitor General Mitchell, filed a brief for respondent:

The evidence obtained by means of the wire tapping operation of the Federal prohibition agents was admissible, unless these operations constitute an unreasonable search & seizure within the meaning of the 4th Amendment.

Twining v NJ 211 US 78, 53 LEd 97, 29 SCtRep 14; Blakemore _Prohibition_ 2nd ed. pp 519 et seq.; Cornelius _Search & Seizure_ pg

45; State v Aime 62 UT 476, 32 ALR 375, 220 Pac 704; State v Owens 302 MO 348, 32 ALR 383, 259 SW 100; Adams v NY 192 US 585, 48 LEd 575, 24 SCtRep 372; 5 Jones _Evidence_ 2nd ed. sub-sections 2075 et seq.; Hester v US 265 US 57, 68 LEd 898, 44 SCtRep 445; McGuire v US 273 US 95, 71 LEd 556, 47 SCtRep 259; Koth v US (Circuit Court of Appeals 9th) 16 F2 59; US v Mandel (DC) 17 F2 270.

The "wire tapping" operations of the federal prohibition agents were not a "search & seizure" in violation of the security of the "persons, houses, papers, & effect" of the petitioners, in the constitutional sense, or within the intendment of the 4th Amendment.

1 Cooley _Const Lim_ 8th ed. pg 612; Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Ex parte Jackson 96 US 727, 24 LEd 877; Entick v Carrington 19 HowStTr 1029; Adams v NY 192 US 585, 48 LEd 575, 24 SCtRep 372; Weeks v US 232 US 383, 59 LEd 652, LRA 1915B, 834, 34 SCtRep 341, AnnCas 1915C, 1177; Perlman v US 247 US 7, 62 LEd 950, 38 SCtRep 417; Stroud v US 251 US 15; 64 LEd 103, 40 SCtRep 50; Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261; Amos v US 255 US 313, 65 LEd 654, 41 SCtRep 266; Burdeau v McDowell 356 US 465, 65 LEd 1048, 13 ALR 1159, 41 SCtRep 574; Hester v US 265 US 57, 68 LEd 898, 44 SCtRep 445; Carroll v US 267 US 132, 69 LEd 543, 39 ALR 790, 45 SCtRep 280; Agnello v US 269 US 20, 70 LEd 145, 51 ALR 409, 46 SCtRep 4; McGuire v US 273 US 95, 71 LEd 556, 47 SCtRep 259; US v Lee 274 US 559, 71 LEd 1202, 47 SCtRep 746; Holt v US 218 US 245, 54 LEd 1021, 31 SCtRep 2, 20 AnnCas 1138; Re Harris 221 US 274, 55 LEd 732, 31 SCtRep 557; Johnson v US 228 US 457; 57 LEd 919, 47 LRA (NS) 263, 33 SCtRep 572; State v Hester 137 SC 145, 134 SE 885; Brindley v State 193 AL 43, 69 S 536, AnnCas 1916E, 177; State v Minneapolis Milk Co 124 MN 34, 51 LRA (NS) 244, 144 NW 417; Leatherman v State 11 GAApp 756, 76 SE 102; Eversole v State 106 TXCrimRep 567, 294 SW 210; Smith v US (CCA 4th) 2 F2 715; Ogden v Saunders 12 Wheat 213, 6 LEd 616; Lake County v Rollins 130 US 662, 32 LEd 1060, 9 SCtRep 651; People v Mayen 188 CA 237, 24 ALR 1383, 205 Pac 435.

William Howard Taft:

These cases are here by certiorari from the circuit court of appeals for the 9th circuit. 19 F2 842 & 850. The petition in #493 was filed 1927-08-30; in #s 532 & 533 1927-09-09. 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 & others, intercepted by means of wire tapping, amounted to a violation of the 4th & 5th 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 & importing

intoxicating liquors & maintaining nuisances, & by selling intoxicating liquors. Seventy-two (72) others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted, & others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess & sell liquor unlawfully. It involved the employment of not less than 50 persons, of 2 sea-going vessels for the transportation of liquor to British Columbia, of smaller vessels for coast-wise transportation to the state of Washington, the purchase & use of a ranch beyond the sub-urban limits of Seattle, with a large under-ground cache for storage & a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, sales-men, delivery-men, dispatchers, scouts, book-keepers, collectors & an attorney. In a bad month sales amounted to $178K; the aggregate for a year must have exceeded $2M.

Olmstead was the leading conspirator & the general manager of the business. He made a contribution of $10K to the capital; 11 others contributed $1K each. The profits were divided one-half to Olmstead & the remainder to the other 11. Of the several offices in Seattle the chief 1 was in a large office building. In this there were 3 telephones on 3 different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, & at other places in the city. Communication was had frequently with Vancouver, BC. Times were fixed for the deliveries of the "stuff", to places along Puget sound near Seattle, & from there the liquor was removed & deposited in the caches already referred to. One of the chief men was always on duty at the main office to receive orders by the telephones & to direct their filing 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 & its nature & extent was largely obtained by intercepting messages on the telephones of the conspirators by 4 Federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of 4 of the petitioners & 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 & their subordinates. Men at the wires heard the orders given for liquor by customers, & 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 & the seizure of cases of liquor in garages & 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, & also direct promises to officers of payments as soon as opportunity offered.

