THE JURISPRUDENCE OF PROHIBITION AS RELATIVE
TO THE FOURTH AMENDMENT OF THE UNITED
STATES CONSTITUTION

A Thesis
Presented to
The Graduate Division
Drake University

In Partial Fulfillment
of the Requirements for the Degree
Master of Arts

by
John Robert Carson
January 1963
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CHAPTER I

PROHIBITION MOVEMENT (1783-1920)

I. INTRODUCTION

The problem that formed the point of departure for this thesis can be simply stated as follows: to determine to what extent, if any, and in what manner the extensive litigation arising under the enforcement of the prohibition statutes in the 1920's compelled the United States Supreme Court to clarify and expand the civil liberties guarantees of the Fourth Amendment of our federal constitution. Resolution of this problem required accomplishment of four closely related projects: a critical inquiry into the origins and nature of the prohibition movement; a historical analysis of the interpretation of the Fourth Amendment before the advent of National Prohibition; an interpretative survey of the prohibition cases reaching the Supreme Court which involved some aspects of the Fourth Amendment; and a pulling together of conclusions reached after the comparative analysis of prohibition litigation had been completed.

In approaching this problem in constitutional law, it was not deemed necessary to devise any new methodological tools. Rather resort was had to a variety of tools and techniques that have long been standard in political science scholarship. Among the most important of these procedures were the following:
documentary examination; legal analysis; topical taxonomy; comparison; and historical induction (reaching general conclusions that sum up but do not go beyond the historical data analyzed). The greater part of the author's research involved a critical analysis of relevant Supreme Court decisions in the United States Reports, their systematic collation and comparison, and an interpretation of their significance in throwing light on the central problem of this thesis. It was not the author's purpose either to praise or condemn specific Supreme Court opinions, but rather to subject them to a critical examination.

While several interesting books and a variety of magazine articles have been written about various aspects of the prohibition movement in the United States, only one book and but a few articles have been written about the broad effects prohibition had on the development of American jurisprudence. Blakemore's work, National Prohibition (1925), is a very scholarly and lengthy volume devoted to a historical survey of state and federal court interpretations of anti-liquor legislation until 1925; however, Blakemore had little opportunity to evaluate the decisions of the United States Supreme Court in this field since the cases reaching it concerning prohibition litigation were nearly negligible prior to 1925. The United States Supreme Court, after this date, had

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much to say about the prohibition movement and how its legal enforcement either was consonant with or antipathetic to the cherished ideals of American constitutional practice.

Fourth Amendment litigation reached its apex in the years between 1920-1934, when the Eighteenth Amendment was in force. Violations of the National Prohibition Act were very extensive, and the courts were thus actively involved. Scores of cases reached the federal district courts with a significant number later being reviewed by the circuit courts of appeal. Twenty-nine of these "Fourth Amendment cases" reached the United States Supreme Court either by writ of appeal or by writ of certiorari. The High Court's final decisions were sometimes sharply criticized and sometimes applauded. Those who criticized the "pro-government" opinions suggested that the Fourth Amendment had lost all of its validity during these litigious years. Others thought that the amendment was being too rigidly construed by the courts and that violators of the prohibition laws were afforded too many technical rights and procedural liberties. Any way the courts ruled, it was certain that a substantial number of people would be dissatisfied. As ever, it depended on whose ox was being gored.

The most complex legal controversies that developed out of prohibition were those initiated by science and technology. Had the "noble experiment" on a national level been attempted fifty years earlier, many of the same problems would undoubtedly have developed and, possibly, prohibition's life would have lasted no
longer than it did. But undoubtedly the criticism of the Supreme Court's rulings would not have been so extreme. This is clear, for the majority of prohibition cases adjudicated by the Supreme Court and which prompted such enormous criticism involved either the automobile or some other scientific invention which did not exist fifty years before. Since the Founding Fathers were naturally unaware of such scientific devices in 1787, these innovations called for judicial determination of their relationship to the Fourth Amendment. Was a search warrant necessary, in terms of the Fourth Amendment, to validate a "reasonable" search of an automobile in violation of national laws? Could photographic evidence obtained without a warrant be used in a court of law if no seizure of the originals was made? Could one tap the telephone wires of another party and use such evidence against the accused in court? These were novel questions which the Supreme Court had to answer during prohibition, and the court's answers to them will be fully discussed in subsequent chapters.

Before one can adequately evaluate the impact that the decisions rendered by the Supreme Court during prohibition had on the meaning of the Fourth Amendment, it is essential that this study be prepared with two related discussions. First, what precisely was the prohibition movement? Was it a sudden eruption of a new national sentiment or was it a deep-seated moral phenomenon? Secondly, how had the Founding Fathers and the Supreme Court of the United States viewed the Fourth Amendment prior to national
prohibition? If prohibition did have a significant effect on the Supreme Court's interpretation of the Fourth Amendment, this effect will only become apparent after an examination of the causes that prompted the Fathers to put the Amendment into the Constitution and after a look at certain pre-1920 court opinions.

So much by way of Introduction. The inquiry will now be commenced with a glance at the historical background of the Prohibition Movement.

II. HISTORICAL BACKGROUND

If dedicated principles predicated upon perseverance and pursuit of desired ends are the basic ingredients of any accomplishments, national prohibition in the United States should have been an overwhelming success. There has been no single national issue, with the possible exception of slavery, that had so permeated the social and political lives and consciences of the American people during the 19th and early 20th centuries as did prohibition; yet when the "chips were down," the American public was unable to accept the consequences and responsibilities of this national revolution.

The fight for regulation, and finally prohibition, of the manufacture and sale of intoxicating beverages is older than the nation itself. Most of the colonies had passed laws prohibiting the selling of liquor to Indians. New Jersey, for example, in 1678 prohibited such sale and fined violators twenty pounds, the
fine to be doubled with each subsequent offense, with twenty
stripes if the offender could not pay.¹

Georgia, under the influence of its founder, Oglethorpe,
in 1733, prohibited the importation of liquors into the state.²
Forty-five years later, on February 27, 1777, the Continental
Congress adopted the following resolution:

That it be recommended to the several Legislatures of the
United States immediately to pass laws the most effectual
for putting an immediate stop to the pernicious practice of
distilling grain, by which the most extensive evils are likely
to be derived, if not quickly prevented.³

It is also significant to note that the first three Presi-
dents of the United States, Washington, Adams, and Jefferson, were
acutely aware of the alcoholic problem. George Washington wrote
a letter on March 31, 1789, just one month before taking office
as President, in which he referred to drink as "the source of all
evil and the ruin of half the workmen in the country."⁴ John
Adams, writing in his diary on February 29, 1760, drew a graphic
picture of the social and moral evils of the licensed houses and
observed:

But the worst effect of all, and which ought to make every
man who has the least sense of his privileges tremble, these
houses are becoming the nurseries of our legislators. An art-
ful man, who has neither sense nor sentiment, may by gaining
a little sway among the rabble of a town, multiply taverns

¹D. Leigh Colvin, Prohibition in the United States (New
²Ibid.
³Ibid.
⁴Ibid., p. 14.
and dramshops and thereby secure the votes of taverner and retailer and of all; and the multiplication of taverns will make many, who may be induced by flip and rum, to vote for any man whatever.¹

Thomas Jefferson after eight years in the White House was reported to have said with great emphasis:

The habit of using ardent spirits by men in public office has produced more injury to the public service, and more trouble to me, than any other circumstance that has occurred in the internal concerns of the country during my administration. And were I to commence my administration again, with the knowledge which from experience I have acquired, the first question that I would ask with regard to every candidate for public office should be, 'Is he addicted to the use of ardent spirit?'²

It was prior to the election of George Washington as President of the United States that the prohibition movement had its beginning. With the publication of the Effects of Ardent Spirits upon the Human Mind and Body (1785) by Dr. Benjamin Rush of Philadelphia, who had been a signer of the Declaration of Independence, the movement for constitutional prohibition began.³ After Dr. Rush's book came out, temperance societies began to develop rapidly, the first being in the town of Moreau, Saratoga County, New York, in 1808, followed soon by similar organizations in Massachusetts. By the close of 1829, eleven state temperance societies had been formed; and within a short time there were 1,000 local societies with 100,000 members. By May, 1831, there were state

societies in nineteen states and 3,000 local societies which were reputed to have 300,000 members. The success of the early movement can be better appreciated when one realizes that the total population of the United States in 1830 was only about thirteen million.

The results achieved by the temperance societies were impressive. Over the country, by 1835, more than 4,000 distilleries had been closed, and more than 8,000 merchants had ceased to sell any kind of intoxicating liquors. Ships often left their ports without carrying ardent spirits. In Massachusetts, three counties containing an aggregate population of 120,000 had not issued licenses for the sale of spirits for three years preceding 1835. Considering the conditions of the times, the limited means of transportation, the absence of modern means of publication and mass media, the spread and power of the temperance movement after 1808 were truly remarkable.

Many influential public men were actively identified with the movement including Congressmen, governors, college presidents, and professors. A valuable literature was also developed with a number of temperance periodicals being started. It was General James Appleton who gave most impetus to the prohibition movement during the 1830's. A native of Massachusetts, and later a resident and Congressman from Maine, he insisted that the only remedy

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1Colvin, op. cit., p. 16. 2Ibid.
was complete abstinence. License laws, which legalized the selling of spirits were morally wrong, he felt, because of the injurious tendency to legalize a moral wrong. As he wrote in 1832:

"One immediate effect of prohibition would be to render the traffic disreputable as well as unlawful. The mere existence of such a law would exert the most salutary influence upon the public mind. It would of itself go far to create public opinion in regard to the necessity of ardent spirits, for it is no more true that the laws are an expression of public opinion than that they influence and determine public opinion. They are as surely the cause as the effect of the popular will. It is the nature of law to mold the public mind to its requirements, and to fasten upon all an abiding impression of its value and necessity. All good and wholesome laws prescribe, at least, what is right, and forbid what is wrong."¹

The abstinence ideas of Appleton were first effectively implemented by the Washington Movement of 1842. This organization was composed of men who had once been alcoholics but who had pledged to abstain. Theirs was a moral pledge-signing movement which swept the country with its special appeal to disillusioned drinking men. In numerous cities the number of saloons decreased sharply as a direct result of increasing membership in the Sons of Temperance (as their movement was called). In 1851, this organization reported a membership of 238,403, and by 1892, 2½ million members had been initiated.²

But the real problem had scarcely been touched as Appleton well saw in 1832. The law still protected the sale of spirits.

¹Ibid., p. 21.
²August F. Fehlandt, A Century of Drink Reform in the United States (Cincinnati: Jennings & Graham, 1904), pp. 57-58.
As soon as a few saloons would close, others would come to take
their places. Realizing the necessity of outright prohibition
laws, the temperance advocates pressed hard to get the states to
prohibit by constitutional amendment the sale of beverage alcohol.
Between the years 1851-1855, the following states adopted some form
of prohibition: Rhode Island, Massachusetts, Vermont, New York,
Michigan, Wisconsin, Connecticut, Ohio, Indiana, Delaware, Iowa,
New Hampshire, and Nebraska (still a territory at this time).
It seemed that the idea had caught hold and that significant re-
sults were in the offspring; however, these were turbulent times,
when the slavery issue was more urgent than the prohibition issue.
Several state courts had also declared their state prohibition
laws unconstitutional, all of which greatly discouraged many peo-
ple who had supported the movement. The imperfect enforcement of
the laws also aroused repeal agitation in other states, while the
natural fear of politicians to tangle with controversial issues
made others retreat. From 1855, not a single state enacted a pro-
hibition law for a quarter of a century. Also during this period
many of the states that had adopted such laws modified or repealed
them.

The legislative machinery for state prohibition had first
been set in motion by the Maine Law of 1851, which prohibited the
manufacture, sale, and keeping for sale of intoxicating liquors.
The law provided heavy penalties with imprisonment for the third
offense. It also provided for search and seizure upon complaint
of three inhabitants, and for confiscation of liquor found to be
illegally held. The law was quite well enforced in Maine, and the
entire country carefully watched the developments there. At the
National Temperance Conference of 1851, after hearing the details
of the Maine Law, many delegates returned home with the desire
of putting a similar provision in their own state statutes or
constitutions. As has been noted, some of them were successful.

III. RISE OF THE PROHIBITION PARTY

At the conclusion of the Civil War, it was realized that
the drink evil had greatly increased. In only five states were
prohibitory laws still in effect, and they were not being effec-
tively enforced. Soldiers returning home had been greatly affected
by the alcoholic menace. Moreover, the passage of the Internal
Revenue Act of 1862 greatly aided the liquor traffic. By taxing
liquor interests it was felt that the government was actually sanc-
tioning the sale and use of liquor. The liquor elements had thus
been legally elevated from a disreputable position to parity with
legitimate industries. In 1866, temperance organizations again
began to develop; and since the fight against slavery had been
won, a renaissance of the prohibition crusade was in order. Re-
cognizing that a separate political movement was essential to a
prohibition movement comeback, temperance leaders decided to

1Krout, op. cit., pp. 293-95.
establish a third political party. Through the efforts of John Russell, such a party first developed in Michigan, although it was not then called the Prohibition Party but rather "The Special Committee for Political Action". Illinois was the first to organize a party by the name of Prohibition Party, and other states soon followed suit: Ohio, Minnesota, and Maine, for example.

It was in the 1872 Presidential election that the party first ran a national ticket: James Black of Pennsylvania, Presidential nominee; and John Russell of Michigan for Vice-President. Though the party received less than 10,000 votes for its first national ticket (largely due to the fact that the party's candidates did not appear on many of the states' ballots), it was not wholly without influence. Thus, it is significant to note that of the four constitutional amendments adopted between 1870 and 1920, three of the four existed in the Prohibition Party's 1872 platform: Direct Election of United States Senators; Prohibition; and Woman Suffrage. As for the fourth, the Income Tax Amendment, the Prohibition Party was also the first party to advocate this in a party platform.

Liquor interests however, continued to increase their power during the 1870's. In 1860, the national consumption of beer had

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2 Colvin, op. cit., p. 90.
been 36,563,009 gallons; by 1870, consumption had more than doubled to 204,756,156 gallons. Ineptual enforcement of the liquor tax laws likewise robbed the government of much tax revenue and produced many scandals. Yet the Prohibition Party continued fighting. It nominated and won several seats in state legislatures and nominated candidates for President and Vice-President in 1876 and 1880; again to no avail.

IV. FOUNDING OF W. C. T. U.

The greatest "dry" achievement of the 1870's was the founding of the W. C. T. U. (Women's Christian Temperance Union) in 1874. By 1880, its membership had soared to 44,412, and rapidly increased as the years went by. The 1880's brought a slightly different technique into the prohibition crusade. Unable in three national presidential campaigns to attract much attention, the movement became much more aggressive and more centrally organized. The president of the W. C. T. U., Frances E. Willard, in 1883 was commissioned by her organization to present the movement's case to that year's Republican Party Convention. She was coldly received and her efforts proved futile. This inaction on the part of the Republican Party helped drive the ex-governor of Kansas, John P. St. John, from the Republican into the Prohibition camp. The impetus he gave to the movement popularized him among

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1 Ibid., p. 105.  
2 Fehlandt, op. cit., pp. 238-47.
prohibitionists throughout the nation and ended in his nomination as the Party's presidential candidate in 1884. Other influential figures followed St. John's example and joined the ranks: David Preston, Detroit banker; Julius H. Seelye, President of Amherst College; James B. Hobbs, President of the Chicago Board of Trade; and Dr. John A. Brooks, a noted Missouri preacher. These distinguished men and others had become increasingly disturbed by the passive attitude of the two major parties toward the liquor problem.

The outcome of the 1884 election was extremely close. James Blaine lost the electoral vote of New York State by the narrow margin of 1,047 popular votes, which, if he had won it, would have made him the President of the United States. For its part, the Prohibition Party managed to garner 24,999 votes in New York State. Throughout the nation the party got more than 150,000 votes as compared to the 11,000 it had received in 1880. The accession of prestigious names was clearly a big factor in the party's growth.¹

The 1888 election showed a 70% gain over the party's 1884 showing, with the party receiving in that year nearly 250,000 votes; however, the '92 and '96 campaigns revealed a different picture. In 1892, the party only received a national vote of 264,133, not much of an increase over the '88 election; yet the showing

was still not too bad considering the popularity of the Populist movement. Indeed the Prohibition Party received 74,000 more votes that year than did the Populists.\textsuperscript{1} The 1896 election produced a sharp setback with the Prohibition Party getting only approximately 135,000 votes. This was nearly a 50% drop from the previous election. This decline was due to several reasons. The major parties were beginning to realize the popular impact of the prohibition movement and had begun to incorporate many of its ideas into their own platforms. Also a tightening up of enforcement laws by Congress enabled the major parties to reattract many of their disidents. A law passed by Congress to permit scientific temperance instruction in public schools also aided the major parties' cause.

