SUMMARY OF KEY CONCEPTS

Section 1. Legal Analysis

Legal analysis is the link between legal research and legal writing. Legal research is the foundation for sound legal analysis. Paralegals engage in legal research to:

- answer specific questions;
- find legal principles and authorities that can affect the client’s interests; and,
- provide guidance for the client to deal with some situation in a lawful and beneficial manner.

To be successful in legal research, one must understand her objective. When the legal assistant takes on a new research assignment, it is customary for the attorney to brief her on the circumstance and purpose, so that her research can be focused and effective.

When the legal assistant understands the context for the research assignment, the next step is to define the issues. In Chapter 8, a hypothetical situation is used to demonstrate this process. Because a client’s property has been flooded by runoff from up-slope development, the attorney wants to know if the county government has any liability for approving the development without improving the drainage and storm drain systems. One issue is the possibility of treating the county’s inadequate storm drain systems as a public or private nuisance. Obviously, the legal assistant will have to understand the concept of “nuisance” and its private and public variations. It will be necessary to determine whether a local government is exempt from nuisance liability, either by statute or under the common law. Although the attorney has not asked the legal assistant to research issues of damages, she should be alert for case law which might support the recovery of damages for emotional distress, in case that issue arises later.

When researching these issues, the paralegal will be using various sources of legal authority. It is essential to understand their differences and how they can govern or influence the outcome of any legal controversy. Primary sources always state the law, and are either constitutional, statutory, regulatory or case law. Primary sources for Texas law are mandatory authority for the courts of Texas—those courts are bound to follow and apply them. The courts of other states may consider Texas primary sources as persuasive, but they are bound only by the primary sources of their own states. Thus, primary sources can be mandatory or persuasive, depending upon the jurisdiction of that law.

The courts of each state are the final authority on the law of that state. Even the U.S. Supreme Court considers itself bound by the decisions of state courts on the law of their respective jurisdic-
tions. Within each state, of course, it is the court of last resort that has the final word on the meaning and application of that state’s laws.

In special circumstances, a court of one state will treat the primary sources of another state as though they were mandatory authority. The most common example arises under contract law. Many contracts identify the state whose laws are to govern that contract. If a contract states that New York law is to govern that contract, then Texas courts will apply New York’s primary sources when interpreting or enforcing that contract. It is not that a contract can change a court’s source for mandatory authority—rather, it is the parties to that contract who have chosen the authority that will govern it.

Secondary sources are very different from primary sources. While primary sources state the law, and are created by government, secondary sources tell us about the law. Secondary sources can be created by anyone who is able to get his legal theories into print. Examples of secondary sources include legal encyclopedias, legal treatises, law review articles, and other publications. Secondary sources are never mandatory for any court, and succeed in being persuasive only if they have gained some recognition among jurists or legal scholars. Since they are not mandatory, a court may consider or ignore any secondary source.

To summarize, the only mandatory authority for any court is the primary sources of that jurisdiction. The primary sources of other jurisdictions, and all secondary sources, are only persuasive authority, at best—to be considered or ignored, at the court’s own discretion. With primary sources, then, the critical issue is one of jurisdiction.

While Texas courts are not bound by the primary sources of other states, like the courts of all states, they are bound by the Supreme Law of the Land (i.e., federal law). So primary sources for federal law—the U.S. Constitution, federal statutes, treaties, and regulations—are mandatory authority in all state and federal courts. This becomes significant, however, only when a question of federal law arises (e.g., when a state law is challenged as violating the Fourteenth Amendment).

In legal research, the legal assistant should always cite mandatory authority whenever it can be found. Persuasive authority should be cited only when:

- mandatory authority cannot be found;
- mandatory authority is unfavorable to the client’s position; or,
- persuasive authority clarifies the application of mandatory authority.

The second of these circumstances must be approached with care. The researcher must not ignore unfavorable mandatory authority, which always must be brought to the attorney’s attention. Favorable persuasive authority also should be reported, if it is favorable to the client’s situation. In many situations, the mandatory authority is strictly case law, which the appellate courts may decide to change.

It may sound contradictory to state that the courts might change “mandatory” authority, but case law is mandatory only for the lower courts of that jurisdiction. An appellate court that has created case law may always modify it at a later time. When that happens, the new rule then becomes mandatory for the lower courts of that jurisdiction.

Occasionally, it is difficult to locate case law which governs a novel legal issue. It might be that it is an issue of first impression in that jurisdiction. In other words, no court of that jurisdiction has ruled on the issue. When this occurs, persuasive authority from other jurisdictions becomes very important. The courts of some jurisdictions are considered to be particularly influential as persuasive authority—for example, Delaware for corporate law, Texas and California for tort law.

One approach to legal analysis is called the IRAC method, which most attorneys learn in law school. IRAC stands for:

- Issue
- Rule
- Application
- Conclusion

This method ensures that the researcher approaches the problem in a systematic and productive manner. It breaks the analytical process into four basic steps:

- defining the Issue;
- locating the Rule;
- Applying that rule; and,
- stating the Conclusion.

Sometimes, the rule can be found in a statute. More frequently, however, one must search for it in case law. Although a single case might state the governing rule, often it is necessary to fashion a “new” rule based upon the legal principles that apply to similar (though not identical) circumstances.

Cases which confront the legal issue in question are said to be “on point.” But usually those cases have significant differences in their factual circumstance. The legal issue in question might be slightly
Section 2. Legal Research

For the less experienced, finding a starting point for legal research can be intimidating. Often, the attorney will suggest a statute or court case as a starting point. If the attorney and paralegal do not know of an appropriate statute or case, the paralegal should begin with secondary sources:

- digests;
- treatises; and,
- legal encyclopedias.

