IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 533.

EDWARD H. McINNIS, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Supreme Court of the United States:

Comes now the above-named petitioner, Edward H. McInnis, and petitions that the Court grant a rehearing upon his petition for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, and in support thereof respectfully shows:

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That the constitutional question involved in this case has such a far-reaching effect upon the economic and social life of the nation that it should be unqualifiedly determined by the decision of this Honorable Court. It affects the home and business life of every member of this Court and every man and woman living in the United States. If the action of Government agents in tapping private telephone lines is stamped by the courts as lawful, then the personal, private and confidential communications of the millions of people who use the telephone daily for lawful purposes will be subject to the scrutiny of Government agents acting under the guise of attempting to obtain information relating to crime. It requires no stretch of the imagination to visualize the statement of Circuit Judge Rudkin that "such a situation would be deplorable and intolerable to say the least" (R., 594).

It is generally recognized that a writ is frequently denied by this Court for reasons not affected by the merits of the question involved. Therefore, the denial of the writ sought by this petitioner does not proclaim to the bench and bar the opinion of this Court as to whether it is lawful or unlawful for Government agents to seize evidence in the manner that it was obtained in this case, but leaves the matter in a condition of uncertainty. The fact that the decision of the Circuit Court of Appeals for the Ninth Circuit was made by a divided court—Justice Frank H. Rudkin having filed a most vigorous and persuasive dissenting opinion—clearly shows that there is difference of opinion among the leading judges and lawyers of the

country. When the matter arises in some other circuit court of appeals the majority of that court may adhere to the views expressed by Justice Rudkin. For these reasons it is hoped that this Court upon further consideration will grant a writ of certiorari and establish by a definite opinion a uniform rule applicable to the entire nation.

The dissenting opinion of Justice Rudkin is based principally upon the ground that the rights of the petitioner under the Fourth and Fifth Amendments of the Constitution have been violated, and it is the profound conviction of this petitioner that a constitutional question is involved in the case which has not heretofore been passed upon by this Court. If the obtaining of evidence over the private telephone lines of petitioner, tapped by agents of the Government, does amount to a search and seizure within the meaning of those words as used in the Fourth Amendment, then there can be no doubt that a constitutional question is involved. It will be the purpose of this petition to further point out that such acts on the part of Government agents do constitute an unlawful search and seizure.

The petition for the writ of certiorari was resisted by the Government on the theory that no search and seizure was involved. In doing so, counsel for the Government necessarily urged a narrow interpretation of the language of the Fourth Amendment. Such interpretation is directly contrary to the frequent admonitions of this Court that a most liberal construction must be given to the language of said Amendments. The leading case in which the expressions of

this Court are found upon search and seizure law is that of *Boyd vs. United States,* 116 U. S., 616. A careful analysis of that case shows that in fact *no* search and *no* seizure were involved if the words "search and seizure" be given their literal meaning. In that case, which involved the forfeiture of certain goods alleged to have been imported in violation of the customs laws, the Court issued a notice to the claimants of said goods, requiring the claimants to produce a certain invoice of a previous importation. This notice was issued pursuant to an Act of Congress, which authorized the issuance of the same upon motion of the Government attorney, and the penalty prescribed by the act of Congress for the non-compliance with the notice was that the allegations of the Government attorney as to that which the invoice or paper contained would be taken as confessed. Boyd produced the notice under protest, and this Court held that the rights of the claimants under the Fourth and Fifth Amendments of the Constitution had been violated.

It is respectfully urged that this procedure did not involve a search because no search was made or contemplated. Neither did it involve an actual seizure because the Government representatives did not seize the paper and the claimant was not required to part with the possession and custody of the same. The Court, in its decision, admitted this to be true, but held, in effect, that the result was the same as if a search and seizure had been made, and therefore the procedure came within the scope of the Fourth Amendment. In this conneution the Court said:

> "But in regard to the Fourth Amendment, it is contended that whatever might have been alleged against the constitutionality of the Acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection, because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. *That is so;* but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting; * * * but it accomplishes the substantial object of those acts in forcing from the party evidence against himself. It is our opinion, therefore, that the compulsory seizure of a man's private papers to establish a crime charged 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." (Italics ours.)