V. DEVELOPMENTS IN EARLY 1800's

With the Spanish-American War of 1898, the issue became "red hot" once again. The expansion of the liquor traffic into our new possessions, the Phillipines and Puerto Rico, plus the liquor problem in the United States Army canteens stirred up great resentment back home. The result was that about two-thirds of the votes lost by the Prohibition Party in 1896 were regained in the 1900 Presidential election. Following this success at the polls, new alliances and auxiliaries were formed throughout the nation.

The Young People's Prohibition League, begun in 1897, burgeoned after the 1900 election, as did the Intercollegiate Prohibition Association with its motto, "As go the colleges today, so goes the nation tomorrow."

The early 1900's saw a partial renaissance of the prohibitionists. Several state offices were won by devout prohibition candidates; yet on the national level, things remained much the same. Some of the reasons why national success had been impeded have been mentioned; however, two more specific problems stymied the cause: local option and the rise of the Anti-Saloon League.

Local option provided that minor political divisions, towns, cities, counties, etc., could decide whether licenses to sell liquor within their limits should be granted. From 1833 on, this idea grew rapidly. Massachusetts, Illinois, New Hampshire, Connecticut, Ohio, New York, Michigan, Pennsylvania, Michigan, California, Kentucky, Missouri and Georgia had legislatively provided for such option. The handicaps were not hard to imagine. It was possible that one political division within a state would accept local option and prohibit ardent spirits while another contiguous division would sanction the selling of liquor by license. This obviously

1Colvin, op. cit., p. 325.

hindered the progress of the Prohibition Party, since people began to feel that the major parties were extending efforts to regulate, and maybe eventually eradicate the liquor menace.

VI. FOUNDING OF ANTI-SALOON LEAGUE

The second thorn in the side of the Prohibition Party was the Anti-Saloon League, an organization with similar goals as the Prohibition Party but very much opposed to the party's means. The League, unlike the Prohibition Party, did not support a separate third party program. In the eyes of the League, the Prohibition Party was inconsequential. Party platforms meant nothing; it was the men who did the voting in legislatures who were important. Stay with the traditional parties, Democratic or Republican, the league advocated. Vote for the candidates within these parties who would support prohibition legislation. Non-partisan politics was the theme of this movement, a very different theme from that of its sister organization. Without question the Anti-Saloon League, created in Ohio in 1833, greatly weakened the future development of the Prohibition Party.

The rise in real national significance of the prohibition movement dates from 1914. At that time there were only nine states prohibiting the sale or use of liquor with no net gain for such laws for $\frac{3}{4}$ years. The year 1914, however, saw five more states

\[1\text{Colvin, op. cit., p. 430. (Maine, Kansas, North Dakota, Oklahoma, North Carolina, West Virginia, Georgia, Mississippi and Tennessee).}\]
join the movement.¹ Five more adopted prohibitory legislation in 1915,² and four more followed in 1916.³ Thus, at the close of 1919, thirty-three states had adopted prohibition, either through constitutional or statutory action. The real significance of this rapid increase in the number of prohibition states was that the people, not the legislatures, were chiefly responsible for the legal action. Of the thirty-three states which had enacted prohibition laws by 1919, an examination of Table I shows that legal prohibition was either initiated by the people or submitted to them by the legislatures for final approval in all but eight of these states.⁴

In 1913, when nine states had prohibition laws, Congress repassed over President Taft’s veto the Webb-Kenyon Act. Recognizing the need of federal protection for these nine states, Congress made it a federal crime to transport liquor into states with prohibition laws. This law induced the people of other states to seek such prohibitory legislation, now that the federal government was providing real protection. This act, plus the outbreak of wars in Europe in 1914, stimulated the die-hard prohibitionists

¹Ibid. (Virginia, Oregon, Washington, Colorado and Arizona).
²Ibid., p. 431. (Alabama, Arkansas, Iowa, Idaho and South Carolina).
³Ibid. (Michigan, Nebraska, South Dakota and Montana).
⁴Ibid., p. 434. (Georgia, Mississippi, Tennessee, Alabama, Arkansas, Iowa, Indiana and New Hampshire).
TABLE I

TABLE SHOWING WHEN, HOW AND BY WHAT MAJORITY STATE PROHIBITION WAS ADOPTED

<table>
<thead>
<tr>
<th>State</th>
<th>When Adopted</th>
<th>Stat. or Initia.</th>
<th>Vote For</th>
<th>Vote Against</th>
<th>Maj. For</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Maine</td>
<td>1851</td>
<td>S. Leg.</td>
<td>70,383</td>
<td>23,841</td>
<td>46,972</td>
</tr>
<tr>
<td>Maine</td>
<td>1884</td>
<td>C. Sub.</td>
<td>92,302</td>
<td>84,304</td>
<td>7,998</td>
</tr>
<tr>
<td>2. Kansas</td>
<td>1889</td>
<td>C. Sub.</td>
<td>18,552</td>
<td>17,393</td>
<td>1,159</td>
</tr>
<tr>
<td>3. N. Dakota</td>
<td>1807</td>
<td>S. Leg.</td>
<td>130,361</td>
<td>112,256</td>
<td>18,103</td>
</tr>
<tr>
<td>4. Georgia</td>
<td>1908</td>
<td>S. Leg.</td>
<td>113,612</td>
<td>69,416</td>
<td>44,196</td>
</tr>
<tr>
<td>5. Oklahoma</td>
<td>1912</td>
<td>C. Sub.</td>
<td>164,945</td>
<td>72,603</td>
<td>92,342</td>
</tr>
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<td>7. N. Carolina</td>
<td>1914</td>
<td>C. Ini.</td>
<td>136,842</td>
<td>100,362</td>
<td>36,480</td>
</tr>
<tr>
<td>8. Tennessee</td>
<td>1914</td>
<td>C. Ini.</td>
<td>189,840</td>
<td>171,208</td>
<td>18,632</td>
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<tr>
<td>9. W. Virginia</td>
<td>1914</td>
<td>C. Ini.</td>
<td>129,559</td>
<td>118,017</td>
<td>11,572</td>
</tr>
<tr>
<td>10. Virginia</td>
<td>1915</td>
<td>S. Leg.</td>
<td>25,887</td>
<td>22,743</td>
<td>3,144</td>
</tr>
<tr>
<td>11. Oregon</td>
<td>1916</td>
<td>S. Leg.</td>
<td>90,576</td>
<td>35,456</td>
<td>55,120</td>
</tr>
</tbody>
</table>

1Colvin, op. cit., p. 435.
### TABLE I (continued)

<table>
<thead>
<tr>
<th>State</th>
<th>When Adopted</th>
<th>Stat. or Con.</th>
<th>Leg. Subm.</th>
<th>Vote For</th>
<th>Vote Against</th>
<th>Vote Maj. For</th>
</tr>
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<tbody>
<tr>
<td>S. Carolina</td>
<td>1915</td>
<td>S.</td>
<td>Sub.</td>
<td>41,735</td>
<td>16,809</td>
<td>24,926</td>
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<tr>
<td>Montana</td>
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<td>S.</td>
<td>Leg.</td>
<td></td>
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<td>S.</td>
<td>Leg.</td>
<td></td>
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<td>N. Hampshire</td>
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<td>Sub.</td>
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<td>10,234</td>
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</table>

Total.......... 2,837,580  2,274,863  662,717

Total Prohibition Majority twenty five states............ 662,717
to seek a new approach.

VII. WORLD WAR I DEVELOPMENTS

When the United States entered the war on April 6, 1917, efforts were made by drys on a national scale to bring a halt to the liquor traffic, which had proved so detrimental during the Civil and Spanish-American Wars. Almost immediately, in May, 1917, the federal government prohibited the sale of liquor to members of the armed services, while the popular agitation for complete war prohibition and even postwar prohibition continued to grow. After much compromising, the Food Control Bill passed Congress in September, 1917. It prohibited the manufacture and importation of distilled liquors (not beer or wine) for beverage purposes. The President could, if he desired, reduce the alcoholic content of beer and wine and regulate the use of food materials in the manufacturing of the same. The distilleries were subsequently closed, but the warehouses were full; and the sale of stored beverages was not prohibited, except to service men.¹

The "wets" in Congress were truly scared after the passage of the Food Control Bill. The next step seemed to be a constitutional amendment establishing prohibition throughout the country. As a tactical matter, the "wets" eventually consented to go along with such an amendment, feeling it was destined to come anyway;

¹Ibid., pp. 442-44.
but they insisted on one serious qualification. If at the end of seven years the required number of states (36) had not ratified the proposed amendment, it would be considered "inoperative." Not for a moment thinking that such an amendment could be ratified by the required number of states within the short period of seven years, the "wets" were confident that liquor would not be outlawed. The "drys" agreed to the seven year compromise, and after passing Congress in December, 1917, the amendment was submitted to the states.

As history shows, the "wets" greatly misjudged the sentiment of the American people, for on January 13, 1919, the thirty-sixth and last necessary state, Nebraska, ratified the Eighteenth Amendment. On January 16, 1920, National Prohibition went into effect, one year after the last state ratified the amendment as provided in the initial legislation. The Volstead Act, the legislative enabling act, was repassed by Congress over the veto of President Wilson on October 28, 1919. National prohibition had finally come, but the country's problems with illegal liquor were only beginning.

1The Eighteenth Amendment of the United States Constitution, Section 3.
CHAPTER II

THE DEVELOPMENT OF THE FOURTH AMENDMENT

I. INTRODUCTION

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 warrant 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.¹

Now that a rudimentary sketch of the prohibition movement in the United States has been presented, a more detailed and specific discussion of the problem at hand is in order. What is the Fourth Amendment? What has been its historical significance? How had the Supreme Court interpreted its provisions before National Prohibition? If one is to understand the impact of National Prohibition upon the Supreme Court's reading of the Fourth Amendment, the answers to these questions must now be sought.

II. JAMES OTIS' CONTRIBUTION

The 1760's of American history provide a concrete starting point for a general survey of the Fourth Amendment's development. The unfortunate experiences the colonists had with the writs of assistance represented the immediate reason for the inclusion

¹The Fourth Amendment of the United States Constitution.
of the Fourth Amendment in the United States Constitution. These writs were a type of general search warrant authorizing any English officer to search any establishment within the American colonies, seize any materials upon the slightest suspicion that the Navigation Acts were not being obeyed and, more specifically, that duties were not being paid upon goods entering the colonies. Homes were maliciously searched without a warrant; property was destroyed or confiscated without just cause. The colonists in time demanded public hearings to highlight the illegalities of the general search law and to condemn its continuance. The Boston merchants, for example, vehemently protested in 1760 against the issuance of these writs on the grounds that they were clearly unconstitutional. A trial was eventually granted (only because of the intensive agitation caused by the colonists), at which time the American patriot, James Otis, who was Massachusetts' counsel in the case, made his famous inspirational plea that was later to be paraphrased in the Fourth Amendment. He said:

I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search.

Everyone with this writ (general)¹ may be a tyrant; if this commission be legal, a tyrant in a legal matter also may control, imprison, or murder anyone within the realm. In the next place, it is perpetual; there is no return.

¹Parentheses by the writer.
A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him. In the third place, a person with this writ, in the daytime, may enter all houses, shops, etc., at will, and command all to assist him. Fourthly, by this writ not only deputies, but even their menial servants, are allowed to lord it over us. Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses, when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. This wanton exercise of this power is not a chimerical suggestion of a heated brain...

Every man, prompted by revenge, ill humor, or wantonness, to inspect the inside of his neighbor's house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and in blood...

Again, these writs are not returned. Writs in their nature are temporary things. When the purpose for which they are issued are answered, they (special writs) exist no more; but these (general) live forever; no one can be called to account...

No acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void. But these prove no more than what I before observed, that special writs may be granted on oath and probable suspicion.

Despite the strenuous efforts of James Otis and his Massachusetts supporters, the law permitting general writs was not repealed; which fact prepared the way for a future showdown. Whether or not James Otis had lived, the Fourth Amendment would undoubtedly have found its way into the United States Constitution.

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1Parentheses by the writer.

Still the arguments of Otis contributed much to the Amendment's wording; and, as we shall see later, they contributed considerably to the future interpretation of the Amendment by the United States Supreme Court.

None would suggest that the United States Constitution was written as a panacea to solve all the problems our nation would ever encounter. We know that the Fathers anticipated a vast variety of future contingencies by their inclusion in the Constitution of paragraph 18, Section 8, of Article I and by their establishment of an independent judiciary to interpret and protect the Constitution. From the earliest days, divers cases found their way into the federal courts for clarification of some section of the Constitution; and the Fourth Amendment was certainly not above the need of judicial clarification. Several cases since 1789 have been crucial in advancing our understanding of the Amendment's meaning. In the following pages we shall examine some of these.

From the writing of the Constitution until 1919, three particularly important cases were decided by the Supreme Court, which, when viewed in conjunction with Otis' speech, provided the framework for the judiciary's interpretation of the Fourth Amendment. It is to these landmark cases and the opinions evolving from them that we must now address our analysis. They were the cases of Boyd v. United States (1886), Adams v. New York (1904), and Weeks v. United States (1914).
The Customs Law of 1874 provided the basis of the Boyd case of 1886. Three provisions of the law provided the legal controversy. They were the following:

1. A court of the United States is authorized in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney shall be taken as confessed.

2. Goods which had been alleged to have been fraudulently imported without having paid the duties thereon could be used as evidence against the accused after the claimants had provided the goods in court.

3. A compulsory production of a party's private books and paper, to be used against himself or his property in a criminal or a penal proceeding, or for a forfeiture, is within the spirit and meaning of the Fourth Amendment. It is equivalent to a compulsory production of papers to make the non-production of them a confession of the allegations which it is tended they will prove.¹

Mr. Boyd and his unnamed associates had, in June, 1874, imported 35 cases of plate glass into the United States, and fraudulently evaded the payment of duties. After their apprehension

¹18 Stat. 187 (1874), Sec. 5.
by the law, it became necessary to know at the trial the quantity and value of the cases of glass imported. Using the Customs Law of 1874, the district attorney required the claimants to produce the invoice for the imported merchandise. Reluctantly, the claimants did; and when the invoice was offered in evidence, the claimants objected to its reception on the grounds that it was unconstitutional by the Fourth Amendment. The court of appeals of the State of New York upheld the action of the district attorney and found the claimants guilty; however, when the case was appealed to the United States Supreme Court, the decision of the lower court was reversed and a new trial for the defendant was ordered. Justice Bradley presented the majority opinion which carefully analyzed the amendment's deeper meaning:

Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an "unreasonable search and seizure" within the meaning of the Fourth Amendment of the Constitution? Or is it a legitimate proceeding? . . .

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.\(^1\)

The significance of the case lies in the fact that it was now unconstitutional for the state to compel a person against his will to produce evidence which may be used against himself.

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\(^1\)Boyd v. United States, 116 U. S. 616, 622 (1886).
Such action by the courts, or any government agency, is initiating an "unreasonable search and seizure." However, the dissenting opinion in the same case, delivered by Justice Miller and concurred in by Chief Justice Waite, was almost as significant as the majority opinion. Even though both men agreed that Boyd's constitutional rights as protected by the Fifth Amendment had been violated, they did not feel that the Fourth Amendment had been infringed. The dissenters argued:

The things here forbidden are two: search and seizure. And not all searches nor all seizures are forbidden, but only those that are unreasonable. Reasonable searches, therefore, may be allowed, and if the thing sought be found, it may be seized . . . .

I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has that evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute.¹

The majority decision in the Boyd case was, I believe, in total agreement with the ideas of the framers of the constitution and the views of James Otis. Yet one new element emerged: the forcible procurement of evidence from a defendant, at the request of a legal officer, was now deemed to constitute an unreasonable search and to violate one's constitutional rights. This problem was not, however, entirely settled in 1886; it was to remain very much alive, especially because of the dissenting opinion of Justice Miller.

¹Ibid., p. 641.
IV. ADAMS v. NEW YORK

Whereas the Boyd case dealt with the legitimacy of the means by which evidence was obtained, the Adams v. New York case of 1904, concerned the admissibility of tainted evidence once obtained. The plaintiff, Mr. Adams, after being found guilty by the superior court of New York, for the possession of gambling paraphernalia used in the game commonly known as Policy, appealed his case to the United States Supreme Court. Mr. Adams charged that his constitutional rights as guaranteed by the Fourth Amendment were violated for the following reasons:

1. The seizure from his residence, without his consent of his private papers and other documents, which had nothing whatsoever to do with the game of Policy, and the reception in evidence of the same, which led to his conviction, constituted a violation to his constitutional rights.

