were dire warnings about the effect on law enforcement. Those predictions simply have not come true. Over time, the bright line of *Miranda* has proven a useful guide for law enforcement and a workable protection against coerced confessions.

With all the many problems facing our criminal justice system—the increase in juvenile violence, continuing drug-related crime—why are we focusing on the exclusionary rule and *Miranda*?

Both the exclusionary rule and *Miranda* warnings serve to safeguard important constitutional protections without preventing law enforcement from doing an effective job.

I hope our discussion today can resolve the concerns some may have and can help us refocus our efforts on moving forward effectively to address the real problems facing our law enforcement and our public.

The CHAIRMAN. Thank you, Senator Biden.

We will turn to Professor Amar.

PANEL CONSISTING OF AKHIL R. AMAR, SOUTHMAYD PROFESSOR OF LAW, YALE LAW SCHOOL; WILLIAM GANGI, PROFESSOR, DEPARTMENT OF GOVERNMENT AND POLITICS, ST. JOHN'S UNIVERSITY; AND PAUL J. LARKIN, JR., KING AND SPAULDING

STATEMENT OF AKHIL R. AMAR

Mr. AMAR. Thank you, Mr. Chairman. It is a great privilege to be here today. My name is Akhil Reed Amar. I am Southmayd professor of law at Yale Law School, where I have taught for 10 years. My subjects include constitutional law, criminal procedure, Federal jurisdiction, and constitutional history. I have written rather widely on these topics, over a dozen lead articles and about 40 articles in all, and I am currently finishing up a book on the Bill of Rights. In light of today's focus on the fourth amendment, my two most relative pieces are articles in the Yale Law Journal in 1991 and a 1994 Harvard Law Review article entitled "Fourth Amendment First Principles."

I care deeply about our Constitution and Bill of Rights. At times, they are all I think about, and my daily life as a teacher and scholar revolves around them. I am a lover of liberty. Autobiographically, I identify with the civil rights-civil liberties tradition, and I stress all that for a reason.

I strongly support the basic architecture of Senator Hatch's proposed fourth amendment reforms. They vindicate the fourth amendment, rightly understood. Yet, I fear that some friends of civil liberty, influenced by a mistaken understanding of the fourth amendment or a mistaken understanding of the Hatch bill or a failure to understand the key differences between the Hatch bill and the House bill, may misinterpret Senator Hatch's proposed reforms as a step back for constitutional liberty.

In fact, these reforms are a great leap forward. They vindicate the framers' original intent and translate it into modern times in just the right way. They create new remedies for innocent citizens victimized by unreasonable government searches and seizures, and thereby make us all more "secure in our persons, houses, papers, and effects," the fourth amendment language.

They eliminate the so-called exclusionary rule, a perverse rule rejected by the Founders, and a rule whose principal effect is to protect guilty criminals. Make no mistake, when it applies, the exclusionary rule helps the guilty to get off and go free, free to prey

on innocent citizens who are, in important ways, thereby made less secure in their persons, houses, papers, and effects.

Government must be deterred from violating the Constitution, but exclusion is neither necessary nor sufficient to achieve deterrence. Damage actions against the government and, where appropriate, punitive damages are necessary and sufficient remedies, and the Hatch bill begins to provide these, in dramatic contrast to the House bill.

Finally, the Hatch bill restores coherence to our constitutional structure. It takes the fourth amendment out of criminal procedure, where it doesn't fit, and it puts it back where it belongs, in constitutional law. Although the so-called exclusionary rule is limited to criminal cases, the fourth amendment says nothing about criminal as opposed to civil cases brought by the Government.

The fifth amendment's self-incrimination, double jeopardy, and grand jury clauses, and the sixth amendment rights—these are about criminal procedure, and they say so, but the fourth amendment is not and does not. It reads like the first amendment, the takings clause, the due process clause, the equal protection clause, and other global constitutional rights. When these rights are violated—freedom of speech, freedom of the press, freedom of religion, just compensation, and so on—we do not use a criminal exclusionary rule. We use damage suits, like section 1983. We make the government and/or its officials pay damages to innocent citizens. That is what we should do in the fourth amendment, too, and that is what the Hatch bill does. That is my bottom line.

Now, let me try to defend and elaborate it all. The fourth amendment promises to make Americans "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." How would this occur remedially? Through damage actions against abusive officials. Property and tort law protects people, makes them secure in their persons, houses, papers, and effects.