When using such secondary sources, it is helpful to have several “key terms” in mind. The most useful key terms are known as legal “terms of art,” which have well-defined meanings and are frequently used in court decisions. Negligence, fraud, strict liability and malpractice are examples of terms of art. These terms will appear in indexes to treatises and legal encyclopedias, and digests are organized by topics identified by such terms.

The statutes of most jurisdictions are organized into “codes” that include the laws on a given topic, such as motor vehicles or education. If the legal assistant does not have a citation to a specific code section, the key terms can be used in searching the topical index that accompanies most statutory codes. When using indexes, the skilled researcher will try various alternatives until he finds the reference he seeks. If looking for the statutory duties of public school teachers, one might need to look under headings such as “school,” “teachers,” and “public schools.”

The official state codes provide the literal language of the statute, and little else. Much more useful for the researcher is the annotated code. Following each statute in an annotated code, the researcher will find brief paragraphs which summarize court decisions interpreting or applying that code section. By reviewing those summaries, the legal assistant can identify court opinions of possible value for further research. There also might be authoritative commentary on the legislative intent for that section.

Court opinions are found in case reporters, bound volumes containing the published opinions of a court, or of a number of courts. For example, the United States Reports is the official reporter for opinions of the U.S. Supreme Court. Those same opinions appear in unofficial reporters like West’s Supreme Court Reporter. The unofficial reporters contain every word of the Supreme Court opinions. However, they also contain editorial commentary not found in the official reporter. State court opinions are similarly published in official and unofficial reporters. West publishes the National Reporter System of seven regional reporters, reporters for the federal courts, and separate state reporters for the courts of California, Illinois, and New York. Most secondary sources (such as treatises and encyclopedias) print a list of reporter abbreviations in the front matter of each volume. From that list the legal assistant can determine that “P.2d” refers to West’s Pacific Reporter, Second Series, or that “LE2d” stands for United States Supreme Court Reports, Lawyers’ Edition, Second Series.

A major challenge of legal research is locating case law that addresses the legal issue at hand. DIGESTS are designed to help the researcher do exactly that. A digest is a multi-volume publication that groups cases by topic (i.e., by the legal issues decided in those cases). Thus, cases on negligence...
law will be in one volume, and cases on breach of contract will be in another. Within those volumes, these topics are further subdivided to facilitate locating cases on the “duty of care” under negligence law, or “specific performance” under contract law. Each court opinion (on specific performance, for example) will be summarized in a brief paragraph, followed by a citation to that case. These summaries are very similar to the case annotations found in an annotated code of statutes.

When using a digest published by West, each topic is identified by a Key Number that West has assigned. The identical Key Numbers appear in other West publications. Thus, a legal assistant can identify the Key Number for an issue and then use it to locate case summaries and citations in other West publications. If the Key Number is not known, the legal assistant can find his issue in a digest by using the “descriptive word index” volumes that accompany the digest.

When reading a court opinion, the legal assistant must be careful to distinguish the court’s actual opinion from the preceding editorial commentary. That commentary appears in a summary (or syllabus) and in numbered headnotes. The summary and headnotes are not written by the court, and have no official standing whatsoever. They must never be quoted or relied upon as authority. The summary and headnotes are prepared by attorneys who work for the publishing company, or by the reporter of decisions (in an official reporter). Even in the latter case, however, they have no legal authority.

The summary is provided to permit the reader to quickly determine if the case appears relevant to his research. If it is, the researcher will then read the court’s opinion (which follows the headnotes). The headnotes identify each legal issue that the court has decided in that case. There is a separate headnote for each issue. The headnote numbers appear in the body of the court’s opinion as a convenience for the researcher. If headnote 7 addresses the legal issue of concern, the researcher can go directly to that portion of the opinion by locating the number “[7]” (within brackets and in bold print) within the opinion.

Having found and studied a court opinion on point, the researcher has just begun his task. Virtually all court opinions cite legal authority to support their own legal conclusions. Most often, those citations are to prior case law, although statutes and other legal authorities are commonly cited, as well. To fully understand a pivotal case, the legal assistant will read also the key precedents cited in that opinion, and he will locate later cases on the same issue and read those opinions as well. Finally, he will have to use a case citator, such as Shepard’s Citations, to verify that any cases relied upon are still good law.

The “paper chase” is the process of following clues found in annotated codes, digests, court opinions, and other sources until the researcher has found the legal authority that resolves the issue at hand. If the authority cannot be found in primary sources, secondary sources must be used. At times, the courts rely upon secondary sources when they cannot find primary source authority.

When a court explicitly adopts a legal principle found in a secondary source, that declares the principle to be the common law of that jurisdiction. That court opinion then becomes primary source authority for that principle. When courts must rely upon secondary sources, most often they cite a treatise. Over time, particular treatises have gained a reputation for their scholarly foundation and have become highly persuasive secondary sources.

When leads are found to a very large number of cases, the paralegal must prioritize them in some fashion so that she can efficiently use her time and locate the more important precedents among them. Generally speaking, the following criteria can be used (in descending order of importance):

- cases within the jurisdiction;
- decisions by the higher appellate courts; and,
- more recent cases.

So, the most recent opinion by the supreme court of the state that has jurisdiction over the client’s matter should be read first. If, as often happens, it turns out not to be on point, the researcher works her way down the list of other appellate opinions from that state. Finally, one must understand that a recent case from the supreme court of a different jurisdiction has less value than an older case from a mid-level appellate court of the client’s state. In legal authority, jurisdiction always trumps both recency and appellate level.

When valuable cases have been found, the legal assistant must verify that they have not been reversed or overruled. This is done using a case citator, such as Shepard’s Citations or West’s KeyCite. A case is overruled when the same court adopts a contrary rule of law in a later case, and is reversed when a higher court holds that a lower court’s ruling was in error. Appellate courts commonly reverse lower court decisions, but do not often overrule their own prior holdings.