2. Such procedures, as well, caused a violation of his rights as stated in the Fifth Amendment concerning self-incrimination.¹

In spite of the arguments of Mr. Adams, the Supreme Court upheld the lower court's ruling, and Justice Day delivered the opinion of the court:

It may be mentioned in this place that though papers and other subjects of evidence (not mentioned in the warrant)²

²Parentheses by the writer.
may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.1

This decision appeared to weaken the guarantees of freedom contained in the Fourth Amendment. For any evidence, whether legally or illegally obtained, was now admissible in a court, though if obtained illegally, the officer involved was subject to prosecution. Also, when a search warrant has been issued, evidence collected and pertinent to the case at hand will not be inadmissible simply because it was not mentioned in the warrant. Moreover, according to Justice Day, no violation of the defendant's constitutional rights as stated in the Fifth Amendment can be deduced since (1) no force on him was made to secure the papers, nor (2) was he compelled to testify or make any admission about them in a court of law.2

V. WEEKS v. UNITED STATES

It was in 1914, ten years after the Adams case, that a strikingly similar case reached the Supreme Court on an appeal by a Fremont Weeks, who contended that his constitutional rights had been knowingly violated by the federal district court in Missouri. Weeks was arrested in Kansas City, Missouri, by the

2Ibid., p. 596.
municipal police without a warrant. The charge was unlawful and fraudulent use of the United States mails. At approximately the time of his arrest other policemen had gone to his home without a warrant, secured entrance, and procured from his home papers, money, heirlooms, and other personal property, some of which was very pertinent to proving the defendant's fraudulent use of the mails. Mr. Weeks asked for the return of his personal property, but he received only that part which was not pertinent to his trial. The defendant argued that his constitutional rights had been violated; but the lower court refused his argument because of the Adams case precedent and its rule about the admissibility of all pertinent evidence.

Mr. Weeks was thus found guilty, and the United States Supreme Court agreed to review his case. Justice Day, who presented the opinion of the high court in the Adams case, also presented the opinion of the court in this case. Noting the Boyd and Adams cases as precedents, Justice Day pointed out the striking difference between the Weeks' case and the Adams litigation, a distinction which, he said, clarified a generality within Adams v. New York. Regarding the Adams case of 1904, Justice Day pointed out that the admissibility of any pertinent evidence was there held permissible only when such evidence was obtained by means of a legal search warrant. ¹ The officers in the Weeks case, he

agreed, violated the constitutional rights of the defendant be-
cause no such document was procured, while in *Adams v. New York*
the warrant existed. Justice Day wrote:

It is therefore evident that the Adams case affords no
authority for the action of the court in this case, when
applied to in due season for the return of papers seized in
violation of the Constitutional Amendment. The decision in
that case rests upon incidental seizure made in the execu-
tion of a legal warrant, and in the application of the doc-
trine that a collateral issue will not be raised to ascer-
tain the source from which testimony, competent in a criminal
case, comes.\(^1\)

VI. CONCLUSION

Admittedly, if one studies the Fourth Amendment cases ap-
pealed to the Supreme Court between the years 1789-1920, he would
find many more than these three cases; however, a close scrutiny
of these years would not disclose any vitally different rulings
by the Supreme Court on the Fourth Amendment's interpretation.
Since this paper is basically concerned with National Prohibition
and the Fourth Amendment, it is only essential at this point that
the basic conceptions of the court in this area be analyzed.
This is all that has been attempted.

As the introductory materials have now been completed,
what can one say was the practical meaning of the Fourth Amend-
ment prior to prohibition? Actually the meaning had changed lit-
tle since its inception. If one should read the complete speech

\(^1\)Ibid., p. 396.
of James Otis, cited earlier, given during the trial of 1761, and add to it the following modifications, a clear conception of the Judiciary's view of the amendment's meaning would be ascertained:

No person could be compelled to deliver evidence, detrimental to his defense, to a court of law because such action is in direct violation of the Fifth Amendment (protection against self incrimination) and, in turn, directly violates his rights as set forth in the Fourth Amendment concerning unreasonable searches and seizures (Boyd v. United States). However, though a special search warrant narrowly specifies the thing or things to be searched and apprehended, this does not disqualify the seizure of other pertinent evidence within the domain being searched provided the warrant is legal.

With the background of the problem now fully sketched, it is time to proceed to an analysis of the Supreme Court's expanding interpretation of the Fourth Amendment as necessitated by a succession of cases arising from the "Noble Experiment."
CHAPTER III

CONVEYANCES AND THE FOURTH AMENDMENT

I. INTRODUCTION

When compared with that of the prohibition era, litigation in the federal courts relative to the Fourth Amendment was nearly negligible prior to 1920. With the passage of the Volstead Law by Congress on October 28, 1919, over the veto of President Wilson, and the implementation of its provisions on January 16, 1920, an unsuspected new source of Fourth Amendment litigation was initiated. With an eye to its constitutionality, the framers of the Volstead Law paid homage to the Fourth Amendment in three sections of the law:

Section 25: Unlawful Possession of Liquor or Property Designed for Manufacturers thereof; Search Warrants.

It shall be unlawful to have or possess any liquor or property designated for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property . . . . No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transciently but solely as a residence in an apartment house, hotel, or boarding house.1

141 Stat. 315 (1919), Sec. 25.
Section 26: Unlawful Transportation of Liquors.

Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof . . . . The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities . . . . If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken . . . and if no claimant shall appear within ten days . . . the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.1

Section 27: Delivery of Seized Liquors to the United States for Certain Purposes.

In all cases in which intoxicating liquors may be subject to be destroyed under the provisions of this chapter the court shall have jurisdiction upon the application of the United States attorney to order them delivered to any department or agency of the United States Government for medicinal, mechanical, or scientific uses, or to order the same sold at private sale for such purposes to any person having a permit to purchase liquor the proceeds to be covered into the Treasury of the United States to the credit of miscellaneous receipts.2

These sections did nothing to infringe the guarantees of the Fourth Amendment; rather they clearly respected them. The issue, as Osmond K. Fraenkel put it in 1928, was simply this:

Is it better that a few offenders go free and respect for the law maintained, or is it better that society be protected

1 41 Stat. 315 (1919), Sec. 26.
2 41 Stat. 316 (1919), Sec. 27.
against the mistakes of overzealous officers and they be punished independently?  

What was an unreasonable search and seizure for alcohol? What was a reasonable search and seizure? What was more important, respect for the procedures of the law or respect for society? These were the questions which were to face the courts after January 16, 1920. An analysis of these questions and the answers they received might be evaluated in several ways; yet the author has developed an approach which he feels is the most systematic and best facilitates comprehension on the part of the reader. Since the automobile and other means of transportation were so directly involved in many of the Supreme Court's decisions concerning the Fourth Amendment, it is reasonable that a chapter be devoted to these innovations and the way they affected the High Court's holdings. After this presentation, we shall point out what constituted unreasonable searches and seizures as defined by the Supreme Court. Chapter Five will then evaluate the Court's opinions of reasonable searches and seizures, this to be followed by a concluding and summary chapter. Within these chapters every case reaching the United States Supreme Court relative to the Fourth Amendment and prohibition will be discussed and evaluated.

II. REASONABLE AND PROPER CAUSE

The most significant case involving an automobile illegally

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transporting liquor which reached the Supreme Court during pro-
hibition was Carroll v. United States (1925). All future de-
cisions with a similar background were to be based upon the hold-
ing of the Carroll case. It is, therefore, pertinent that this
litigation be closely analyzed.

The defendant, Carroll, and a John Kiro had been convicted
in the United States District Court of Western Michigan for il-
legally transporting intoxicating beverages. In December, 1921,
the defendant had been stopped by prohibition agents without a
warrant on the highway between Detroit and Grand Rapids. Within
the car were found 68 quarts of whiskey and gin. The defendants
were immediately apprehended, indicted, and convicted by the dis-
trict court for violating the Volstead Act. The circuit court of
appeals and the Supreme Court ultimately upheld the convictions,
although the defendants had argued that their constitutional rights
as guaranteed by the Fourth Amendment had been flagrantly vio-
lated. It was Chief Justice William Howard Taft who delivered
the Supreme Court's opinion. He wrote:

On reason and authority the true rule is that if the search
and seizure without a warrant are made upon probable cause,
that is, upon a belief, reasonably arriving out of circum-
stances known to the seizing officer, that an automobile or
other vehicle contains that which by law is subject to sei-
zure and destruction, the search and seizure are valid.
The Fourth Amendment is to be construed in the light of what
was deemed an unreasonable search and seizure when it was
adopted, and in a manner which will conserve public interests

as well as the interests and rights of individual citizens. 1

Thus, contraband liquors in automobiles or other vehicles could be seized without a warrant, the Court ruled, if there existed a "reasonable and proper cause" for the search and seizure. It was further held by the Court, that if no reasonable cause could be ascertained, the officers making the search and seizure could be prosecuted for their misconduct. The officers might also, without a warrant, arrest anyone who has committed or is about to commit a felony. The same would also apply to a misdemeanor if such act were committed in an officer's sight. 2 These rights of search and seizure were not dependent on the officers' right to arrest. They were dependent on the reasonable cause the seizing officers had that the contents of the automobile offended the law. As Taft later commented:

If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient. 3

Whether the driver knew about his car's contents did not invalidate the seizure. Too much leniency would be granted the offender and the legitimate rights of society left unprotected if the reasonable and proper cause of an officer's search of an automobile needed to be predicated on a valid search warrant when, in the process of securing such a document, sufficient time for

1 Ibid., p. 149.  
2 Ibid., p. 132.  
3 Ibid., p. 161.
the departure of the evidence was allowed.

It is not surprising that the Carroll case dismayed the bootleggers throughout the country; nor is it surprising that some legal minds had doubts about the decision. The method employed in apprehending Carroll and his associate aroused considerable apprehension among constitutional lawyers concerning the effectiveness of the Fourth Amendment. As early as September, 1921, the defendants had been under suspicion for violating the National Prohibition Act. The same three prohibition agents who arrested the defendants disguised themselves as bootleggers on September 29, 1921, and agreed to buy three cases of whiskey from the defendants. Not having received the contraband on that day, the agents were alert for any overt or covert acts of the defendants. Such an occasion developed on December 21, 1921. With the Supreme Court holding that a reasonable and proper cause was sufficient in stopping a motorist who was a potential law violator, the Fourth Amendment was seemingly undergoing a radical change in meaning. Forrest Black was one authority who questioned the validity of the Carroll opinion:

As soon as the Carroll case begins to operate, the officers are no longer trespassers. Where officers have probable cause to believe that liquor is being transported illegally, they have the right, without warrant, to enter upon and search such suspected vehicles. The Fourth Amendment was intended to protect persons, houses, papers, and effects. The logical implications of the Carroll doctrine left only houses unscathed.¹

How was the Court, then, to define probable or reasonable cause? Were suspicions and hearsay evidence enough to validate the sudden search and seizure of an automobile? Black later commented:

The inevitable consequence of the Carroll case has been to place the innocent motorist, especially in the night time, in an uncomfortable dilemma. The person attempting to stop the car may be either a bandit or an officer. The motorist is running a risk both if he stops or fails to stop.1

It was also held in the Carroll case that whatever illegal things might be found on a person or in control of one legally arrested ("legally arrested" meant with probable cause) could also be seized and held as evidence. This followed from Section 25 of the Volstead Act, which said: "no property rights shall exist in any such liquor or property."2

The Carroll decision had its dissenters on the Supreme Court. Justices McReynolds and Sutherland both dissented, and Justice McReynolds wrote quite an interesting dissent. He said, in part:

If an officer, upon mere suspicion of a misdemeanor, may stop one on the highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments? . .. 3

... The negotiations concerning three cases of whiskey on September 29th were the only circumstance which could have subjected plaintiffs in error to any reasonable suspicion.

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1Ibid., p. 1095.

241 Stat. 315 (1919), Sec. 29.

No whiskey was delivered, and it is not certain that they ever intended to deliver any. The arrest came 2\(\frac{1}{2}\) months after the negotiation. Every act in the meantime is consistent with complete innocence. Has it come about that merely because a man once agreed to deliver whiskey, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit? . . . .

. . . . The damned character of the bootlegger business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods . . . . To press forward to a great principle by breaking through every other principle that stands in the way of its establishment—in short to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.2

What was meant precisely by "reasonable or proper cause" was left unanswered by the Carroll case; yet, ironically, this was the most significant question raised by the opinion. Two other cases, relative to the automobile, found their way into the high court based on claims similar to those advanced by Carroll; and in each the Supreme Court upheld the rule of law handed down in the Carroll case.

Gambino v. United States (1927) provided a unique set of circumstances.3 The defendant had been arrested in New York, near the Canadian border, for conspiring to import and transport contraband liquor. Two New York state troopers made the arrest, without a warrant, thoroughly searched the automobile and turned over to federal officers the incriminating evidence. The Northern Federal District Court of New York convicted the defendant for

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1Ibid., p. 174.  
2Ibid., p. 163.  
violating the National Prohibition Act, and the circuit court of appeals affirmed the conviction. By certiorari, the Supreme Court took the case and reversed the judgment. Unlike the Carroll case, the Supreme Court held that in this instance the government was unable to prove any reasonable cause for the search and seizure of the defendant's automobile. Merely stopping the defendant on slight suspicion was not sufficient cause for an intensive search of the vehicle.¹ The Carroll case, it was argued, was based on a 2½ months' surveillance of the suspects which produced a reasonable cause at the time of the search. Such was not the case in the Gambino case. The difference was held to be substantial enough to warrant a reversal of the lower court's decision; yet it was not the heart of the case. The crucial issue in Gambino was the identity of the arresting officers. The state troopers, not being federal agents, by their delivery of the contraband to a federal officer immediately after its confiscation indicated to the Supreme Court that the officers' intentions were to enforce the National Prohibition Act. Such action, the Court ruled, violated the defendant's constitutional rights as provided by the Fourth Amendment. The act itself contemplated some cooperation between state and federal officials in the act's enforcement. Section 2 of the act stipulated that when state magistrates were authorized by the federal government to arrest

¹Ibid., p. 310.
and imprison violators no constitutional rights could be forfeited.¹ Since the state officers were not authorized or aided by the federal government in this instance, the defendant's arrest and the confiscation of evidence were held to have been unconstitutionally obtained. If the federal government had had knowledge of the incident prior to the search and seizure, and had legally participated in the affair, the evidence would have been constitutionally obtained; this not being so, the obviously guilty defendants were set free with the evidence no longer admissible in a federal court. It was Justice Brandeis who wrote the Court's opinion. He said:

The conclusion here reached is not in conflict with any of the earlier decisions of this court in which evidence wrongfully secured by persons other than Federal officers had been held admissible in prosecutions for Federal crimes. For in none of those cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in enforcement of its laws.

The record in the case at bar does not show that the relation between the state troopers and the Federal agencies for prohibition enforcement was called by counsel to the attention of the court. But as the conviction of these defendants rests wholly upon evidence obtained by invasion of their constitutional rights, we are of opinion that the judgment should be reversed ....²

In 1931, the Supreme Court again used the Carroll precedent in Husty v. United States (1931).³ Even though the lower court's conviction of Husty was reversed by the Supreme Court,

¹41 Stat. 508 (1919), Sec. 2.
the reversal was not because of any backtracking on the Carroll opinion. Like Carroll, the defendant Husty was accused of transporting liquor unlawfully and was thus convicted by a federal district court in Michigan. The defendant had been arrested without a warrant, and he therefore insisted on the inadmissibility of the government’s evidence because of the allegedly unconstitutional procedure by which it was obtained. He also argued that his arrest was not based upon a "reasonable cause." The Supreme Court, however, unanimously held that a reasonable cause was present for information had been received by a prohibition agent from a reliable source (the name of the informer needed not be disclosed) that the defendant had liquor in a particular automobile. More specifically, the majority opinion held:

Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape when hailed by the officers were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officers of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightfully denied.1

1Ibid., p. 701.
The "probable cause" doctrine of the Carroll case was thus maintained in the Husty decision even though the district court's judgment against Husty was reversed by the Supreme Court. The Supreme Court held that the sentence for each petitioner exceeded the maximum penalty for "illegal possession," which was for a first offense, a $500 fine, and for a third offense, not less than a $500 fine and not more than two years imprisonment. The Jones Act, under which the defendants had been indicted, created no new crime. It increased the penalties for illegal manufacture, sale, transportation, importation, and exportation to a $10,000 fine and/or five years imprisonment. As illegal possession was not one of the offenses enumerated in the Jones Act for which increased penalties were provided, the Supreme Court ruled that the lower court was in error for providing the defendants the increased penalties for possession.¹

Even with the Husty litigation, no exact definition of a "reasonable and proper cause," as established by Carroll, had yet come forth. And it now appeared that any future elucidation would depend on the particular case at hand and the personal opinions of the justices on the Supreme Court.