The 4th Amendment provides: "The right of the people to be secure in their persons, houses, papers, & effects, against unreasonable searches & seizures, shall not be violated, & no warrants shall issue, but upon probable cause, supported by oath or affirmation, & particularly describing the place to be searched, & the persons or things to be seized." And the 5th: "No person... shall be compelled in any criminal case to be a witness against himself[, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation]."

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

Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524, was an information filed by the district attorney in the Federal court in a cause of seizure & forfeiture against 35 cases of plate glass, which charged that the owner & 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 & value of glass contained in 29 cases previously imported. The 5th section of the Act of 1874-06-22 [18 Stat at Large 187, chp 391 USC title 19 section 535], provided that in cases not criminal under the revenue laws, the US attorney, whenever he thought as invoice, belonging to the defendant, would tend to prove any allegation made by the US, might by a written motion describing the invoice & setting forth the allegation which he expected to prove, secure a notice from the court to the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced the US attorney should be permitted, under the direction of the court, to make an examination of the invoice, & might offer the same in evidence. This act had succeeded the Act of 1867-03-02 [14 Stat 546 chp 188], which provided 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 & take possession of it & hold it subject to the order of the judge. This had been preceded by the Act of 1863-03-03 [12 Stat 737 chp 76], of a similar tenor, except that it directed the warrant to the collector instead of the marshal. The US attorney followed the Act of 1874, & compelled the production of the invoice.

The court held the Act of 1874 repugnant to the 4th & 5th Amendments. As to the 4th Amendment, Justice Bradley said (pg 621):

"But, in regard to the 4th Amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 & 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 & seizure of books & 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 & seizure, such as forcible entry into a man's house & searching amongst his papers, are wanting, & 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 4th Amendment to the Constitution, in all cases in which a search & seizure would be; because it is a material ingredient, & effects the sole object & purpose of search & seizure."

Concurring, Mr. Justice Miller & Chief Justice Waite, said that they did not think the machinery used to get this evidence amounted to a search & seizure, but they agreed that the 5th Amendment had been violated.

The statute provided an official demand for the production of a paper or document by the defendant, for official search & use as evidence on penalty that by refusal he should be conclusively held to admit the incriminating character of the document as charged. It was certainly no straining of the language to construe the search & seizure under the 4th Amendment to include such official procedure.

The next case, & perhaps the most important, is Weeks v US 232 US 383, 58 LEd 652, LRA 1915B, 834, 34 SCtRep 341, AnnCas 1915C, 1177, 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 officials & the US marshal went to his house, got the key from a neighbor, entered the defendant's room & searched it, & took possession of various papers & 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, & on introduction of the papers contended that the search without warrant was a violation of the 4th & 5th Amendments, & they were therefore inadmissible. This court held that such taking of papers by an official of the US, acting under color of his office, was in violation of the constitutional rights of the defendant, & upon making seasonable application he was entitled to have them restored, & 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 US 727 @733, 24 LEd 877 @879, saying that the 4th

Amendment as a principle of protection was applicable to sealed letters & packages in the mail, & that, consistently with it, such matter could only be opened & examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182, the defendants were arrested at their homes & detained in custody. While so detained, representatives of the government, without authority, went to the office of their company & seized all the books, papers & documents found there. An application for return of the things was opposed by the district attorney, who produced a sub poena 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, & under the Weeks Case the seized papers must be restored.

In Amos v US 255 US 313, 65 LEd 654, 41 SCtRep 266, the defendant was convicted of concealing whisky 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 & store "within his curtilage", without warrant, would 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 & found whisky. Further searches in the house disclosed more. It was held that this action constituted a violation of the 4th Amendment, & that the denial of the motion to restore the whisky & to exclude the testimony was error.

In Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261, the facts were these: Gouled & 2 others were charged with conspiracy to defraud the US. One pleaded guilty & another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The 1st related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by 1 acting under the direction of an officer of the Intelligence Department of the Army of the US. Gouled was suspected of the crime.

A private in the US Army, pretending to make a friendly call on him, gained admission to his office & in his absence, without warrant of any character, seized & carried away several documents. One of these, belonging to Gouled, was delivered to the US attorney, & 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 4th Amendment.

Agnello v US 269 US 20, 70 LEd 145, 51 ALR 409, 46 SCtRep 4, held that

the 4th & 5th 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, & 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 5th Amendment unless the 4th Amendment was 1st violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually & voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the 4th Amendment.

The striking out-come of the Weeks Case & those which followed it was the sweeping declaration that the 4th Amendment, although not referring to or limiting the use of evidence in court really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. This was held by the supreme judicial court of Massachusetts, in Com. v Dana 2 Met 329 @337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the 4th Amendment had been invaded was by suit & judgment for damages, as Lord Camden held in Entick v Carrington 19 HowStTr 1029. Mr. Justice Bradley made effective use of this case in Boyd v US.

But in the Weeks Case, & those which followed, this court decided with great emphasis, & established as the law for the Federal courts, that the protection of the 4th 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 4th Amendment, directed against general warrants & writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers, & his effects, & 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 Lumber Co Case, & in the Amos Case.