If your person or your house or your paper or your possession is searched or seized, you may sue under property and tort law, and if the Government that ordered the search or seizure acted unreasonably, its trespass against you is unconstitutional, null and void. You are entitled to be made whole and in some cases to recover punitive damages. That is how the fourth amendment is to be implemented on a close reading of the text. The text, of course, says nothing about excluding reliable evidence in criminal cases and, of course, we should begin with the text.

Constitutional history provides overwhelming support for this reading. In 1791, the framers clearly had in mind a single case that exemplified an unreasonable search, the 1763 English case of *Wilkes* v. *Wood*. The Government had unreasonably searched Wilkes' house for his private papers, and many other houses, too, in a dragnet search. Wilkes and the others brought hugely successful damage actions that made the plaintiffs whole, and then some. Punitive damages were awarded to deter future abuse and the Government footed the bill, paying in all about 100,000 pounds in court costs, attorneys fees, and punitive and actual damages. This was the remedial model in the mind of virtually every framer.

The *Wilkes* case was the most famous case of its era, the O.J. Simpson case of its day, and Wilkes was a hero to Americans, as

any map shows. Look at Wilkes Barre, PA; Wilkes County, AL; Wilkes County, GA; and the many other places that were named after the flamboyant plaintiff. The judge who heard the case and upheld punitive damages was no less celebrated, Lord Camden, as in Camden, NJ; Camden, SC, and so on.

The so-called exclusionary rule, which rewards guilty criminals, was unheard of. It is not and never has been the English rule. England is the other of these common law liberties. It was never until the last few years the Canadian rule. Though virtually every State constitution had a ban on unreasonable searches and seizures, no court in America, State or Federal, ever excluded evidence in criminal cases on grounds of illegality before 1886. The issue was not how the evidence had come to court, but whether it was reliable.

We are talking here about thousands and thousands of criminal cases, and no exclusion. In the 1820's, the most famous legal scholar and Supreme Court Justice in America, the great Joseph Story, dismissed the idea of exclusion as preposterous. He had never heard of such a rule, and the only issue was, again, whether the evidence was reliable.

How, then, did the exclusionary rule creep into the law? I can't tell the full tale here, so I will ruthlessly compress. The exclusionary rule did not begin as a pure fourth amendment remedy, but as a fifth amendment self-incrimination rule. To use in a criminal case a man's diary or personal papers was, in effect, to make him an involuntary witness against himself.

Exclusion didn't remedy a fourth amendment violation. The violation had occurred whether or not it uncovered evidence or criminal evidence, and only damages could provide a remedy for the innocent citizen in an unreasonable search that found nothing. So exclusion wasn't born as a fourth amendment remedy for a past search, but to prevent a future violation of the fifth amendment that would occur if the diary were used in a criminal case, and this explains why the exclusionary rule applied only to criminal cases and not civil cases brought by the Government. By a convoluted process, this fifth amendment logic eventually was extended to exclude not just diaries and papers, but all defendant property, and later still all unlawfully seized stuff—contraband, stolen goods, and the like.

Three things must now be said. First, this fourth-fifth fusion theory was the best and dominant theory behind the exclusionary rule, visible in over 15 U.S. Supreme Court cases beginning in 1886 and stretching to 1963. For example, it is the key theory in both the 1914 *Weeks* case and in the 1961 *Mapp* case that Senator Kennedy mentioned.

Second, virtually all scholars, friends and foes of exclusion alike, have now rightly concluded that this fourth-fifth fusion theory of exclusion is, in the end, wrong, and the Supreme Court now agrees. Third, once this fourth-fifth fusion theory is rejected, no firm constitutional basis exists for the exclusionary rule.

Three modern arguments are typically trotted out to support it, but none works. First, it is said that for a court to use tainted evidence would violate judicial integrity. That can't be right. Do English judges lack integrity? Did all American judges before 1886, or

most State judges before 1961? Do all judges in civil cases today, where exclusion is not and never has been the rule, lack integrity?

Third, it is said that government can't profit from its own wrong by using criminal evidence illegally gotten. That sounds nice, but it is also wrong. A guilty defendant is also a wrong-doer, and he too should not profit from his wrong, but he does under the exclusionary rule. If government truly cannot profit from its own wrong, why can it use illegally-seized evidence in a civil case? Why is it allowed to keep the drugs rather than giving them back? If keeping the drugs is not wrong, using the drugs as criminal evidence is also not wrong. In fact, returning the drugs to the drug dealer or stolen goods to the thief—that would be wrong, and so, too, is excluding reliable evidence.