Also it will be borne in mind that this was not a case in which any person was on trial for a crime, and that therefore the requirement that the claimant produce the papers in connection with a forfeiture of goods,

does not, with any strict interpretation, bring the case within the condemnation of the Fifth Amendment, namely, "that no person shall be compelled in any criminal case to be a witness against himself."

It is, therefore, apparent that the Court for the purpose of preventing a recurrence of those acts which were the direct cause of the Revolution reached out and forcibly applied the Fourth and Fifth Amendments by giving to them the most liberal construction. After applying these two amendments to the facts in that case the Court then proceeded to lay down some definite and wholesome search-and-seizure law. In arriving at its decision as to that which constitutes an unreasonable "search and seizure," the Court points out with considerable particularity the historical facts leading up to the adoption of the Fourth and Fifth Amendments, and the particular objects to be accomplished by the amendments which were in the minds of the framers of the same. It is pointed out that the decision of Lord Camden must be considered as the true and ultimate expression of constitutional law, and that his decision must have been considered by the framers of these amendments "as sufficiently explanatory of what was meant by 'unreasonable search and seizure'."

After quoting at length from the decision of Lord Camden, the Court then states that the principles laid down in his opinion apply to all invasions on the part of the Government and its employees of the *sanctity of a man's home* and the *privacies of life*. And, further, the Court says that "It is the invasion of his indefeasible right of personal security, personal liberty, and

private property * * * which underlies and constitutes the essence of Lord Camden's judgment." What greater invasion upon one's rights to personal security, personal liberty, and private property can be imagined than to have the private and confidential communications to his family and business associates intercepted by Government agents under the pretext of searching for evidence? The telephone as a means of communication was not known to the world at the time of Lord Camden's judgment, or at the time of the adoption of the Fourth and Fifth Amendments to the Constitution, or at the time of the famous decision of this Court in the Boyd case. The only means of communication was by letter. However, the application of the principles laid down by Lord Camden and by this Court in the Boyd case should be expanded to meet the advancement in social and business intercourse, as affected by modern inventions, and this Court has declared this to be the true criterion in the case of *Village of Euclid vs. Ambler Realty Co.*, 47 Sup. Ct. Repts., 114, in the following language: "* * * while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."

The force of the statements of the Court in the quoted language from the *Boyd* case applies equally to the case at bar. The telephone engaged by petitioner was his against all the world, except the company, and

it was his against the company while his tolls were paid. The telephone line, as well as the telephone equipment in his house, was his private property, and the right to the exclusive use and enjoyment of the same was the right of a privacy of life. When the Government agents tapped petitioner's private telephone line they committed a trespass upon the rights and property of petitioner. By means of this trespass the Government agents obtained evidence of private communications transmitted over the telephone, which evidence was used against the petitioner in a criminal case. Can it be doubted that the petitioner was thereby forced to give evidence against himself just as effectively as if he had been forced to take the witness stand and testify himself as to the conversations held over the telephone? Or, just as effectively as if petitioner had been required to produce in court a private communication transmitted by a letter instead of by telephone? The extortion of petitioner's testimony in the one case comes as fully within the scope of the Fourth and Fifth Amendments as in the other, because in each case it "effects the sole object and purpose of a search and seizure." It is the indirect method of compelling one to be the unwilling source of evidence that will forfeit his property or convict him of crime that is condemned by the Court in the *Boyd* case, and petitioner believes should be condemned in this case.

It is again pointed out to the Court that if the stamp of approval is placed upon the acts of Government agents in tapping private telephone lines for the

pose of securing evidence of crime, that the door is opened wide for the imposition upon the citizenship of this country of the most drastic and obnoxious system of espionage imaginable. In the *Boyd* case this Court sternly condemned in its language against any system of "snooping" or espionage. What greater system of "snooping" or espionage can be conceived than that of Government agents tapping private telephone lines? The legality of such procedure is squarely presented to the Court in this case, and the legality or illegality should be stated by this Court in a definite decision as a guide for the future conduct of inferior courts and Government agents.

For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the Court issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

FRANK R. JEFFREY,
Attorney for Petitioner.

Certificate of Attorney.

I, Frank R. Jeffrey, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing on the petition for a writ of certiorari is presented in good faith and not for delay.

Dated this 14th day of December, 1927.

FRANK R. JEFFREY,
Attorney for Petitioner.

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