III. INNOCENT THIRD PARTIES

Another important category of prohibition litigation was

¹Ibid., p. 282.
the degree of responsibility innocent third parties should bear in the confiscation and forfeiture of automobiles illegally used in the transportation of liquor. This issue emerged from an un- contemplated disparity arising from the passage of two federal acts, the National Prohibition Act and the Revenue Act of 1921, each of which said something different relative to the security of innocent third parties. The Revenue Act included the follow- ing provision:

Whenever any goods ... in respect whereof any tax is or shall be imposed ... are removed, or are deposited or concealed in any place, with interest to defraud the United States of such tax, ... (every)\(^1\) conveyance whatsoever ... used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.\(^2\)

This act clearly implied that any vehicle, in spite of ownership, must be confiscated and forfeited to the government in the event of its attempted use to defraud the government of revenue. The National Prohibition Act, (see the necessary por-
tions of the act cited on page 37), Section 26, Title 2, does not employ such absolute language; it seems to imply, in fact, that innocent third parties, such as lienholders of automobiles, must be protected. Obviously when one was accused of illegally transporting spirits by automobile of which the title was still possessed by the automobile company, the lienholders were inter-
ested in protecting their property.

\(^1\)Parentheses by the writer.

The first case to be heard by the Supreme Court relative to this issue was the *United States v. One Ford Coupé Automobile* (1926). In this litigation the automobile of a man named Killian was seized by a federal prohibition agent on the grounds that it was being used for the purpose of depositing and concealing certain illicit beverages on which the federal taxes had not been paid. The subsequent seizure and forfeiture of the automobile were based on Section 3450 of the Revenue Act, not on the National Prohibition Act. However, the Garth Motor Company, the lienholder, immediately claimed ownership and denied any knowledge of Killian's purpose or action. The company quickly moved to quash the forfeiture and sought to preserve its property by arguing that the automobile could not be forfeited under Section 3450 because it was Killian's purpose to violate the National Prohibition Act, not the Revenue Act. Also it argued that the National Prohibition Act had superseded the Revenue Act. The district court granted the company's request and preserved the lienholder's property. The circuit court of appeals upheld the lower court's opinion; but, having granted certiorari, the United States Supreme Court reversed the decision.

Because the original allegation against the accused never indicated that the automobile had been used or discovered in the transportation or possession of contraband liquor, the Supreme

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Court held that there was no legal reason for the belief that the National Prohibition Act had been violated.\(^1\) The allegation only indicated that the accused had concealed liquors without having paid the taxes thereon with the clear intent of defrauding the government of revenue. Based solely on the government's charge, the only violation was thus of Section 3460 of the Revenue Act, not the Prohibition Act. Also, according to the Supreme Court, the argument that the National Prohibition Act had superseded the Revenue Act, making the latter null and void, was wholly erroneous. The Revenue Act applied to liquors on which no tax had been paid, whereas Section 26 of the National Prohibition Act applied whether taxes were paid or not. The existence of two similar punitive acts, concluded the court, does not necessarily make them antithetical. It was Justice Brandeis who presented the Court's written opinion. He wrote:

The claimant contends that [section] 26 has modified section 3460, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. . . . That since the Willis-Campbell Act, Congress has not intended to restrict any remedy theretofore given in aid of the revenue laws is clear. The argument that by [section] 26 Congress manifested the intention to protect generally innocent interest is unfounded. The section is narrow in scope. The protection afforded is stated explicitly. It does not apply generally to violations of the Prohibition Act, nor to the violations of any provision of the revenue laws. It applies solely to cases of forfeiture incident to

\(^1\)Ibid., pp. 330-1.
the prosecution, as therein provided, of a person transporting liquor by a vehicle in violation of the Prohibition Act.  

The essence of this case was not that innocent third parties' rights were always to be forfeited in prohibition cases, but simply that a person could be tried only for what he had been indicted. The opinion validated the constitutionality of the two related acts and meant that when one was accused and properly convicted of violating a certain act, he could be punished only by the sanctions provided by that act.

The court had an opportunity to clarify (or further confuse) this holding in another case it decided two years later. This was the case of Commercial Credit Corporation v. United States (1926). Here the facts were similar, but with one striking difference. An automobile was confiscated by federal prohibition agents for violating the National Prohibition Act. The title to the car belonged to Commercial Credit, which claimed absolute ignorance of the possessor's bootlegging activities. The company argued that the forfeiture of the car was unconstitutional and pleaded for its recognition as an innocent third party. The district court and subsequently the circuit court of appeals affirmed the car's forfeiture in accord with Section 26, Title 2 of the National Prohibition Act, under which the

1 Ibid., pp. 332-3.
2 Commercial Credit Corporation v. United States, 276 U. S. 226 (1928).
accused had been indicted. The Supreme Court, however, reversed
the decision, this time protecting the innocent party's rights.
The difference between the two cases was extremely significant
in the eyes of the Supreme Court. For the confiscation in the
second case came about as a consequence of the alleged violation
of the National Prohibition Act, under which the interests of
innocent third parties were not to be forfeited. Justice San-
ford wrote the Court's majority opinion:

The essential distinction between Section 26 and Section
3450 in so far as relates to the forfeiture of a vehicle is
that where Section 26 is the only applicable provision for
its forfeiture the interests of innocent owners and lienors
are not forfeited, but where it may be forfeited under Sec-
section 3450 by reason of its use to evade the payment of a
tax the interests of those who are innocent are not saved.1

To add further to the confusion, another case came to the
Supreme Court by certiorari in 1930, which possessed features of
each of the previously discussed cases. This was Richbourg Motor
Company v. United States (1930).2 Again a conflict between the
two controversial statutes was the issue. In this case, also
referred to as Davis Motors v. United States, a person was ar-
rested while illegally transporting intoxicating beverages in a
motor vehicle. The initial seizure was made under Section 26
of the National Prohibition Act, but the district attorney did
not proceed with the prosecution of the charge. Rather he ob-
tained an indictment under Section 3450 of the Revenue Act, for

1Ibid., p. 231.
2Richbourg Motor Company v. United States, 281 U. S. 528
(1930).
removing and concealing spirits with intent to defraud the government of taxes, and seized the vehicle. The lienholder argued for his rights as an innocent third party, but his pleading was to no avail in the federal district court nor in the circuit court of appeals. The Supreme Court agreed to review this case and ultimately reversed the judgment of the lower court. It was Justice Stone who delivered the Court's majority opinion. He wrote:

Where a vehicle has been seized as one used for the unlawful transportation of intoxicating liquor in violation of the National Prohibition Act, proceedings for its forfeiture may be had only under that act, by which the interests of innocent lienors are protected, and not under U. S. Revenue Stat. 3450, authorizing the forfeiture of vehicles used in the removal or concealment of any commodity with intent to deprive the United States of any tax upon it, even where the charge against the driver under the National Prohibition Act has been dropped, and he has been prosecuted and convicted under Revenue Stat. 3450, for removing and concealing spirits with intent to defraud the government of its tax.\(^1\)

In short, in accord with the holding of this case, bootleggers in future encounters could only be tried for the laws they had actually broken. Since it was clear that the National Prohibition Act was violated in this instance, the provisions of that act and that alone had to determine the nature of the punishment. Thus, the lienholder was able to get his property back.

Whether these decisions of the Supreme Court were valid or invalid in the writer's view is not the question to be discussed here. But it must be conceded that a strong element of

\(^1\)Ibid., p. 528.
logic did exist in the Court's interpretation of the property
dights of innocent third parties. That search, seizure, and for-
feiture of contraband property could, in some instances, be con-
stitutional was not denied by the Court; yet the means to achieve
these ends were conservatively scrutinized by the justices and
the rights of the accused were certainly not disregarded.

IV. ON THE HIGH SEAS

The automobile was not the only transportation medium to
create litigation during prohibition. Seizure of illegal intoxici-
cating beverages occurred beyond the terrestrial boundaries of
the United States. Here, too, accused were not hesitant in seeking
court action to protect their constitutional rights as guar-
anteed by the Fourth Amendment. Two such cases reached the United
States Supreme Court during prohibition: Ford v. United States
(1927)¹ and United States v. Lee (1927).²

The United States Government, recognizing the possibili-
ties of smuggling liquor from foreign soil into the United States,
negotiated several treaties with foreign governments to improve
the enforcement of the Eighteenth Amendment. One such treaty
was negotiated in 1924 with Great Britain, authorizing the sei-
sure of British ships and the taking into custody of British

subjects who were knowingly violating the National Prohibition Act. Not only the fate of the vessels but that of everything on board would be subject to adjudication by the United States courts. Hence the crews and vessels, lawfully seized, were not to be immune from United States prosecution.

Twenty-five miles from the western coast of California and 5.7 miles from the Farallon Islands, a territory of the United States, the British ship Quadra was seized in November, 1924, by the United States Coast Guard. The British vessel and its crew were alleged to have violated the National Prohibition Act. The crucial question to be answered in this instance was whether the search and seizure were legal when they occurred beyond the three mile limit. The treaty with England provided that the rights of the United States could not be exercised at a greater distance from the boundaries of the United States or its territory "than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." When the Coast Guard ship, the Shawnee, had ordered the Quadra to stop, the officers of the British vessel ordered the contraband liquors to be taken from the vessel and placed on a motor boat adjacent to the Quadra. The smaller boat supposedly had orders to conceal the liquor until such time that it was safe to return aboard. The Shawnee,

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2Ibid., pp. 619-20.
3Ibid., p. 608.
however, spotted the motor boat and seized it, taking the contraband into custody. After the government in federal district court proved that the motor boat could have traveled the distance of 8.7 miles in less than one hour, the jurisdiction of the United states courts was held to be established. Also, by contending that the conspiracy was originally laid in San Francisco, where the liquor had been ordered, rather than on the high seas beyond the three mile limit, the government sought further to validate the jurisdiction of the federal courts.

After the legality of United States jurisdiction had been established, the district court found the British crew guilty, and the circuit court of appeals later affirmed the conviction. The defendants, still feeling that their rights had been abridged, asked for a writ of certiorari from the Supreme Court. The Supreme Court reviewed the case but eventually affirmed the judgment of the lower court. The rule of law was laid down here that despite the locus where defendants might be apprehended, if a conspiracy against the United States was proven, even if such conspiracy were initiated outside the three mile limit of United States territorial or national boundaries, the government's efforts to quash the conspiracy were constitutional. The holding of the Court was as follows:

They argue that they are charged with a conspiracy illegally to import or to attempt to import liquor into the United States when they were corporeally at all times during the alleged conspiracy out of the jurisdiction of the United States and so could commit no offense against it. What they are
charged with is conspiring "at the Bay of San Francisco" with the defendants Quarteraro and Belanger illegally to import liquor and the overt acts of thus smuggling and attempting to smuggle it. The conspiracy was continuously in operation between the defendants in the United States and those on the high seas adjacent thereto, and of the four overt acts committed in pursuance thereof, three were completed and took effect within the United States, and the fourth failed of its effect only be reason of the intervention of the federal officers. In other words, the conspiring was directed to violation of the United States law within the United States by men within and without it, and everything done was at the procuration and by the agency of each for the other in pursuance of the conspiracy and the intended illegal importation. In such a case all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country.  

It was clear from Chief Justice Taft's majority opinion that, for reasons similar to those applying to the automobile, a search warrant need not always be procured in checking ocean traffic, though reasonable and proper cause must exist.

Only one other prohibition case involving the Fourth Amendment guarantees and their applicability to the high seas reached the Supreme Court during the 1920's, and the decision in this case simply affirmed the holding in the Ford case. Yet this case did introduce a new aspect, one that would be very consequential in 1928: the validity of a scientific apparatus in uncovering evidence. This was the case of United States v. Lee (1927). In this case the lower courts had ruled that the means by which the evidence had been obtained infringed the constitutional rights.

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1Tbid., pp. 619-20.

of the accused. The facts were these: On the afternoon of February 25, 1925, a Coast Guard patrol boat saw a motorboat proceed southwesterly from Gloucester Harbor, Massachusetts. Suspiciously, the Coast Guard boat followed the vessel but lost sight of her in the evening fog. Later the same evening the motorboat was again located alongside the schooner L'Homme, approximately twenty-four miles from land. The boatswain of the Coast Guard vessel put a search light on the motorboat and ordered the occupants to put up their hands. By using the searchlight the motorboat was examined from the deck of the Coast Guard patrol boat. A number of cans of alcohol were detected, and the bootleggers, McNeill, Niesa, and Lee, were put under arrest and escorted to Boston.\textsuperscript{1}

The district court and the circuit court of appeals held that the Coast Guard was not authorized to visit and search American vessels more than twelve miles from the coast; that the seizure there made was without legal authority; and that the evidence obtained was therefore inadmissible. The Supreme Court reversed the decision with Justice Brandeis writing its opinion. He wrote:

The government contends that the Coast Guard has authority to visit, search, and seize an American vessel on the high seas beyond the 12 mile limit when probable cause exists that our law is being violated; that it has authority also to arrest persons on such vessel whom there is reason to believe are engaged in committing a felony; that here probable cause was shown that the crime, a felony, was being committed; that if any search, within the meaning of the Constitution was made of the motorboat before she reached port, it was

\textsuperscript{1}ibid., p. 559.
valid as an incident of a lawful arrest of persons whom the officer had reasonable cause to believe were engaged in committing a felony; that the constitutional prohibition against search and seizure without a warrant is not applicable to this small motorboat which does not appear to have been used as a place of residence; and that it does not appear that any search was, in fact, made before the motorboat was examined in Boston by the deputy surveyor, within the territorial limits of the United States, where search is clearly valid.¹

The defendants had argued that there existed no probable cause, and that their motor boat was followed only from mere suspicion by the Coast Guard patrol boat. To this argument the Court replied:

... But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motorboat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. ...  

... A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained.²

This case was significant for two reasons. First, it reiterated the reasonable clause doctrine originally established in the Carroll case and extended it beyond the boundaries of the United States. Secondly, this opinion was a prelude to the historic wiretapping decision of the Court in 1928 (Olmstead v. United States), which will be examined later. The use of a scientific apparatus obtaining incriminating evidence against

¹Ibid., p. 562.  
²Ibid., p. 563.
the accused was, not in this case a violation of the defendant's constitutional rights, since what the defendant revealed to the officers was of his own free will and there was no compulsion from any member of the Coast Guard crew.

V. CONCLUSION

In concluding this chapter, one could make several observations as to the effect conveyance litigation in the twenties and on the Supreme Court's interpretation of the Fourth Amendment. As was true in the Boyd, Adams, and Weeks cases, the Court consistently held that the Fourth Amendment must be liberally construed to meet the exigencies of the changing times. The Fourth Amendment was never intended to forbid all searches and seizures, said the Court, but only those which were unreasonable. Thus, the task of the Court in this area was simply this: to uphold only reasonable searches and seizures as recognized by the Constitution. As to what a reasonable search was, the Court would in each instance have to decide. Searching an automobile without a warrant, where sufficient cause existed, was clearly within the confines of the Fourth Amendment. This was not unreasonable since the time needed to procure a warrant would provide an escape for the automobile and the contraband materials. However, just any search and seizure of a bootlegging automobile was not justified (Bambino v. United States). Probable and reasonable cause must have previously existed (Carroll v. United States). Innocent
third parties, furthermore, were to be protected against confiscation and forfeiture of their vehicles used in violation of the National Prohibition Act (United States v. One Ford Coupe Automobile; Commercial Credit Corporation v. United States; Richbourg Motor Co. v. United States). As for ship cases, ships might also be searched without a warrant, provided reasonable and proper cause could be determined.

Conveyances were, thus, the subject of a tremendous amount of litigation during prohibition; still this represented but one phase of the Supreme Court's involvement in the "Noble Experiment." The concepts of reasonable and unreasonable search and seizure were relevant to many other phases of the Court's action besides the automobile and the vessel. It is now pertinent to evaluate these other non-conveyance cases and observe how the Supreme Court distinguished between an unreasonable and a reasonable search and seizure.

