INDEX

CASES CITED

MAin 2279
94 Spring St.
Seattle, Wash.

Nos. 493, 532, and 533

In the

Supreme Court of the United States

October Term, 1927

ROY OLMSTEAD, JERRY L. FINCH, CLARENCE G. HEALY, CLIFF MAURICE, TOM NAKAGAWA, EDWARD ENGDAHL, MYER BERG, JOHN EARL, and FRANCES RICHARD BROWN, Petitioners

vs.

UNITED STATES OF AMERICA

CHARLES S. GREEN, EMORY A. KERN, Z. J. HEDRICK, EDWARD ERICKSON, WILLIAM P. SMITH, DAVID TROTSKY, LOUIS O. GILLIAM, CLYDE THOMPSON, and B. G. WARD, Petitioners

vs.

UNITED STATES OF AMERICA

EDWARD H. McINNIS, Petitioner

vs.

UNITED STATES OF AMERICA

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

Petition for Rehearing

PETITION FOR REHEARING

Come now the petitioners, Roy Olmstead, Jerry L. Finch, Clarence G. Healy, Cliff Maurice, Tom

Nakagawa, Edward Engdahl, Myer Berg, John Earl, and Francis Richard Brown (in cause No. 493), and Charles S. Green, Emory A. Kern, Z. J. Hedrick, Edward Erickson, William P. Smith, David Trotsky, Louis O. Gilliam, Clyde Thompson, and B. G. Ward (in cause No. 532), and Edward H. McInnis (in cause No. 533), and joining herein for the purpose of petitioning this court for a rehearing, respectfully ask of this court a rehearing as to the matters and things contained in the decision of this court filed herein on the 4th day of June, 1928, and as reasons therefor they respectfully urge and show:

The record, as limited by the order for certiorari, presents this question: May *government agents*—e. g., national prohibition agents—interpose a "tap" upon the private telephone wire of a citizen of this country, listen in to conversations passing over such wire, and upon trial use the evidence so obtained to convict such citizen of crime; or, is the evidence so obtained and used obtained and used in violation of the rights, privileges and immunities of such citizen vouchsafed him by the Fourth and Fifth Amendments to the Constitution of the United States?

In answer to this question there have been five opinions filed, one by a bare majority of the court answering the question in favor of the practice, and

four different and distinct dissenting opinions by as many different members of the court.

It seems to us that this case would be easy of determination, and the decision would approach nearer unanimity, were the case approached from the proper angle. The first determinative subject for consideration is not this case at all. The subject not only of primal but decisive importance is a reconsideration of the *Boyd* case, mentioned so many times in the decision. The reason lies in the fact that this case is ruled absolutely by the *Boyd* case. If the law as laid down in that case is to remain the law of this court, then this case must be reversed. If, on the other hand, this case is to be affirmed, then the *Boyd* case perforce must be written out of the books. This case is *not* one of "search and seizure." This case is *not* ruled by the Fourth Amendment, standing alone, nor in conjunction with the Fifth Amendment. But this case *does* come within application of the Fourth and Fifth Amendments *as those amendments have been amplified by this court in the Boyd case.* The *Boyd* case was not one of "search and seizure," either, but in that case was enunciated a doctrine of "stealthy encroachments" upon the Fourth and Fifth Amendments, a doctrine designedly laid down to amplify those amendments so as to encompass the intent and spirit of the framers

of, and a doctrine designedly meant by the court to cover *for all time all* cases of the character of this one. This case comes within that doctrine. Whether that doctrine still lives or it doesn't, is the question before the court; and the decision of that question is perforce the decision of this case. But to dwell upon "searches and seizures," and to compare this case with cases of "search and seizure," is not to convince but only to confuse. Because such is the conviction of the writer, and because all that can be said for this case was said and decided in that case, and because a careful reading and rereading of the various opinions filed by the members of this court fail to reveal any single member of the court entertaining the same view of the *Boyd* case that the writer does, we beg the patience and indulgence of the court while we analyze that case.