Gouled v US carried the inhibition against unreasonable searches & seizures to the extreme limit. Its authority is not to be enlarged by implication & 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 & carried away certain private papers valuable for evidential purposes. This was held an unreasonable search & seizure within the 4th Amendment.

A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance in to the private quarters

of defendant & the taking away of something tangible. Here we have the testimony only of voluntary conversations {actively} secretly over-heard.

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 {particular} place to be searched & the {particular} person or things to be seized. {I can see nothing specifying the concreteness of evidence sought or of the means used to seek it...jgo}

It is urged that the language of Mr. Justice Field in Ex parte Jackson, already quoted, offers an analogy to the interpretation of the 4th Amendment in respect of wire tapping. But the analogy fails. The 4th Amendment may have proper application to a sealed {or unsealed} letter in the mail because of the constitutional provision for the Postoffice Department & the relations between the government & those who pay to secure protection of their sealed {and unsealed} letters. See Revised Statutes, sections 3978 to 3988, USC title 18 sections 303-308, 311, 327, title 39 sections 494-496, whereby Congress monopolizes the carriage of letters & excludes from that business everyone else, & section 3929 USC title 39, section 259, which forbids any post-master 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 {or unsealed} letter is a search & seizure of the sender's papers or effects. The letter is a paper, {the writing on it} an effect, & in the custody of a government that forbids carriage except under its protection.

The US 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 & that only. There was no entry of the houses or offices of the defendants. {Bzzzt!!! Wrong!!! Sound, electromagnetic modulation & the information they convey are effects.}

By the invention of the telephone 50 years ago, & its application for the purpose of extending communications, 1 can talk with another at a far distant place.

The language of the Amendment can not be extended & expanded to include telephone wires reaching to the whole world from the defendant's house of office. {No need to "extend", since "effects" are covered.} The intervening wires are not part of his house of office, any more than are the high-ways along which they are stretched.

This court, in Carroll v US 267 US 132 @149, 69 LEd 543 @549, 39 ALR 790, 45 SCtRep 280, declared:

"The 4th Amendment is to be construed in the light of what was deemed an unreasonable search & seizure when it was adopted & in a manner

which will conserve public interests as well as the interests & rights of individual citizens." {Right. No phone taps in 1789; no phone taps in 2000.}

Justice Bradley in the Boyd Case, & Justice Clarke in the Gouled Case, said that the 5th Amendment & the 4th Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, & effects, or so to apply the words "search & seizure" as to forbid hearing or sight.

Hester v US 265 US 57, 68 LEd 898, 44 SCtRep 445, held that the testimony of 2 officers of the law who trespassed on the defendant's land, concealed themselves 100 yards away from his house & saw him come out & hand a bottle of whisky to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers, or effects. {Wrong!!!} US v Lee 274 US 559 @563, 71 LEd 1202 @1204, 47 SCtRep 746; Eversole v State 106 TXCrimRep 567, 294 SW 210.

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, {and those who intercept them subject to prosecution}, by direct legislation, & thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged & unusual meaning to the 4th 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 {specific individuals he calls or who call him} quite outside, & that the wires beyond his house & messages while passing over them are not within the protection of the 4th Amendment. {Wrong!} Here those who intercepted the projected voices {transmitted signals} were not in the house of either party to the conversation. {Exactly! They weren't invited to participate.}

Neither the cases we have cited nor any of the many Federal decisions brought to our attention hold the 4th Amendment to have been violated as against a defendant unless there has been an official search & seizure of his person or such a seizure of his papers or his tangible material {& intangible & immaterial} effects or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the 4th 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 2-fold objection over-ruled 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 & 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, & thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the US sitting there, consequently, are those of the common law. US v Reid 21 How 361 @263 & 366, 13 LEd 1023-1025; Logan v US 144 US 263 @301, 36 LEd 429 @442, 12 SCtRep 617; Rosen v US 245 US 467, 62 LEd 406, 38 SCtRep 148; Withaup v US 62 CCA 328, 127 F 530 @534; Robinson v US (CCA 9th) 292 F 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 section 254(a)) says:

"It may be mentioned in this place, that though papers & 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." {Though the slime who illegally obtained it shall be ordered held in the public stocks until such time as the court, having completed the trial(s) in which the illegally obtained evidence is introduced, shall deign to begin their trial.}

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

"Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute." vol 5 section 2075 note 3.

The rule is supported by many English & American cases cited by Jones in section 2075 note 3 & section 2076 note 6 vol 5; & by Wigmore, vol 4 section 2183. It is recognized by this court in Adams v NY 192 US 585, 48 LEd 575, 24 SCtRep 372. The Weeks Case announced an exception to the common-law rule by excluding all evidence in the procuring of which gov't officials took part, by methods forbidden by the 4th & 5th Amendments. Many state courts do not follow the Weeks Case. People v Defore 242 NY 13, 150 NE 585. but those who do, treat it as an exception to the general common-law rule & required by constitutional limitations. Hughes v State 145 TN 544 @551 & 566, 20 ALR 639, 238 SW 588; State v Wills 91 W VA 659 @677, 24 ALR 1308, 114 SE 261; State v Slamon 73 VT 212 @214 & 215, 87 AmStRep 711, 50 Atl 1097, 15 SmCrimRep 686; Gindrat v People 138 IL 103 @111, 27 NE 1085; People v Castree 311 IL 392 @396 & 397, 32 ALR 357, 143 NE 112; State v Gardner 77 MT 8 @21, 52 ALR 454, 249 Pac 574; State v Fahn 53 ND 203 @210, 205 NW 67. 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, & other crimes where officers of the law have disguised themselves & joined the organizations, taken the oaths & 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 gov't officials would make society suffer & 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's Comp. Stat. 1922 section 2656-28) 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."