Finally, and this is, I think, what Senator Biden said, it is said the exclusionary rule is needed to deter the cops from violating citizens' rights. In my view, that is the right idea and the wrong application. We must deter government violations, but exclusion alone cannot do this. The exclusionary rule is no help when the cops want to hassle someone they know is innocent, but who may be black or a critic of the cops, or what have you.

The citizen is innocent, so there is nothing to exclude. To protect this person, we need tort-like and administrative remedies, not the exclusionary rule, and these needed remedies for innocent citizens are exactly the ones the Hatch bill provides. Once they are in place, they can achieve deterrence, especially if we have punitive damages.

The perverse exclusionary rule is not only not sufficient to deter the cops, it is also not necessary. The Founders understood this. They stressed deterrence through tort law and punitive damages, the *Wilkes* case. We should do the same. To put the point one other way, we must make the Government pay for its wrongs, but under the exclusionary rule the payment, in effect, goes to the guilty criminals. This is a stupid distribution scheme. Instead, we should make the Government pay, with payments going to innocent citizens. This is how we vindicate other constitutional rights and this is what the Hatch bill does.

OK, you say, but what about the Supreme Court? How would it view the Hatch bill, if adopted? I have to tread carefully here, lest I appear presumptuous. Prediction is always tricky, but I believe that after careful deliberation, a majority of the current Justices would see the Hatch bill for what it is and uphold, perhaps applaud, it.

The 1984 *Leon* case made clear that the Constitution does not require the exclusionary rule. The 1971 *Bivens* case invited congressional involvement in fashioning generous remedies for innocent citizens victimized by unreasonable searches, and the 1976 *Watson* case paid great deference to a fourth amendment statute passed by Congress and supported by ancient common law principles.

Will the Hatch bill solve the crime problem? No. No silver bullet will solve the crime problem, but suppose the bill increases convictions of guilty defendants by 1 percent. That is a lot of guilty rapists, murderers, and robbers, and a lot of victims of crime who can sleep easier. One hundred thousand more cops won't solve the problem either, but more cops and less exclusion are both the right

thing to do. Both will make us more secure in our persons, houses, papers, and effects, and so will the new remedies the Hatch bill creates.

I have several technical suggestions, suggestions about exclusivity and damage amounts, that I think will make these new remedies even better and, with permission, I would like to append these to my testimony.

The CHAIRMAN. Without objection, we will put them in your testimony.

[The information referred to and responses to written questions are retained in the committee files:]

Mr. AMAR. The basic architecture of the bill is sound. The Founders, I think, would be pleased by this bill. It returns to their first principles. The American people today, I think, will also be pleased. It makes us all a little more safe, and thoughtful civil libertarians should be pleased, too. For lovers of liberty, this bill is not a step back, but a leap forward.

Thank you.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

Thank you, Mr. Chair. It is a great privilege to be here today. My name is Akhil Reed Amar. I am the Southmayd Professor of Law at Yale Law School, where I have taught for 10 years. My subjects include Constitutional Law, Criminal Procedure, Federal Jurisdiction, and Constitutional History. I have written rather widely on these topics—over a dozen lead articles, and about 40 articles in all—and am currently finishing up a book on the Bill of Rights. In light of today's focus on the Fourth Amendment, my two most relevant pieces are a 1991 Yale Law Journal article on the Bill of Rights as a whole, and a 1994 Harvard Law Review article entitled "Fourth Amendment First Principles."[1]

I care deeply about our Constitution and Bill of Rights—at times these are all I think about, and my daily life as a teacher and scholar revolves around them. I am a lover of liberty—autobiographically, I identify with the civil rights-civil liberties tradition. I stress all this for a reason: I strongly support the basic architecture of Senator Hatch's proposed Fourth Amendment reforms—they vindicate the Fourth Amendment, rightly understood. And yet I fear that some friends of civil liberty (influenced by a mistaken understanding of the Fourth Amendment or a mistaken understanding of the Hatch Bill or a failure to understand the key differences between the Hatch Bill and the House Bill) may misinterpret Senator Hatch's proposed reforms as a step back for constitutional liberty.

