than reward the guilty. In the latest round of the culture wars, score one for Scalia.

PAPER CHASE

New Republic, Monday, December 15, 1997

Dear Diary: It's time to compose the final exam for my criminal procedure class. Better avoid O. J.—I've already ridden that nag hard enough this semester.

Maybe a question from the Unabomber case instead? Federal agents have seized Ted Kaczynski's diaries in a raid on his mountain shack. Now prosecutors have made public these most intimate of Kaczynski's writings and plan to introduce them in court as evidence, not merely of the alleged Unabomber's guilt, but also of his cold-blooded criminal intent. And that, the government hopes, will convince the jury to mete out the death penalty. Kaczynski's diaries create a troubling picture of a man bent on committing murder and frustrated when he failed.

But that only raises the constitutional stakes. Isn't there something unsettling about the state's breaking into a man's house, pawing through his most private writings, and then using them to brand him an enemy of the state and put him to death?

The Unabomber judge has given the government the green light. But there are serious arguments on the other side—arguments rooted in at least three of the ten amendments in the Bill of Rights.

A good student analysis should probably start with opening words of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Here we see an obvious accent on the notion of privacy—on a citizen's body (his private "person"), on his private abode (his "house" as opposed to other buildings), and on his private "papers" above and beyond all other stuff (his "effects").

And the historical context in which the Fourth Amendment was drafted also suggests that privacy weighed heavily in the Founders' deliberations. They were undoubtedly thinking about the two most famous search-and-seizure cases in the Anglo-American world, *Wilkes v. Wood* and *Entick v. Carrington*. When George III's henchmen broke into John Wilkes's and John

Entick's houses in Britain during the 1760s and rummaged through their private papers, Wilkes and Entick brought suit and won huge jury damage awards for the outrages upon their privacy, in landmark cases presided over by Lord Camden. The colonists loved the rebuke to the king's ministry, and so Wilkes and Camden became genuine American folk heroes.

Camden's language was sweeping, proclaiming that "private papers" are a person's "dearest property" and that even in cases of "atrocious" crime "our law has provided no papersearch."

No doubt some Founders read these words as absolute in their meaning. On the other hand, the Fourth Amendment text does not rule out all "papersearch," but says only that searches must be "reasonable." Camden's "atrocious" was a rhetorical excess—the searches that rightly outraged him were aimed at anti-incumbent pamphleteers, not serial killers. England lacked a First Amendment protecting political scribblers, so libertarian judges like Camden stretched procedural search law to fill the breach. But Americans needn't be so tender toward criminal suspects since we have made it clear that mere political opposition may never be criminalized in the first place.

So the Fourth Amendment means what it says: paper searches are not per se unconstitutional, but they raise special concerns and must always be "reasonable." When the government tries to rifle through newspaper files or bursts into the headquarters of opposition parties, we must beware.

Extra credit if students mention that the Supreme Court missed the boat in the 1978 *Zurcher v. Stanford Daily* case, in which the justices upheld a search of newspaper files where there was reason to believe the *Daily* had incriminating photos of student rioters. If that were enough to go prowling through press files, Richard Nixon could have sent his plumbers to rummage through the drawers of the *Washington Post* whenever the *Post* ran a story about some illegality in the District of Columbia. What was lacking in the *Stanford Daily* case was good reason to think—and a proper judicial finding—that the newspaper was itself part of the illegality it was reporting. Congress said as much when it effectively overruled *Stanford Daily* with the Privacy Protection Act of 1980.

So where does this leave us? It's outlandish to say that Kaczynski, though a political writer of sorts, has a strong First Amendment claim to resist all searches of his papers. His lawyers could claim that he is in fact a noteworthy author: he's published in the *New York Times* and the *Washington Post*! But I doubt even Alan Dershowitz would have the chutzpah to make

that argument. And, unlike in the *Stanford Daily* case, the government established probable cause to believe that Kaczynski was himself guilty of serious criminal wrongdoing, and it did so before searching.

There is, of course, the general issue of reasonableness—not to mention the argument that searching for and reading a man's diary is wildly intrusive. But this only means that the government must have a very good reason to search a person's papers—for example, a high probability that he has committed a string of murders and that his papers will contain important evidence. Telephone conversations can be pretty intimate, too, but no one thinks that the state may never wiretap suspected mobsters.

Are there any other Fourth Amendment issues that students should spot? Maybe that, even if the Founders deemed a search unconstitutional, they never would have dreamed that the evidence found should therefore be excluded. No court in early America ever excluded unconstitutionally seized evidence, and England has never had an exclusionary rule. Of course, this doesn't mean that Founding-era Americans winked at Fourth Amendment violations. Rather, the Founders believed in punishing violations through civil damage suits, along the lines of *Wilkes* and *Entick*, rather than excluding evidence and, quite possibly, unleashing the guilty.

