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SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT AS INTERPRETED BY THE UNITED STATES SUPREME COURT*

By E. G. Trimble**

The Fourth Amendment to the Federal Constitution reads as follows:

"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."

The history of its adoption in 1789 by the first Congress under the Constitution as part of the Federal Bill of Rights is well known. But its real significance for the American people had to be determined by the U. S. Supreme Court as cases under the amendment came before it.

The first important case which came before the Court was that of Boyd v. United States. It was so important that it merits detailed treatment. The case arose on an information in rem, filed by the U. S. District Attorney, in a cause of seizure and forfeiture of property against 35 cases of plate glass seized by the collector of revenue as having been imported in fraud of the revenue laws. The fifth section of an act of Congress of 1874 provided that in any proceeding other than a criminal proceeding, arising under the revenue laws, the Court could in its discretion on motion by the Government issue an order to a defendant or claimant to produce his books, invoices, and papers which might tend to prove any allegation made by the U. S. Government. If the papers were produced, they could be used as evidence; if they were not produced, the allegations of the District Attorney in mak-

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* This is the first of two installments of this article. The second installment will appear in a succeeding issue of the Journal.
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2 116 U. S. 616 (1885).
ing the motion for the court order would be taken as confessed. The defendant in this case on order from the Court produced the papers but objected to the validity of the order, to the law under which it was issued, and to the use of the papers against him. The validity of the law was challenged as being contrary to the Fourth Amendment, as well as to the Fifth which protects a person against self-incrimination. The lower court permitted the evidence to be used and a judgment of forfeiture was given. The circuit court affirmed. The Supreme Court in a unanimous opinion reversed the decision and declared the law unconstitutional.

Justice Bradley, who wrote the opinion, first dealt with the Government's argument that the mere ordering that the papers be produced under the Act of 1874 was not the same as a search for and seizure of papers (which had been authorized in Acts of Congress of 1863 and 1867, which laws had been replaced by the law of 1874.) He pointed out that failure to produce the papers resulted in the allegations of the Government being taken as confessed and said the proceedings "accomplish the substantial object of those acts (of 1863 and 1867) in forcing from a party evidence against himself." He concluded:

"... 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."8

Having thus arrived at the conclusion that compulsory production of a man's papers to be used against him in an action to forfeit his property was the same as a search and seizure, he took up the principal question, that is, whether a search and seizure of a man's papers, or its equivalent, to be used against him in a proceeding to forfeit his property for fraud of the revenue laws was an unreasonable search and seizure under the Fourth Amendment. To the argument that this was a legitimate proceeding sanctioned by long usage, he replied that the Court failed to find any usage or contemporary construction of the Constitution to support the

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8 Id. at 622.
argument. He said that the act of Congress of 1863 which permitted such practice was the first act in this country or in England which purported to authorize such proceeding. The act under which the writs of assistance were used in the colonies, he stated, did not go so far, for it "only authorized the examination of ships and vessels and persons found therein . . . and sic to enter into and search any suspected vaults, cellars, and warehouses" for the purpose of finding goods prohibited from being imported or exported or on which duties were not paid. "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof," he continued, "are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the Government is entitled to the possession of the property; in the other it is not."4

He then pointed out a number of practices which were considered as exceptions to the general rule and to the Fourth Amendment. The seizure of stolen goods was permitted by the common law; the seizure of goods in the enforcement of revenue laws had been permitted by English statutes and by an act of the first Congress under the Constitution; so also could goods be seized which it was unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coins, lottery tickets, implements of gambling, etc. All these exceptions, however, were different from the present action in that in connection with these exceptions either the Government or other individuals had a claim against the goods, whereas in the present action the Government attempted "to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property."5

He then entered into an historical review in order to ascertain what proceedings were meant to be included in the Fourth Amendment as "unreasonable searches and seizures." He referred to the controversy in Boston in 1761 over the use by British revenue officers of writs of assistance empowering them in their discretion to search suspected places for smuggled goods. The

4 Id. at 623.
5 Id. at 624.
legality of these writs was challenged by James Otis, and John Adams was quoted by Justice Bradley as having said that in this controversy "the child of Independence was born."

