

FOURTH AMENDMENT FORUM

BY MILTON HIRSCH AND DAVID O. MARKUS

The Classics — an occasional series

It is the business of this column to keep readers of *The Champion* informed of new developments in the law of search and seizure. On rare occasion, the attention of legislatures and the judiciary is elsewhere, and there are no new developments in this area of the law. Such a lull in the action affords us the opportunity to reflect admiringly on old Fourth Amendment developments. The present column is the first in an occasional series. "The Classics" will rehearse the facts and holdings of some of the landmark cases in American Fourth Amendment history, with a view to reminding us all of what are, or should be, the enduring principles of those cases.

Ask a present-day lawyer or law student when the United States Supreme Court first started hearing Fourth Amendment cases and he's liable to be stuck for an answer. Ask him to guess and he's liable to assume that the Supreme Court has been cranking out Fourth Amendment jurisprudence since first Chief Justice John Jay opened the Court for business. Nothing could be further from the truth. Hard as it may be to believe, a century of American history passed — nearly half of our national history to date — before the Supreme Court had occasion to interpret the Fourth Amendment. In 1886, *Boyd v. United States*¹ became "the very first Fourth Amendment case of any consequence to reach the Supreme Court."² Just as importantly, it was "[t]he first [Fourth Amendment] case associated with the development of the exclusionary rule."³

Before *Boyd*

Unfortunately, the exclusionary rule did not always exist. In the words

of an oft-cited early American case discussing the common law:

If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the [things] seized as evidence, if they were pertinent to the issue, as they unquestionably were. When [something is] offered in evidence, the court can take no notice of how [it was] obtained, whether lawfully or unlawfully.⁴

Curiously, a vestige of this doctrine persists in American law today. If the federal government commits a kidnapping to obtain custody over the person of a Central American head of state (in the process committing a variety of other crimes and, arguably, acts of war), the court will not suppress or exclude the person of the kidnaped defendant, nor even inquire as to the illegality that brought that defendant before the court.⁵ The common law saw the two situations as analogous if not identical: before the court were both the defendant and the evidence against him; the latter did, or did not, prove the case against the former; how either got before the court was of no concern.

If anyone could try to justify the common law rule, it was John Henry Wigmore. In his monumental treatise on the law of evidence, he states:

Necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods. An employer may perhaps suitably interrupt



the course of his business to deliver a homily to his office-boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offenses which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law. It offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the next place, by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it. It offends, further, in that it does this unnecessarily and gratuitously; for since the persons injured by

the supposed offense have not chosen to seek proper process, there is clearly no call to attend to their complaint in this indirect and tardy manner. . . .

For these reasons, it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored.⁶

It was against this doctrinal background that *Boyd* came before the Supreme Court.

Boyd itself

In *Boyd*, the government initiated a forfeiture proceeding against two New York businessmen for importing 35 cases of plate glass in violation of import and revenue laws. During the course of the civil forfeiture trial, the government issued a subpoena for invoices for the plate glass in order to prove its value and quantity. Apparently under the terms of statute pursuant to which the forfeiture was instituted and the subpoena issued, failure to produce the demised invoices would entitle the government to treat its averments as conceded. The claimants produced the invoices, but on appeal alleged that the compelled production violated the Fourth and Fifth Amendments. The High Court agreed and excluded the documents, marking the beginning of the exclusionary rule.

But *Boyd* was an unlikely place to begin the jurisprudence of the Fourth Amendment. “From the facts, it is hard to find a Fourth Amendment issue in the case; there was no search or seizure — at least, given the modern view of that amendment.”⁷ *Boyd* was not even a criminal case, no police were involved.

The Court’s opinion was authored by Joseph P. Bradley. Justice Bradley had attended Rutgers College, graduated in 1836, and “read law” in a lawyer’s office. He was admitted to the New Jersey bar in 1839, and practiced till his appointment to the High Court by President Grant in 1870. He was a student of mathematics, surveying, and other mechanical subjects, all of which stood him in good stead in a law practice that emphasized railroad cases and patent law. He was perhaps best remembered during his own lifetime for casting the deciding vote on the commission that settled the disputed

(and fraud-plagued) presidential election of 1876 between Rutherford B. Hayes and James Tilden. He had been heavily lobbied by friends and colleagues who were Democratic supporters of Tilden, and it was thought that they had his ear. Legend has it, however, that the night before the final vote Mrs. Bradley, a confirmed Republican and a lady not to be trifled with (least of all by her husband, Supreme Court Justice or no), had the last word. In any event, Bradley’s support for Hayes the next day decided the matter. Bradley was liked and respected, but he was an unlikely candidate to be a Fourth Amendment revolutionary.