Exclusion of illegally obtained evidence is an invention of the twentieth-century Supreme Court; modern-day exclusionists say that the rule is required lest government profit from its own wrong. But that's a misshapen claim of principle. If the government finds an illegal bomb in an unconstitutional search, must it give the bomb back lest it wrongly profit? Must it restore kidnap victims to kidnappers, illegal drugs to dealers, and stolen goods to thieves? As the Court now admits, introducing reliable evidence in a criminal case is ordinarily not in itself wrong, nor does it compound the wrong of an earlier unconstitutional search.

Certainly, Kaczynski's is not an ordinary case, and it raises a nice nuance. (A good test for separating the honors students from the rest!) Perhaps reading a man's diary in open court is itself an additional, and highly intrusive, invasion of his privacy. It's one thing to search for and read a man's diary in private, and another to broadcast his most intimate thoughts. Note that this argues for a certain kind of exclusion of evidence—not as a remedy for an earlier wrong, but to prevent a new privacy violation from taking place in the courtroom itself. The argument might hold even if the government lawfully acquired the diary—in a legal search, or pursuant to a lawful subpoena, or if a cop simply found it on the sidewalk.

Then again, if it was reasonable to break open doors and rifle through personal papers to find incriminating passages in a diary, it will usually be reasonable to read them in open court. It's true that, in a few places, the law is more absolute: to preserve certain types of interpersonal privacy, some things are absolutely privileged from view in open court, like conversations between doctors and patients, priests and penitents, husbands and wives. If Kaczynski had vented to a shrink, or a priest, or a wife, his interpersonal venting would be privileged; why not when he vents intrapersonally to his diary?

But there's a good answer to that: Maybe those communications are privileged because society has an interest in channeling possibly antisocial men into churches and marriages and other interpersonal relationships that may tame and socialize these men. Wives and pastors and therapists who listen to the ventings of the violent may well moderate their most antisocial tendencies. Diaries, on the other hand, may encourage inward obsession. (I'm not sure anyone else will buy this argument, but surely you, Dear Diary, will understand!) And it's hard to imagine a more literally antisocial lifestyle than a hermit's—Norman Bates with his mommy dearest and Theodore Kaczynski with his dearest diary.

I know, I know—I've left out the obvious: What about the Fifth Amendment privilege against compelled self-incrimination? In *Entick*, Camden made a cryptic allusion to self-incrimination, and in 1886, the Supreme Court in the *Boyd v. United States* case built on *Entick* to say that a person's private papers could never be read against him in a criminal case, lest he in effect be compelled to be a witness against himself. But *Boyd* is no longer good law; the Supreme Court has twice proclaimed that the case has not withstood "the test of time." If a man writes something down of his own free will, he was not "compelled" to be a witness against himself, even if that writing is later introduced against him, says the modern Court—although it has never squarely so held in the context of diaries, and has technically left the diary question open.

So good students should ask themselves whether we should cheer *Boyd*'s demise and applaud the modern Court's narrower view of compelled witnessing. To answer, students will need to discuss why defendants have the right to take the Fifth in the first place.

And they should know what I have argued in class: The best theory of the Fifth focuses on reliability and innocence-protection. Many innocent defendants, if forced to take the stand, might be made to look guilty by a wily prosecutor skilled in courtroom forensics and artificial courtroom rules of

evidence and procedure. On this theory, diaries look rather different from compelled in-court interrogation. Maybe what a person tells his diary is more like what he might say to a neighbor in a candid moment than what he might say when being cross-examined by a crafty prosecutor.

Well, I guess I've found my exam question. And I suppose it's not too hard to see how I myself would answer this question: Kaczynski loses his constitutional case. Civil libertarians are right to be nervous about Bill of Rights violations, but Kaczynski's lawyers can't prove the government acted unreasonably. But I better be careful in next week's review session not to blurt out too much about Kaczynski! This whole discussion, Dear Diary, is strictly between you and me.

"YOU HAVE THE RIGHT TO . . . "

Los Angeles Times, Sunday, December 12, 1999

I have a confession to make: I've been Mirandized more times than I can remember. I've never actually been arrested or hauled down to a police station. But like virtually everyone else in America, I've been treated to the *Miranda* warning countless times on television. Its words are now burned into my brain as indelibly as the lyrics of "Hey, Jude" or "The Star-Spangled Banner."

Last week, the Supreme Court agreed to hear a case, *Dickerson v. United States*, that could result in the formal overruling of *Miranda*. Civil libertarians quickly began sounding alarm bells, while some of *Miranda*'s fiercest critics started popping champagne corks. More than three decades after it was decided, *Miranda* still gets people excited.

But all the noise last week misses the point. For better or worse, *Miranda* has been woven into the fabric of daily life: into the standard operating procedures of police departments around the country; into the expectations of most judges and prosecutors (to say nothing of defense lawyers); and, most important, into the cultural literacy and mind-set of virtually every American, rich or poor, black or white. Overruling *Miranda* cannot take us back to the world that preexisted *Miranda*, even if we wanted to go there. We have all been Mirandized too many times, if only on television.

Before the Supreme Court decided *Miranda v. Arizona* in 1966, well-settled law held that a police-station confession was admissible against a criminal defendant only if he had given the statement "voluntarily." No single factor marked the line between inadmissible coerced statements and