This statute does not declare that evidence obtained by such interception shall be inadmissible, & by the common law, already referred to, it would not be. People v McDonald 177 AppDiv 806, 165 NYSupp 41.

Whether the state of Washington may prosecute & punish Federal officers violating this law, & those whose messages were intercepted may sue them civilly, is not before us. But clearly a statute, passed 20 years after the admission of the state into the Union, can not affect the rules of evidence applicable in courts of the US. Chief Justice Taney in US v Reid 12 How 361 @363, 13 LEd 1023 @1024, 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 to the states the power of prescribing the rules of evidence in trials for offenses against the US. For this construction would in effect place the criminal jurisprudence of 1 sovereignty under the control of another." See also Withaup v US 62 CCA 328, 127 Fed 530 @534.

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

Oliver Wendell 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 4th & 5th 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. Co 258 US 22 @24, 60 LEd 443 @445, 42 SCtRep 192.

But I think, as Mr. Justice Brandeis says, that, apart from the Constitution, the gov't ought not to use evidence obtained, & only obtainable, by a criminal act. There is no body of precedents by which we are bound, & which confines us to logical deduction from established rules. Therefore, we must consider the 2 objects of desire both of which we cannot have & make up our minds which to choose. It is desirable that criminals should be detected, & to that end that all available evidence should be used. It also is desirable that the gov't should not itself foster & pay for other crimes, 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, & I can attach no importance to protestations of disapproval if it knowingly accepts & pays & announces that in future it will pay for the fruits. We have to choose, & for my part I think it a less evil that some criminals should escape than that the gov't should play an ignoble part.

For those who agree with me, no distinction can be taken between the gov't as prosecutor & the gov't 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 US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182.

And if all that I have said so far be accepted, it makes no difference that in this case wire tapping is made a crime by the law of the state, not by the law of the US. It is true that a state cannot make rules of evidence for courts of the US, but the state has authority over the conduct in question, & I hardly think that the US 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 obtained. but that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v US 232 US 383, 58 LEd 652, LRA 1915B, 834, 34 SCtRep 341, AnnCas 1915C, 1177, & the cases that have followed it.

I have said that we are free to choose between 2 principles of policy. But if we are to confine ourselves to precedent & 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.

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 & with others had been tapped by federal officers. To this end, a line-man of long experience in wire-tapping was employed, on behalf of the gov't & at its expense. He tapped 8 telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the gov't & in their official capacity, at least 6 other prohibition agents listened over the tapped wires & reported the messages taken. Their operations extended over a period of nearly 5 months.

The type-written record of the notes of conversations over-heard occupies 775 type-written pages. by objections seasonably made & persistently renewed, the defendants objected to the admission of the evidence obtained by wire-tapping, on the ground that the gov't's wire-tapping constituted an unreasonable search & seizure, in violation of the 4th Amendment; & that the use as evidence of the conversations over-heard compelled the defendants to be witnesses against themselves, in violation of the 5th Amendment.

The gov't makes no attempt to defend the methods employed by its officers. Indeed, it concedes that if wire-tapping can be deemed a search & seizure within the 4th Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search & seizure, & that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment; & it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget", said Mr. Chief Justice {John} Marshall in M'Culloch v MD 4 Wheat 316 @407, 4 LEd 579 @601, "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 Teleg. Co v Western U. Teleg. Co 96 US 1 @9, 24 LEd 708 @710, Northern P.R. Co v ND 250 US 135, 63 LEd 897, PUR 1919D, 705, 39 SCtRep 502, 18 NCCA 878; Dakota Cent. Teleph. Co v SD 250 US 163, 63 LEd 910, 4 ALR 1623, PUR 1919D, 717, 39 SCtRep 507; Brooks v US 267 US 432, 69 LEd 699, 37 ALR 1407, 45 SCtRep 345.

We have likewise held that general limitations on the powers of gov't, like those embodied in the due process clauses of the 5th & 14th Amendments, do not forbid the US 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 & oppressive". Euclid v Ambler Realty Co 272 US 365 @387, 71 LEd 303 @310, 54 ALR 1016, 47 SCtRep 114; buck v Bell 274 US 200, 71 LEd 1000, 47 SCtRep 584.

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 US 217 US 349 @373, 54 LEd 793 @801, 30 SCtRep 544: "Legislation, both statutory & 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 & 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 documents, designed to meet passing occasions. They are, to use the words of Chief Justice {John} Marshall, 'designed to approach immortality as nearly as human institutions can approach it'. The future is their care & provision for events of good & 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 & power. Its general principles would have little value & be converted by precedent into lifeless & impotent formulas. Rights declared in words might be lost in reality."

When the 4th & 5th Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force & violence were then the only means known to man by which a gov't 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 & other articles incident to his private life -- a seizure effected, if need be, by breaking & entry. Protection against such invasion of "the sanctity of a man's home & the privacies of life" was provided in the 4th & 5th Amendments, by specific language. Boyd v US 116 US 616 @630, 29 LEd 746 @751, 6 SCtRep 524.