A second reason for using a case citator is to locate other cases that discuss the same legal issues. Citators will identify later opinions that
discuss the issue in headnote 5, for example. Using headnote numbers with case citators is a key part of the paper chase. Citators also identify legal periodicals which mention the case in question, and those articles are often a treasure trove of analysis and case citations.

If the citator reveals that an important case has been reversed or overruled, that usually means:

- The case may not be relied upon as precedent; and,
- The case may not be cited as authority for the legal principles stated in that opinion.

However, many cases decide multiple issues, and a reversal on one holding might not affect the court’s holdings on other issues in that case. To be certain about the opinion’s status as precedent, the researcher needs to read the later case in which it was reversed. This is why one sometimes encounters the statement “reversed on other grounds” when a case has been cited as valid authority in a later court opinion.

**Section 3. Legal Writing**

The most prevalent problem in legal writing is not the use of legal jargon, but a disregard for the ordinary rules of good writing. Most obscure and ineffective legal writing results from:

- poor organization;
- excessive use of the passive voice;
- unnecessary and ineffective compound sentences;
- verbiage; and,
- inadequate editing and revision.

Of course, the unnecessary use of legal jargon would only make the result worse.

The beginning of good organization is knowing the purpose for writing. Is it to inform or to persuade? Is the intended audience the court, an attorney, the client, or some other party? Once the objective is clear, the next step is the opening. In journalism, the opening is the headline or title of the article. In legal writing, it might be the heading for a section within a pleading, or the opening paragraph of a memorandum. The opening should hook the reader’s interest and communicate the purpose of the document.

Paragraph by paragraph, the document should lead the reader through a logical development of the content. Except for unfamiliar legal concepts (e.g., “strict products liability”), any educated layperson should be able to understand and follow the general concepts without any prior knowledge. For clarity, the writer should:

- use active language (not passive);
- control sentence and paragraph length;
- use paragraph breaks as markers for content development;
- use concise language; and,
- revise and edit several times.

These guidelines apply to all types of writing: legal memoranda, client correspondence, contracts, and pleadings.

Pleadings are the fundamental documents filed with the court in a lawsuit or other court proceedings. Pleadings contain the parties’ allegations of facts and any legal claims or defenses. However, in common usage, “pleading” is often applied to any document filed with the court for the purpose of influencing the court’s management of the case or the ultimate outcome of the litigation.

The format and content of pleadings are determined by statute and/or court rules. For example, a complaint must always allege facts which give the court jurisdiction over the defendant and the subject matter of the lawsuit. A particular cause of action (e.g., breach of contract) requires allegations to support that cause of action. A new legal assistant should begin to accumulate a form file (or pleading notebook) with copies of documents which have been filed with the courts. These can serve as exemplars for future pleadings, motions, etc., which the legal assistant will be called upon to draft. These exemplars can be maintained on a computer if they are organized by the type of document so that they are easy to locate.

Legal assistants and associate attorneys are sometimes called upon to “brief” a case. A case brief is a summary of that court opinion which can be quickly read and understood by an attorney who has not already read that case. A legal assistant can brief a case more effectively if he understands the facts and legal issues in the client’s legal matter. A case brief usually includes the following sections:

- factual background;
- procedural history (if provided in the court’s opinion);
- legal issue(s);
- holding of the lower court (if stated in the appellate opinion);
- holding of the appellate court; and,
- reasoning of the appellate court.
The factual background helps the attorney to compare the case to the facts of the client’s legal matter. The reasoning of the court helps the attorney to understand why the appellate court reached the conclusion it did. Since the holding itself has been summarized in the prior section, this latter section must summarize the court’s legal analysis which caused it to reach that holding. Inexperienced legal assistants tend to include more factual background than necessary in their case briefs, and to shortchange the final section on the court’s reasoning.

While a case brief summarizes only a single case, a memorandum of law brings into one document the holdings of various appellate court decisions. A memorandum of law is needed when the pertinent legal principles cannot be found within a single case. Memoranda are used as internal documents that never leave the office, or they are provided to clients. The memorandum of law is intended to analyze a situation with objectivity—it is not intended to persuade. Consequently, it includes both favorable and unfavorable legal authorities. A common format for the memorandum is:

- summary of facts;
- legal question(s) presented;
- brief answer(s);
- legal analysis; and,
- conclusion(s).

The legal analysis is often written in the style of an appellate court opinion. Statutes, cases, and secondary authorities are cited. The conclusion will state in summary form the result of the legal analysis.

Memoranda of points and authorities are similar to memoranda of law, but they differ in three important ways:

- they are intended to persuade;
- they are not objective; and
- they are intended for an audience outside of the law firm (e.g., the court).

Partisanship is the distinguishing characteristic of memoranda of points and authorities. Trial briefs and appellate briefs are examples of memoranda of points and authorities. The points are legal propositions (arguments), and the authorities are citations to primary and secondary sources which support those propositions.

A good portion of legal writing aims to persuade. Of course, it isn’t always possible to succeed because some things are beyond the writer’s control. One cannot change the facts of the client’s case, nor erase the personal biases of judges, but the following guidelines are helpful for persuasive writing:

- Write clearly and concisely.
- Start with a statement or position agreeable to the reader.
- Soften any bold statements that are likely to arouse an unfriendly bias.
- Lead the reader gently and methodically toward the desired conclusion.
- Anticipate objections and refute them without antagonizing the reader.
- Quote authority the reader cannot ignore.
- Avoid any hint of arrogance, condescension, or antagonism.
- Remember that the reader should feel good about adopting the client’s position.