In fact, these reforms are a great leap forward. They vindicate the framers' original intent, and translate it into modern times in just the right way. They create new remedies for innocent citizens victimized by unreasonable government searches and seizures, and thereby make us more "secure in our persons, houses, papers, and effects." They eliminate the so-called exclusionary rule—a perverse rule rejected by the founders, a rule whose principal effect is to protect guilty criminals. Make no mistake: when it applies, the exclusionary rule helps the guilty get off, and go free—free to prey on innocent citizens who are in important ways thereby made *less* "secure in their persons, houses, papers, and effects." Government must be deterred from violating the Constitution; but exclusion is neither necessary nor sufficient to achieve deterrence. Damage actions against the government and (where appropriate) punitive damages *are* necessary and sufficient remedies, and the Hatch Bill provides these—in dramatic contrast to the House Bill. Finally, the Hatch Bill restores coherence to our constitutional structure. It takes the Fourth Amendment out of Criminal Procedure, where it does not fit, and puts it back where it belongs: in Constitutional Law. Although the so-called exclusionary rule is limited to criminal cases, the Fourth Amendment says nothing about criminal as opposed to civil cases. The Fifth Amendment's Self-Incrimination, Double Jeopardy, and Grand Jury Clauses, and Sixth Amendment rights—these are about criminal procedure, and they say so; but the Fourth Amendment is not and does not. It reads like the First Amendment, the Takings Clause, the Due Process Clause, the Equal Protection Clause and other global constitutional rights. When these rights are violated—free-

dom of speech, freedom of the press, freedom of religion, just compensation, due process, equal protection—we do not use a criminal exclusionary rule. We use damage suits—we make the government and/or its officials pay damages to innocent citizens. That is what we should do in the Fourth Amendment, too; and that is what the Hatch Bill does.

That's my bottom line. Now let me try to defend and elaborate all this. The Fourth Amendment promises to make Americans "secure in their persons, houses, papers and effects, against unreasonable searches and seizures." How would this occur, remedially? Through damage actions against abusive officials. Property and tort law protects people—makes them secure in their persons, houses, papers, and effects. If your person, house, paper or possession is searched or seized, you may sue under property and tort law; and if the government that ordered the search or seizure acted unreasonably, its trespass against you was unconstitutional, null and void, and you are entitled to be made whole and (in some cases) to recover punitive damages. *That* is how the Fourth Amendment is to be implemented, on a close reading of the text. (The text, of course, says nothing about excluding reliable evidence in criminal cases.)

Constitutional history provides overwhelming support for this reading.[2] In 1791, the Framers clearly had in mind a single case that exemplified an unreasonable search—the 1763 English case of *Wilkes* v. *Wood*.[3] The government had unreasonably searched Wilkes' house for his private papers—and many other houses, too, in a dragnet search. Wilkes and the others brought hugely successful damage actions that made plaintiffs whole and then some. Punitive damages were awarded to deter future abuse, and the government footed the bill, paying in all around 100,000 pounds in court costs, attorneys fees, and punitive and actual damages. *This* was the remedial model in the mind of virtually every Framer; the *Wilkes* case was the most famous case of its era, the O.J. Simpson case of its day. And Wilkes was a hero to the Americans, as any map shows. Wilkes-Barre, Penn., Wilkes County, Ala., Wilkes County Ga., and many other places were named after the flamboyant plaintiff. The judge who heard the case and upheld punitive damages was no less feted: Lord Camden (as in Camden, N.J., Camden, S.C., and so on).

The so-called exclusionary rule, which rewards guilty criminals, was unheard of. It is not and has never been the English rule. It was never, until the last few years, the Canadian rule. Though virtually every state constitution had a ban on unreasonable searches and seizures, no court in America, State or Federal, ever excluded evidence in criminal cases on grounds of illegality before 1886. The issue was not how the evidence had come to court but whether it was reliable. We are talking here about thousands and thousands of criminal cases, and no exclusion. In the 1820's the most famous legal scholar and Supreme Court Justice in America, the great Joseph Story, dismissed an attorney's plea for exclusion as preposterous: he had never heard of such a rule, and the only issue was, again, whether the evidence was reliable.[4]