Since was not commented upon during National Prohibition, where will be, because the state of the Fourth Amendment has been well

- Agreements

- Law

1908 (2017).
CHAPTER IV

UNREASONABLE SEARCHES AND SEIZURES

I. INTRODUCTION

In order to discover how the United States Supreme Court further defined, or attempted to define, an unreasonable search and seizure during the prohibition years, it is perhaps best to examine the Court's other prohibition decisions chronologically. By dividing Chapters 4 and 5 into chronological sections, a higher degree of organization for facilitating understanding can be realized.

II. 1919-1925

Actually, the first case decided by the Supreme Court after the Weeks case (1914) relative to unreasonable searches and seizures was not concerned with intoxicating liquors nor was it decided during National Prohibition; yet it is referred to, as two others will be, because the decision greatly influenced the Court's view of the Fourth Amendment. The first case was Silverthorne Lumber Company v. United States (1915). The Silverthornes, Father and Son, owned and operated a lumber yard. Because of alleged unlawful activities, a grand jury subpoenaed the defendants to

\[1\] Silverthorne Lumber Company v. United States, 251 U.S. 385 (1919).
produce the company's books and documents for a grand jury's study. The men refused to provide such materials on the grounds that such a demand was unconstitutional under the Fourth and Fifth Amendments. As a result of their repeated refusals to oblige the government, they were placed under arrest, the charge being contempt of court. While they were being detained, officers secretly searched the defendants' offices and files, seized the company's records, photographed the same, and took the evidence to the district attorney's office. The defendants requested the return of their records, which, they argued, had been unlawfully seized. The originals were eventually returned, but the photostatic copies were retained by the district attorney. Though it was doubtful that the means by which the evidence was obtained would be approved by the courts, the defendants were indicted by the grand jury for contempt of court, fined $250, and imprisoned by a federal district court. The Silverthornes asked for a writ of certiorari from the Supreme Court, and the high court approved their petition. After reviewing the case the Supreme Court reversed the decision of the lower court. Chief Justice Oliver Wendell Holmes wrote the majority opinion. He said:

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S.
383, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps were required instead of one.

In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence 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. Of course this does not mean that the facts thus obtained become sacred and inadmissible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed.

The California Law Review later published an excellent analysis of the Silverthorne case. As guilty as the defendants were, principles could not be sacrificed for expediency, the editors rightly maintained. For, they wrote:

The real wrong, it is maintained, is not the use of the evidence, but the unlawful obtaining thereof. Evidence is evidence, no matter how it is obtained. Hence let the evidence in, it is urged, and then punish the perpetrators of the wrong in getting it; but to permit collateral attack on the evidence is to cheat justice . . . .

The efforts of the court, to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.

In this case, as in United States v. Lee, a scientific fool was used in the procurement of evidence; yet in the Lee case the Supreme Court sanctioned the use of the device, and in the Silverthorne case the means by which the evidence was procured was declared unconstitutional. How did the Court distinguish between

1Ibid., p. 391.  
2Ibid., p. 392.  
the legitimate use of a searchlight and the illegitimate use of a camera? As ironical as it may appear, the Supreme Court saw a great distinction. The use of the searchlight did not require trespassing on the defendant's private property. The evidence was made available by the defendants; however, the camera was a different matter. Actual trespassing by the officers was necessary in this instance to procure the needed evidence. Such action, the Court held, clearly constituted a violation of the defendants' constitutional rights.

The first search and seizure case to be decided by the Supreme Court during National Prohibition was Gouled v. United States (1921). As in the Silverthorne case, intoxicating liquors were not the subject of the litigation but the decision was pertinent to the Fourth Amendment's interpretation. The defendant Gouled had been under suspicion by the United States Army for some time in connection with defrauding the government through army contracts he had received to manufacture clothing and equipment. Unable legally to obtain needed evidence to prosecute, the government hired a spy for the purpose of obtaining evidence. Having become good friends with Gouled, Mr. Cohen, the army's secret agent, entered the defendant's residence on what was supposed to be a friendly visit. Knowing that Gouled would not be home, Cohen searched and seized without a warrant the necessary

\[\text{Gouled v. United States, 255 U. S. 298 (1921).}\]
documents to warrant a trial. Immediately the agent delivered his information to the district attorney. On the basis of this evidence, Gouled was indicted, tried and convicted by the federal district court. The circuit court of appeals upheld the verdict of the lower court, but the United States Supreme Court reversed the decision. The majority opinion of the court included the following holding:

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 an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be unreasonable, and therefore a prohibited, search and seizure, as 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. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.1

In these two cases the Supreme Court had reversed decisions of the lower courts. The first involved the use of a scientific apparatus in the procurement of evidence, and the second involved spying by a federal agent. In both cases legal warrants for the search were lacking, and in each the accused was released by the Supreme Court because of the illegal means used in the search and seizure. The incriminating evidence was clear in each case, but the high court's interest in preserving civil liberty principles

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1Ibid., pp. 305-6.
ever sustaining convictions was paramount.

The Supreme Court's dedication to libertarian principles was again tested in *Amos v. United States* (1921). ¹ One Lawrence Amos had been under suspicion for some time of violating the national liquor laws. In pursuit of evidence against Amos, federal agents, without a warrant, went to the home of the suspect. Amos was not at home when the agents arrived, but his wife allowed the agents to enter and search the premises. The successful search provided ample evidence against Amos. Even though it was legal to possess liquor in one's house, the defendant was charged with removing whiskey on which the revenue tax had not been paid to a place other than a government warehouse, and selling whiskey on which the tax required by law had not been paid. The federal district court found the defendant guilty with the circuit court of appeals affirming the decision. The Supreme Court heard the case and reversed the conviction.

During the lower courts' litigation, Amos had repeatedly asked for the return of his property, since the means by which it was seized, he said, was in violation of his constitutional rights. The government's attorney had contended throughout that the Fourth Amendment was not violated, since no coercion was exercised by the federal agents upon entry into Amos' home. Thus, the defendant had not been deprived of his constitutional rights.

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¹ *Amos v. United States*, 255 U. S. 313 (1921).
such was not the case, said the Supreme Court. The rights of the defendant had been abridged. Justice Clark, who wrote the Court's majority opinion, said:

After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was argued the district attorney intended to use in evidence at the trial, and which had been seized by P. J. Coleman and C. A. Rector, officers of the government, in a search of defendant's house and store "within his curtilage," made unlawfully and without warrant of any kind, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States.¹

There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon the attention of the court by the government itself. The petition (for the return of the illegally seized property) should have been granted.²

The government had also argued throughout the trial that the defendant's constitutional rights had been waived when his wife admitted the federal agents into the house in search of evidence in behalf of her husband. The Court's opinion on this matter would have been significant to the Fourth Amendment's interpretation, but the Supreme Court felt it unnecessary to consider. As Justice Clark wrote:

The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the

¹Ibid., p. 314. ²Ibid., p. 316.
government officers, who came, without a warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected.\(^1\)

Thus, the Amos case, like the Silverthorne and Goule litigation before it, reaffirmed a basic principle of American jurisprudence, that the rights guaranteed by the Fourth Amendment of the United States Constitution could not be circumvented by federal police.

III. 1925-1931

If one is not yet convinced that the Supreme Court during prohibition was extremely interested in the preservation of civil liberties, the cases about to be discussed should end any doubt. In each of the two, evidence against the accused was quite substantial, but constitutional guarantees, as interpreted by the Supreme Court, precluded conviction. The first of these was Agnello v. United States (1925),\(^2\) and the second was Byars v. United States (1927).\(^3\)

Policemen in New York City, disguised as dope peddlers, went to the home of a Stephan Alba for evidence relating to a

\(^{1}\)Ibid., p. 317.


narcotics syndicate. In the course of the evening, after conversing with Alba, the officers tried to purchase cocaine from him.

Not possessing a supply at that time, excepting a few samples which he gave the disguised officers, Alba told them to return the following week for their complete order. In the meantime the officers secured a legal warrant based on their knowledge that Alba was peddling narcotics. On the designated date the officers returned with a number of other officers, who surrounded Alba's house and waited for the transaction to occur. Alba told the policemen that the supply had not yet arrived and sent a man named Centurino to obtain the supply. Centurino, followed by the policemen stationed outside, went to his own house where he remained for a few moments. From there he went next door to a grocery store belonging to a Pace and Thomas Agnello. The residence of Frank Agnello, a third brother of Pace and Thomas, was in a building adjoining the grocery store. It was here, the officers were led to believe, that the real supply existed. After leaving Frank's house by way of the grocery store, the men then proceeded to Alba's residence. When they arrived, Frank Agnello gave to one of the disguised policemen a package containing cocaine. At that moment the offenders were arrested. While on their way to police headquarters for further questioning, the home of Frank Agnello was searched without a warrant and additional evidence was procured.

The federal district court of Eastern New York convicted
the defendants for selling cocaine without having first registered their intentions with the collector of Internal Revenue and without having paid the prescribed tax. Frank Agnello persistently claimed that the evidence against him had been illegally seized since no warrant had been issued authorizing a search of his residence. The district court overruled this defense, and the circuit court of appeals affirmed the lower court's judgment. The Supreme Court heard the case of Frank Agnello and reversed the lower court's judgment against him. The Court's opinion was clearly stated in the words of Justice Butler:

While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein. . . . The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws.1

It is well settled that when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. . . . The government contends that, even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine. The reason for such application, where required, is that the court will not pause in a criminal case to determine collateral issues as to how the evidence was obtained . . . . But in this case, the facts disclosing that the search and seizure violated the Fourth Amendment were not in controversy. They were shown by the examination of the witness called to give the evidence. There was no search warrant; and from the first, the position of the government has been that none was necessary . . . .

1Agnello v. United States, 269 U. S. 20, 82 (1925).
Where, by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated, and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately, and without any application for the return of the thing seized.  

The admission of evidence obtained by the search and seizure was in error, and prejudicial to the sustained rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded.

The Supreme Court did not, of course, deny that persons arrested while committing a crime may lawfully be searched (Carrell v. United States). However, a search of a house some distance from the violation and for which no warrant had been issued was definitely unconstitutional. Moreover, mere belief that an article sought is concealed in a dwelling is not justifiable grounds for a search without a warrant. Any admission in court of evidence obtained by an illegal seizure would be unconstitutional, said the Court, by the Weeks rule.

The Agnello case was not without serious repercussions. The Supreme Court was vehemently criticized for its holding. An article in a 1926 Yale Law Journal was typical of the legal fraternity's reaction. It argued:

Where the place element alone is the basis of a decision, the reasons for invalidating the search seem less clear. The accused has by his conduct created a reasonable suspicion of guilt, else the arrest is unlawful and the problem does not arise. Public welfare would seem to be best served by privileging officers to search, at the time an arrest is made, any premises within a reasonable distance which the

1Ibid., p. 34.  
2Ibid., p. 35.
accused has recently occupied, if the officers have reason to believe that relevant evidence exists there. Delay may mean the loss of the evidence in cases where the defendant is in fact guilty, and thus be the means of defeating the ends of justice.\(^1\)

But the Supreme Court did not feel that the guarantees of the Fourth Amendment could be so loosely construed. It will be interesting to compare the Agnello case decision with that of\(^2\)

\textit{State v. United States} (1925), where a somewhat similar situation developed but where the search and seizure were declared reasonable by the higher court. This discussion must be reserved, however, for the next chapter.

In 1927, two strikingly similar liquor cases, one of which has already been discussed (\textit{Gambino v. United States}), reached the United States Supreme Court. In each case the accused had been convicted in a district court with the circuit court of appeals affirming the decision. \textit{Byars v. United States} (1927) was the second of these cases.\(^3\) The defendant had been accused and convicted by a federal district court in Iowa for possessing with fraudulent intent certain counterfeit strip stamps used on whiskey bottled in bond. After valid complaints against the accused Byars had been lodged, a municipal judge of Des Moines issued a search warrant for his arrest. When the local authorities received

\(^1\)The Effect of the Agnello Case on Incidental Searches and Seizures," Yale Law Review, XXXV (May, 1928), 618.

instructions to make the search and seizure, they asked the federal prohibition agent in Des Moines to assist in the execution of the warrant. Adams, the federal agent, assisted and helped discover the stamps which were later used as evidence against Byars in federal court. After his conviction, Byars petitioned the Supreme Court for a writ of certiorari. The high court heard the case and reversed the judgment of the lower court. The Court's majority opinion, written by Justice Sutherland, presented the high court's reasoning. It stated:

While it is true that the mere participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and "it is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Byars' decision clearly stated that a search warrant issued by a municipal judge was not valid when in search of federal law violations; however, the federal government could avail itself of evidence unlawfully obtained by a state agency, but not when the federal government was taking an active part in its apprehension. As was true in the Gambino case, Byars had been convicted through the aid of a federal agent helping to execute a state search warrant. Since the federal agent did not possess a federal warrant, his presence constituted a violation of the

\[1\text{Ibid., p. 32.}\]
defendant's constitutional rights. Byars, thus, was now a free
man with the evidence obtained no longer admissible in a court
of law; yet it should again be stated that the cooperation between
the federal and state enforcement agencies was not meant to be
severed in the enforcement of the prohibition laws. The Supreme
Court hoped for such cooperation but only when based upon proper
legal and constitutional safeguards for the accused.

IV. 1931-1934

The last three years of the "noble experiment" provided a
variety of actions for the courts to review. Among the cases
which the Supreme Court adjudicated and in which it disallowed
unreasonable searches and seizures were Go-Bart Importing Com-
pany v. United States (1931), Grau v. United States (1932), Uni-
ted States v. Lefkovitz (1932), Taylor v. United States (1932),
Sgro v. United States (1932), and Nathanson v. United States
(1933). Each of these cases afforded the Supreme Court an addi-
tional opportunity to examine and re-examine the exact nature of
the guarantees of the Fourth Amendment.

As was true in a majority of the Fourth Amendment cases
during prohibition, the Go-Bart Importing Company had been ac-
cused of violating the National Prohibition Act. The federal
prohibition agent involved, a Mr. Calhoun, in order to have a

1 Go-Bart Importing Company v. United States, 282 U. S. 344
(1931).
warrant issued for the arrest of the company's officers, Gowen and Bartels, filed a complaint before a United States commissioner alleging that the accused were conspiring to commit a nuisance against the United States, that is to say, to possess, transport, sell, solicit, and receive orders for intoxicating liquors in violation of the prohibition statutes. The complaint did not specify any building, location, or set forth any particulars as to the case. With only the information set forth in the complaint, a warrant was issued by the commissioner and the search and seizure of the company's records was accomplished. The papers and effects obtained by the search were more than sufficient evidence for an indictment. A federal district court in New York State, after hearing the complaints of the defendants that their constitutional rights had been forfeited and that the evidence obtained should have been dismissed, rejected the motions and held that the search and seizure were legal. The Supreme Court granted certiorari and, after reviewing all the relevant factors, reversed the conviction. Specifically, the court said:

No question is here raised as to the search of the persons. There remains for consideration the question whether the search of the premises, the seizure of the papers therefrom and their retention for use of evidence may be sustained. The first clause of the Fourth Amendment declares: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestioningly extends to the premises where the search was made and the papers taken . . . . The second clause declares, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and the persons or things
to be seized." This prevents the issue of warrants on the loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the union.

The uncontradicted evidence requires a finding that here the search of the premises was unreasonable.

The police action in this case, the Court suggested, unfortunately resembled that of the days of the writs of assistance, when general warrants were the cause of much dissatisfaction and agitation among the colonists. The justices were quite obviously concerned about the encroachment upon personal liberty that such a broad warrant would entail.

In 1932, Grau v. United States reached the Supreme Court. The federal district court had convicted a man named Grau for violating the National Prohibition Act, and the circuit court of appeals had affirmed the conviction. As was true with the Go-Bart incident, a search warrant had been issued; but the means by which it was obtained interested the high court. A prohibition officer on October 14, 1931, was in the vicinity of Grau's residence when he smelled whiskey odors apparently coming from Grau's premises. He also saw persons carrying cans, used in the processing of whiskey, and what appeared to be corn sugar, up to and into the building. The agent then saw a truck haul similar

1Ibid., p. 356.
2Ibid., p. 356.
oans away from the establishment. A search warrant was immediately
ought by the officer as a result of this evidence. The warrant
was granted and the seizure of 350 gallons of whiskey and other
contraband materials was made on Grau's premises. The defend-
dant argued throughout the litigation that no reasonable or pro-
per cause existed for issuance of the warrant; and that, there-
fore, his constitutional rights had been forfeited. After re-
viewing the case, the Supreme Court reversed the decision of the
lower court. It was Justice Roberts who wrote the Court's opinion.
It stated:

Section 25 of title 2 of the National Prohibition Act pro-
vides: No search warrant shall issue to search any private
dwelling occupied as such unless it is being used for the
unlawful sale of intoxicating liquor, or unless it is in part
used for some business purpose such as a store, shop, saloon,
restaurant, hotel or boarding house.¹

The affidavit (in the Grau case) fails to state the place
to be searched is not a private dwelling, and the record
affirmatively shows that it was. At most the deposition charges
the manufacture of whiskey; no averment of sale is made ...