The controversy in England the following year involving the use of general writs was reviewed. There, writs that were general as to the places to be searched and the goods to be seized were used to seize copies of The North Briton, published by John Wilkes, and The Monitor or British Freeholder, published by John Entwick. In both instances, court actions favorable to the editors and against the use of the writs were obtained. But it was the case of Entwick v. Carrington\(^6\) involving the publication of The Monitor which resulted in the more celebrated decision. This opinion Justice Bradley discussed fully. The case involved the legality of a writ by the Secretary of State, Lord Halifax, for the seizure of Entwick together with his books and papers on a charge of seditious libel. Entwick brought an action in trespass against the King's messengers who carried out the search for and the seizure of the books and papers. Lord Camden wrote an exhaustive opinion concerning the authority of the Secretary to issue such a warrant. After dwelling upon the seriousness of the power claimed by the Secretary, Lord Camden said the "law to warrant it should be clear in proportion as the power is exorbitant. The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot . . . be guilty of a trespass, yet where private papers . . . are carried away the secret nature of those goods will be an aggravation of the trespass."

He then asked where the law was that gave a magistrate such a power, and replied, "I can safely answer there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society." He next discussed the similarity between the claimed authority in this case and the case of seizure of stolen goods, and pointed out the difference.

\(^6\)19 State Trials (Howell, 1829).
"In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction and he has no power to reclaim his goods, even after his innocence is declared by acquittal."

He went on to point out that even stolen goods could not be seized except by use of a valid warrant. He discussed the argument that such a search is a useful means of detecting offenders by discovering evidence, and said,

"I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. . . . In the criminal law, such a proceeding was never heard of. . . . It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-acusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then too, the innocent would be confounded with the guilty."

Justice Bradley assumed that every American statesman during our revolutionary period was familiar with the case of Entwick v. Carrington as a "monument of English freedom", and that they accepted it "as the true and ultimate expression of constitutional law when the Fourth Amendment was drafted." The principles laid down in this great case he said,

"apply to all invasions on the part of the Government and its employees of the sanctity 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 Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of 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."

Later on in this part of the opinion, he said,

\footnote{Quoted by Justice Bradley, \textit{id.} at 627.}
"Any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an American. It may suit the purposes of despotic powers; but it cannot abide the pure atmosphere of political liberty and personal freedom."

He then turned to a consideration of whether this was a criminal proceeding, for the fifth section of the act of 1874 expressly excluded production of one's papers in a criminal proceeding. He concluded that actions to forfeit might be civil in form but were "in their nature criminal" and were within the scope of the Fourth Amendment and of that part of the Fifth Amendment protecting a man from being "compelled in any criminal case to be a witness against himself." He closed by pointing out that:

"illegitimate and unconstitutional practices get their first footing ... by silent approaches and slight deviation from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."

A number of things about the decision should be emphasized. In the first place, since this was in form a civil proceeding, the Court could have affirmed the lower court's decision. Instead, however, it leaned over backward to protect the individual's right by holding that the action was in substance criminal. Secondly, it held that compulsory production of a man's private papers to be used against him in a criminal case or to forfeit his property was the equivalent of an unreasonable search and seizure, and hence violated both the Fourth and Fifth Amendments. Of course, there was, technically, no search or seizure at all in this case. The de-

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8 Id. at 632.
9 Id. at 635. Justice Miller and the Chief Justice joined in a separate opinion concurring with Justice Bradley's opinion as to the Fifth Amendment only.
Defendant was ordered to produce his papers and if he did not do so the allegations made by the Government’s attorney in making the motion for the court order would be taken as confessed; if he did produce them and they contained no incriminating evidence, there would be no self-incrimination under the Fifth Amendment. It was the principle involved—that it was contrary to the principles of a free government for the government to invade one’s indefeasible right to personal security, personal liberty and private property—that caused the Court to consider this a violation of both amendments and to make it the duty of the Court to protect these rights.