Support in history

But Justice Bradley’s views on the Fourth Amendment, and the language in which he expressed those views, were revolutionary enough. As noted earlier, there was, on the facts of *Boyd* no search and seizure as those terms are understood today. In fact, much of *Boyd* especially the fusing together the Fourth Amendment and the Fifth Amendment’s Self-Incrimination Clause as support for the exclusionary rule, is no longer endorsed.

Nevertheless, the underlying principle still has a great deal of appeal: “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 . . . in all cases in which a search and seizure would be; because it is a material ingredient, and affects the sole object and purpose of search and seizure.”⁸ For support, the *Boyd* Court went to great lengths to examine the history underlying the Fourth Amendment, including going into some depth about Lord Camden’s memorable discussion of the subject in *Entick v. Carrington and Three Other King’s Messengers*.⁹

The Court also explained that the 1761 debate over the legality of the writs of assistance sparked the resistance of the colonies against the oppressions of Britain: “The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book; since they placed the liberty of every man in the hands of

every petty officer.”¹⁰

In addition to Otis and Lord Camden, Bradley cited to John Adams’ take on the debates concerning the writs of assistance: “‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”¹¹

Best remembered portion

Boyd can be credited for explaining that the principles embodied in the Fourth Amendment apply to these types of governmental invasions into one’s private life. The following passage from *Boyd* is perhaps the best-remembered portion of the opinion:

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. . . . 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.¹²

Then and now

If, then, the visitatorial process employed in *Boyd* was the equivalent of a search and seizure, was it an unreasonable search and seizure for purposes of the Fourth Amendment? Nowadays, of course, “reasonableness” is a measure of the manner in which a search was conducted: Was there a warrant? Was any detention limited in its intrusiveness? And so on. For Justice Bradley, however, “reasonableness” turned not upon the manner of the search or seizure, but upon the nature of the thing searched for or seized. A search for contraband, or for stolen property, would likely be reasonable. The party in possession of the contraband or stolen property has no real claim to it; the government (as to contraband) or the true owner (as to stolen property) has. Search for and seizure of such property, if undertaken pursuant to the procedural protections of the common law (which was understood to require a

particularized warrant, issued upon oath) was necessarily reasonable. By contrast, a man's business papers are not only his lawful property, but also his private, perhaps intimate property.

The notion that Fourth Amendment reasonableness turns, not upon how the search was conducted, but upon the quality of the object sought and the level of deference afforded by the law to the proprietary or possessory interest asserted as to that object, strikes the modern reader as odd. But it had deep common law roots, and a vestige of it is to be found in the "mere evidence" rule that formed part of the jurisprudence of search and seizure as recently as a few decades ago.¹³

In siding with the *Boyd* claimants, the Supreme Court did not purport to be announcing a new constitutional rule or remedy; and of course it made no reference to anything called an "exclusionary rule." "In *Boyd* exclusion was a by-product of the Fifth Amendment's ban on compulsory testimony; therefore, only testimonial evidence such as papers or books — and not contraband, such as drugs or guns — had to be excluded."¹⁴ Such a slender reed seemed a poor and evanescent foundation upon which to build a constitutional jurisprudence. And indeed in the years after *Boyd* many courts continued to proclaim the common law doctrine that the law did not concern itself with the illegal means by which evidence came before courts.¹⁵ Even the Supreme Court, when called upon two decades later to develop the jurisprudence of the exclusionary rule, seemed to handle *Boyd* like a hot potato. In *Adams v. New York*¹⁶ the Court, having stated uncomfortably that *Boyd* "has been frequently cited by this Court and we have no wish to detract from its authority"¹⁷ proceeded to rehash the common law doctrine that the illegal means by which evidence was obtained gave rise to no objection to its admission.