The court below, however, held that the facts set forth war-
ranted a belief that the dwelling was being used as headquar-
ters for the merchandising of liquor. This was deemed suffi-
cient compliance with the statutory permission for search
of a dwelling if used for the unlawful sale of intoxicating
liquor.

A search warrant may issue only upon evidence which would
be competent in the trial of the offense before a jury and
would lead a man of prudence and caution to believe that the
offense has been committed. Tested by these standards, the
affidavit was insufficient.²

Therefore the Court had ruled that an affidavit asserting
belief that certain facts were true could not be sufficient to

¹Ibid., p. 127. ²Ibid., p. 128.
support a liquor search warrant. The officer, it was noted, stated in the affidavit that what he saw "appeared" to be the location of a liquor warehouse, though he did not say it actually was. Also the failure of the warrant to state specifically that the building to be searched was a private dwelling made it a direct violation of the Fourth Amendment.

General warrants were again challenged by the Supreme Court in United States v. Lefkowitz (1932). An affidavit by a federal agent had been filed in federal district court charging Lefkowitz with the use of a room to solicit orders for liquor, to cause it to be delivered, and to collect for it and divide proceeds. The complaint did not allege that the room was a place where liquor was or ever had been manufactured, sold, kept, or bartered. A search warrant was subsequently issued containing only the data contained in the affidavit. When it was executed, a general search of the premises was instigated. The general search disclosed that the room was also employed for storage of contraband liquors. Based upon the evidence thus obtained, the defendant was convicted by the federal district court; the circuit court of appeals, however, reversed the judgment of the lower court, declaring that the seized materials were unconstitutionally confiscated, as no mention in the warrant was made as to the use of the room for storage purposes. The Supreme Court upheld

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the decision of the appellate court. Justice Butler wrote the Court's opinion, which stated:

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy . . . . Its protection extends to offenders as well as to the law abiding . . . . The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons of crime.1

The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments.2

Prohibition officers often seemed to let their sense of smell run away with them. As was true with the federal officer in Grau v. United States, such was the situation in Taylor v. United States (1932).3 Being near the residence of a man named Taylor, prohibition agents sensed a distinct odor, which they "thought" was whiskey, coming from the enclosed doors of the defendant's garage. Suspiciously the officers entered the garage, without a warrant, and found that their senses were accurate. Immediately 122 cases of liquor were confiscated and Taylor was

1Ibid., p. 484. 2Ibid., p. 487. 3Taylor v. United States, 286 U. S. 1 (1932).
arrested. The federal district court ruled that the officers' actions constituted a legal search and seizure, since the act was the same as if committed within their sight (see Carroll v. United States). The circuit court of appeals affirmed the decision; but the Supreme Court reversed the decision with Justice McReynolds writing the opinion. He held:

Although over a considerable period numerous complaints concerning the use of these premises had been received, the agents had made no effort to obtain a warrant for making a search. They had an abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such a warrant. Moreover, a short period of watching would have prevented any such possibility... Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search. This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage; the action of the agents had no immediate connection with an arrest. The purpose was to secure evidence to support some future arrest.¹

⁰ As stated in the opinion, the Court did not deny that the sense of smell was a valid reason for seeking a legal search warrant; however, the knowledge that a dwelling or any building privately owned contained contraband liquors did not justify an unreasonable search and seizure prohibited by the Fourth Amendment.

The invalidity of, or the lack of, a legal search warrant was the basis of most of the Supreme Court's definitions of an

¹Ibid., p. 6.
unreasonable search and seizure. *Sgro v. United States* (1932) brought to the Court a very unique situation relative to an invalid search warrant. The defendant *Sgro* had been convicted by a federal district court for the illegal manufacture, possession, and selling of intoxicating beverages. On July 6, 1926, a warrant based upon an officer's affidavit was issued for the searching of the defendant's premises. The man who filed the affidavit, *Dodd*, claimed he had purchased beer from *Sgro*. As of July 27, 1926, the search had not yet been executed; and the federal agents authorized to make the search, knowing that the time period for the warrant's execution had elapsed, returned to the district commissioner's office to secure a new warrant. At that time the date on the warrant was changed from the 6th to the 27th of July. Soon afterwards the search was successfully made, and the defendant and the evidence were taken into custody.

Section 11 of the National Prohibition Act had clearly stated that a search warrant must have been executed within a period of ten days, after which date the warrant, unless executed, became void. The government claimed that the redating of the warrant reactivated it. The district court and the circuit court of appeals approved of the government's action and found nothing illegal with this procedure; however, the Supreme Court felt differently. It was Justice Hughes who presented the view of the

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The fact that it is a second warrant gives the commissioner no privilege to dispense with the statutory conditions. These cannot be escaped by describing the action as a reissue. If the warrant is the old one, sought to be revived, the proceeding is a nullity, and if it is a new warrant, the commissioner must act accordingly. The statute in terms requires him before issuing the warrant to take proof of probable cause. This he must do by examining on oath the complainant and his witness and requiring their affidavits or depositions. The proof supplied must have appropriate relation to the application, for the new warrant must speak as of the time of the issue of that warrant.¹

Simply redating a warrant with the intent of reactivating it thus was not legal unless the procedures by which the original warrant was issued were again repeated.

In 1933, the Supreme Court was asked to pronounce upon the supremacy of the United States Constitution over any Congressional statute dealing with search and seizure. The occasion was prompted by Nathanson v. United States (1935).² The defendant had been convicted by a federal district court of illegally possessing intoxicating liquors. The appellate court had affirmed the district court's decision. The defendant promptly appealed to the United States Supreme Court. The High Court heard the case and reversed the decision of the lower court on the grounds that the defendant's constitutional rights, as guaranteed by the Fourth Amendment, had been violated.

The evidence against the defendant had been obtained, the

¹Ibid., p. 211.

²Nathanson v. United States, 290 U. S. 41 (1933).
government contended, by a legal search warrant; however, the
basis for the warrant was not the National Prohibition Act but
the Tariff Act of 1930. This act had stated that if any federal
agent had any cause to suspect the presence in any dwelling, store
or other building of any merchandise on which tax duties had not
been paid, the government was authorized to secure a warrant,
enter such dwelling and secure such merchandise. Because the
federal agents could not secure a warrant against Nathanson under
the provisions of the National Prohibition Act as sufficient
facts were not available to merit such a warrant, the Tariff Act,
with its emphasis on "suspicion," seemed to be the best recourse.
The Supreme Court, however, held that the constitutional rights
of citizens could not be limited by an act of Congress. As Jus-
tice McReynolds argued for the Court:

The Amendment applies to warrants under any statute: re-
venue, tariff, and all others. No warrant inhibited by it
can be made effective by an act of Congress or otherwise.
It is argued that searches for goods smuggled into the
United States in fraud of the revenue, based upon affidavits
of suspicion or belief, have been sustained from the earli-
est times; that this practice was authorized by the Revenue
Act of July 31, 1789, 1 Stat. at L. 43, chapter 5, also sub-
sequent like enactments. But we think nothing in these stat-
utes indicates that a warrant to search a private dwelling
may rest upon mere affirmation of suspicion or belief with-
out disclosure of supporting facts or circumstances.2

The Fourth Amendment asserted that "probable cause, sup-
ported by Oath or affirmation," was needed to validate a search.
This provision, the High Court found, was grossly violated in the

1Ibid., p. 42.          2Ibid., p. 47.
Nathanson case because suspicion, not "probable cause," directed the actions of the arresting officers.

V. CONCLUSION

Here it is appropriate to emphasize again the remarks of Osmond K. Fraenkel:

Is it better that a few offenders go free and respect for the law be maintained, or is it better that society be protected against the mistakes of overzealous officers and they be punished independently?1

This was essentially the question that the Supreme Court was forced to answer in each of the previously discussed cases. It is not difficult at this point to see how the High Court answered the question. In each of the cases, Silverthorns through Nathanson, there was not a single doubt as to the guilt of the accused; yet each of them was saved from prison because some part of his constitutional rights had been violated. Before, however, we give the reader the impression that civil liberties were more important to the Supreme Court than the rights of society, it should be noted that there were other cases, some very similar to the ones already cited, where the obviously guilty were not let off. The High Court did recognize and upheld reasonable searches and seizures in situations other than those involving conveyances. The line of demarcation, however, between reasonable and unreasonable was sometimes finely drawn and quite difficult to ascertain; yet the Court relying on precedent and logical

1Fraenkel, loc. cit.
principles did a good job in differentiating the two. Ironically some of the actions which the Court called reasonable caused more public outcry than those it denoted as unreasonable.
CHAPTER V

REASONABLE SEARCHES AND SEIZURES

I. INTRODUCTION

Using roughly the same time procedure as was employed in the previous chapter, we shall now discuss how the Supreme Court defined a reasonable search and seizure. In many instances the line between reasonable and unreasonable searches seemed to be fine indeed; yet it is to the credit of the Court of the 1920's that it remained rigidly consistent in its use of the criteria for differentiating reasonable from unreasonable police actions. The Court followed stare decisis throughout, never once overturning a previous prohibition decision.

II. 1919-1926

*Burdeau v. McDowell* (1921) was decided by the Supreme Court during the same year as was *Gouled v. United States* (1921).¹ In both instances the defendant had pleaded that the means by which the incriminating evidence had been procured violated his constitutional rights as set forth in the Fourth Amendment. Each of the defendants claimed that his premises had been searched without a warrant by an officer; yet the Gouled conviction was

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reversed and McDowell's was affirmed by the Supreme Court. What was the distinction?

McDowell had been suspected by federal authorities of the fraudulent use of the United States mails. Two private detectives without a warrant secretly secured entrance into his home and went away with sufficient evidence to convict him. Burdeau, an assistant United States district attorney, did not receive information concerning the seized personal effects of McDowell for several months after their disappearance. Even though it was known that the detectives involved were working for Burdeau, the district attorney testified in district court that he never knew of, nor sanctioned, the action of the detectives. He further maintained that the government did not get possession of the evidence until several months after the incident allegedly took place. When the government did get possession, however, it immediately undertook to prosecute the defendant. The federal district court in Pennsylvania, after hearing all the testimony, declared the seizure of the evidence by the detectives inadmissible because of the unconstitutional means by which it was obtained. The defendant was immediately ordered absolved of all accusations by the district court. The government immediately appealed on the grounds that the evidence was not illegally obtained. The United States Supreme Court, allowing the case to bypass the appellate court, heard the appeal and reversed the lower court's decision. As the High Court pointed out in its
majority decision written by Justice Day:

The Fourth Amendment gives protection against unlawful searches and seizures and, . . ., 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. . . .

In the present case the record clearly shows that no official of the Federal Government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another . . . .

We know of no constitutional principle which requires the government to surrender the papers under such circumstances. The papers having come into the possession of the government without a violation of petitioner's rights by government authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminating character.2

In the Gouled case, it will be remembered, the government had actually ordered the seizure of Gouled's papers and effects and was very much aware of the intended search and seizure some time before the act actually occurred; however, the Court asserted, the McDowell case presented a different problem. The federal government neither sponsored nor knew anything concerning the confiscation of McDowell's personal effects and remained ignorant of the facts until some time after the event. Even though the evidence was unlawfully seized by a private individual, the

1Ibid., p. 475. 2Ibid., p. 476.
admissibility of such evidence in a federal court was not thereby prohibited. The Supreme Court did not deny that the defendant could have redress against the detectives for their illegal actions; but since the federal government had no part in the incident, the decision of the lower court was reversed. Thus, the rule of law was that though evidence was unlawfully confiscated by a private agency, the goods do not become "sacred and inadmissible" in a federal court.¹

Justices Brandeis and Holmes were unable to concur with the rule of law laid down in the Burdeau decision. The tenor of their view is best understood by examining an excerpt from Justice Brandeis' dissenting opinion:

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... Respect for the law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play.²

The Hester case, three years after Burdeau v. McDowell, provided the medium for a completely novel interpretation of the Fourth Amendment, such as that occasioned by the innovation of the automobile.³ Charley Hester was accused by two federal agents of concealing distilled spirits on his premises in violation of the National Prohibition Act. The California federal

district court, after hearing all the evidence in the trial, convicted the accused of the offense. The defendant appealed his case on the grounds that the agents were without a warrant at the time the evidence was obtained. Prior to the arrest and confiscation, the federal agents had concealed themselves fifty to one hundred yards away from Hester's dwelling, but still on the defendant's property. From this distance the agents detected a liquor transaction between Hester and a man named Henderson. The transaction was made outside the home of the defendant but on his personal property. After the transaction was made, the defendant and his associate were arrested and the illicit materials confiscated. On appeal, the Supreme Court ruled in favor of the government and affirmed the lower court conviction. The Court held that because of the defendant's own deliberate act, and not any acts of the federal agents, had disclosed the contraband liquor, no illegal search or seizure had occurred. What about the charge that federal officers lacked a search warrant? This matter brought forth the new element in the Court's holding. As Justice Holmes wrote in the Court's majority opinion:

The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible; it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure.

The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This
evidence was not obtained by the entry into the house, and it is immaterial to discuss that . . . . 1 The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields. 2

The Hester decision caused many scholars to wonder what precisely was meant by "personal effects" in terms of the Fourth Amendment. The Amendment states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." Did or did not the ground owned by a person represent his personal effects and was it or was it not protected from invasion by the Fourth Amendment? The Court clearly had this issue in mind when deciding the Hester case. But it will be recalled that the defendant's action constituted a felony; and, as the Court had ruled in the Carroll case, when a felony was being committed in sight of a federal agent, the officer could legally arrest without a warrant. 3

In Grau v. United States (1932), United States v. Lefkowitz (1932), and Agnello v. United States (1925), the Supreme Court had held that the procurement of evidence was unconstitutional because the Constitution prohibited the issuance of general

1Ibid., p. 58. 2Ibid., p. 59. 3Carroll v. United States, 267 U. S. 132 (1925).
warrants. The things to be seized and the places to be searched had to be specified explicitly within the search warrant prior to any legal confiscation. *Steele v. United States* (1925) provided the Court with an opportunity to differentiate between a general and a specific search warrant.¹ Steele, the defendant, had been accused and convicted in a New York federal district court of violating the federal liquor laws. The federal agent, Isidor Einstein, who made the arrest and executed the warrant, had made an application for the warrant with the following affidavit:

... I saw a small truck driven into the entrance of the garage the address of the residence, 611 West 46th Street, had been specified earlier in the affidavit, and I saw the driver unload from the end of a truck a number of cases of stenciled "whiskey." They were the size and appearance of whiskey cases and I believe that they contained whiskey ....

The said premises are within the southern district of New York, and upon information and belief, have therein a quantity of intoxicating liquor containing more than \( \frac{1}{2} \) of 1% of alcohol by volume, and fit for use of beverage purposes.²

As a result of this affidavit a warrant was issued to Mr. Einstein to search the premises at 611 West 46th Street, New York City. Because the building had three entrances, each with a different address, and because essential evidence was obtained from each and used in court by the prosecution, the defendant pleaded that his constitutional protection against general warrants had been abridged. The district judge denied the defendant's plea, and he was convicted of the charge. On appeal, the


²Ibid., p. 500.
Supreme Court affirmed the lower court's opinion in a way that seemed to contradict other decisions we have discussed concerning the issuance of general warrants. The Supreme Court did not feel, however, that Einstein's affidavit was general, as the following excerpt from the opinion shows:

Then it was said that the property seized was not sufficiently identified in the warrant. It was described as "cases of whiskey," and while there is no evidence specifically identifying the particular cases which were seized as those which Einstein saw, the description as "cases of whiskey" is quite specific enough... Einstein, a man of experience in such prosecutions and in such seizures, saw the name "whiskey" stenciled on cases and said they looked like whiskey cases. He ascertained by his own investigation of the official records that there was no permit for the legal storage of whiskey on these premises... What Einstein saw and ascertained was quite sufficient to warrant a man of prudence and caution and his experience in believing that the offense had been committed of possessing illegal whiskey and intoxicating liquor and that it was in the building he described.