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REVIEW QUESTIONS

1. A primary source is a statement _________ the law. A secondary source is a statement _________ the law.
2. Primary sources are mandatory authority _________ they state the law of that _________.
   Primary sources from a different jurisdiction are only _________ authority.
3. The law of _________ is the law governing civil wrongs that injure another person (e.g., fraud, slander, negligence, assault, etc.).
4. The IRAC method of legal research stands for _________, _________, _________, and _________.
5. A court may _________ its records to prevent anyone from examining them without prior court permission.
6. Using the logical process of _________ we apply the same legal principle to different, but similar, fact situations.
7. When an appellate court justice differs from the majority on which legal principle should be applied to a given case, she might write a _________ opinion.
8. At times, it appears that an earlier precedent should govern the case before the court. But if the court determines that factual differences call for a different legal result, it is said to ________ the case at bar from that earlier precedent.

9. A statutory ________ is a collection of statutes organized by topic.

10. In a statute, an enumerated ________ is a discrete provision, of one or more paragraphs, which is to be read and interpreted as a whole.

11. Published court opinions are found in case ________, which are bound volumes containing the opinions of one or more courts.

12. The official publication for U.S. Supreme Court decisions is the United States ________.

13. Regardless of which reporter one is using to research U.S. Supreme Court cases, only the ________ reporter should be cited to the courts.

14. The decisions of the federal District Courts are published in the Federal ________. Decisions of the federal Courts of Appeals are published in the Federal ________.

15. Regional reporters for the courts of all 50 states are published by West as part of the ________ System.

16. A ________ contains brief summaries of court decisions, organized by topic.

17. The text of published court opinions are preceded by an unofficial ________ of the case, and by numbered ________ that summarize the court’s holding on discrete legal issues. Neither of these may be quoted or cited as legal authority.

18. At the very end of an appellate opinion, the court states its ________ of that case.

19. When a court explicitly adopts a legal principle found in a secondary source, it effectively declares that principle to be part of the ________ law of that jurisdiction. Thereafter, that case may be cited as a ________ source for that legal principle.

20. When a very large number of cases have been identified for review on a specific legal issue, the legal assistant should prioritize them according to the following criteria (in descending order of importance):
   1) cases from the client’s ________;
   2) cases from the ________ appellate courts; and,
   3) the more ________ cases.

21. A case is ________ when the same court adopts a contrary rule of law in a later case.

22. A case is ________ when a(n) ________ court holds that the lower court’s ruling was in error.

23. A ________ provides citations to subsequent cases or publications which have cited or ruled upon the case in question.

24. Shepardizing is not complete until all current ________ have been checked.

25. “Constructive fraud” and “private nuisance” are examples of legal ________ of art.

26. A complaint must allege facts that give the court ________ over the defendant and the subject matter of the lawsuit. To avoid dismissal, the complaint must also allege facts that establish a valid ________ of action.

27. A memorandum of ________ is an objective evaluation of a legal situation, and is used within the law office. A memorandum of ________ is a partisan discussion which advocates the client’s interests.

28. The court rules of most jurisdictions require the citation format prescribed in The ________: A Uniform System of Citation.

KEY TERMS

annotated code
Your “best effort” definition:
Your revised definition:

case of first impression
Your “best effort” definition:
Your revised definition:

case brief
Your “best effort” definition:
Your revised definition:

dictum
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WORKING ON-LINE

Go to the terrific Web site, “Barger on Legal Writing,” which Professor C. M. Barger (University of Arkansas, Little Rock) maintains for law school students:

http://www.ualr.edu/~cmbarger

Follow the link for “One-L Help” [One-L = 1st year law student] and explore the pages and links under “Class Preparation.” Try an interactive tutorial on briefing cases or using the IRAC approach for legal research. For a treasure trove of research tips, scroll down to “De-Mystify the Tools of Legal Research.”

ETHICAL CHALLENGE

It is not unusual for paralegal students to study together and to collaborate in working through their homework assignments. Experienced teachers appreciate this cooperation because they know that students often learn as much from each other as they do from the instructor. Of course, this “cooperation” should not include copying homework or otherwise avoiding the learning experiences an assignment is intended to provide. Student-to-student collaboration works best when it helps one another to discover the pathways to success.

However, collaboration can also reveal the unethical conduct of an errant classmate. How would you handle the following situation?

Your instructor has given a fairly simple research assignment. You and your classmates are to select a statutory section from the state penal code and read several of the cases found in the following annotations. You are then to write a summary of how those court decisions interpreted or applied that statute. As usual, your group of “regulars” are seated at a table in the county law library on Saturday morning, working on the week’s assignment. Each of you has selected a different statutory provision, but you are sharing questions, comments, and ideas about how to complete the assignment. Gradually, you become aware that major portions of a classmate’s paper appear to be copied word-for-word from the court opinions, without attribution or quotation marks.

The situation makes you uncomfortable because the instructor has insisted that all quotations be clearly indicated. He also has made it clear that he considers anything less to be plagiarism. Finally, to sink his point home, the instructor has said that there is no place for unethical paralegals in the practice of law.

How should you handle this situation?

ETHICAL ANALYSIS

“There is no place for unethical paralegals in the practice of law.” It’s pretty difficult to argue with that proposition. But what does that suggest your own ethical obligation to be in this situation?

The instructor is absolutely correct in saying that it is plagiarism to use another’s words as though they are your own. It is also lazy, and it avoids the skill development that comes from paraphrasing the court opinions in one’s own words. In your own mind, you also realize that you would be committing a fraud upon the instructor if you submitted plagiarized text as though it were your own.