The next occasion that the Supreme Court had to consider the Fourth Amendment was in 1904 in Adams v. New York. In this case, New York officers had a warrant to search Adams’ office for policy slips used in gambling. The slips were found and also certain private papers not included in the warrant were seized and introduced at the trial to help convict Adams. He objected to the use of the papers that were not included in the warrant on the ground of the Fourth and Fifth Amendments. His objection was overruled, he was convicted, and his conviction was affirmed by the New York Court of Appeals. He then appealed to the U. S. Supreme Court under the 14th Amendment where his conviction was again sustained.

Justice Day spoke for the court in an opinion which because of its confusion almost defies analysis. In the first place there would seem to be an inescapable question of jurisdiction, for, since the Fourth and Fifth Amendments apply only to the National Government, the court could have jurisdiction only if the 14th Amendment made the Fourth and Fifth apply to the States. But the opinion stated that the court did not feel called upon to discuss that question because the court was convinced there “has been no violation of these constitutional restrictions.” Of course, there could have been no violation if they did not apply to the States, and the New York Court of Appeals had taken the position

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192 U.S. 585 (1904).

See J. Day’s explanation below in Weeks case; Justice Holmes in the Silverthorne case where he says admissibility of the evidence was raised for the first time at the trial; while in Hale v. Henkel, Justice Brown said the decision was based on principle of not raising a collateral issue by looking into the method by which evidence was obtained.
that there was no federal question involved for this very reason. This position was also taken by the attorneys for New York before the Supreme Court. But the Court would not say whether the amendments did or did not apply to the States.

After having said there had been no violation of these amendments, Justice Day explained that the question of the admissibility of the evidence was not raised in an attempt "to resist an unlawful seizure of private papers of the plaintiff in error but arose upon objections to the introduction of testimony clearly competent as tending to establish the guilt of the accused." In such cases, he said, "the weight of authority as well as reason limits the inquiry to the competency of the proffered testimony and the courts do not stop to inquire as to the means by which the evidence was obtained," and he quoted a general statement from Greenleaf that a "court will not take notice how they (subjects of evidence) were obtained, whether lawfully or unlawfully." If the Court was going to assume jurisdiction and adopt this rule of procedure, it was not necessary to say whether or not the amendments were violated. But Justice Day seemed to assume that in some mysterious way the manner in which the use of the evidence was objected to had some bearing on whether the amendments had been violated. Apparently he meant that a court should not look into the methods by which evidence has been obtained unless it is forced to do so by the type of the legal action brought, for he went on to say that the "Supreme Court of New York before which the defendant was tried was not called upon to issue process or make any order calling for the production of private papers of the accused, nor was there any question presented as to the liability of the officer for the wrongful seizure or of the plaintiff in error's right to resist with force the unlawful conduct of the officer." It is not easy to see why the protection of a right guaranteed in the Constitution should depend upon the form of action brought if the Court has a duty, as the opinion in the Boyd case said, to protect those rights and especially when as in this case the Court could have protected the right by merely changing a rule of practice.

Further on in his opinion, Justice Day seemed to assume that the papers were legally seized as "incidental" to the execution of

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12 Id. at 594.
a valid warrant, for after he pointed out that stolen goods, instruments of crime, gambling devices, etc., could admittedly be seized with a warrant, he said, "the contention is, that if, in the search for instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration: if a search warrant is issued for stolen property and burglars' tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were not intended to have that effect." This assumption (which he clearly expressed in the Weeks case below) is interesting in view of the fact that the Court of Appeals of New York\(^\text{13}\) assumed that the seizure was illegal but, not having the equivalent of the Fourth Amendment in the State constitution, it followed the rule against raising the collateral issue about how evidence was obtained. Furthermore, any supposed analogy between the seizure of burglars' tools and the seizure of a man's private papers is of course lacking in any legal validity, for according to the reasoning in the Boyd case and in the Entwick case, the seizures of the two items are very different. The individual has no right to have burglar tools in his possession and the Government has a primary right to seize them; in the case of private papers the owner has a primary right to them and the Government has no right to them.