The search fully complied with the statutory and constitutional requirements as set forth above, the liquor was lawfully seized, and the district court rightly held that it should not be returned.2

An obvious distinction existed between this case and the Agnello case decided the same year. Agnello's residence was some distance away from the intended place to be searched. Unlike the situation in the Grau and Lefkovitz cases, the exact location and the type of building to be searched were stated in the warrant authorizing the search of Steele's premises. Because the interior of 611 West 46th Street had no permanent partitions separating it from the two adjoining establishments, the Court

1Ibid., p. 504. 2Ibid., p. 505.
held that the warrant was applicable to all three. The conviction of Steele, thus, was affirmed by the Supreme Court because a reasonable search and seizure, as defined by the High Court, had occurred.

While the case just cited attempted to distinguish between a general and specific search warrant, the Supreme Court provided another lesson in judicial semantics in Dumbra v. United States (1925). This time the issue was "probable cause." What did it mean and how was it to be distinguished from an "improbable cause?"

A man named Dumbra had been convicted by a New York federal district court of violating the National Prohibition Act. Dumbra had argued that his arrest was not predicated on "probable cause," because no crime had been committed at the time he was apprehended.

After his conviction by the district court, the defendant applied for a writ of error, which the United States Supreme Court granted. When the High Court had finished review of the case, it found no error and affirmed the lower court's verdict. The case, however, did give the Supreme Court an opportunity to reaffirm the meaning of "probable cause." As Justice Stone wrote:

In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

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The apparent readiness of members of the family of a person in control of the suspected premises to sell intoxicating liquors to casual purchasers without any inquiry as to their right to purchase, and the actual production of the liquor sold, in one instance from the premises suspected, and, in the other, from the vicinity of those premises, under such circumstances as to lead to the inference that the suspected premises were the source of supply, gave rise to a reasonable belief that the liquors possessed on the suspected premises were possessed for the purpose and with the intent of selling them unlawfully to casual purchasers ... 

There was, therefore, probable cause for the issuing of the warrant, and the search and seizure made pursuant to it were authorized by the statutes of the United States, and were not a violation of the Fourth Amendment.¹

III. 1926-1930

The question of what constituted a "reasonable search and seizure" was much at issue during the latter stage of prohibition. Although several decisions of importance were handed down, they were overshadowed by the holding of the Olmstead case of 1928, to which the majority of this section will be devoted. The decision itself and the controversial aspects of it will be fully examined after the 1926 and 1927 litigations have been analyzed.

One significant but seldom referred to case, which was decided by the Supreme Court in 1927, was McGuire v. United States.² The crucial question introduced here was just how much investigative authority a federal prohibition agent really possessed when executing a legally obtained search warrant. The residence

¹Ibid., p. 441.
of one McGuire had been searched by prohibition officers holding a legal warrant. While at the residence they uncovered the existence of contraband liquor. After arresting McGuire, but before escorting him to jail, the evidence which had been legally seized, with the exception of one quart of whiskey and one quart of alcohol, was destroyed by the agents. Later the defendant was indicted with the retained evidence being used against him. McGuire repeatedly claimed that his personal property had thus been maliciously destroyed and that such action was a direct violation of his constitutional rights. The district court, however, found McGuire guilty of violating the National Prohibition Act, and the circuit court of appeals affirmed the conviction. The defendant then filed a writ of error with the United States Supreme Court, which reviewed the case, but the decision of the lower court was affirmed. It was conceded by the Supreme Court that the destruction of the liquor was "vicious," but since no property rights could exist in contraband liquor according to Section 25, Title 2, of the National Prohibition Act, the justices felt they had no recourse but to affirm the conviction. It was Justice Stone who wrote the Court's majority opinion. It said in part:

That the destruction of the liquor by the officers was in itself an illegal and oppressive act is conceded. But it does not follow that the seizure of the liquor which was retained violated constitutional immunities of the defendant or that the evidence was improperly received. The arguments advanced in behalf of the accused concern primarily the personal liability of the officers making the search and seizure for their unlawful destruction of a part of the liquor seized. They have at most a remote and artificial bearing upon the right
of the government to introduce in evidence the liquor seized under a proper warrant . . . .

The Fourth and Fifth Amendments protect every person from the invasion of his home by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion . . . Here there was no such invasion. The seizure of the liquor received in evidence was in fact distinct from the destruction of the rest. Its validity as far as the government is concerned should be equally distinct. We can impute to the one the illegality of the other only by resorting to a fiction whose origin, history and purpose do not justify its application where the right of the government to make use of evidence is involved.

As is well known, the issuance of general search warrants has always been unconstitutional in American jurisprudence.

Steele v. United States (1925) was but the most recent prohibition case to reaffirm this rule. In Marron v. United States (1927) the High Court had yet another opportunity to speak out on this very basic matter.

Marron and others had been convicted by the federal district court in California of operating an illegal establishment in violation of the National Prohibition Act. The decision was affirmed by the appellate court, and the defendants requested a writ of certiorari from the United States Supreme Court. Marron argued that the warrant issued against him by federal prohibition agents was illegal in that the materials taken from him were not mentioned as items to be sought for in the warrant. The warrant, as issued, called for the confiscation of "intoxicating

1Ibid., p. 98.
2Ibid., p. 99.
liquors and articles for their manufacture." However, as it turned out, ledgers, gas, light, telephone, and water bills were also taken by the federal agents. In affirming the lower court's decision, Justice Butler wrote the following for the Supreme Court:

The closet in which liquor and the ledgers were found was used as part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose. The bills for gas, electric light, water, and telephone services disclosed items of expense; they were convenient, if not, in fact necessary, for the keeping of the accounts; and as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest.1

If, however, the materials so mentioned had been located in another building some distance from where the intended search was to be made (see Agnello v. United States) or had the warrant stated only that liquor was to be confiscated (see Grau v. United States), such a seizure would have been declared unconstitutional by the Supreme Court. As it was, the search was ruled as being wholly within the meaning of the Fourth Amendment.

The Boyd decision, which was cited in Chapter 2, provided grounds for controversy in the 1928 case of Brown v. United

1Ibid., p. 199.
Was a man compelled to provide the books and papers of a company of which he was an employee for the inspection by a grand jury? The Boyd opinion, it will be recalled, held the following:

But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of...2 It is our opinion, therefore, that a compulsory production of a man’s private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure.3

Arthur C. Brown was the secretary of the National Alliance of Furniture Manufacturers whose activities were suspected of being in violation of the Sherman Anti-Trust Act. Brown, as the company’s secretary, was subpoenaed by the federal district court to produce the records and books of the company for a grand jury. He refused to comply with the court’s orders saying that such action would violate his constitutional rights as set forth in

1Brown v. United States, 276 U. S. 154 (1928).
3Ibid., p. 622.
the Fourth and Fifth Amendments. For his repeated refusals to comply, he was cited for contempt of court. The defendant appealed his case to the circuit court of appeals, but the appellate court also ordered his presence at the grand jury hearing. The Supreme Court then reviewed the case and upheld the lower court's decision. Using the Boyd case as a precedent, the High Court distinguished between the two sets of circumstances. In the Boyd case the defendant was ordered to produce evidence which was knowingly going to incriminate him. This was clearly violative of both the Fourth and Fifth Amendments. But, said the Supreme Court in the Brown decision:

Upon his presentment to the district court as a contumacious witness, he answered, among other things, that to compel him to produce the documents set forth in the subpoena would be to submit to an unlawful seizure and to produce evidence against himself. There was a hearing, but the record fails to disclose what was before the court for its consideration upon that hearing. It appears only that the court held that no sufficient excuse for Brown's conduct had been shown, and he was ordered to again appear before the grand jury and produce the documents called for, whether that body saw fit to administer an oath to him or not, appearing before the grand jury, he again refused, except on condition that he should be subpoenaed and sworn. Thereupon, he was adjudged by the district court to be in contempt for his failure to comply with its order, and sentenced to imprisonment.

Whether the papers were produced for the inspection of the court does not appear, but it may well be that they were and that from an examination of them it appeared that the claim of privilege was wholly without merit. In any event it was Brown's duty to produce the papers in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. If he declined to do so, that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena.\footnote{\textit{Brown v. United States}, 276 U. S. 134, 144 (1928).}
Brown had continually declined to say whether his refusal to obey the subpoena was out of fear that obedience would incriminate him. In short, he refused to "take the Fifth." The government's counsel informed the defendant that the purpose of the subpoena was not to inquire into his personal affairs but only his affairs as an officer of the company. Since Brown would not say that to obey the subpoena would actually incriminate him, the Court ruled that he must answer the demands of the grand jury.

The Brown case, nevertheless, left one matter quite ambiguous. If Brown had said he was disobeying the subpoena because he felt he would personally be incriminated, would the Supreme Court have commanded his compliance? The answer is not clear. In the Boyd case, this was the situation which impelled the Supreme Court to put the defendant's civil rights above the interests of the government.

The year 1928 must be regarded as an epochal year in Supreme Court prohibition litigation. Nine years earlier, it will be recalled, the Court had stated:

"It is that although of course its seizure was an outrage which the government now regrets; it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition..."

1Silverthorne Lumber Company v. United States, 251 U. S. 365, 391 (1919).
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.¹

Yet in 1928, the Court was to recognize as admissible evidence in a federal court wiretapping evidence. The fact that the Supreme Court was able to reach such a decision without abridging the defendant's Fourth and Fifth Amendment rights represented a significant development in prohibition jurisprudence.

One of the largest bootlegging conspiracies against the Eighteenth Amendment and the National Prohibition Act had its nucleus in Seattle, Washington. Roy Olmstead, the leading conspirator, was general manager of an illicit liquor empire there. He had made an initial contribution of $10,000 to the group's capital while eleven others contributed $1,000 each. The profits were divided, one-half to Olmstead and one-half to the remaining eleven. Of the several offices the organization had in Seattle, the central headquarters was in a large downtown office building. In this office there were three telephones on three different lines. Each of the associates and the manager had telephones in their private homes. Effective and extensive communications were essential to the organization since huge business operations were carried on with other bootleggers in Vancouver, British Columbia, and other distant points. Besides the twelve men already mentioned, bookkeepers, delivery boys, salesmen, dispatchers, scouts,

¹Ibid., p. 392.
collectors and attorneys were on the group's roll. Yearly aggregate sales probably exceeded $2,000,000.

The call numbers of the group's telephones were given to all prospective customers. At times the sales by phone amounted to 200 cases per day. Such a huge enterprise could not but be known by more than those directly and actively involved; however, within such a highly organized business, the obtaining of incriminating evidence for prosecution was a tedious task. The device of intercepting telephone messages between the offices and the clientele was decided upon by the federal prohibition agents. Phones were inconspicuously tapped in the residences of four of the associates and in the main headquarters. The tappings were made without trespass upon any property of the defendants. They were made, in fact, in the basement of the office building and in the streets bordering the residences.

The accumulation of wiretap evidence covered a period of many months. The evidence procured related to practically every phase of the syndicate's illicit activities. Some of the disclosures revealed additional criminal acts. With the necessary evidence thus finally available, the defendants were arrested and indicted for violating the National Prohibition Act. The federal district court in Washington State, over the objections of the defendants, admitted the wiretap evidence in the trial; and upon that evidence the defendants were found guilty. The circuit court of appeals affirmed the convictions. The defendants then petitioned

1Olmstead v. United States, 277 U. S. 438 (1928).
for certiorari to the United States Supreme Court. This was granted, and on June 4, 1926, the Supreme Court upheld the judgment of the lower courts. The vote, however, in the Supreme Court was extremely close, closer, in fact, than that in any other case decided during prohibition where the Fourth Amendment was the subject of the litigation. It was a five to four decision. Justices Brandeis, Holmes, Butler, and Stone dissented, with the remaining five justices constituting the majority. Chief Justice William Howard Taft wrote the opinion of the Court. He said:

The common-law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Professor Greenleaf, in his work on evidence . . . says:

"It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question."

Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials by direct legislation, and thus depart from the common-law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many Federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house or curtilage for

\textit{ibid.}, p. 467.
the purpose of making a seizure.
We think, therefore, that the wire tapping here disclosed
did not amount to a search or seizure within the meaning of
the Fourth Amendment.\(^1\)

In the Silverthorne case, it may be recalled, the defendant's private papers had been photographed by federal prohibition officers without a warrant. After the return of the originals, the photostats were retained by the government for future prosecution. The Supreme Court called this an unreasonable search and seizure. How did the Court now justify the use of another scientific instrument in the procurement of evidence? Chief Justice Taft replied concerning the Silverthorne case:

The defendants were arrested at their homes and detained in custody. While so detained, representatives of the government, without authority, went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the district attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

"Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the government planned, or at all events ratified, the whole performance."\(^2\)

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of interception. Our consideration must be confined to the Fourth Amendment.\(^3\)

The United States takes no such case of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching.

\(^1\)Ibid., p. 465.
\(^2\)Ibid., p. 461.
\(^3\)Ibid., p. 462.
There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants.  

By the invention of the telephone fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office, any more than are the highways along which they are stretched.

This Court, in Carroll v. United States, . . . declared: "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens."  

It is also interesting to note that a statute of the State of Washington, adopted in 1909, provided that:

Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor.  

How, then, did the Supreme Court react to the federal government's violation of this state statute? Again we refer to Chief Justice Taft's opinion:

This statute does not declare that evidence obtained by such intervention shall be inadmissible . . . Whether the state of Washington may prosecute or punish federal officers violating this law, and those whose messages were intercepted may sue them civilly, is not before us. But clearly a statute, passed twenty years after the admission of the state into the Union, cannot affect the rules of evidence applicable in courts of the United States.  

As was stated before, four of the nine judges dissented in the Olmstead case; one more dissenter would have meant a

1Ibid., p. 464.  
2Ibid., p. 465.  
3Ibid., p. 468.  
4Ibid., p. 469.
reversal of the decision of the lower court. Without giving some attention to the views of this sizeable minority, we cannot fully appreciate the difficulties of interpreting the Fourth Amendment when wiretapping evidence is the issue. The best argument for the unconstitutionality or inadmissibility of wiretapping evidence is that contained in the dissenting opinion of Justice Brandeis. He wrote:

When the Fourth and Fifth Amendments were adopted, the form of evil theretofore taken, had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incidental to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of the "sanctities of man's home and privacies of life" was provided in the Fourth and Fifth Amendments by specific language. But time works changes, brings into existence new conditions and purposes. Subtler and more far reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. . . . As a means of espionage, writs of assistance are but puny instruments of tyranny and oppression when compared with wiretapping.

Moreover, in the application of a constitution, our contemplation cannot be only of what has been, but of what may be. The progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer," was said by James Otis of much lesser intrusions than these.  

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1Ibid., p. 473.  
2Ibid., p. 474.
Even after the Supreme Court's holding in this case, the issue of wiretapping was far from settled. In criminal and civil trials, it remained one of the most controversial issues. Congress itself was not entirely pleased with this decision. For in the Federal Communications Act of 1934, Section 605 provided that:

... no person not being authorized by the sender shall intercept any communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person ...; and no person having received such intercepted communications ... shall ... use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto ....

The constitutionality of this act was never tested by the Supreme Court; but in 1937, wiretapping was again a subject for the High Court to consider (Nardone v. United States). Until 1961, the rule established by the Supreme Court in the Nardone case was the official judicial view of the admissibility of wiretapping evidence. The Court held here that evidence obtained directly or indirectly from wiretapping must be excluded as evidence in a federal court, but only because its admission would violate a federal statute, not the Constitution. If the same evidence could be obtained from legitimate sources, it could still be employed the same as any other evidence. The Nardone

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148 Stat. 1103 (1934), Sec. 605.

rule is best understood in the majority opinion of Justice Roberts:

The government contends that Congress did not intend to prohibit tapping wires to procure evidence. It is said that this court, in Olmstead v. United States . . . held such evidence admissible at common law despite the fact that a state statute made wiretapping a crime; and the argument proceeds that since the Olmstead decision departments of the federal government, with the knowledge of Congress, have, to a limited extent, permitted their agents to tap wires in aid of detection and conviction of criminals. It is shown that, in spite of its knowledge of the practice, Congress refrained from adopting legislation outlawing it, although bills, so providing, have been introduced.¹

We nevertheless face the fact that the plain words of section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that "no person" shall divulge or publish the message or its substance to "any person." To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshakeable by the government's arguments.