Several issues arise here:

1. While it “appears” that your classmate is committing plagiarism, are you absolutely positive?
2. If it does prove to be plagiarism, do you have an ethical obligation to report that offense to your instructor?
3. Would it be possible to convince the classmate to eliminate any plagiarism from the paper she ultimately submits?
4. Do you have an ethical obligation to “police” the ranks of prospective paralegals and ensure that the unethical candidates are discovered and dropped?

If there is no plagiarism, there is no apparent ethical problem. But, is it any of your business even to inquire or investigate that question? If your answer to questions 2 and 4, above, are “Yes,” then you might have an ethical obligation to determine whether plagiarism is occurring. It certainly would be unethical to make unfounded accusations. So, if you believe you have an ethical obligation under questions 2 and 4, you need to explore the issue of plagiarism. If you believe that you do not have any obligations under those questions, you could ignore the situation.

Whatever your belief about reporting cheaters—and without trying to confirm whether plagiarism is actually taking place or not—you could initiate a discussion among your regulars about the issue. A question such as, “Why does the instructor make such a big deal about us copying from the court opinions?” should generate some useful discussion. If the consensus is that cheating is O.K., then your group is in serious need of individual ethical self-evaluations, and one would wonder why they are in-
interested in becoming paralegals. If the opposite consensus occurs, then your classmate might feel deterred from submitting a plagiarized paper.

There is more value in deterring or reforming an offender than in catching them at the crime. If a report must be made, it might be best to suggest anonymously to the instructor that additional emphasis be placed on plagiarism in a class discussion.

READING CASE LAW

The complete text of *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564 (1928) is printed here. This is the case excerpted in Chapter 8 to illustrate a vigorous dissenting opinion that prophetically stated legal principles the Court would adopt as the law of the land many years later. The *Olmstead* court split 5-4 on this decision.

The dissent by Justice Brandeis articulated a rationale for excluding illegally obtained evidence. Read the majority and dissenting opinions in *Olmstead*. Then, read the Supreme Court’s opinions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), the cases in which the Court overruled its earlier decision in *Olmstead*. What do you believe accounts for the Court’s sea change in constitutional interpretation?

ANSWERS TO REVIEW QUESTIONS

1. A primary source is a statement of the law. A secondary source is a statement about the law.
2. Primary sources are mandatory authority when they state the law of that jurisdiction. Primary sources from a different jurisdiction are only persuasive authority.
3. The law of *torts* is the law governing civil wrongs that injure another person (e.g., fraud, slander, negligence, assault, etc.).
4. The IRAC method of legal research stands for Issue, Rule, Application, and Conclusion.
5. A court may seal its records to prevent anyone from examining them without prior court permission.
6. Using the logical process of analogy we apply the same legal principle to different, but similar, fact situations.
7. When an appellate court justice differs from the majority on which legal principle should be applied to a given case, she might write a dissenting opinion.
8. At times, it appears that an earlier precedent should govern the case before the court. But if the court determines that factual differences call for a different legal result, it is said to distinguish the case at bar from that earlier precedent.
9. A statutory code is a collection of statutes organized by topic.
10. In a statute, an enumerated section is a discrete provision, of one or more paragraphs, which is to be read and interpreted as a whole.
11. Published court opinions are found in case reporters, which are bound volumes containing the opinions of one or more courts.
12. The official publication for U.S. Supreme Court decisions is the *United States Reports*.
13. Regardless of which reporter one is using to research U.S. Supreme Court cases, only the official reporter should be cited to the courts.
14. The decisions of the federal District Courts are published in the *Federal Supplement*. Decisions of the federal Courts of Appeals are published in the *Federal Reporter*.
15. Regional reporters for the courts of all 50 states are published by West as part of the National Reporter System.
16. A digest contains brief summaries of court decisions, organized by topic.
17. The text of published court opinions are preceded by an unofficial summary of the case, and by numbered headnotes that summarize the court’s holding on discrete legal issues. Neither of these may be quoted or cited as legal authority.
18. At the very end of an appellate opinion, the court states its disposition of that case.
19. When a court explicitly adopts a legal principle found in a secondary source, it effectively declares that principle to be part of the common law of that jurisdiction. Thereafter, that case may be cited as a primary source for that legal principle.
20. When a very large number of cases have been identified for review on a specific legal issue, the legal assistant should prioritize them according to the following criteria (in descending order of importance):
   1) cases from the client’s jurisdiction;
   2) cases from the higher appellate courts; and,
   3) the more recent cases.
21. A case is overruled when the same court adopts a contrary rule of law in a later case.

22. A case is reversed when a(n) appellate/higher court holds that the lower court’s ruling was in error.

23. A citator provides citations to subsequent cases or publications which have cited or ruled upon the case in question.

24. Shepardizing is not complete until all current supplements have been checked.

25. “Constructive fraud” and “private nuisance” are examples of legal terms of art.

26. A complaint must allege facts that give the court jurisdiction over the defendant and the subject matter of the lawsuit. To avoid dismissal, the complaint must also allege facts that establish a valid cause of action.

27. A memorandum of law is an objective evaluation of a legal situation, and is used within the law office. A memorandum of points and authorities is a partisan discussion which advocates the client’s interests.

28. The court rules of most jurisdictions require the citation format prescribed in The Bluebook: A Uniform System of Citation.
Supreme Court of the United States.

OLMSTEAD et al.  
v.  
UNITED STATES.

No. 493.  
GREEN et al.  
v.  
SAME

No. 532.  
McINNIS  
v.  
SAME.

No. 533.

Argued Feb. 20 and 21, 1928.  
Decided June 4, 1928.

Mr. Justice Brandeis, Mr. Justice Holmes, Mr. Justice Butler, and Mr. Justice Stone dissenting.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Roy Olmstead, Charles S. Green, Edward H. McInnis, and others were convicted of a conspiracy to violate the National Prohibition Act, which convictions were affirmed by the Circuit Court of Appeals (19 F.2d) 842, 53 A. L. R. 1472; 19 F.2d) 850), and they bring certiorari. Judgments of Circuit Court of Appeals affirmed, and mandate directed under rule 31.