But "time works changes, brings into existence new conditions & purposes". Subtler & more far-reaching means of invading privacy have become available to the gov't. Discovery & invention have made it possible for the gov't, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

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 gov't with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the gov't, without removing papers from secret drawers, can reproduce them in court, & by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic & related sciences may bring means of exploring unexpressed beliefs, thoughts & 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. [Tudor _James Otis_ pg 66; John Adams _Works_ vol 2 pg 524; Minot _Continuation of the History of MA Bay_ vol 2 pg 95.]

To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society". [Entick v Carrington 19 Howell StTr 1030 @1066]

Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in Boyd v US, 116 US 616 @627-630, 29 LEd 746 @749-751, 6 SCtRep 524, a case that will be remembered as long as civil liberty lives in the US. This court there reviewed the history that lay behind the 4th & 5th Amendments. We said, with reference to Lord Camden's judgment in Entick v Carrington 19 Howell StTr 1030: "The principles laid down in this opinion affect the very essence of constitutional liberty & 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 gov't & its employees of the sanctity of a man's home & the privacies of life. It is not the breaking of his doors, & the rummaging of his drawers, that constitute the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, & private property, where that right has never been forfeited by his conviction of some public offense -- it is the invasion of this sacred right which under-lies & constitutes the essence of Lord Camden's judgment. Breaking into a house & opening boxes & drawers are circumstances of aggravation; but any forcible & 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 4th & 5th Amendments run almost into each other." [ICC v Brimson 154 US 447 @479, 38 LEd 1047 @1058, 4 IntersComRep 545, 14 SCtRep 1125, the statement made in the Boyd Case was repeated; & the court quoted the statement of Mr. Justice Field in Re Pacific R Commission (CC) 32 Fed 241 @250: "Of all the rights of the citizen, few are of greater importance or more essential to his peace & happiness than the right of personal security, & that involves, not merely protection of his person from assault, but exemption of his private affairs, books, & papers, from the inspection & scrutiny of others. Without the enjoyment of this right, all others would lose half their value."]

"In Ex parte Jackson 96 US 727, 24 LEd 877, it was held that a sealed letter intrusted to the mail is protected by the Amendments. The mail is a public service furnished by the gov't. The telephone is a public service furnished by its authority. {?!?!?!} There is, in essence, no difference between the sealed letter & the private telephone message. As Judge Rudkin said below: "True, the 1 is visible, the other invisible; the 1 is tangible, the other intangible; the 1 is sealed & the other unsealed; but these are distinctions without a difference." [53 ALR 1484, 19 F2d 842]

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 & all conversations between them upon any subject, & although proper, confidential, & privileged, may be overheard. Moreover, the tapping of 1 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 & general warrants are but puny instruments of tyranny & oppression when compared with wire-tapping.

Time & again, this court in giving effect to the principle under-lying the 4th 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, & effects, against unreasonable searches & seizures", would not be violated, under any ordinary construction of language, by compelling obedience to a sub-poena. But this court holds the evidence inadmissible simply because the information leading to the issue of the sub-poena has been unlawfully secured. Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182.

Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261, that evidence so obtained could not be used. No court which looked at the words of the Amendment rather than at its under-lying purposes would hold, as this court did in Ex parte Jackson 96 US 727 @733, 24 LEd 877 @879, that its protection extended to letters in the mails. The provision against self-incriminations in the 5th 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 protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime. (Counselman v Hitchcock 142 US 547 @562 & 586, 35 LEd 1110 @1113 & 1122, 3 IntersComRep 816, 12 SCtRep 195), but that "it applies alike to civil & 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 1 who is also a party defendant." McCarthy v Arndstein 266 US 34 @ 40, 69 LEd 158 @160, 45 SCtRep 16.

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 [sic] is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." Counselman v Hitchcock supra @562.

Decisions of this court applying the principle of the Boyd Case have settled these things. Unjustified search & seizure violates the 4th Amendment,

* what-ever the character of the paper
  [Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261],
* whether the paper when taken by the federal officers was in the home
  [Weeks v US 232 US 383, 58 LEd 652, LRA 1915B @834, 34 SCtRep 341,

AnnCas 1915C, 1177; Amos v US 255 US 313, 65 LEd 654, 41 SCtRep 266;
Agnello v US 269 US 20, 70 LEd 145, 51 ALR 409, 46 SCtRep 4;
Byars v US 273 US 28, 71 LEd 520, 47 SCtRep 248],
* in an office
[Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Hale v Henkel
201 US 43 @70, 50 LEd 652 @663, 26 SCtRep 370; Silverthorne
Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426,
40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261;
Marron v US 275 US 192, ante @231, 48 SCtRep 74],
* or elsewhere
[Ex parte Jackson 96 US 727 @733, 24 LEd 877 @879; Carroll v US
267 US 132 @156, 69 LEd 543 @552, 39 ALR 790, 45 SCtRep 280;
Gambino v US 275 US 310, ante @293, 52 ALR 1381, 48 SCtRep 137];
* whether the taking was effected by force
[Weeks v US 232 US 383, 58 LEd 652, LRA 1915B @834, 34 SCTRep 341,
AnnCas 1915C, 1177; Silverthorne Lumber Co v US 251 US 385,
64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Amos v US 255 US 313,
65 LEd 654, 41 SCtRep 266; Carroll v US 267 US 132 @156,
69 LEd 543 @552, 39 ALR 790, 45 SCtRep 280; Agnello v US
269 US 20, 70 LEd 145, 51 ALR 409, 46 SCtRep 4; Gambino v US
275 US 310, ante @293, 52 ALR 1381, 48 SCtRep 137],
* by fraud
[Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261],
* or in the orderly process of a court's procedure
[Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524;
Hale v Henkel 201 US 43 @70, 50 LEd 652 @663, 26 SCtRep 370.
See Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261;
Byars v US 273 US 28, 71 LEd 520, 47 SCtRep 248;
Marron v US 275 US 192, ante @231, 48 SCtRep 74].