It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same consideration may well have moved the Congress to adopt section 605 as evoked the guarantee against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.²

For years controversy has raged with respect to the morality of the practice of wiretapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong. In the light of these circumstances we think another well recognized principle leads to the application of the statute as it is written so as to include within its sweep federal officers as well as others. That principle is that the sovereign is embraced by general words

¹Ibid., p. 381.
²Ibid., p. 387.
of a statute intended to prevent injury and wrong.\textsuperscript{1}

Like the Olmstead case, the Nardone ruling had its dissenters, with Justice Sutherland writing a notable dissent. He said:

I think the word "person" used in this statute does not include an officer of the federal government, actually engaged in the detection of crime and the enforcement of the criminal statutes of the United States, who has good reason to believe that a telephone is being, or is about to be, used as an aid to the commission or concealment of a crime. The decision just made will necessarily have the effect of enabling the most depraved criminals to further their criminal plans over the telephone, in the secure knowledge that even if these plans involve kidnapping and murder, their telephone conversations can never be intercepted by officers of the law and revealed in court.\textsuperscript{2}

There is a manifest difference between the case of a private individual who intercepts a message from motives of curiosity or to further personal ends, and that of a responsible official engaged in the governmental duty of uncovering crime and bringing criminals to justice. It is fair to conclude that the word "person" as here used was intended to include the former but not the latter.\textsuperscript{3}

My abhorrence of the odious practices of the town gossip, the peeping Tom, and the private eavesdropper is quite as strong as that of any of my brethren. But to put the sworn officers of the law, engaged in the detection and apprehension of organized gangs of criminals, in the same category, is to lose all sense of proportion.\textsuperscript{4}

The Nardone rule seemed to imply that indirectly obtained wiretapping evidence was admissible, but directly obtained evidence was not. Wiretapping could, in substance, be used as a pretext for obtaining needed evidence, but the government must then proceed to get the same evidence in a judicially approved

\textsuperscript{1}Ibid., p. 384. \hfill \textsuperscript{2}Ibid., p. 385.

\textsuperscript{3}Ibid., p. 386. \hfill \textsuperscript{4}Ibid., p. 387.
manner, a manner which would not disclose the previous use of wiretapping.

One conflict which has seriously plagued the enforcement of section 605 of the Federal Communications Act has been the holdings by the Supreme Court on the admission of wiretapping evidence in a state court. Does the effectiveness of section 605 extend to the commission of crimes subject only to federal jurisdiction? Or are state courts also bound by the federal statute? The most recent ruling to clarify this matter was delivered by the Court in Pugach v. Dollinger (1961). The Pugach ruling simply reaffirmed a previous opinion by the High Court relative to this matter. It said:

Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute.

Therefore, as the rule now stands, where a state has favorably legislated in favor of the admission of wiretapping evidence into a state court, such action or/prosecution will not be declared void because of the 1934 federal law. The incongruities of this ruling are obvious. Under such circumstances what becomes of the Fourteenth Amendment? Is there a direct

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3Fourteenth Amendment, Section 1: "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
conflict between it and the Fourth? These are interesting and challenging questions for the inquisitive reader to examine, but they are beyond the scope of this study. Quite possibly the High Court will be afforded abundant opportunity to explore these points in future litigations.

IV. 1930-1934

Whatever the Supreme Court said after the Olmstead case relative to reasonable searches and seizures was certainly anticlimactic; yet there remained two additional cases with "reasonable" conclusions. Danovitz v. United States (1930) brought to the High Court a matter not yet adjudicated.\(^1\) The defendant had been found guilty in a federal district court of the unlawful manufacture of intoxicating beverages. His appeal to the circuit court of appeals was granted but without avail. The Supreme Court then reviewed the defendant's claim that his constitutional rights had been forfeited by his conviction. The defendant specifically claimed that properties such as containers, barrels, bottles, corks, labels, cartons, etc., were not seizable under Section 25, Title 2, of the National Prohibition Act. This act prohibits the possession of materials used in the unlawful manufacture of intoxicating beverages. Since these above mentioned materials were not used in the actual manufacture of liquor, as

\(^1\)Danovitz v. United States, 281 U. S. 389 (1930).
the manufacturing process was completed before these materials could be used, the charge against the defendant, he argued, was invalid and unconstitutional. The Supreme Court, however, affirmed the ruling of the lower court by holding:

A search warrant may issue, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order . . . .

The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word "manufacture" be taken in the strictest and most exact sense. But the word may be used in a looser way to express the whole process by which an article is made ready for sale on the open market. As the purpose of the prohibition act was to "suppress the liquor traffic" condemned by the act, it should be liberally construed to the end of this suppression, and so directs.1

The final case during prohibition used by the United States Supreme Court to explain what was a reasonable search and seizure as provided by the Fourth Amendment was Blackmer v. United States (1932).2 Although the issue here was not the illegal manufacture or possession of intoxicating liquors, the case, like others preceding it, did shed more light on the Supreme Court's interpretation of the Fourth Amendment during these years of the "Noble Experiment."

An act of Congress passed on July 3, 1926, provided that a citizen of this country residing abroad could be, in criminal

1Ibid., p. 396.

cases, required to attend sessions of court when his presence there was deemed necessary.\(^1\) The defendant, Blackmer, was sub-
poenaed by the Supreme Court of the District of Colombia to ap-
pear in court for testimony in a criminal case. Two such sub-
poeaees were issued to Blackmer, who was at the time residing in Paris, France. To each subpoena the defendant failed to respond or to give any reason for his failure. For this negligence the defendant was charged with contempt of court and fined a total of $60,000, the fine to be paid by the confiscation of his per-
sonal and real property. The defendant did respond to this ac-
tion and based his response on the Fourth Amendment. In the circuit court of appeals and the United States Supreme Court the decision of the lower court was unheld. The Supreme Court vali-
dated the lower court's ruling with the following opinion:

The authorization of the seizure of the property belong-
ing to the defaulting witness and within the United States, upon the issue of the order to show cause why he should not be punished for contempt, affords a provisional remedy, the propriety of which rests upon the validity of the contempt proceeding. As the witness is liable to punishment by fine if, upon the hearing, he is found guilty of contempt, no reason appears why his property may not be seized to provide security for the payment of the penalty . . . . The property is to be held pending the hearing and is to be applied to the satisfaction of the fine if imposed and unless it is paid. Given the obligation of the witness to respond to the sub-
poea, the showing of his default after service, and the validity of the provision for a fine in case default is not excused, there is no basis for objection to the seizure upon constitutional grounds. The argument that the statute creates an unreasonable classification is untenable. The disobedience

\(^1\)Ibid., p. 421.
of the defaulting witness to a lawful requirement of the court, and not the fact that he owns property, is the ground of his liability. He is not the subject of unconstitutional discrimination simply because he has property which may be appropriated to the satisfaction of a lawful claim.¹

¹Ibid., p. 441.
CHAPTER VI

CONCLUSION

As was indicated in Chapter one, the problem that motivated the writer to undertake constitutional law was the following: to determine to what extent, if any, and in what manner the extensive litigation arising under the enforcement of the prohibition statutes in the 1920's compelled the United States Supreme Court to clarify and expand the civil liberties guarantees of the Fourth Amendment of our federal constitution. In order to resolve this problem, four related tasks were attempted and completed: an inquiry into the origins of the prohibition movement; a historical analysis of the writing and pre-1920 interpretation of the Fourth Amendment; an interpretative survey of the prohibition cases reaching the Supreme Court in the 1920's that involved some phase of the Fourth Amendment; and an induction of certain generalized conclusions clearly warranted by the historical evidence.

No new methodological procedures were devised in approaching this study. Rather resort was had to a variety of tools and techniques that have long been standard in political science scholarship. Among the most important of these procedures were the following: documentary examination; legal analysis; topical taxonomy; comparison; and historical induction (reaching general
conclusions that sum up but do not go beyond the historical data analyzed). The greater part of the writer's research involved a critical analysis of relevant Supreme Court opinions in the *United States Reports*, their systematic collation and comparison, and an interpretation of their significance in throwing light on the central problem of this thesis. Throughout the author scrupulously refrained from passing moral judgment on specific Supreme Court opinions.

The time has now come to ask the question: What conclusions, if any, can be legitimately drawn from the data presented in this study which will throw light on its central problem? It would appear that several significant conclusions are warranted by the evidence that has been adduced.

There can be no doubt that sufficient data have been brought forth to make the flat assertion that prohibition litigation definitely did compel the United States Supreme Court to clarify and expand the civil liberties guarantees of the Fourth Amendment. The process of clarification and expansion was a slow and involved one, and it took many forms; yet today the Fourth Amendment is surely a more sturdy bulwark of civil liberty than it was before the adoption of the Eighteenth Amendment. In what ways, it may well be asked?

For the first time, the Supreme Court in the 1920's attempted to make a clear distinction between a "reasonable" and an "unreasonable" search and seizure. Their distinction was
often a finely drawn one and hard to follow, yet the effort was made.

The Court also narrowed the range of situations in which the police might search an individual's home or office without a search warrant. Before prohibition, getting a search warrant was the exception rather than the rule with most American police.

Furthermore, the Court faced up to the problem of the automobile in determining to what extent a person's car is subject to the guarantees of Fourth Amendment privacy. If its determination in this area did not please everybody, the Court can hardly be accused of dodging a controversial and complex issue.

Perhaps most important of all, the Court of the 1920's for the first time really came to grips with the issue posed by electronic crime detection instruments—things wholly unknown to the Founding Fathers. Their conclusions in this area, particularly their wiretapping opinions, left civil libertarians unhappy; and the relation of wiretapping and electronic "peeping" to the Fourth Amendment is still a highly litigious matter. Yet once again it must be said for the justices that they boldly confronted a new and challenging problem in the field of civil liberties and brought at least some clarity to a hitherto wholly clouded field. Perhaps the very fact that the Court of the Twenties was equally condemned by "liberals" and order-conscious "conservatives" is convincing evidence of the success with which it reconciled the competing imperatives of liberty and authority.
In conclusion it should be noted that the prohibition litigation reaching the Supreme Court dramatized in graphic fashion three fundamental facts about the American democratic system of justice—facts that are often neglected by experts and all too often unknown to the layman. First of all it proved once again that, in the final analysis, the Constitution and Bill of Rights are what the Supreme Court say they are. This is a truism to students of our Constitutional history; it is not so obvious to others. Secondly, it proved that constitutional good may often flow from statutory evil. In the minds of most scholars, prohibition was an ineffective (evil) way of controlling the abuse of alcohol; yet it was precisely from this "evil" that much good, in the form of a clear elaboration of the constitutional guarantees of the Fourth Amendment, flowed. And lastly, the litigation dramatically proved that great developments in constitutional interpretation usually follow the enactment of "revolutionary" legislation. Thus, for example, enactment of the Sherman Act led to a fuller elaboration of the Commerce Clause of the Constitution; adoption of state segregation laws finally forced the Court to interpret more specifically the substance of the Fourteenth Amendment; and enactment of recent anti-Communist legislation has driven the Court into an "agonizing reappraisal" of the true meaning of the guarantees of the First Amendment. This is all as it should be. Until Congress or the States pass a law, and some litigant complains about the law, the Supreme Court cannot and should not speak. This is the essence of American democracy.
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A. BOOKS


B. PERIODICALS


C. UNITED STATES SUPREME COURT CASES

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Commercial Credit Corporation v. United States, 276 U. S. 226 (1928).
Hester v. United States, 265 U. S. 57 (1924).
athanson v. United States, 290 U. S. 41 (1933).
Silverthorne Lumber Company v. United States, 251 U. S. 385 (1919).
APPENDICES
APPENDIX A

JUSTICES OF THE UNITED STATES SUPREME COURT
(1919-1934)

October Term, 1919:

Hon. Edward D. White, Chief Justice
Hon. Joseph McKenna
Hon. Oliver Wendell Holmes
Hon. William R. Day
Hon. Willis VanDevanter
Hon. Mahlon Pitney
Hon. James C. MoReynolds
Hon. Louis D. Brandeis
Hon. John H. Clarke

October Term, 1920:

Hon. Edward D. White, Chief Justice*
Hon. William Howard Taft, Chief Justice*
Hon. Joseph McKenna
Hon. Oliver Wendell Holmes
Hon. William R. Day
Hon. Willis VanDevanter
Hon. Mahlon Pitney
Hon. James C. MoReynolds
Hon. Louis D. Brandeis
Hon. John H. Clarke

*White died on May 19, 1921
*Taft appointed June 30, 1921

October Term, 1921: (Same as 1920)

October Term, 1922:

Hon. William Howard Taft, Chief Justice
Hon. Joseph McKenna
Hon. Oliver Wendell Holmes
Hon. Willis VanDevanter
Hon. James C. MoReynolds
Hon. Louis D. Brandeis
Hon. George Sutherland
Hon. Pierce Butler
Hon. Edward T. Sanford
October Term, 1923:  (Same as 1922)

October Term, 1924:

Hon. William Howard Taft, Chief Justice
Hon. Joseph McKenna
Hon. Oliver Wendell Holmes
Hon. Willis VanDevanter
Hon. James C. McReynolds
Hon. Louis D. Brandeis
Hon. George Sutherland
Hon. Pierce Butler
Hon. Edward T. Sanford
Hon. Harlan Fiske Stone

*McKenna retired January 5, 1925
*Stone appointed February 5, 1925

October Term, 1925:  (Same as amended in 1924)

October Term, 1926:  (Same as amended in 1924)

October Term, 1927:  (Same as amended in 1924)

October Term, 1928:  (Same as amended in 1924)

October Term, 1929:

Hon. William Howard Taft, Chief Justice
Hon. Charles Evans Hughes, Chief Justice
Hon. Oliver Wendell Holmes
Hon. Willis VanDevanter
Hon. James C. McReynolds
Hon. Louis D. Brandeis
Hon. George Sutherland
Hon. Pierce Butler
Hon. Edward T. Sanford
Hon. Harlan Fiske Stone
Hon. Owen J. Roberts

*Taft died March 8, 1930
*Hughes appointed February 13, 1930
*Sanford died March 8, 1930
*Roberts appointed May 20, 1930
October Term, 1930:

Hon. Charles Evans Hughes, Chief Justice
Hon. Oliver Wendell Holmes
Hon. Willis VanDevanter
Hon. James C. McReynolds
Hon. Louis D. Brandeis
Hon. George Sutherland
Hon. Pierce Butler
Hon. Harlan Fiske Stone
Hon. Owen J. Roberts

October Term, 1931:

Hon. Charles Evans Hughes, Chief Justice
Hon. Oliver Wendell Holmes*
Hon. Willis VanDevanter
Hon. James C. McReynolds
Hon. Louis D. Brandeis
Hon. George Sutherland
Hon. Pierce Butler
Hon. Harlan Fiske Stone
Hon. Owen J. Roberts
Hon. Benjamin N. Cardozo*

*Holmes resigned January 12, 1932
*Cardozo appointed March 2, 1932

October Term, 1932: (Same as amended in 1931)

October Term, 1933: (Same as amended in 1931)

October Term, 1934: (Same as amended in 1931)
VOTING TABULATION OF EACH CASE DECIDED BY THE UNITED STATES SUPREME COURT BETWEEN 1919-1934 AND RELATIVE TO THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

1919:

Silverthorne Lumber Company v. United States 251 U. S. 365 7-2, Taft and Pitney dissenting.

1921:

Gouled v. United States 255 U. S. 298 9-0

Amos v. United States 255 U. S. 313 9-0

Bordeau v. McDowell 256 U. S. 485 7-2, Holmes and Brandeis dissenting.

1924:

Hester v. United States 265 U. S. 57 9-0

1926:

Agnello v. United States 269 U. S. 20 9-0

Carroll v. United States 267 U. S. 132 7-2, McReynolds and Sutherland dissenting.

Dumbra v. United States 268 U. S. 435 9-0

Steele v. United States 267 U. S. 498 9-0

1926:

1928:

Cowan v. United States 274 U.S. 388, 403.
9-0.

1929:

9-0.

1930:

Danzovitz v. United States 281 U.S. 78, 389.
9-0.

9-0.

1931:

9-0.

9-0.

United States v. United States 273 U.S. 9, 23.
9-0.

United States v. United States 273 U.S. 9, 95.
9-0.

Ford v. United States 273 U.S. 593.
9-0.

9-0.

9-0.

9-0.

1929:

5-4.

Olmstead v. United States 277 U.S. 460.
5-4, Brandeis, Holmes, Butler and Stone dissenting.

Stone did not participate in the case.

1930:

1931:
1932:

Blackmer v. United States 284 U. S. 421
8-0, Roberts not participating in the case.

United States v. Lefkowitz 285 U. S. 452
8-0, Cardozo not participating in the case.

Taylor v. United States 286 U. S. 1
9-0

Grau v. United States 287 U. S. 124
7-2, Stone and Cardozo dissenting.

Sgro v. United States 287 U. S. 206
7-2, Stone and Cardozo dissenting.

1933:

Mathanson v. United States 290 U. S. 41
9-0