Conclusion

Justice Bradley died in harness in 1892, and thus was not on the Court when *Adams* came before it. But he had foreseen the constitutional backsliding that was sure to come, and he had built the rebuttal into *Boyd*

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.¹⁸

Boyd is rightly credited with being the genesis of the exclusionary rule. Thankfully, the Supreme Court did not stop with *Adams* and in its next major case concerning the exclusionary rule, *Weeks v. United States*,¹⁹ the Court relied only on the Fourth Amendment to suppress letters seized from petitioner's home, assuaging the fear that the Fifth Amendment needed to play a part in the exclusion of evidence. Justice Holmes solidified Justice Bradley's premise of the exclusionary rule in *Silverthorne Lumber Co. v. United States*, explaining that without the exclusionary rule, "[t]he Fourth Amendment [would be reduced] to a form of words."²⁰ But these developments are best considered in future installments of *The Classics*.

Notes

1. 116 U.S. 616 (1886).

2. Wayne R. LaFave, *TWO HUNDRED YEARS OF INDIVIDUAL LIBERTIES: ESSAYS ON THE BILL OF RIGHTS: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures?* 1991 U. ILL. L. REV. 729, 764. There had been earlier Supreme Court cases making reference to the Fourth Amendment. Thomas Davies, in his excellent article *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 at n.174 (1999), addresses some of these cases, but *Boyd* was the first of real consequence and the first to deal with the difficult issue of remedying a Fourth Amendment violation:

For Supreme Court decisions that referred to the Fourth Amendment, see: *Ex parte Burford*, 7 U.S. (3 Cranch) 447, 450-51 (1806), in which the Marshall Court ordered the release of a man in a habeas corpus

proceeding who had been imprisoned by the justices of the peace of the District of Columbia for being "an evil doer and disturber of the peace" (the Court quoted the warrant clause of the sixth Article to the Constitution (the Fourth Amendment) while reminding the justices of the peace that a warrant of commitment to prison could be issued only upon a conviction for a recognized crime); *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75, 110 (1807), in which the Marshall Court in a habeas corpus proceeding, during which counsel for a petitioner recited the Fourth Amendment and emphasized the warrant clause, ruled that an arrest warrant issued to commit two men to trial for treason was invalid because it lacked an adequate showing of probable cause as to the offense (In an earlier proceeding of the Circuit Court for the District of Columbia in the latter case, Chief Judge Cranch had opined that the issuance of an arrest warrant against the men was inconsistent with the Fourth Amendment (denoted "sixth article of the amendments"). See *United States v. Bollman*, 24 F. Cas. 1189, 1190, 1192-93 (C.C.D.C. 1807) (No. 14,622)); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855), in which the Justices turned away a challenge brought by Maryland oystermen against a Maryland state statute that authorized search warrants for the regulation of oystering on the grounds that the Fourth Amendment "restrains the issue of warrants only under the law of the United States, and has no application to state process"; *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), in which the Court rejected a challenge to a "warrant" used for execution of a civil judgment because the Fourth Amendment did not apply to writs or process issued in a private civil action, but only to warrants issued in causes to which the United States is a party; *Ex parte Jackson*, 96 U.S. 727, 733 (1877), in which the Court, while discussing statutory postal authority, noted in dicta that letters and packages in the mail could not be opened without a search warrant....

Reported decisions by lower federal courts rarely referred to the Fourth Amendment. One did manifest an

understanding that the provision addressed warrant standards. *See In re Meador*, 16 F. Cas. 1294, 1298 (D.C.N.D. Ga. 1869) (No. 9375) (discussing the history of the Fourth Amendment and asserting that the Fourth Amendment is a "provision[] in regard to search warrants" and that it applies only to criminal proceedings because search warrants were never recognized at common law for use in civil proceedings).

3. Potter Stewart, *The Road to Mapp V. Ohio and Beyond: the Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (Oct. 1983).

4. *Commonwealth v. Dana*, 43 Mass. 329, 337 (Mass. 1841).

5. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), citing *Frisbie v. Collins*, 342 U.S. 519 (1952) and *Ker v. Illinois*, 119 U.S. 436 (1886).