Justice Day made a feeble attempt to distinguish the Boyd case by saying the law there involved "virtually compelled the defendant to furnish testimony against himself . . . and ran counter to both the Fourth and Fifth Amendments. The security intended to be guaranteed by the Fourth Amendment," he said, ". . . is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law acting under legislative or judicial sanction, and to give remedy against such usurpation when attempted. But the English and nearly all of the American cases have declined to extend the doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent."\(^\text{14}\) No cases were cited.

It is difficult to see why the papers in this case were not seized

\(^{13}\) See, People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903). See also, People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

\(^{14}\) Boyd v. United States, 116 U.S. 616, 638 (1885).
under "judicial sanction" if they were seized as "incidental" to the execution of a valid warrant. Whether they were so seized or whether seized illegally, it would seem that the protection which the Fourth Amendment was said to provide was called for unless the Court was willing to ignore a provision of the Constitution which it had held in the *Boyd* case restricted the power of Congress itself. And even though the Court wished to adopt the common law rule and not look into the methods by which the evidence was obtained, it did not need to go further and say that the Fourth and Fifth Amendments were not violated. That is a very different thing from saying it would not look at the methods used in securing the evidence. Saying the amendments were not violated was both unnecessary and, it is believed, unwise. The conclusion seems inescapable that the opinion was confused, badly written, and according to later decisions, incorrectly decided.

The next important case that came before the Supreme Court was *Weeks v. United States*. The defendant in this case was convicted in a federal district court for sending lottery tickets through the mails in violation of a federal statute. State police officers and later a federal marshall entered the defendant's home without a warrant and seized some private letters concerning his connection with the lottery. These letters were used against him at the trial over his objection, made before the trial started and again after the jury was sworn, that the search and seizure were made in violation of the Fourth and Fifth Amendments. Justice Day again wrote the opinion of the Court reversing the lower court and holding the evidence was seized in violation of the defendant's constitutional rights. In dealing with the Fourth Amendment, he referred to its history as set forth by Justice Bradley in the *Boyd* case. He said:

"The effect of the Fourth Amendment is to put the Courts of the United States and federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority and to forever secure the people, their persons, houses, papers, and effects against unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of a crime or not, and the duty of giving to it force

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232 U.S. 383 (1914).
The tendency of enforcement officers to violate rights of persons accused of crime, he said "should find no sanction in the judgment of the Courts . . . to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."17

"The United States marshall could," he continued, "only have invaded the house of the accused when armed with a warrant issued as required by the Constitution upon sworn information and describing with reasonable particularity the thing for which search was to be made." This not having been done, and there having been made a "seasonable application" for the return of the evidence, the opinion held that the accused's constitutional rights had been violated.

Justice Day was faced with his opinion in Adams v. New York, and he said the court below had doubtless relied upon what the government now claimed to be the correct rule as laid down in the Adams case that the Court would not inquire into the methods by which the letters had been acquired. He made a rather unsuccessful effort to distinguish the case. He said that "the decision in that case rests upon the incidental seizure made in the execution of a legal warrant, and the application of the doctrine that a collateral issue will not be raised to ascertain the source from which testimony, competent as a criminal case, comes." A careful reading of the opinion shows that the decision was based largely on the principle that the court would not raise a collateral issue by looking into the method by which competent evidence was acquired, although both principles were mentioned. The New York courts based their decisions on the collateral issue rule, but as will appear this was not the rule followed later by the Supreme Court. Such a view would make a mockery of the Fourth Amendment and of the Court's duty to protect rights under it. In fact, the rule permitting the seizure of articles unnamed in a warrant as being seized "incidentally" to a lawful search would seem also to destroy the provision of the Amendment requiring the warrant particularly to describe the "things to be seized."