The *Boyd* case was one on the civil side of the docket—not a criminal case. It was an action begun by way of information to forfeit thirty-five cases of plate glass seized by the collector of customs in the southern district of New York for an alleged violation of the customs laws. Boyd became the claimant to the goods. For reasons sufficient unto that case it became important to show the quantity and value of glass in twenty-nine cases previously imported. To do this the district attorney offered in evidence an

order, in form a notice, made by the district judge directing notice under seal of the court to be given to the claimant, requiring him to produce the invoice of the twenty-nine cases. This order or notice was a procedure provided for by section 5 of the same act upon which the information itself was planted, which section provided as a penalty for the non-compliance with the order, or notice, that the moving papers upon which the same was founded should be taken as confessed. The claimant, in obedience to the notice, but objecting to its validity and to the constitutionality of the law which sponsored the notice, produced the invoice; and when it was offered in evidence by the district attorney he objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from a claimant himself, and also that the statute, so far as it compels production of evidence to be used against a claimant, is unconstitutional and void. Judgment having gone against the claimant, the proceedings were brought to this court for review. The judgment of the lower court was reversed, this court, through Mr. Justice Bradley, handing down a decision "that will be remembered as long as civil liberty lives in the United States," a decision well worth a critical re-examination at this time.

In the majority opinion filed herein this court, in its analysis of the *Boyd* case, says: "The statute provided for 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 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."

We respectfully urge such to be a gross misconception of the *Boyd* case, and of the statute that gave it birth. Herein lies the error of the court. The point being so vital, we deem it necessary to reprint section 5 of the statute verbatim:

"Sec. 5. In all suits and proceedings other than criminal arising under any of the revenue laws of the United States, the attorney representing the government, whenever in his belief any book, invoice or paper belonging to, or under the control of, the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice or paper in court, at a day and hour to be specified in such notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy

of, or otherwise serving the same as original notices of suit in the same court are served; and if the defendant or claimant shall fail or refuse to produce such book, invoice or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant, or claimant, or his agent, may be present) of such entries in said book, invoice or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid."

18 Stat. 187 (Copied from *Boyd* case, p. 639.)

Please note, that the statute permitted *no search* and *no seizure*; and *no use* of the document, unless the defendant were *willing* to produce it in response to the notice. The notice followed strictly the statute, and the statute provided only that the defendant might be notified to *produce the paper in court.* It provided for no search. It provided for no seizure. Indeed, not even *inspection* could be had before it be produced, if at all, in court. All the order *could* recite, following the statute, was to produce the paper in court. It could not and did not ask, much less demand, inspection. And the defendant need not obey

the order, either, if he saw fit not to do so. Though the order, or notice, was solemn in form, and under seal of the court, and directed him, with no alternative, to produce it in court, yet if he failed to obey no contempt would lie. He could neither be jailed nor fined for a failure to obey, because the statute had fixed the penalty, and the penalty so fixed was that the moving papers should be taken as confessed. Even if he should produce the paper in court, still no action could be taken that would squint at a seizure, for the act punctiliously provided that even on that occasion the custody of the paper should be and remain in the *defendant or his attorney.* ("But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in the court as aforesaid.")

So far from being "no strain at all," as said by the court, it would have been an impossible straining of the language to have brought such facts within the wording of the Fourth Amendment, and the entire personnel of the court deciding the *Boyd* case recognized and admitted such fact. As said by Mr. Justice Miller in a dissenting opinion concurred in by the Chief Justice, "If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he choses is a search, then

a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the Constitution was made. The searches meant by the Constitution were such as led to seizure when the search was successful. But the statute in this case uses language *carefully framed* to forbid any seizure under it, as I have already pointed out." And said the majority: "Reverting then to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and *neither*, therefore, *within the literal terms* of the Fifth Amendment to the Constitution any more than it is *within the literal terms of the Fourth.*" The *Boyd* case, then, was *not* one of "search and seizure." The court was unanimous upon that point, and to determine the case must and did look to principles outside the law of "search and seizure." For this court now to proceed upon the theory that the *Boyd* case was one of search and seizure is to plant the argument upon false premises.

What then *was* the *Boyd* case, and upon what principles was it decided?

In view of the point we are making, "the concrete form of the case with its adventitious circumstances" is of no moment. What we want the court to understand is that the *Boyd* case, in its final analysis, presented the same question that is presented in this case; that this case presents nothing new for decision; that the controversy within the court today is the controversy that was within the court that day. In that view the *Boyd* case, like the present one, presented an instance of governmental aggression upon the personal liberty and security of the citizen, with the object in view of obtaining from the citizen himself the evidence to be used to forfeit his property or convict him of crime. The question was then, and is now, resolved into one of constitutional aspect—do the Fourth and Fifth Amendments apply?