6. 4 John Henry Wigmore, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2183, at 2954 (1904). Writing nearly two decades after *Boyd* and collecting cases, Wigmore takes the position that the view expressed in the excerpted text was universally followed. The *Boyd* opinion merits only a footnote, *id.* at p. 2957, and no more comment than a dismissive "unsatisfactory opinion;" by which, of course, Dean Wigmore meant that the *Boyd* opinion was unsatisfactory to *him*. Wigmore was perhaps the greatest of all evidentiary scholars, and certainly the most engaging writer, but there is some question whether he believed in the theoretical possibility of an innocent defendant.

7. *Stewart, supra*, at p.1373.

8. *Boyd*, 116 U.S. at 622.

9. *Id.* at 625. (quoting *Entick v. Carrington and Three Other King's Messengers*, reported at in 19 How. St. Tr. 1029.)

10. *Id.*

11. *Id.* at 625. See also Maclin, Tracey, *The Central Meaning of The Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993) (discussing the above-mentioned history of the Fourth Amendment).

12. *Boyd*, 116 U.S. at 630. Wigmore particularly turns up his nose at Bradley's suggestion of the Fourth and Fifth Amendments "run-[ning] almost into each other." Wigmore is quick to point out that the two amendments have very different provenances. As a historical criticism this is perfectly valid, but it seems to miss the point (and certainly the grandeur) of the excerpted language.

13. Under the "mere evidence" rule,

courts were not to issue warrants for the seizure of mere evidence in a criminal case, as opposed to fruits or contraband. If, for example, there is reason to believe that I am the man who held up the Last National Bank at gunpoint, wearing a ski mask and a red plaid shirt, and who made off with \$10,000 in marked bills, the "mere evidence" rule would justify the magistrate who issued and the officer who executed a warrant (assuming adequate probable cause, particularity, etc.) authorizing the search of my house for, and the seizure of, the money; but not the shirt or the mask. It would have been considered reasonable at common law and in early constitutional theory for police to search for and seize stolen money from me (something I had no right to in any event), but not to search for or seize my shirt or ski cap (things I have a perfect right to own, and to keep in my house). *Cf. Hale v. Henkel*, 201 U.S. 43 (1906); with *Warden v. Hayden*, 387 U.S. 294 (1967).

14. *Stewart, supra*, at 1375.

15. *See, e.g., State v. Griswold*, 67 Conn. 290, 34 A. 1046 (Con. 1896). But Justice Bradley must have made some converts. *Cf. id.* at 310-11, ___ (Baldwin, J., concurring):

The common law was ready to supply a remedy for any unreasonable search or seizure, by an action of

trespass against the individuals who made it. [The Fourth Amendment] would be meaningless if it did not seek to do more than this. Its guaranties were designed to protect the citizen against the [government], that is, against any and every officer claiming to act under its authority; and to do so in a way that would repress the wrongful act most efficiently. Upon the trial of a civil action between private individuals, either can introduce any relevant paper in evidence, notwithstanding he may have obtained it in a manner not warranted by law If the constitutional guaranty now under consideration is to be liberally interpreted in favor of the citizen, it would be difficult to apply the principle of such decisions to criminal prosecutions, supported by proof of papers illegally seized for that purpose, in the defendant's house, by public officers acting professedly as such, without seeming to allow the [government] to profit by its own wrong.

16. 192 U.S. 585 (1904).

17. *Id.* at 597.

18. *Boyd*, 116 U.S. at 635.

19. 232 U.S. 383 (1914).

20. 251 U.S. 385 (1920). ■

About the Authors

Milton Hirsch is the author of *Hirsch's Florida Criminal Procedure*, the leading treatise of its kind in Florida. He is a Past President of the Florida Association of Criminal Defense Lawyers (FACDL) Miami Chapter.



An adjunct professor at Nova University Law Center, he authored the *amicus* brief for NACDL in *Florida v. Riley*.

Milton Hirsch

Two Datan Center, Suite 1200
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 670-0077
Fax (305) 670-7003

E-MAIL mhirsch@hirschmarkus.com

David O. Markus is a *magna cum laude* graduate of Harvard Law School. He is a former Assistant Federal Public Defender in Miami. Currently, he teaches at the University of Miami School of Law, serves on the Board of FACDL, and is a partner in Hirsch & Markus, LLP.



David O. Markus

Two Datan Center, Suite 1200
9130 S. Dadeland Boulevard
Miami, FL 33156
(305) 670-0077
Fax (305) 670-7003

E-MAIL dmarkus@hirschmarkus.com