16 Id. at 391.
17 Id. at 392.
In 1921, the case of *Gouled v. United States* came before the Court. Gouled and Vaughn were suspected of conspiracy to defraud the government through contracts to supply it with clothing and equipment. One Cohen, a private in the army, attached to the Intelligence Department, having known Gouled, went on instruction from his superior to make what was ostensibly a friendly call on Gouled. While Gouled was out of the office, Cohen seized, without any warrant, a number of papers, later used as evidence against Gouled and over his objection that their use violated the Fourth and Fifth Amendments. Because Gouled did not learn of the seizure of some of the papers until they were introduced at the trial, his objection to their use was not made until after the trial started. The lower court admitted the evidence, but on what ground was not made clear. The Supreme Court, speaking through Justice Clark, held the seizure and use of the papers contrary to the Fourth Amendment. Justice Clark said the objection by Gouled to the use of the papers, "coming as it did promptly upon the first notice the defendant had that the Government was in possession of the papers, the rule of practice relied upon that such an objection will not be entertained unless made before trial, was obviously inapplicable." The Court had pointed out in the *Weeks* case that a "seasonable" demand had been made before trial for a return of the evidence. It did not, however, make this seasonable demand a requirement. He went on to say as to the method by which entrance was obtained,

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures, and if for a Government officer to obtain entrance to a man's house or office by force or by illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, and it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion."\(^9\)

The *Boyd* case, he said, would make this a violation of the Fifth Amendment, also.

\(^{18}\) 255 U.S. 298 (1921).
\(^{19}\) P. 305.
Three other private papers involved in this case had been taken from Gouled’s office under a warrant. Justice Clarke pointed out that the only interest the Government had in the documents as far as the record showed, was to use them as evidence against the defendant, and this could not be done under the Fourth Amendment under the rule in the *Boyd* case.

Two additional questions were raised by the record and considered by the Court. The first was whether evidence legally seized under a warrant charging the defendant with one crime could be used against him for a different offense. Justice Clarke answered that evidence legally acquired could be used in connection with any crime. The second question was whether, when papers had been seized as evidence and before trial a motion to have the evidence returned had been denied by the judge, later a trial court under a different judge is bound to consider the method by which the papers were obtained when they are offered in evidence and objected to. Justice Clark said it was plain the trial court had acted on the principle that a court will not stop to inquire how relevant evidence has been acquired. This rule was, though, a rule of procedure to be applied according to circumstances. We think rather, he said, “that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.”20 This, of course, is exactly the opposite of the position taken by the Court in *Adams v. New York* above, and seems clearly to have overruled that case without the Court’s saying so.21 This case also makes clear that an objection to the use of illegally seized evidence does not necessarily have to be made before trial. These cases following the *Adams* case, show an increasing respect on the part of the Court for individual rights and a greater willingness to use its power to protect them.

20 pp. 312, 313.

21 Justice Day, who wrote the opinion when the *Adams* case was still on the Court, seems not to have dissented in either the *Gouled* or *Amos* case.
Soon after the Gouled case, the decision in Amos v. United States was handed down, involving again the principle of the Adams case. In the Amos case agents of Internal Revenue without any warrant went to Amos' home (that had a store room attached) and told his wife that they were government officers and had come to search the premises for untaxed liquor. She let them in, and they found some untaxed liquor in the store room and some in the house. At the trial, after a jury was sworn, defendant petitioned the court to have the evidence returned to him because the officers had no warrant for his arrest or to search his house. The petition was overruled. Later in the trial, after the government agents had testified, counsel for the defendant made a motion to have their testimony stricken from the record because it was based on evidence obtained in violation of the Fourth Amendment. The motion was denied. The government argued on appeal that the first motion was made too late in the proceedings and that the second was governed by the rule laid down in Adams v. New York that the court will not during a trial open a collateral question about the method by which evidence was obtained. Justice Clarke, speaking for a unanimous court, said, "Plainly the questions thus presented for decisions are ruled by the conclusions in the Gouled case. The first petition should have been granted, but it having been denied the motion should have been sustained." "We need not consider whether it is possible for a wife, in the absence of her husband . . . to waive his constitutional rights, for it is perfectly clear that under the implied coercion here presented no such waiver was intended or effected," he said.