How then, did the exclusionary rule creep into our law? I cannot tell the full tale here, so I shall ruthlessly compress.[5] The exclusionary rule did not begin as a Fourth Amendment remedy, but a Fifth Amendment Self-Incrimination rule. To use in a criminal case a man's diary or personal papers was in effect to make him an involuntary *witness* against himself. Exclusion did not remedy a Fourth Amendment violation—the violation had occurred whether or not it uncovered evidence, or *criminal* evidence, and only *damages* could provide a remedy for an innocent citizen in an unreasonable search that found nothing. So exclusion was not born as a *Fourth* Amendment *remedy* for a *past search*; but to prevent a *future violation* of the *Fifth* Amendment that would occur if a diary were *used* in a criminal case. (And this explains why the exclusionary rule applied only to *criminal* cases, and not civil cases brought by the government.) By a convoluted process this Fifth Amendment logic eventually was extended to exclude not just diaries and papers but all defendant property, and (later still) all unlawfully seized stuff, including contraband and stolen goods.

Three things must now be said. First, this Fourth-Fifth fusion theory was the best and dominant theory behind the exclusionary rule, visible in over 15 U.S. Supreme Court cases beginning in 1886 and stretching to 1963.[6] (It is, for example, a key theory in both the 1914 *Weeks* case and the 1961 *Mapp* case.)[7] Second, virtually all scholars—friends and foes of exclusion alike—have now rightly concluded that the Fourth-Fifth fusion theory of exclusion is, in the end, wrong. And the Supreme Court now agrees.[8] Third, once this Fourth-Fifth fusion theory is rejected, no firm constitutional basis exists for the exclusionary rule.

Three modern arguments are typically trotted out to support the exclusionary rule, but none works. First it is said that for a court to use tainted evidence would violate judicial integrity. This can't be right. Do English judges lack integrity? Did

all American judges before 1886, or most state judges before 1961? Do all judges in civil cases today (where exclusion is not, and never has been the rule) lack integrity? Next, it is said that government cannot profit from its own wrong by using criminal evidence illegally gotten. Sounds nice, but also wrong. A guilty defendant is also a wrongdoer, and he, too, should not profit from his wrong. But he does under the exclusionary rule. If government truly cannot profit from its own wrong, why can it use illegally seized evidence in a civil case? Why is it allowed to keep the drugs rather than giving them back? If keeping the drugs is not wrong, using the drugs as criminal evidence is also not wrong. In fact, returning drugs to a dealer, and stolen goods to the thief would be wrong—and so too is excluding reliable evidence. Finally, it is said that the exclusionary rule is needed to deter the cops from violating citizens' rights. Right idea, wrong application. We *must* deter government violations. But exclusion alone cannot do this. The exclusionary rule is no help when the cops want to hassle someone they know is innocent—but who may be black, or a critic of the cops, or what have you. The citizen is innocent, so there is nothing to exclude. To protect this person, we need tort-like and administrative remedies, not the exclusionary rule. And these needed remedies for innocent citizens are exactly the ones provided by the Hatch Bill. And once these are in place, they can achieve deterrence. The perverse exclusionary rule is not only not *sufficient* to deter the cops, it is not *necessary*. The Founders understood this—they stressed deterrence through tort law and punitive damages. We should do the same. To put the point one other way, we must make the government pay for its wrongs, but under the exclusionary rule the payment in effect goes to guilty criminals. This is a stupid distribution scheme. Instead, we should make the government pay with the payments going to innocent citizens. This is how we vindicate other constitutional rights, and this is what the Hatch Bill does.

"Alright," you say: "But what about the Supreme Court? How would it view the Hatch Bill if adopted?" I must tread carefully here, lest I appear presumptuous: prediction is always a tricky business. But I believe that after careful deliberation, at least 6 or 7 of the current Justices would see the Hatch Bill for what it is, and uphold—perhaps applaud—it. The 1984 *Leon* case made clear that the Constitution does *not* require the exclusionary rule; the 1971 *Bivens* case invited congressional involvement in fashioning generous remedies for innocent citizens victimized by unreasonable searches; and the 1976 *Watson* case paid great deference to a Fourth Amendment statute passed by Congress and supported by ancient common law principles.[9]

Will the Hatch Bill solve the crime problem? No silver bullet will solve the crime problem. But suppose the bill increases convictions of guilty defendants by 1 percent. That's a lot of guilty rapists, murderers, and robbers; and a lot of victims of crime who can sleep easier. One hundred thousand more cops won't solve the crime problem either. But more cops, and less exclusion are both the right thing to do. Both will make us more secure in our "persons, houses, papers and effects." And so will the new remedies the Hatch Bill creates. (I have several technical suggestions for making these new remedies even better—suggestions about exclusivity and damage amounts—which, with permission, I'd like to append to my testimony, but the basic architecture of this Bill is sound.)