When this question is proposed it is at once apparent that neither case is a case of "search and seizure," as those words are usually employed in legal parlance, and no amount of argument will make them such. But the very question brings home to the student of history a realization of the fact that the framers of the amendment, though they had in mind the idea of governmental aggression in gathering evidence as the dominant thought, had used language far too restrictive to cover all cases of such. The question then arises, can the amendment be

changed to meet all such cases? Now, there might be good cause for divergence of opinion on the point were the question a new one today, but the point we are bringing to the attention of the court, and which seems to have gone unnoticed, is that that very point arose in the *Boyd* case, and in that case the amendment *was changed*; that is to say, the literal wording of the amendment was enlarged to encompass the *intent* of the framers thereof, so that in the future it should be interpreted to apply to "all invasions of the right of privacy" while gathering evidence. Nay, more, that it was the thought of the court to lay down a rule whereby, in the future, when a case like the present arises, all that would be necessary for the guidance of the bar and courts would be to draw upon the *Boyd* case.

How do we know all this? How do we know *the intent of the court*? We know it from the fact that such was the only excuse the court had for touching the Fourth Amendment at all! The Fourth Amendment was not necessary to the decision of the *Boyd* case. It was not only unnecessary, but the determination to employ it is what occasioned the division within the court! The entire court was agreed that the decision of the lower court should be reversed. All agreed that the case presented facts obnoxious to the *Fifth* Amendment; which fact alone would

reverse the case. The Fifth Amendment condemns making a man a witness against himself in a criminal case. The statute upon which the proceedings in the *Boyd* case was founded excepted criminal cases from its operation, it is true; but the entire court agreed that a proceeding to forfeit one's property was sufficiently criminal in its nature to come within the condemnation of that amendment. Then why not stop there? Was that not decisive? If the amendment lays down the rule, "The government may not compel one to become a witness against himself in a criminal case"; and the government then says to one, "Take the stand and become a witness against yourself in this criminal case"; could there be a more positive and direct violation of the rule? Read the dissenting opinion, please, and note how readily the case is ruled by resolving it in terms of the Fifth Amendment only. The majority and the minority were in accord thus far, and the case resting there would have been reversed unanimously. Then why go further? Why split the court by bringing in the *Fourth* Amendment, the one relating to unreasonable searches and seizures? Could serving one with a notice to produce a paper in court—a subpoena *duces tecum*, nothing more and nothing less, though the penalty provided for failure to obey the one be different from the penalty provided for failure

to obey the other—be made "search and seizure" within the literal meaning of those words? Not in a thousand years! Then why bring into the case the Fourth Amendment? We have already answered the question. The court, having had brought to its attention the deficiency in the literal wording of the amendment, would seize the occasion to enlarge such wording so as to encompass the intent of the framers; and further, to put the question at rest *for all time* it would lay down a rule of construction for the guidance of the courts in all future cases of similar character, as we shall presently see.

In order to show the spirit underlying the amendment the court delved into history treating of those governmental aggressions of the past that had been perpetrated in a quest for evidence. It showed the evils that had prevailed in England from the use of the general search warrants; and those suffered by the colonists where their counterpart, the writs of assistance, drove such colonists to distraction. It cited the famous Wilkes controversy with the British government growing out of the government's search of his house and seizing of his papers for evidence, which resulted in Wilkes suing and obtaining judgment against the secretary of state who caused the seizure. The court then adverted to the case of *Entick v. Carrigan*, decided by Lord Camden, which

nullified the power for evil in the general search warrants and settled the law of search and seizure in England for all time. It declared that the Fourth Amendment had been formulated with Lord Camden's decision in the minds of the framers, and thus made the decision a part of such amendment. The court then proceeded to quote that decision at great length, and treating the principles it laid down as its own expression of the law of this country, said:

"The principles laid down in this (Lord Camden's) opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; *they apply to all invasions*, on the part of the government and its employes, *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 the offense; *but it is the invasion of his indefeasible right of personal security, 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 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.*" (All italics ours.)

To enable it to write this paragraph, so as to make clear for all time that the Fourth Amendment condemns any and all invasions of the rights of privacy,

by any governmental agency, while such agency is on a quest for evidence alone, is the only excuse the court had for employing the Fourth Amendment in the *Boyd* case at all. The court was divided on the question that day, just as it is divided on the same question today, but SO IT WAS WRITTEN! Your Honors are now threshing over the same ground, *without noting* that the question was once settled. Your Honors would now differentiate the *Boyd* case, and in the attempt so to do speak in terms of "search and seizure." That only confuses. The *Boyd* case was not "search and seizure"—no more than this case is.

But not content with construing the amendment to embrace the intent of the framers thereof, the court in the *Boyd* case would lay down the rule of construction for the future, to be applied to all cases of trespass where the trespassers are government agents bent only on a quest for evidence. It ended its decision (except for some observations directed at some stray cases thought to be at variance with the decision) thus:

"Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight

deviations 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 encroachments thereon.* THEIR MOTTO SHOULD BE *OBSTA PRINCIPIIS.*" (Italics and capitals ours.)