West Headnotes

[3] Criminal Law  $ 386  
110k386

Common-law rules of evidence in criminal cases in courts of United States sitting in Washington are those of common law, inasmuch as English common law prevailed before and after admission of territory of Washington as a state.

[7] Evidence  $ 154  
157k154


Federal Civil Procedure  $ 56  
170Ak56

Common-law rules of evidence, prevailing in Washington, prevail in criminal cases in federal courts sitting there.

Evidence  $ 205(3)  
157k205(3)  
(Formerly 170Ak1187)


Criminal Law  $ 393(1)  
110k393(1)


Criminal Law  $ 394.1(1)  
110k394.1(1)

Common law, even in criminal prosecution, did not exclude evidence because illegally obtained.

Criminal Law  $ 394.1(1)  
110k394.1(1)

Courts have no discretion to exclude evidence solely on ground that means of obtaining it were unethical.

Criminal Law  $ 394.3  
110k394.3

Tapping of wires leading from defendants' residences to chief office from which alleged conspiracy was directed held not to constitute unlawful search or seizure, rendering evidence so obtained inadmissible. National Prohibition Act, 27 U.S.C.A.; Rem. Comp. Stat. Wash. § 2656(18); Const. U.S. Amend. 4.
Criminal Law 394.3


Telecommunications 493

Tapping of wires leading from defendants' residences to chief office from which alleged conspiracy was directed held not to constitute unlawful search or seizure. National Prohibition Act, 27 U.S.C.A. § 1 et seq.; Rem.Comp.Stat.Wash. § 2656(18); U.S.C.A.Const. Amend. 4.

Mr. John F. Dore, of Seattle, Wash., for petitioners Olmstead and others.

Mr. Frank R. Jeffrey, of Seattle, Wash., for petitioner McInnis.

Mr. Arthur E. Griffin, of Seattle, Wash., for petitioners Green and others.

The Attorney General and Mr. Michael J. Doherty, of St. Paul, Minn., for the United States.


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, 53 A. L. R. 1472, and 19 F.(2d) 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 wire tapping, amounted to a violation of the Fourth and Fifth Amendments. 276 U. S. 609, 48 S. Ct. 207, 72 L. Ed. --.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act (27 USCA) 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. *456 It involved the employment of not less than 50 persons, of two sea-going 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 branch 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, and 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 $2,000,000.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; 11 others contributed $1,000 each. The profits were divided, one-half to Olmstead and the remainder to the other 11. 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 the 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 *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.'

*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, 6 S. Ct. 524, 29 L. Ed. 746, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against 35 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 29 cases previously imported. The fifth section of the Act of June 22, 1874 (19 USCA s 535), provided that, in cases not criminal under the revenue laws, the United States attorney, whenever he thought an invoice, belonging *456 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 (14 Stat. 547), 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 and take possession of it and hold it subject to the order of the judge. This had been preceded by the act of 1863 (12 Stat. 740) 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 (6 S. Ct. 527)):
*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 *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, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1815C, 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 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.

24 L. Ed. 877, 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 Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426, the defendants were arrested at their homes and *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:

'This case is not that of knowledge acquired through the wrongful act of a stranger, *567 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, 41 S. Ct. 266, 65 L. Ed. 654, 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 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 whisky. 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 whisky and to exclude the testimony was error.

In Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, 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 *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 United States 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, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409, 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.

[1] 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 court, 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 *463 unimportant. This was held by the Supreme Judicial Court of Massachusetts in Commonwealth v. Dana, 2 Metc. 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 *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 **568 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 wire tapping. 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 Postoffice Department and the relations between the government and those who pay to secure protection of their sealed letters. See Revised Statutes, ss 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and section 3929 (39 USCA s 259), 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.

[2] 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.

*465 By the invention of the telephone 50 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, 45 S. Ct. 280, 284 (69 L. Ed. 543, 39 A.
L. R. 790), 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
interest and rights of individual citizens.'

Justice Bradley, in the Boyd Case, and Justice
Clarke, 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, 44 S. Ct. 445,
68 L. Ed. 898, held that the testimony of two officers
of the law who trespassed on the defendant's land,
concealed themselves 100 yards away from his house,
and saw him come out and 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. United States v. Lee, 274 U. S.
559, 563, 47 S. Ct. 746, 71 L. Ed. 1202; Eversole v.

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, *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 wire tapping 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 twofold objection, overruled in both
courts below, that evidence obtained through
intercepting of telephone messages by a 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.

[3] 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 **569 United States sitting there
consequently are those of the common law. United
States v. Reid, 12 How. 361, *467(Cite as: 277 U.S.
438, *467, 48 S.Ct. 564, **569) 363, 366, 13 L. Ed.
1023; Logan v. United States, 144 U. S. 263, 301, 12

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STUDY GUIDE

48 S.Ct. 564 (Mem)
(Cite as: 277 U.S. 438, *466, 48 S.Ct. 564, **569)


[4][5] 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 (volume 1 (12th Ed., by Redfield) s 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.' Section 2075, note 3, vol. 5.


[6] 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 oathbound conspiracies for murder, robbery, and other crimes, where officers of the law have disbursed 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.

[7] The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes 1922, s 2656(18) 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.'

*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. 806, 165 N. Y. S. 41. 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 20 years after the admission of the state into the Union, cannot affect the rules of evidence applicable in courts of the United States. Chief Justice Taney, in United States v. Reid, 12 How. 361, 363 (13 L. Ed. 1023), construing the thirty-fourth section of the Judiciary Act (now 28 USCA s 77), said:

'But it could not be supposed, without very plain

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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 United
States. For this construction would in effect place
the criminal jurisprudence of one sovereignty under
the control of another.'