In the case of Burdeau v. McDowell, the Court was presented with the question whether evidence seized illegally by private persons could be used by the Government. Private parties representing a former employer of McDowell broke into his office and carried away some of his papers turning them over to Burdeau, a special assistant to the Attorney General, who was going to use them in an effort to indict McDowell. McDowell petitioned the district court to have them returned because they were seized in

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255 U.S. 313 (1921).
26 p. 317.
24 256 U.S. 465 (1921).
violation of the Fourth Amendment. Justice Day again wrote the opinion holding that "the Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies." He then pointed out that no official had participated in the wrongful seizure of the petitioner's property but "whatever wrong was done was the act of individuals in taking the property of another. . . . We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances herein disclosed, but with such remedies we are not now concerned."\(^{25}\) Justice Brandies (with Justice Holmes concurring) dissented. He pointed out that an officer of the law received the papers, knowing them to have been stolen, to use them against the owner, that the court had control over the papers, and that it would restore them if they were still in the hands of the thief. Although the Constitution might not require their return, he said:

"Still I cannot believe that action of a public official is necessarily lawful, because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty, insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

This case marks the beginning of a division in the Court as to the application of these rules where human rights were involved. With the advent of National Prohibition, many difficult and technical questions came before the Court involving adjustments between the rights of the individual and the demands of government.

The application of the Fourth and Fifth Amendments to
corporations during the period covered by the above cases caused the Court some difficulty when Congress entered the field of regulating interstate commerce. In *Interstate Commerce Commission v. Brimson*, the Court sustained the power of Congress to authorize the Commission to require testimony before it and the production of books and papers of the corporations subject to its control. The constitutionality of the grant of power to the Commission to require the production of a company's books and papers was not actually raised but in deciding the case the Court said in a dictum:

"It was clearly competent for Congress to invest the Commission with authority to require the attendance and testimony of witnesses and the production of books, papers, tariffs, and contracts, agreements and documents relating to any matter legally committed to that body for investigation."  

In the later case of *I. C. C. v. Baird*, the Court did have before it the constitutionality of the power of the Commission to compel testimony and the production of books and papers in the light of the Fourth and Fifth Amendments. But Congress had in 1893 passed a statute which provided immunity from punishment for persons for testimony given before the Commission. Justice Day, in the opinion of the Court, pointed out that the statute protected the individual from self-incrimination under the Fifth Amendment and that, according to the *Boyd* case, the Fourth and Fifth Amendments meant practically the same thing. "Testimony given under such circumstances," he said, "presents scarcely a suggestion of an unreasonable search and seizure. Indeed, the parties seem to have made little objection to the inspection of the papers, the contest was over their relevancy as testimony."  

In *Hale v. Henkel* a subpoena duces tecum was issued ordering Hale, secretary of a corporation under investigation for alleged violation of the Anti-Trust Law, to appear before a federal grand jury to testify and to bring certain documents of the company. Hale refused and was cited for contempt and appealed to the Supreme Court. One ground of his defense was the Fourth

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*154 U.S. 447 (1894).*  
*26*  
*94 U.S. 25 (1903).*  
*p. 46.*  
*201 U.S. 43 (1906).*
and Fifth Amendments. His appeal was denied. Justice Brown, speaking for the majority of the Court, cited the immunity statute of 1893 to answer the argument involving the Fifth Amendment. He discussed the Fourth and again pointed out that in the Boyd case the two amendments were considered as running together. Subsequent cases, he said, had treated them as distinct and as having separate functions. He went on to say, "We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence." Continuing he made a distinction "between an individual and a corporation" and said, "The latter has no right to refuse to submit its books and papers for an examination at the suit of the State. The individual may stand upon his constitutional rights as a citizen." This distinction was based on the theory that, "the corporation is a creature of the State," "presumed to be incorporated for the benefit of the public," receive "special privileges and franchises, and holds them subject to the laws of the State." "It would be a strange anomaly," he said, "to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose."31 After having taken that position, however, he went on to say that he did not want "to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment against unreasonable searches and seizure. A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body, it waives no constitutional immunities appropriate to such body."32

He then examined the subpoena here used and found it "far too sweeping in its terms to be regarded as reasonable," the number and variety of documents called for was entirely too great.