From these decisions, it follows necessarily that the Amendment is violated by the officer reading the paper without a physical seizure, without his even touching it; & 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 [Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182. Compare Gouled v US 255 US 298 @307, 65 LEd 647 @651, 41 SCtRep 261. In Stroud v US 251 US 15, 64 LEd 103, 40 SCtRep 50, & Hester v US 265 US 57, 68 LEd 898, 44 SCtRep 445, the letter & articles admitted were not obtained by unlawful search & seizure. They were voluntarily disclosed by the defendant. Compare Smith v US (Circuit Court of Appeals 4th) 2 F2 715; US v Lee 274 US 559, 71 LEd 1202, 47 SCtRep 746.] -- any such use constitutes a violation of the 5th 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 & of his intellect. They knew that only a part of the pain, pleasure & satisfactions of life are to be found in material things. They sought

to protect Americans in their beliefs, their thoughts, their emotions & their sensations. They conferred, as against the gov't, the right to be let alone -- the most comprehensive of rights & the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the gov't upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment. and the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the 5th.

Applying to the 4th & 5th Amendments the established rule of construction, the defendants' objections to the evidence obtained by a wire-tapping must, IMO, 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 gov't's purposes are beneficent. Men born to freedom are naturally alert to repeal 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. [The point is thus stated by counsel for the telephone companies, who have filed a brief as amici curiae: "Criminals will not escape detection & conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the gov't, who will act at their own discretion, the honest & the dishonest, unauthorized & unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful."]

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce's Code 1921 section 8975 (18). [In the following states {at the time Brandeis wrote this dissent} it is a criminal offense to intercept a message sent by telegraph &/or telephone: AL Code 1923 section 5256; AZ Revized Statutes 1913, Penal Code section 692; AR Crawford & Moses Digest 1921 section 10,246; CA Deering's Penal Code 1927 section 640; CO Compiled Laws 1921 section 6969; CT General Statutes 1918 section 6292; ID Compiled Statutes 1919 sections 8574 & 8586; IL Revised Statutes 1927 chp 134 section 21; IA Code 1927 section 13,121; KS Revised Statutes 1923 chp 17 section 1908; MI Compiled Laws 1915 section 15403; MT Penal Code 1921 section 11,518; NE Compiled Statutes 1922 section 7115; NV Revised Laws 1912 sections 4608 & 6572 (18); NY Consolidated Laws chp 40 section 1423 (6); ND Compiled Laws 1913 section 10,231; OH Page's General Code 1926 section 13,402; OK Session Laws 1923 chp 46; OR Olson's Laws 1920 section 2265; SD Revised Code 1919 section 4312; TN Shannon's Code 1919 sections 1839 & 1840; UT Compiled Laws 1917 section 8433; VA Code 1924 section 4477 (2), (3); WA Pierce's Code 1921 section 8976 (18); WI Statutes 1927 section 348.37; WY Compiled Statutes 1920 section 7148. Compare State v Behringer 19 AZ 502, 172 Pac 660; State v Nordskog 76

WA 472, 60 LRA(NS) 1216, 136 Pac 694. In the following states it is a criminal offense for a company engaged in the transmission of messages by telegraph &/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: {references to statutes omitted} AL, AZ, AR, CA, CO, CT, FL, ID, IL, IN, IA, LA, ME, MD, MI, MN, MS, MO, MT, NE, NV, NJ, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, UT, WA, Wi. The Alaskan Penal Code, Act of 1899-03-03, chp 429, 30 Stat@L 1253 @1278, provides that "if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall willfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof,... the person so offending shall be deemed guilty of a misdemeanor, & shall be punished by a fine not to exceed $1K or imprisonment not to exceed 1 year, or by both such fine & imprisonment, in the discretion of the court." The Act of 1918-10-29 chp 197, 40 Stat@L 1017, provided "that operation of the telephone & telegraph systems of the US... shall, without authority & without the knowledge & consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or willfully interfere with the operation of such telephone & telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized or entitled to receive the same, shall be fined not exceeding $1K or imprisoned for not more than 1 year, or both." The Radio Act 1927-02-23 chp 169 section 27, 44 Stat@L 1162 @1172, US C Appx title 47 sections 63-39 {sic} (Mason's), provides that "no person not being authorized by the sender shall intercept any message & divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."]

To prove its case, the gov't 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 US 36, ante @457, 48 SCtRep 268.