Sec. also, Withaup v. United States (C. C. A.) 127
F. 530, 534.

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

Affirmed.

**570 *471 Mr. Justice BRANDEIS (dissenting).

The defendants were convicted of conspiring to
violate the National Prohibition Act (27 USCA). 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 wire tapping
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 wire
tapping, on the ground that the government's wire
tapping 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
*472 that, if wire tapping can be deemed a search and
seizure within the Fourth Amendment, such wire
tapping 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 4 L. Ed. 579, '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, 24 L. Ed. 708; Northern Pacific
502, 63 L. Ed. 897; Dakota Central Telephone Co. v.
South Dakota, 250 U. S. 163, 39 S. Ct. 507, 63 L.
Ed. 910, 4 A. L. R. 1623; Brooks v. United States,
267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A.
L. R. 1407. 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.
114, 118 (71 L. Ed. 303); Buck v. Bell, 274 U. S.
200, 47 S. Ct. 584, 71 L. Ed. 1000. 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, 30 S. Ct. 544, 551 (54 L. Ed.
793, 19 Ann. Cas. 705):

'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 *473 and purposes.
Therefore a principal 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

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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, 6 S. Ct. 524, 29 L. Ed. 746. But 'time works changes, brings into existence new conditions and purposes.' Subtle 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.

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 wire tapping. Ways may some day 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. [FN1] To Lord Camden a far slighter intrusion seemed 'subversive of all the comforts of society.' [FN2] 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, 6 S. Ct. 524, 29 L. Ed. 746, 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 employee s 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 offense; but it is the invasion of his indefeasible right of personal security, *475 personal liberty and 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 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 exortion 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.' [FN3]

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FN1 In Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 155 U. S. 3, 14 S. Ct. 1125, 15 S. Ct. 19, 38 L. Ed. 1047, 39 L. Ed. 49, the statement made in the Boyd Case was repeated, and the court quoted the statement of Mr. Justice Field in Re Pacific Railway Commission (C. C.) 32 F. 241, 250: 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.' The Boyd Case has been recently reaffirmed in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, in Gouled v. United States, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and in Byars v. United States, 273 U. S. 28, 47 S. Ct. 248, 71 L. Ed. 520. In Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, it

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FN3


FN2 Entick v. Carrington, 19 Howell's State Trials, 1030, 1066.
was held that a sealed letter intrusted 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 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 wire tapping.

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 of 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, 40 S. Ct. 182, 64 L. Ed. 319. 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, 41 S. Ct. 261, 65 L. Ed. 647, 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, 24 L. Ed. 877, that its protection extended to letters in the mails. **572 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 *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, 12 S. Ct. 195, 35 L. Ed. 1110, but that:

'It 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. Arndstein, 266 U. S. 34, 40, 45 S. Ct. 16, 17 (69 L. Ed. 158).

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, page 562 (12 S. Ct. 198).

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; [FN4] whether the paper when taken by the federal officers was in the home, [FN5] in an office, [FN6] or elsewhere; [FN7] whether the taking was effected by force, [FN8] by *478 fraud, [FN9] or in the orderly process of a court’s procedure. [FN10] 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 [FN11] 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 *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 wire tapping 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. [FN12]

FN12 The point is thus stated by counsel for the telephone companies, who have filed a brief as amici curiae: 'Criminals will not escape detection and 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 government, who will act at their own discretion, the honest and the dishonest, unauthorized and 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. [FN13] Pierce'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 (No. 117) 276
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(Cite as: 277 U.S. 438, *480, 48 S.Ct. 564, **573)