The reasoning was not entirely clear, but what it seemed to amount to was that a corporation was in a slightly different position from an individual in claiming the protection of the Fourth

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31 p. 75.
32 p. 76.
Amendment since it owed its life and privileges to the State; but at the same time for the State to require it to produce its records for use as evidence against it, the procedure employed had to be within the bounds of reason—judicial reason.

In the case of Willson v. United States, a contempt citation against Willson as president of the corporation for failure to obey a subpoena duces tecum directed to the corporation itself, was upheld and Willson was required to produce the papers even though they might contain matter incriminating him personally. After considering other questions raised in the case, Justice Hughes said, "nor was the process invalid under the Fourth Amendment. The rule laid down in the case of Boyd v. United States is not applicable here. . . . Possessing the privileges of a legal entity and having records, books and papers, it is under a duty to produce them when they may properly be required in the administration of justice." He went on to say "there is no unreasonable search and seizure when a writ, suitably specific and properly limited in scope, calls for the production of documents which as against their lawful owner to whom the writ is directed, the party procuring its issuance is entitled to have produced."

Here again, as in Hale v. Henkel, the Court takes the view that a corporation's papers may be seized and used if the order for seizure is "reasonable", "specific", and "limited" in scope, and also we see the view again expressed that because a corporation enjoys special privileges it is in a slightly different position—a less favorable position—than is an individual in claiming protection under the Fourth Amendment.

In 1920, in Silverthorne Lumber Co. v. United States, the Court had before it a clear case of illegal seizure by federal officers without a warrant of written material from the office of the company. Copies were made of the documents and, after the originals had been returned under court order, the evidence illegally seized was used to subpoena the originals for use by the grand jury. The company refused to obey the subpoena, and its refusal was upheld. Justice Holmes, speaking for the majority of the Court said, in

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22 221 U.S. 361 (1911).
23 375.
24 376.
25 251 U.S. 385 (1920).
effect, that the rule of the *Weeks* case could not be evaded by taking two steps instead of one. "The essence," he said, "of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all." On the question of whether a corporation was entitled to the protection of the Fourth Amendment, he said,

"In *Linn vs. United States* (1918, 251F476), it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

The above case was followed in 1924 by the case of *Federal Trade Commission v. American Tobacco Company.* In this case, the Commission had petitioned the Federal District Court for a mandamus to compel the Company to submit records, contracts, memos, and correspondence for inspection to enable the Commission to prepare a report for the U. S. Senate in response to a Senate Resolution calling for such report. Section 6 of the Federal Trade Commission Act authorized the Commission "to require reports and answers under oath to specific questions, furnishing the Commission such information as it may require" on the subjects under the Commission's control. The lower court refused the mandamus, and was supported by the Supreme Court. Justice Holmes, writing the opinion for the Supreme Court said the Commission claimed an unlimited right to papers. But, he said, "The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence." "A general subpoena in the form of these petitions would be bad," he continued, because "Some evidence of materiality of the papers demanded must be produced," citing *Hale v. Hendel.* "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public," he concluded. He refused to discuss the question of whether Congress could authorize a general fishing expedition for evidence, for "nothing short of the most explicit language

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27 p. 392.
28 298 U.S. 303 (1924).
would induce us to attribute to Congress that intent." "It is con-
trary to the first principles of justice," he concluded, "to allow a
search through all the respondent's records, relevant and irrele-
vant, in the hope that something will turn up." Here nothing
is said to the effect that a corporation is in any different position
from an individual in regard to the protection of the Fourth
Amendment, but the rule in the Wilson case that a corporation's
papers could be subpoenaed and used against it if and when the
subpoena was reasonably specific and limited, was not disavowed.
Justice Holmes merely refused to assume that Congress intended
to authorize the Commission to engage in a general fishing expedi-
tion for evidence and denied the Commission's authority to order
the production of documents generally without regard to whether
they were relevant as evidence or not. The clarification of the
extent to which a corporation could claim the protection of the
Fourth Amendment had yet to be worked out.

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39 p. 306.