The situation in the case at bar differs widely from that presented in Burdeau v McDowell 256 US 465, 65 LEd 1048, 13 ALR 1159, 41 SCtRep 574. 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 federal prosecution.

Here, the evidence obtained by crime was obtained at the gov't'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 & to secure a conviction. The evidence so obtained

constitutes the warp & woof of the gov't's case. The aggregate of the gov't evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping & of facts ascertained thereby. [The above figures relate to case #493. In numbers 522, 533, the gov't evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wire-tapping.]

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 eaves-droppers 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 & controlled by the Constitution of the US."

* * * * *

The 18th 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 MD v Soper 270 US 9, 70 LEd 449, 46 SCtRep 185. 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 crime on behalf of the US. It may be assumed that the Attorney General of the US did not give any such instructions. {If only it were true today. g8} [According to the gov't's brief, pg 41, "the Prohibition Unit of the Treasury disclaims it {wire-tapping} & the Department of Justice has frowned on it." See also "Prohibition Enforcement" 69th Cong, 2nd Session, SenDoc#198 pp iv, v, 13 & 15, referred to Committee, 1927-01-25; also same, part 2.]

* * * * *

When these unlawful acts were committed, they were crimes only of the officers individually. The gov't was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the gov't, having full knowledge, sought, through the Dept 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. Compera the Habana (US v Habana) 189 US 453 @465, 47 LEd 901 @903, 23 SCtRep 593; O'Reilly de Camara v Brooke 209 US 45 @52, 52 LEd 676 @678, 28 SCtRep 439; Dodge v US 272 US 530 @532, 71 LEd 392 @393, 47 SCtRep 191; Gambino v US 275 US 310, ante @293, 52 ALR 1381, 48 SCtRep 137.

* * * * *

And if this court should permit the gov't, 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 gov't itself would become a law-breaker.

Will this court, by sustaining the judgment below, sanction such

conduct on the part o 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. [See Hannay v Eve 3 Cranch 242 @247, 2 LEd 427 @429; Bank of US v Owens 2 Pet 527 @538, 7 LEd 508 @512; Bartle v Nutt 4 Pet 184 @188, 7 LEd 823 @827; Kennett v Chambers 14 how 38 @52, 14 LEd 316 @322; Marshall v Baltimore & OH R Co 16 How 314 @334, 14 LEd 953 @961; Provident Tool Co v Norris 2 Wall 45 @54, 17 LEd 868 @870; The Ouachita Cotton (Whithenbury v US) 6 Wall 521 @532, 18 LEd 935 @939; Coppell v Hall 7 Wall 542, 19 LEd 244; Forsyth v Woods 11 Wall 484 @486, 20 LEd 207 @209; Hanauer v Doane 12 Wall 342 @349, 20 LEd 439 @441; Trist v Child (Burke v Child) 21 Wall 441 @448, 22 LEd 623 @624; Meguire v Corwine 101 US 108 @111, 25 LEd 899 @900; Oscanyan v Winchester Repeating Arms Co 103 US 261, 26 LEd 539; Irwin v Williar 110 US 499 @510, 28 LEd 225 @230, 4 SCtRep 160; Woodstock Iron Co v Richmond & D Extension Co 129 US 643, 32 LEd 819, 9 SCtRep 402; Gibbs v Consolidated Gas Co 130 US 396 @411, 32 LEd 979 @985, 9 SCtRep 553; Embrey v Jemison 141 US 336 @348, 33 LEd 172 @177, 9 SCtRep 776; West v Camden 135 US 507 @521, 34 LEd 1117 @1123, 10 SCtRep 839; Hazelton v Sheckells 202 US 71, 50 LEd 939, 26 SCtRep 567, 6 AnnCas 217; Crocker v US 240 US 74 @78, 60 LEd 533 @536, 36 SCtRep 245. Compare Holman v Johnson, Cowp. pt 1, pg 341, 98 Eng Reprint 1120.]

The maxim of unclean hands comes from courts of equity. [See Creath v Sims 5 How 192 @204, 12 LEd 111 @117; Kennett v Chambers 14 How 38 @49, 14 LEd 316 @321; Randall v Howard, 2 Black 585 @586, 17 LEd 269 @270; Wheeler v Sage 1 Wall 518 @530, 17 LEd 646 @649; Dent v Ferguson 132 US 50 @64, 33 LEd 242 @247, 10 SCtRep 13; Pope Mfg Co v Gormully 144 US 224 @236, 36 LEd 414 @419, 12 SCtRep 632; Miller v Ammon 145 US 421 @425, 36 LEd 759 @761, 12 SCtRep 884; Hazelton v Sheckells 202 US 71 @79, 50 LEd 939 @941, 26 SCtRep 567, 6 AnnCas 217. Compare International News Service v AP 248 US 215 @245, 63 LEd 211 @223, 2 ALR 293, 39 SCtRep 68.]

But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the gov't 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. [Compare State v Simmons 39 Kan 262 @264 & 265, 18 Pac 177; State v Miller 44 MO App 159 @163 & 164; Re Robinson 29 NE 135, 8 LRA 398, 26 AmStRep 378, 45 NW 267; Harris v State 15 TX App 629 @ 634, 635 & 639.]