U. S. 36, 48 S. Ct. 268, 72 L. Ed. 457, decided February 20, 1928.

FN13 In the following states it is a criminal offense to intercept a message sent by telegraph and/or telephone: Alabama, Code 1923, s 5256; Arizona, Revised Statutes 1913, Penal Code, s 692; Arkansas, Crawford & Moses' Digest, 1921, s 10246; California, Deering's Penal Code 1927, s 640; Colorado, Compiled Laws 1921, s 6969; Connecticut, General Statutes 1918, s 6292; Idaho, Compiled Statutes 1919, ss 8574, 8586; Illinois, Revised Statutes 1927, c. 134, s 16; Iowa, Code 1927, s 13121; Kansas, Revised Statutes 1923, c. 17, s 1908; Michigan Compiled Laws 1915, s 15403; Montana, Penal Code 1921, s 11518; Nebraska, Compiled Statutes 1922, s 7115; Nevada, Revised Laws 1912, ss 4608, 6752(18); New York, Consolidated Laws, c. 40, s 1423(6); North Dakota, Compiled Laws 1913, s 10231; Ohio, Page's General Code 1926, s 13402; Oklahoma, Session Laws 1923, c. 46; Oregon, Olson's Laws 1920, s 2265; South Dakota, Revised Code 1919, s 4312; Tennessee, Shannon's Code 1917, ss 1839, 1840; Utah, Compiled Laws 1917, ss 8433, 8434; Virginia, Code 1924, s 4477(2); (3), Washington, Pierce's Code 1921, s 8976(18); Wisconsin, Statutes 1927, s 348,37; Wyoming, Compiled Statutes 1920, s 7148; Compare State v. Behringer, 19 Ariz. 502, 172 P. 660; State v. Nordskog, 76 Wash. 472, 136 P. 694, 50 L. R. A. (N. S.) 1216. In the following states it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conspiring with them, to disclose or to assist in the disclosure of any message: Alabama, Code 1923, ss 5543, 5545; Arizona, Revised Statutes 1913, Penal Code, ss 621, 623, 691; Arkansas, Crawford & Moses' Digest 1921, s 10250; California, Deering's Penal Code 1927, ss 619, 621, 639, 641; Colorado, Compiled Laws 1921, ss 6966, 6968, 6970; Connecticut, General Statutes 1918, s 6292; Florida, Revised General Statutes 1920, ss 5754, 5755; Idaho, Compiled Statutes 1919, ss 8568, 8570; Illinois, Revised Statutes 1927, c. 134, s 7, 7a; Indiana, Burns' Revised Statutes 1926, s 2862; Iowa, Code 1924, s 8305; Louisiana, Acts 1918, c. 134, p. 228; Maine, Revised Statutes 1916, c. 60, s 24; Maryland, Bagby's Code 1926, art. 27, s 489; Michigan, Compiled Statutes 1915, s 15104; Minnesota, General Statutes 1923, ss 10423, 10424; Mississippi, Hemingway's Code 1927, s 1174; Missouri, Revised Statutes 1919, s 3605; Montana, Penal Code 1921, s 11494; Nebraska, Compiled Statutes 1922, s 7088; Nevada, Revised Laws 1912, ss 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes 1910, p. 5319; New York, Consolidated Laws, c. 40, ss 552, 553; North Carolina, Consolidated Statutes 1919, ss 4497, 4498, 4499; North Dakota, Compiled Laws 1913, s 10078; Ohio, Page's General Code 1926, ss 13388, 13419; Oklahoma, Session Laws 1923, c. 46; Oregon, Olson's Laws 1920, ss 2260, 2262, 2266; Pennsylvania, Statutes 1920, ss 6306, 6308, 6309; Rhode Island, General Laws, 1923, s 6104; South Dakota, Revised Code 1919, ss 4346, 9801; Tennessee, Shannon's Code 1917, ss 1837, 1838; Utah, Compiled Laws 1917, ss 8403, 8405, 8434; Washington, Pierce's Code 1921, ss 8982, 8993; Wisconsin, Statutes 1927, s 348,36. The Alaska Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that, 'if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall wilfully 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, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court.' The Act of October 29, 1918, c. 197, 40 Stat. 1017 (Comp. St. s 3115 3/4 cc), provided: 'That whoever during the period of governmental operation of the telephone and telegraph systems of the United States *** shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and 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 $1,000 or imprisoned for not more than one year, or both.' The Radio Act of February 23, 1927, c. 169, s 27, 44 Stat. 1162, 1172 (47 USCA s 107), provides that 'no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person.'

*481 The situation in the case at bar differs widely from that presented in Burdette v. McDowell, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 1159. There only a single lot of papers was involved. They had been obtained by a private detective while

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acting on behalf of a private party, without the knowledge of any federal official, long before any one had thought of instituting a *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’s evidence occupies 306 pages of the printed record. More than 210 of them are **574 filled by recitals of the details of the wire tapping and of facts ascertained thereby. [FN14]

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.

FN14 The above figures relate to case No. 493. In Nos. 532, 533, the government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wire tapping.

As Judge Rudkin said below (19 F.(2d) 842):

‘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 any one to violate the criminal laws of a state. And Congress has never purported to do so. Compare Maryland v. Soper, 270 U. S. 9, 46 S. Ct. 185, 70 L. Ed. 449. The terms of appointment of federal prohibition agents do not purported to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit *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. [FN15]

FN15 According to the government’s brief, p. 41, ‘The Prohibition Unit of the Treasury disclaims it (wire tapping) and the Department of Justice has frowned on it.’ See, also,


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, 23 S. Ct. 593, 47 L. Ed. 900; O’Reily de Camara v. Brooke, 209 U. S. 45, 52, 28 S. Ct. 439, 52 L. Ed. 676; Dodge v. United States, 272 U. S. 530, 532, 47 S. Ct. 191, 71 L. Ed. 392; Gambino v. United States, 275 U. S. 310, 48 S. Ct. 137, 72 L. Ed. 293, 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. [FN16] The maxim of unclean hands comes *484 from courts of equity. [FN17] 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. [FN18]


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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 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. [FN19] Then aid is denied despite the defendant’s wrong. It is denied in order to maintain respect for law; in order **575 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 *485 spoken of as a rule of substantive law. But it extends to matters of procedure as well. [FN20] 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. [FN21] 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.

*469 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, 42 S. Ct. 192, 66 L. Ed. 443. But I think, as Mr. Justice BRANDEIS says, that apart from the Constitution the government ought not to use *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 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, 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, 40 S. Ct. 182, 64 L. Ed. 319, 24 A. L. R. 1426. 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 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 *471 obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, 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.

*485 Mr. Justice BUTLER (dissenting).

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

*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 *576 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 'wire tapping' 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 intent[ion] of the Fourth Amendment.'

The court, adhering to and reiterating the principles laid down and applied in prior decisions [FN22] construing the search and seizure clause, in substance adopts the contention of the government.

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

*487 Telephone 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. Wire tapping 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, 6 S. Ct. 524, 29 L. Ed. 746, 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, 47 S. Ct. 248, 71 L. Ed. 520), as well as to those granting governmental powers. McCulloch v. Maryland, 4 Wheat. 316, 404, 406, 407, 421, 4 L. Ed. 579; Marbury v. Madison, 1 Cranch, 137, 153, 176, 2 L. Ed. 60; Cohens v. Virginia, 6 Wheat. 264, 5 L. Ed. 257; Myers v. United States, 272 U. S. 52, 47 S. Ct. 21, 71 L. Ed. 160.

This court has always construed the Constitution in the light of the principles upon which it was founded. *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.

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 Judicial Code, s 240(a). 28 USCA s 347(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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