The Founders, I think, would be pleased by this Bill—it returns to their First Principles. The American people, I think, will also be pleased—it makes us all a little more safe. And thoughtful civil libertarians should be pleased too: for lovers of liberty, this bill is not a step back, but a leap forward.

ENDNOTES

1. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994).

2. *See also,* Bradford P. Wilson, Enforcing the Fourth Amendment: A Jurisprudential History (1986).

3. 19 Howells State Trials, 1153 (C.P. 1763), 98 Eng. Rep489. The *Wilkes* case is discussed at length in my Fourth Amendment article, *supra* note 1.

4. See *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 843–44 (c.c.d. Mass 1822) (No. 15, 551) (Story, Cir. J.). The case is discussed in greater detail in my Fourth Amendment article, *supra* note 1; and in Professor Wilson's book, *supra* note 2.

5. For much more analysis, see Amar, 107 Harv. L. Rev. at 787–800.

6. For a partial list of these cases, see Akhil Reed Amar and Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev., 16 n. 97 (1995). For additional cases, see Akhil Reed Amar and Renee Lettow, Fifth Amendment First

Principles: The Self Incrimination Clause, 93 Mich. L. Rev. (forthcoming 1995) (last footnote).

7. See *Weeks* v. *United States*, 232 U.S. 383, 393, 395 (1914); *Mapp* v. *Ohio*, 367 U.S. 643, 646–647, 646 n.5, 656–57 (1961); *id.* at 661–66 (Black, J., concurring).

8. *See, e.g., United States* v. *Leon*, 468 U.S. 897, 905–06 (1984); *Fisher* v. *United States*, 425 U.S. 391, 407–08 (1976).

9. See *Leon*, 468 U.S. at 905–06 (1984); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *United States* v. *Watson*, 423 U.S. 411 (1976).

The CHAIRMAN. Thank you, professor.

Professor Gangi, we will turn to you at this point.

STATEMENT OF WILLIAM GANGI

Mr. GANGI. Thank you. I will depart somewhat from my remarks because of his presentation, which covered, in part, mine.

Can we assume that the practical men who framed the fourth amendment believed that once that amendment was ratified, we would never, ever again have an illegal search and seizure? I think the answer must be no. So what specific remedy, then, did they provide in the Constitution for such violations? You can't find one. Should we conclude, therefore, that its ratifiers enacted rights that were meaningless, mere words? Not at all.

The framers didn't provide a remedy in the Bill of Rights because they relied on the availability of common law tort remedies to do the job. They believed that if citizens then or at any time in the future considered those remedies inadequate, they would ask Congress to modify them or to substitute others.

Congress would be held accountable at the polls for whatever it did and did not do to protect such rights. Congress would define the abuses. If necessary, Congress would provide remedies other than those available at common law, which it does today, and Congress would judge whether or not the remedies provided were effective ones.

One other fact, as he mentioned, is incontrovertible. Excluding reliable evidence from a criminal trial would have been incomprehensible to the framers and ratifiers of the fourth amendment. In 1922, a full 30 years after the fourth amendment was adopted, Justice Story could still write without fear of contradiction, "The right of using evidence does not depend, nor as far as I have any recollection, has ever been supposed to depend, upon the lawfulness or unlawfulness of the mode by which it is obtained."

Then not until 1914 do we have *Weeks*, which, in effect, ignored that history, as so eloquently presented, and it provided a remedy more to the judge's liking than the one that had been provided by the framers and by the Congress. Since that point, of course, again, as already presented, the Supreme Court has retreated from the idea that the exclusion is a fourth amendment personal right.

Nonetheless, proponents of the rule continue to put forth many arguments in support both of exclusion as a constitutional right and of the power of Federal courts to impose it. Eleven years ago, I thoroughly investigated these arguments and found them unconvincing. When all was said and done, what these arguments amounted to was this, that proponents of the rule prefer it to other remedies and that they are prepared to redefine judicial power in order to impose and sustain it.