Now, that, Your Honors, is what the *Boyd* case was, and such were the principles employed to decide it. But let us examine it a little further.

"The motto of the courts should be '*obsta principiis.*' "

We trust our Latin does not fail us when we translate it, "the motto of the courts should be, 'stop (these things) in the beginning.' " Stop what things? Stop these "stealthy encroachments" upon this amendment (the Fourth). But that prompts again the question, What is a "stealthy" encroachment? We all know what a plain encroachment is. A plain encroachment upon the amendment is a violation of it; and a violation of it is an encroachment upon it. But what is a "stealthy" one? What else can it be but a violation that comes not within the literal wording of the amendment but violates the spirit of it? Then if we go farther still and ask why these

tions, the *Boyd* case itself has the answer for us—that we may have left substance, not sound alone.

What we assert now is this, as we said in the beginning: The decision handed down in this case can not stand with the *Boyd* case. The two are irreconcilable, and one or the other must give way. But the question before the court should be approached through the *Boyd* case, because there the present controversy first arose, and was settled; there the wording of the Fourth Amendment was enlarged to embrace the intent of its framers; there a doctrine of "stealthy encroachment" was promulgated to meet just such cases as this. And if the *Boyd* case be re-examined, the decision whether it shall stand or be discarded will perforce decide this case.

Shall the *Boyd* case stand, or shall it be reversed? Shall the motto of the court remain "*obsta principiis*," or shall we have a new one, and what shall it be?

Should the court take up the question, it is only fair to say that there are two other cases among the decisions of the court that stand or fall with the *Boyd* case. The doctrine of "stealthy encroachment" has been carried forward. *Silverthorne Lumber Company v. United States*, 251 U. S. 385, is one of them. This is the case, referred to in the court's opinion, where the defendant had refused to obey a

subpoena *duces tecum*. That was not a case of search and seizure, but it was ruled nevertheless by the Fourth Amendment. It instanced a stealthy encroachment, because the knowledge used in enumerating the items called for in the subpoena had been gained by an unlawful search and seizure. Later came the case of *Gouled v. United States*, 255 U. S. 298, where a party in the employ of the intelligence department of the United States Army, under the guise of a social call, had surreptitiously taken a paper from the office of the defendant, and the government later introduced the paper upon the trial. That was not search and seizure, either, but it was ruled by the Fourth Amendment. How firmly the "amendment" of the Fourth Amendment, and the doctrine of "stealthy encroachment" had taken hold of the minds of the court by this time is best shown by quoting from the *Gouled* case:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; in Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable

to the 'full enjoyment of personal security, personal liberty, and private property,' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers."

Even as late as January, 1927, when the court decided the case of *Byars v. United States*, 47 Sup. Ct. Rep. 248,—which *was*, it is true, a search and seizure case—the same thought seems to have been uppermost in the minds of the court when it ended the decision thus:

"The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

The path blazed by the *Boyd* case has been travelled frequently enough and for a sufficient length of time to acquire the character of a well-trodden road. The guide-post first set along the way has proven

ficient for the purpose. No reason is apparent why a barrier be now erected across the way and such guide-post removed.

This case instances a gross *trespass*, having for its object the *attainment of evidence*—and the trespass was perpetrated by *governmental agencies*. These are the elements of the offense condemned by the Fourth Amendment, in the view of the *Boyd* case.

Obsta principiis!

In granting the order for certiorari the court limited the discussion to the telephone question. Though feeling that the court in so doing had grievously, though unconsciously, wronged the petitioners, all of them have kept the faith. And unless the court shall of its own motion right that wrong and permit of other matters being urged, we have decided to remain silent. Should, however, the court deem this petition to have merit, and another hearing had, we hope Your Honors may see fit to lift the ban and permit of at least two other matters being urged which the petitioners deem of equal importance in the orderly administration of law with the ones discussed, which matters were hinted at by Judge Rudkin in his dissenting opinion, though he thought they were of no "great public importance."

For the reasons stated, it is respectfully urged that this petition for rehearing be granted, and that the judgment of the Circuit Court of Appeals for the Ninth Circuit in these cases be reversed.

Respectfully submitted,

JOHN F. DORE,
FRANK R. JEFFREY,
ARTHUR E. GRIFFIN,
Atorneys for Petitioners.

CERTIFICATE OF ATTORNEY

I, Frank R. Jeffrey, one of the attorneys for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated June 21, 1928.

FRANK R. JEFFREY,
Attorney for Petitioners.