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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 citizens; 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. [See Armstrong v Toler 11 Wheat 258, 6 LEd 468; Brooks v Martin 2 Wall 70, 17 LEd 732; Planters' Bank v Union Bank 16 Wall 483 @499 & 500, 21 LEd 473 @479 & 480; Houston & TCR Co v TX 117 US 66 @99, 44 LEd 673 @688, 20 SCtRep 545; Bothwell v Buckbee M. Co 275 US 274, ante @277, 48 SCtRep 124.]

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 spoken of as a rule of substantive law. But it extends to matters of procedure as well. [See Luttin v Benin 11 Mod 50, 88 Eng Reprint 877; Barlow v Hall 2 Anstr 461, 145 Eng Reprint 935; Wells v Gurney, 8 Barn & C 769, 108 Eng Reprint 1229; Ilsley v Nichols 12 Pick 270, 22 AmDec 425; Carpenter v Spooner 2 Sandf 717; Metcalfe v Clarke 41 Barb 45; Williams v Reed 29 NJL 385; Hill v Goodrich 32 Conn 588; Townsend v Smith 47 WI 623, 32 AmRep 793, 3 NW 439; Blandin v Ostrander 152 CCA 534, 239 Fed 700; Harking v Brundage 276 US 36, ante @457, 48 SCtRep 268.]

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. [Coppell v Hall 7 Wall 542 @558, 19 LEd 244 @248; Oscanyan v Winchester Repeating Arms Co 103 US 261 @267; 26 LEd 539 @542; Higgins v McCrea 116 US 671 @685, 29 LEd 764 @769, 6 SCtRep 557. Compare Evans v Richardson 3 Meriv 469, 36 Eng Reprint 181; Norman v Cole 3 Esp 253, 170 Eng Reprint 606; NW Salt Co v Electrolytic Alkali Co (1913) 3 KB 422, AnnCas 1915B, 228 -- CA]

It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

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Decency, security, & liberty alike demand that gov't officials shall be subjected to the same rules of conduct that are commands to the citizen. In a gov't of laws, existence of the gov't will be imperilled if it fails to observe the law scrupulously. Our gov't is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the gov't becomes a law-breaker, it breeds contempt for law; it invites every man to become a law until himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the gov't may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retributions. Against that pernicious doctrine this court should resolutely set its face.

Mr. Justice Butler, dissenting:

I sincerely regret that I cannot support the opinion & judgments of the court in these cases.

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 & 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 provisions of the 4th Amendment that declares: "The right of the people to be secure in their persons, homes, papers, & effects, against unreasonable searches & seizures, shall not be violated." The 5th Amendment prevents the use of evidence obtained through searches & seizures in violation of the rights of the accused protected by the 4th Amendment.

The single question for consideration is this: May the gov't, consistently with that clause, have its officers whenever they see fit tap wires, listen to, take down & report the private messages & conversations transmitted by telephones?

The US maintains that "the wire-tapping" operations of the federal prohibition agents were not a 'search & seizure' in violation of the security of the 'persons, houses, papers & effects' of the petitioners in the constitutional sense, or within the intendment of the 4th Amendment." The court, adhering to & reiterating the principles laid down & applied in prior decisions construing the search & seizure clause, in substance adopts the contention of the gov't. [Ex parte Jackson 96 US 727, 24 LEd 877; Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524; Weeks v US 232 US 383, 58 LEd 652, LRA 1915B @834, 34 SCtRep 341, AnnCas 1915C @1177; Silverthorne Lumber Co v US 251 US 385, 64 LEd 319, 24 ALR 1426, 40 SCtRep 182; Gouled v US 255 US 298, 65 LEd 647, 41 SCtRep 261; Amos v US 255 US 313, 65 LEd 654, 41 SCtRep 266.]

The Question at issue depends upon a just appreciation of the facts.

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Telephones are used generally for transmission of messages concerning official, social, business & personal affairs including communications that are private & privileged -- those between physician & patient, lawyer & client, parent & child, husband & wife. The contracts between telephone companies & 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. Wire tapping involves interference with the wire while being used. Tapping the wires & listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard & taken down.

In Boyd v US 116 US 616, 29 LEd 746, 6 SCtRep 524, 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 & seizure clause, merely authorized judgment for sums claimed by the gov't on account of revenue if the defendant failed to produce his books, invoices & papers. The principle of that case has been followed, developed & applied in this & many other courts. And it is in harmony with the

rule of liberal construction that always has been applied to provisions of the Constitution safe-guarding personal rights (Byars v US 273 US 28 @32, 71 LEd 520 @523, 47 SCtRep 248), as well as to those granting gov'tal powers. M'Culloch v MD 4 Wheat 316, 404 @406, 407 & 421, 4 LEd 570 @601, 602 & 605; Marbury v Madison 1 Cranch 137 @153 & 176, 2 LEd 60 @66 & 73; Cohen v VA 6 Wheat 264, 5 LEd 257; Myers v US 272 US 52, 71 LEd 160, 47 SCtRep 21.

This court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established & applied by this court, the 4th Amendment safe-guards against all evils that are like & equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason & in full accord with the course of decisions since M'Culloch v MD. 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.

Mr. Justice Stone, dissenting:

I concur in the opinions of Mr. Justice Holmes & 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 Judicial Code, section 240 (a), this court determines a case here on certiorari, "with the same power & authority, & with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal."